

Guy v Crown Melbourne Limited & Anor (No 2) [2018] FCA 36 – Summary

This document is a summary only – the bulk of the material is the inclusion of quotes from the judgment that illustrate judicial rationales for the decision.

Key points and paragraphs [xxx] (or part paragraphs [xxx]...) from the judgment are shown in *italics*.

The full judgment is available at:

<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0036>

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Overview

On Friday 2 February 2018 Justice Mortimer of the Federal Court of Australia handed down her decision in the proceedings brought by Ms Shonica Guy (“The Applicant”) against Crown Melbourne Limited and Aristocrat Technologies (“The Respondents”).

The case revolved around the Dolphin Treasure EGM (manufactured by Aristocrat) of which there were 38 examples (at the time of the trial) at Crown Melbourne.

The Applicant was supported by the Alliance for Gambling Reform and represented pro bono by Maurice Blackburn Lawyers,

The Applicant claimed contraventions of the Australian Consumer Law (ACL) in designing/supplying (Aristocrat) and making available to the public (Crown) the Dolphin Treasure EGM. The core of the Applicant’s case was a claim that “design features” of this EGM are misleading/deceptive with regard to the odds of winning.

The Applicant also claimed unconscionable conduct in designing/supplying/providing the allegedly misleading/deceptive Dolphin Treasure EGM - claiming that it plays upon the vulnerabilities of a specific class of persons (those at risk of developing a gambling disorder/becoming problem gamblers) by misinforming them of their odds of winning and encouraging them to chase further wins.

The case is of national importance as the elements of the game design that were alleged to be misleading and deceptive are not unique to the Dolphin Treasure EGM and the claims made by the Applicant reflect a number of claims made in an ongoing debate about the nature and structure of EGMs.

The Applicant’s argument focussed upon three major areas:

- 1) **“Equal Reel Size Representation”** – The Applicant claimed that each virtual EGM reel on the Dolphin Treasure EGM appears to have the same number of symbols - when in fact this may vary (the first four reels on the Dolphin Treasure EGM investigated for the trial have 30 symbols while the fifth has 44). This “feature” was claimed to encourage the perception of near misses. (It was also referred to by the Applicant as the “Starved Reel” feature);
- 2) **“Equal Symbol Distribution Representation”** – The Applicant claimed that as symbols appear to be evenly distributed across the EGM reels and that, as when each of the reels comes to a rest symbols are distributed so that no two symbols of the same kind appear on any given reel, a further misperception that equal numbers of symbols exist across all reels is created by the EGM design. (The Applicant referred to this latter element of EGM game display as the “Dispersed Symbols Image”).

The Applicant argued that both the “Equal Reel Size Representation” and “Equal Symbol Distribution Representation”, as well as a “ticking sound” accompanying the spinning reels, creates a false impression/belief in consumers regarding how many stopping positions are on each EGM reel and a false/misleading expectation as to the probability of winning.

- 3) **“The Risk Representation”** – The Applicant took issue with Return to Player (RTP) information presented on the Player Information Display (PID). It was claimed that this material leads players to believe that their individual return for a session of play would accord with the theoretical RTP stated for the EGM.

The Applicant also claimed that “Losses Disguised as Wins” or “LDWs” (perhaps more accurately described as any win less than the amount bet on single spin of multi-line EGM) contribute to

continued play by creating a misperception in gamblers (through the use of sound) that there has been a net win for the spin.

The Court determined (with regard to claims of misleading and deceptive conduct):

- whether the machine gives rise to representations about the odds of winning which are misleading or deceptive;
- whether representations made by Crown Melbourne in making the electronic gaming machine available for gambling are misleading or deceptive;
- whether representations made by Aristocrat in manufacturing and supplying the machine could be considered misleading or deceptive; and
- whether the term “theoretical return to player” could be considered potentially misleading or deceptive.

The Court also determined (with regard to claims of unconscionable conduct):

- whether there is a class of gamblers of the Dolphin Treasure electronic gaming machine who are “habituated” or “addicted” to gambling; and
- whether such a class of gamblers are at a “special disadvantage”;
- consideration of expert evidence concerning the relationship between features of electronic gaming machines and gambling disorder; and
- whether the respondents engaged in unconscionable conduct in making the machine available for play to this class of gamblers

The Court explored the arguments put forward by the Applicant and the Respondent’s defence at some length.

