THE CONSCIENCE OF THE KING: *KAKAVAS v CROWN MELBOURNE LTD* [2013] HCA 25 (5 June 2013)

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I INTRODUCTION

In the case of *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) ('*Kakavas*'), the Full Bench of the High Court considered the application of equitable principles relating to unconscionable conduct to the situation of a 'problem' gambler and his dealings with Crown Melbourne Ltd ('Crown'). Although the substantive sections, which address the issue of alleged unconscionable conduct by the respondent, constitute a very small percentage of the judgment,[1] the decision effectively limits the availability of equitable relief in instances of unconscionable behaviour. It is argued below that this is achieved by substantially narrowing the ambit and the definition of 'disability' as enunciated Fullagar J in *Blomley v Ryan* ('*Blomley*'),[2] and addressed in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*')[3] by both Deane and Mason JJ.

Indeed, the *Kakavas* judgment is disturbing on a number of levels. In addition to the circumscription of the equitable principles relating to unconscionable conduct, the High Court, in the joint/collective judgment, demonstrates an unusual degree of what may only be described as subjectivity in its weighing of the evidence presented at first instance. Both the tenor and content of the judgment also suggest that the High Court was in some degree influenced by the potential for a decision in the applicant's favour to 'open the floodgates' to further actions by problem or compulsive gamblers against casinos and other venues at which gambling is encouraged.

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[1] The majority of the judgment sets out in great detail the dealings between Mr Kakavas and Crown over a number of years and reviews at length the evidence adduced at the hearing at first instance.

[2] *Blomley v Ryan* (1956) 99 CLR 362.

[3] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

II THE FACTS

The facts of the case are fairly complex, being concerned with the numerous dealings between the appellant and the respondent over a number of years, as well as a number of ancillary events and issues. At all three levels of the litigation,[4] the courts were at pains to describe the facts in detail. Indeed, the judgment of the Supreme Court of Victoria Court of Appeal[5] presents a description of all of the transactions between Mr Kakavas and Crown; these being taken from the judgment of the primary judge.[6] The facts summarised below are abstracted from the Supreme Court of Victoria Court of Appeal judgment, upon which the High Court relied for the facts recited in its judgment.[7]

The appellant is what is described in all three decisions as 'a pathological gambler.'[8] In common parlance, he would be described as a 'gambling addict' or 'compulsive gambler.'[9] Interestingly, he is also described in all three decisions as a 'high roller,' i.e. a person who habitually gambles for extremely high stakes.[10] His relationship with the respondent began in 1994, when the Crown first opened its casino in Melbourne. In addition to gambling at Crown, the appellant would also gamble at casinos on the Gold Coast and in Sydney. In 1998, Mr Kakavas was sentenced to two years imprisonment for fraud, 18 months of which was suspended.[11] The appellant alleged that the fraud was committed to help fund his gambling addiction. During the time that he was awaiting trial he underwent therapy for his addiction and self-excluded from Crown.[12] On his release from gaol, the appellant applied to Crown to have the self-exclusion order revoked. This was accomplished in June 1998. However, on revoking the self-exclusion order, the respondent revoked the appellant's licence to remain on the

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[4] *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (8 December 2009); *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013).

[5] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012); see especially the judgment of Bongiorno JA, [45]–[165].

[6] *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (8 December 2009).

[7] Ibid.

[8] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012); see especially the judgment of Mandie JA, [22]–[24].

[9] The appellant had been treated for a gambling addiction by various psychologists since August 1996. Ibid [42] – [43] (Bongiorno JA).

[10] This use of dual terminology produces interesting results. The connotation of 'pathological' or 'compulsive' gambler connotes someone who cannot resist the urge to gamble, and therefore is unable to control his or her actions. The term 'high roller,' on the other hand connotes someone in complete control of their actions and who approaches gambling as a 'business' rather than the means of satisfying an addiction.

[11] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [44].

[12] Ibid.

casino's premises.[13] The licence was revoked because the appellant had been charged with an armed robbery offence. The charges were dismissed at the committal hearing.