The Judgment opens with detail of the EGM’s appearance, operation and the extensive regulatory controls in place with regard to EGM design and provision – these portions of the judgment are not summarised here.

On assessment of the evidence, Justice Mortimer determined that the Applicant failed to make her case with regard to all of her claims.

The decision of the Court was that Ms Guy’s application as to both misleading/deceptive conduct and unconscionable conduct by the Respondents should be dismissed in its entirety.

Note regarding Expert Witnesses:

While Expert Witness testimony cannot be said to have decided the case, Justice Mortimer expressed substantial displeasure with academics called as Expert Witnesses for the Applicant.

Of the two expert witnesses who actually provided evidence at the trial for the Applicant:

- Professor Murat Yucel (of Monash University, Melbourne) was found by the Judge to have copied parts of his submission from Wikipedia, plagiarised other sources and overstated the probative value of the available research on some subjects. He reportedly gave the Court such little confidence that his opinions could be relied upon that her Honour queried his understanding of his role and obligations as an Expert Witness and disregarded his entire contribution. Her Honour said:

“Professor Yucel’s opinions are irretrievably tainted by his flawed and irresponsible approach and I have disregarded them entirely”.

- A second expert called for Guy, Dr Deighton (of the Cairnmillar Institute), was also criticised by the Judge. Of this witness her Honour said:

“I did not find Dr Deighton’s opinion to be grounded in sufficient understanding, experience and factual basis to be of assistance.”

Dr Charles Livingstone of Monash University, who has been a vocal protagonist of the claims made in the *Guy* case, did not appear as an Expert Witness. His assistance to the Applicant’s legal representatives in the conduct of the case and his position (until 2017) on the Board of the Alliance for Gambling Reform impacted independence. Dr Livingstone did file a lay witness affidavit - which was also largely ruled inadmissible.

Expert witnesses for the second Respondents (Aristocrat) were:

- Professor Robert Ladouceur of the Universite Laval in Quebec, Canada;
and
- Professor Lia Nower, Director of the Center for Gambling Studies at Rutgers University, New Jersey, USA.

Both of these experts have written extensively on the subject of gambling and problem gambling over past decades - and their opinion as experts (particularly that of Professor Nower) was stated by Justice Mortimer to be preferred.

Key Points and Paragraphs – EGM Characteristics claimed to be Misleading/Deceptive

Reel “size”, symbol distribution on the EGM reels and “ticking sounds” made by EGM reels

The Applicant argued that the Dolphin Treasure EGM game design misleads gamblers to believe that reels are of the same size (“Equal Reel Size Representation”) and that symbols are equally distributed on the reels (“Equal Symbol Distribution Representation”). Ticking sounds as the reels spin were also claimed by the Applicant to evoke a perception of regularity. The Applicant then argued that these structural characteristics mislead the player into believing that there is a greater probability of winning than actually exists.

Her Honour remarked on the absence of evidence, both in research and from gamblers testifying as lay witnesses for the Applicant, on the effects of the EGM characteristics as claimed:

[312] There is a marked absence of evidence from individuals who have gambled on the Dolphin Treasure EGM, or other EGMs with the same characteristics, about the effects of the impugned features. There is no survey evidence going to these matters. There are no studies relied on, which are directly relevant to the Dolphin Treasure EGM, disclosing how gamblers perceive or react to the impugned features, presentation and devices of the Dolphin Treasure EGM, or any other equivalent EGM.

Her Honour found that there was no evidence that a hypothetical player’s perceptions of reel size and symbol distribution would lead them to turn their mind to how many reel stop positions exist on each reel - and then to think about how this may affect the probability of winning:

[352]...accepting that this is what the hypothetical gambler sees or perceives does not lead me to draw the inference for which the applicant contends. There is no evidence from which it could be inferred that these perceptions would lead a gambler to turn his or her mind at all to how many “stopping points” exist on each reel, and how this might affect the probabilities of a winning line occurring. There is no lay evidence about such a perception. There is no account of such perceptions in any of the secondary source material which has been drawn to the Court’s attention. No studies have been conducted, at least so far as the evidence reveals, which indicate such a perception exists. It is not a natural or expected consequence of the features I have accepted in [327] above that a gambler would turn her or his mind to the number of stopping points on each reel, in order to suppose or assume there is some evenness. I do not see why a gambler would form such an impression. A gambler’s focus, as I describe below, would in my opinion be much narrower.

Justice Mortimer also rejected the Applicant’s assertion that sounds made by the reels “ticking” prompt players to believe that there are an even number of stopping positions on the reel. She saw the principal purpose of this feature rather to be the ‘mimic’ of old fashioned slots:

[359] I see no basis in the evidence to infer that the ticking sounds emitted would lead the hypothetical gambler to believe that the 13 symbols were evenly dispersed on each reel. The ticking may promote a sense of pattern and regularity, but no more. I find its principal purpose, and the principal effect it has, is to act as a “mimic” of old fashioned slot machines, which, it would seem, increases the enjoyment of those who use the machine.

Nor did her Honour believe there was any basis in the evidence provided to find that a hypothetical player, focusing on the game symbols, would be looking at the distribution of the symbols for the purposes of understanding their odds of securing a winning line:

[360]... I do not see how this feature – no symbol appearing more than once on a given reel in the matrix in the screen – could lead the hypothetical gambler to any particular belief about how many stopping points were on each reel. If the gambler were focussing on the symbols at all, and looking for different ones, it would be with an eye to anticipating which symbols she or he hopes may land on a winning line. No basis in the evidence has been provided for an inference that such a gambler would be looking at the distribution of the symbols for the purposes of understanding the odds of securing a winning line.

Her Honour later remarked that she did not accept the Applicant’s implication that there was something untoward or improper in how these characteristics actually affect the experience of the EGM user:

[365]...it appears implicit in the Applicant’s case that there is something untoward, or improper, in how these features affect the gambling experience of a person using the Dolphin Treasure EGM. I do not accept that implication.

Her Honour stated that, even if she *had* concluded that the EGM made misrepresentations via the operation of the structural characteristics outlined that she did not then accept that there was sufficient causality to lead players into material error:

[378]...Even if, contrary to my findings above, I had concluded either or both of the Equal Reel Size and Equal Symbol Distribution representations were made, I would not have been persuaded either representation led the hypothetical gambler into an error that was material in the sense of there being a sufficient causal link between the representation made and any erroneous belief or assumption of the ordinary and reasonable member of the class.

Near Misses

Justice Mortimer noted that arguments made by the Applicant about ‘Near Misses’ as an outcome of “starved reels” were put too late in the case (they did not appear until the Applicant’s closing arguments). As such this matter was little discussed - but her Honour did note that the proposition remained unevicenced:

[390]...To move from these propositions to the proposition that near misses are “more likely” to occur on an EGM with a “starved reel” is also such a general statement, unsupported by any underlying calculations, as to not assist the Applicant’s case. There is simply no evidence about whether, if at all, an individual gambler would experience a higher number of near misses because of the “starved reel” feature.

Return to Player Information

The Applicant referred to RTP information and the PID screen as a “Risk Representation”.

Justice Mortimer *did* find that an ordinary reasonable player may be likely to take Return to Player Information as provided to represent the return to a player in a *particular session* (largely owing to wording in the Dolphin Treasure PID screen).

[430]... I consider the representation is likely to cause confusion to the hypothetical gambler. The gambler is likely to believe, at least momentarily, that the statement is directed at her or his individual chances of winning on the machine.

However her Honour also noted that any misunderstanding would be almost immediately dispelled when a gambler started playing and the randomness and operation of the EGM became clear.

[431] That belief will, in my opinion, soon be dispelled in a practical sense, and is also likely to be remedied by the gambler looking at some of the information available at Crown Casino (not all the brochures at Crown deal with the RTP) or on the internet. There may be some fleeting confusion, but nothing more.

[438]... Actually engaging in betting on the EGM will dispel any initial expectation that the gambler may have had that she or he will have around 87% of what she or he bet returned. The erroneous belief will be entirely transient as the reality of random outcomes intrudes.

Her Honour spoke of any continued misunderstanding about RTP as a function of unrealistic expectations and assumptions:

[439] If the hypothetical gambler continues to expect to receive back most of what she or he gambles, or even continues to expect to win more than she or he has gambled, then that is not because of the Risk Representation. Rather it is because the hypothetical gambler harbours unrealistic expectations, perhaps engendered by habituation or by any number of other personal, emotional and psychological factors. There is then no causal link between the Risk Representation and the assumptions made, the cause of the assumptions coming from factors personal to the gambler.

In other words, while RTP information may be found confusing, any such confusion is fleeting and, as such, not misleading or deceptive.

Her Honour also found that other information was readily available to remedy any misunderstanding.

At paragraph 440 her Honour noted that a hypothetical gambler curious enough to access the PID and read about RTP was also just as likely to access any of the other information materials available (such as the Player Information brochures available at the casino or online) and that, in her view, the stands with information at Crown are displayed in locations where they are easily seen and easily accessed.

Further, her Honour noted (at paragraph 441) that the brochures at Crown are quite explicit on the subject of RTP and further, with regard to the Crown information brochure RTP statement:

[443] The hypothetical gambler who read this statement could not labour a moment longer under any belief she or he may see a return of around 87%

Key Points and Paragraphs – Unconscionable Conduct

Vulnerable Players

Her Honour stated that the Applicant faced difficulty in establishing the class of players said to be the victims of unconscionable conduct by the Respondents:

The Applicant's pleadings spoke of people who are "vulnerable to becoming habituated and/or addicted to playing EGMs" and the Applicant's closing submissions emphasised that this applied not only to those already habituated or addicted but also those who were "vulnerable" to becoming so.

Her Honour found (at paragraph 475) that on taking the Applicant's view of "Vulnerable Players" at its highest and proceeding on the basis that there is "a group of consumers of gambling services who can be described as being either habituated or addicted to gambling, and who experience problems controlling their gambling behaviour" (i.e. problem gamblers) that she did not consider that it would be correct to find that they are necessarily "vulnerable", certainly not in the sense of having a "special disadvantage for the purposes of the equitable concept of unconscionability".

Her Honour's reasoning was influenced, in part, by her acceptance of the expert witness evidence of Professors Ladouceur and Nower – who reported that clinically diagnosed problem gamblers maintain an ability to exercise judgements in their own best interests:

[491] That is because, on the evidence of Professors Ladouceur and Nower, which I accept, even individuals suffering from a diagnosed gambling disorder maintain the ability to perform voluntary acts and make judgements in their own best interest when putting themselves in a position to use, and in using, EGMs. It is worthwhile reproducing the whole of the answer of the two professors to Questions 8 and 9 of the joint report.

[493] Their answer was:

In our opinion, individuals suffering from gambling disorder maintain the ability to perform voluntary acts and to make judgements in their own best interests when putting themselves in a position to play and playing EGMs. Gamblers make a long and complex series of decisions when deciding to gamble: When to gamble, with whom to gamble, where to get cash, whether to use credit, how to get to the venue, what activities to play, whether to play machines and which machines, how many lines to play, when to cash out or reinvest, how to obtain extra cash if necessary to continue play, how to meet biological needs including eating or drinking during play, etc. All of these decisions involve voluntary decision-making. The demands of this decision-making become more complex, not less, as a gambler develops gambling-related problems. Disordered gamblers lie to friends and family to get money to gamble, request bailouts with inventive excuses, steal or misuse money, divert legitimate expenditures to funds for gambling, and engage in a wide range of behaviors that often require a great deal of ingenuity and forethought. Unlike with drugs and alcohol, gamblers are usually able, through their resourcefulness, to hide the effects of their gambling from friends and family until many or most of the assets are gone. Despite excessive levels of play, then, problem gamblers remain able to make judgments that they believe to be in their own best interests and perform a series of voluntary acts to prolong play. [Nower report, §13.1, p. 20]. In this case, there was educational material available to the Applicant that explained terms like "return to player" and "random number generator," detailed the statistical odds of winning, the way machines work, and methods for checking actual wins and losses during play, then clearly stated: "In the end, the machine will win." A player would have to make a volitional choice to ignore these materials as well as the warnings they contain to persist in

spending money they knew or should have known they would lose in order to continue playing. The fact that gamblers often choose to make bad judgements does not detract from their ability to do so [Ladouceur report, §80, p. 36].

[495] Herein lies the real difficulty for the applicant, in fitting her arguments within the concept of special disadvantage (in the case as she has chosen to present it): whatever level of dysfunction is selected (a gambling “problem”, an inability to control gambling, the recognised psychiatric condition of a gambling disorder), to prove that across the spectrum of a widely defined group of individuals (all with their own strengths and weaknesses, and different personal, financial and living circumstances) that group should be determined to have no capacity to make judgements for themselves, is a significant challenge indeed.

[497] For the applicant to contend, as she does in her closing submissions that the ‘Vulnerable Players’ “ability to make decisions in their own best interests, or to exercise control, is impaired” does not approach satisfaction of the concept of special disadvantage. A person who is reckless may well have an impaired ability to control herself or himself: indeed, such a lack of ability might be inherent in describing a person as reckless.

Her Honour also looked at the reasoning in the *Kakavas v Crown Melbourne* [2013] HCA 25; 250 CLR 392 noting that, if that is the state of the law in relation to those who have a demonstrable addiction or problem (Kakavas’ case claiming unconscionable conduct also failed – albeit on differing facts) then it would apply with even greater force to those persons at the stage of being “vulnerable” to an addiction or problem.

As a side note, her Honour had already briefly discussed the level of voluntariness and conscious choice in gambling. (Justice Mortimer’s statements regarding gambler feelings of “compulsion” to gamble or enter a venue are of interest as she accepted that there remains a personal choice to enter a gambling venue):

[343] ...Some of the lay evidence, as I have recounted, suggested some witnesses felt under a compulsion to go to a venue where she or he could gamble. Nevertheless, as Professors Ladouceur and Nower made clear, and I accept, there remains a personal choice to enter a gambling venue.

Her Honour also accepted that evidence establishes multi-faceted rationales for gambling – including subjective and emotional issues:

[344]...that a wide range of factors affect the human inclination to gamble. For instance, Professor Nower stated in her report, in relation to “problem gamblers”:

...a complex interplay of varying degrees of bio-psycho-social risk and protective factors, as outlined below, lead some individuals to develop gambling problems or other maladaptive behaviors, while other players adopt coping strategies or social support mechanisms that insulate them from addiction altogether....

...a sizeable proportion of problem gamblers, including those in a study I co-authored (Nower & Blaszczynski, 2010), report that their major motivation for gambling is not to win money; rather, for many problem gamblers, excitement, escape and other emotional and subjective motivations prove more predictive of problem gambling than winning.

The Regulatory Environment

The highly regulated nature of the provision and supply of EGMs was considered of importance by Justice Mortimer. Her Honour noted regulatory requirements to be comprehensive and to contain restrictions expressly directed to ensuring that consumers who gamble on EGMs do so in ways which do not involve unfairness, disguise or false encouragement:

[507] In my opinion there are two bases on which the applicant's unconscionability case under s 21 must fail because she has not established any conduct capable of being characterised as unconscionable in relation to a class of consumers. The first basis is that all of the pleaded conduct has been the subject of regulatory approval under a highly prescriptive scheme that includes assessment of the operation of the EGM for fairness. The second is that her claim remains at a hypothetical level in relation to the class of consumers she has chosen to identify.

[515] The regulatory framework, which I have set out earlier in these reasons, is not only comprehensive, it contains a number of restrictions which are expressly directed to ensuring that consumers who gamble on EGMs do so in ways which do not involve unfairness, disguise or false encouragement.

...and her Honour did not find any lack of compliance with the regulatory framework:

[518] There are no allegations that either respondent has failed to comply with its obligations under the regulatory framework. To the contrary, the evidence positively demonstrates compliance.

"Losses Disguised as Wins"

Justice Mortimer recognised that EGMs routinely identify an outcome as a "win", which the EGM then accompanies with auditory (described in the case as "celebratory") feedback, when the player has actually made a net loss. Her Honour noted that the fact that this occurs was not in dispute.

While Justice Mortimer did not place any store on the evidence provided by the Applicant's expert witnesses, her criticisms of Professor Murat Yücel on "LDW's" at this juncture are of interest. Yücel based his arguments on Professor Kevin Harrigan's Canadian (2015) research into "LDWs" – much as a number of advocates do currently:

[298] Professor Yücel deliberately distanced himself from the opinion of the authors of one of the more recent studies (2015) into the possible effects of the losses disguised as wins feature, where the authors themselves stated that this research was in its nascence. This is despite Professor Yücel having himself cited this study for his assertion that there was "solid evidence" concerning specific design features. Without any apparent basis other than his own conviction, Professor Yücel asserted to the Court that the research is "a bit stronger than in nascence". This is a good example of his preparedness to make assertions without any basis in research or fact, and to continue to do so despite the flaws and failings in the preparation of his report having been exposed. In another instance, he also disagreed with Professor Blaszczynski, an expert whom he accepted was "eminent" in the field of gambling studies, on a range of topics in a recent (2016) literature review conducted by Professor Jonathan Parke, Dr Adrian Parke and Professor Alex Blaszczynski. Again, Professor Yücel disagreed with the authors that research into losses disguised as wins was at a "nascent stage of research", without any evidence to back up his assertion.

Her Honour's findings with regard to gamblers, sound and "LDWs" noted that sounds made are a measure the size of the win – whether it was more or less than bet – and are heard at the same time the credit metre is being displayed:

[519] The "celebratory feedback" is linked, as the applicant developed her case, to the "losses appear as wins" rather than as an independent source of unfairness or exploitation. Taken together, as Ms

Bryant stated in her evidence, (subject to a cap) the sounds associated with a win on the Dolphin Treasure EGM are chosen to align with the length of time an amount won by the player takes to increment on the “win meter” of the Dolphin Treasure EGM. Contrary to being unfair, or deceptive, or exploitative, a correlation such as this – recalling the gambler is sitting in front of the machine watching the increments of any win being added to her or his credits – is a way of allowing a gambler to measure the size of the win – whether or not it is more or less than the bet.

Her Honour dismissed the Applicant’s submission that “LDWs” were confusing or that a further statement on screen as to the amount of any loss may be required - noting that the information on the EGM screen was already quite clear:

[521]...There was no suggestion that Aristocrat had any other motivation in designing the Dolphin Treasure EGM to be a multi-line game with the inevitable consequence that there would be “less than bet” wins, or “losses disguised as wins”, whatever term is used. As Crown also submits, the fact that a gambler is only getting back a sum of money less than she or he has bet is apparent from the information which is required to stay on the screen at all times in front of the gambler. Individuals may choose to ignore the information, or choose to discount the significance that they are losing more than they are betting, but the information is as plainly presented to them as it could be. The applicant submits that “[t]here is no reason why the net loss cannot be recorded beside the ‘win’, nor is there a reason why the fact that sights and sounds will play when an LDW or LTB occurs could not be disclosed to players...” She submits that “there is reason to believe that such disclosure would be of assistance”. First, there is no evidentiary basis to support the submission that there is “reason to believe” these modifications would be of assistance in rectifying any alleged unfairness. Second, even if I were to accept or assume further information of this kind may improve the understanding of some gamblers (how many, one does not know), this does not change the fact that information about the amount bet and the amount won is already displayed to the gambler, and allows the gambler to see easily whether her or his “win” is a net win or a net loss.

...and that there is no “disguise” or conscious design to deceive/entice the vulnerable:

[522] There is no “concealment” of any of these features from the gambler. Concealment suggests an active decision to hide a matter which should be disclosed...

[523] There was nothing put to Ms Bryant to the effect that those designing the Dolphin Treasure software for Aristocrat (such as herself) were doing so in a way which was intended to practice any deception on or exploit those gamblers who were “Vulnerable Players”, nor was it suggested that in designing this software there was any plan or design to entice gamblers who were Vulnerable Players to behave in ways which were against their interests. The fact these matters were not explored is not determinative, but it is another illustration of how hypothetical the applicant’s case really is.

Overall Findings

Both Crown and Aristocrat were comprehensively cleared of claims with regard to both misleading/deceptive conduct:

[537] I have concluded that none of the applicant's causes of action are made out. In relation to the s 18 allegations, I find that the Equal Reel Size and the Equal Symbol Distribution representations are not made out. Although I have found the Risk representation is made, I find that at most, it gives rise to some initial confusion or misapprehension. The making of that representation does not constitute to misleading or deceptive conduct within the terms of s 18 because any initial impression or misapprehension would be dispelled once a gambler starts using the EGM, and or alternatively looks at further information available in the form of brochures on the casino floor.

...and unconscionability:

[538] In relation to the ss 20 and 21 allegations, neither of these are made out, because on the evidence the conduct of Crown or Aristocrat cannot be characterised as unconscionable, whether in the meaning of the unwritten law or under s 21. Further, her claim remains at a hypothetical level in relation to the class of consumers she has chosen to identify.

What was not decided?

The interrelationship between the ACL and the regulatory scheme in relation to gambling

Justice Mortimer noted that if she had found for the Applicant it would then have been necessary to consider in some detail the interrelationship between the regulatory scheme and the requirements of the ACL. The strict and prescriptive nature of gambling regulation would make this a more difficult and complex matter than in other industries (where regulatory prescription is lesser). Her Honour noted though that any issue that may (or may not) exist was not the subject of the matter at hand:

[539]...the potential for inconsistency as between the operation of approvals under the Victorian Appendix and the ACL is clear. The same is true of para 3.9.57 and 3.9.57a of the National Standard, which deal with “fairness”. No doubt there are arguments about the construction of these standards which may mean they do not engage with the applicant’s arguments, but all this highlights why the Court should not embark on any determination of all of these matters until a proceeding requires that to be done.

[541] It would have been an issue of some complexity to determine, where a regulatory approval scheme explicitly incorporates concepts such as fairness to the users of EGMs, how a contravention of ss 18, 20 or 21 could avoid cutting across regulatory and policy choices. Perhaps that is a potential inconsistency which is simply a consequence of the operation of the ACL, perhaps not. These matters can be left for a proceeding in which they must be determined.

The role of cognitive factors in gambling disorders and in those with difficulty controlling their gambling

Her Honour found it clear from Professor’s Ladouceur and Nower’s opinion that “the causes of gambling disorder (and it would seem, other behavioural difficulties people experience with controlling their gambling) are multifactorial, cognitive factors play some (presently unquantified) role” and went no further. (see paras 542-545)

The “contribution” of the identified features of the Dolphin Treasure EGM to the development or persistence of gambling disorder, or difficulties in controlling gambling activity

Her Honour notes that the issue of causation was central to the Applicant’s unconscionability claim and after reasserting that no proof of unconscionable conduct was found (and could not be in this case) she then says further:

[550] Whether there is a casual connection of any kind between features of an EGM machine such as the Dolphin Treasure (and whether those features identified in this case, or other features) and the development or persistence of gambling disorder, or difficulties in controlling gambling activity, is an important question of some moment well beyond the confines of this case. Unless it is necessary to decide it, I do not consider it appropriate I do so.

Other Matters

Player understanding, the provision of information and the PID

Justice Mortimer noted in her general observations that perhaps both parties attributed too much to gambler understanding – be that understanding either faulty (Applicants) or informed (Respondents):

[308] I consider both parties arguments at times attributed too much to those that gamble on the Dolphin Treasure EGM (or, for that matter, on any similar EGM). The applicant tended to attribute a sophisticated level of analysis to the gambler, about the meaning and operation of the features of the EGM, that either found no foundation in the evidence or (in relation to the lay witnesses) was not consistent with the evidence. The respondents' arguments tended to attribute to those who gamble on these machines a level of mathematical understanding, and a level of inquiry into the information available about the working of the machines, that I do not consider realistic nor made out on the evidence.

This does not detract from the outcomes of the case. Justice Mortimer was satisfied that “if there is only one message which is conveyed by the publicly available material to those who gamble on EGMs, it is that the machine will always come out ahead” and she was “satisfied, on the evidence, that most individuals who gamble on EGMs understand this reality at some level” (see para 309). However she did comment on the provision of information in some depth:

- 1) On EGM information materials generally Justice Mortimer raised considerations concerning literacy and English language comprehension that were not addressed within the case:**

[338] It was apparent on the view, and I consider it is a matter of which I can take judicial notice, that the diversity of the Australian community is represented at a place like Crown Casino. Relevantly, that includes the ethnic and racial diversity of the Australian community. It is also a matter of which I can take judicial notice, although it may also be buried somewhere in the evidence, that the Casino is frequented by international tourists and travellers, many of whom will be from a diverse ethnic and racial background. It seems to me that the ‘parties’ approach may involve a false premise: namely, that all members of the class can read and understand the English language as their first language, or at a similar level of proficiency. If members of the class cannot do so, then they cannot read and understand the rules, nor the player information display, nor any available brochures or other information. Perhaps some have used EGMs in other countries where similar information is provided, and such information is presented in a language they read and understand, perhaps not. There is no evidence on this matter.

[339] Further, there is a significant proportion of the Australian community who have little or no literacy skills in English, even if it is their first language. They also will not be assisted by written information, although they will be able to understand the symbols. Perhaps the answer for this group is that they will not be misled at all, even on the applicant's case. I doubt that is so, but again, no party sought to address the Court on this.

- 2) Regarding the language used in RTP Information on PID screens Justice Mortimer noted the plural term ‘players’ would render the RTP statement more accurate:**

[415] It is a small but important point, and one made by the applicant, that the RTP figure is described in the text on the screen as a theoretical return to “Player of this Game”, in the singular. Whereas, in the regulatory impact statement for the amendments to the Gambling Regulations that introduced the requirement to display the RTP, the government said the Regulations will:

Require each gaming machine to display the following information in relation to each game that may be played on that machine:

- the return to players of that game; and*
- the average number of individual games played per any win; and*
- the chances or odds of achieving the top and bottom five individual winning combinations; and*
- the maximum and minimum bet options available.*

(Emphasis added.)

[416] The plural is also used in reg 22 of the 2005 Regulations and reg 5 of the 2015 Regulations, which impose the requirement: see [124]-[125] above. The departure in the example given in the National Standard, and in the statement that appears on the player information display on the Dolphin Treasure EGM, is unfortunate, and also contributes to giving a wrong impression about the function, and effect, of the RTP.

Justice Mortimer is quite clear that the language in the PID does not impact her conclusions – but advises that some simple corrections would alleviate any issue:

[445]...the applicant has proven that an incorrect representation is made. A simple corrective statement would alleviate the issue. In her closing submission, the applicant submits that:

There would have been no impediment to Aristocrat including an explanation along the lines of that which is published by the Victorian government: “It takes millions of games for a machine to tend towards its ‘return to player’ setting. There is no individual requirement for an individual poker machine actually to return the expected rate in any given period of play.”

[446] Nor would there be any impediment to returning to the kind of example given in the Productivity Commission’s report, which was after all the apparent origin of the RTP requirement. It is undesirable, even if it is not unlawful, that gamblers be given any message about prospective returns from their gambling which could lead to erroneous expectations, even if fleeting.

Justice Mortimer concludes at paras 554 and 555 that the VCGLR should look at the current regulations and the National Standard regarding the notifications required around RTP and that the Respondents should consider amending the wording on the screen or providing more information on ‘talkers’.

The state of gambling research, developing knowledge and ongoing debate

Finally, the AGC would note the following from Justice Mortimer’s discussion – which suggests (unsurprisingly) that developments in research are likely to continue to fuel debate.

Whilst claims about contraventions of the ACL and law alleged in the *Guy* case ultimately failed completely (and for very sound reasons) the Court did not delve into some of the other matters that stakeholders continue to explore:

[460] There are real debates to be had, on the law and on the facts, about some of those matters, especially in relation to the state of research and knowledge about gambling addictions, and pathways to addiction, including the role of what is called the “dopamine effect” on the development of gambling addiction. Although I refer to some of these matters in this section of my reasons, I do not propose to make any findings beyond those necessary to determine the outcome of this proceeding. The failure of the applicant’s allegations in this case is just that: a failure of the particular allegations

made, on the evidence adduced. It is neither necessary nor appropriate in those circumstances for the Court to make any broader pronouncements, by reference to aspects of the evidence, on some of the complex issues to which the legalisation of gambling on poker machines gives rise, including whether and how EGMs contribute to the development or continuation of a gambling disorder, or to the development or continuation of a habit or pattern of gambling that is harmful to a person.