On dismissal of the criminal charges, from December 1998 until October 2004 the appellant constantly applied and reapplied to Crown for revocation of the Withdrawal of Licence ('WOL'). Throughout these six years, Mr Kakavas established and ran a profitable property development company on the Gold Coast and continued to gamble at other venues in Australia and Las Vegas, in the United States of America. It was not until the management of the respondent discovered that the appellant had been gambling (and losing) $3 and $4 million dollars at the casinos in Las Vegas that it finally considered the revocation of the WOL.[14] In November 2004, the respondent opened negotiations with the appellant for the revocation of the WOL and the terms upon which he would be allowed to gamble in the casino. It is interesting to note that the judge, at first instance was:

> . . . critical of the processes followed by Crown in deciding to restore the appellant's licence to enter Crown Casino. He described them as 'uncoordinated, unstructured and unsatisfactory,' even if the decision to revoke the WOL could, in itself, be justified.[15]

It is uncertain from the evidence as to the exact date on which the WOL was revoked. However, towards the end of January 2005, the appellant was the guest of the respondent at the Australian Men's Open Tennis tournament.

The incentives offered by Crown to the appellant included preferential treatment in the casino, an increased stakes limit, the use of a private jet and a cash 'rebate' of 20% on his losses.

The period of gambling which formed the basis of the appellant's claim against Crown commenced in June 2005 and August 2006, during which time he attended the casino on '30 separate occasions, turned over $1.479 billion and in the process lost $20.5 million.'[16]
The facts as presented to the court at first instance also raised the issue of an exclusion order in relation to Star City casino, Sydney, imposed by the New South Wales Commissioner of Police in September 2000 pursuant to s 81 of the *Casino Control Act 1992* (NSW). The effect of the order is to make entry into the relevant casino by the excluded person

[13] Ibid [47]–[48].
[14] Ibid [62].
[15] Ibid [81].
[16] Ibid [35].

a criminal offence.[17] In 2002 and 2004 amendments to the Victorian *Casino Control Act 1991* (Vic) not only extended the effect of an exclusion order from another state ('IEO') to Victoria, and thereby rendered the appellant's entry into a casino in Victoria illegal pursuant to s3, but also required the subject of the order to forfeit any winnings to the State (s 78B(2)). The respondent's knowledge of the IEO and its implications in regard to its conduct toward the appellant was considered at length in the hearings at first instance and in the appeal, but was addressed only briefly by the High Court.

III THE PROCEEDINGS AT FIRST INSTANCE AND ON APPEAL

The appellant commenced proceedings against Crown Melbourne Ltd and two other defendants (they were John Williams, chief operating officer of the casino and Rowen Craigie, a former chief operating officer) initially alleging:

> . . . negligence at common law, unconscionable conduct, misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth), breach of statutory duties imposed by the *Casino Control Act 1991* [(Vic)] and restitution.[18]

The claim against Williams and Craigie was based upon the allegation that they had been accessories to the respondent's breach of the *Trade Practices Act*. In an interlocutory hearing it was held that the claims in negligence, restitution and pursuant to the *Trade Practices Act* could not be sustained and were struck out. A Second Amended Statement of Claim was filed on 28 August 2008 which relied upon allegations of unconscionable conduct by the respondent.

The basis for the claim for equitable relief in regard to unconscionable conduct was founded in the appellant's gambling addiction, which he alleged was a 'special disability' of which the respondent was aware and of which the respondent took advantage by offering him inducements to gamble at its casino. Further, the appellant alleged that the respondent had taken advantage of his disability for the purposes of its own financial advantage. The appellant also claimed that he was under a further disability in that he was subject to the IEO, that the respondent was aware of this disability and that he was therefore liable to forfeit to the State any winnings from the casino.

[17] Ibid [184].
[18] Ibid [37].

Naturally, the respondent denied these allegations and whilst admitting that the appellant had lost $20,539,484 at its casino, counterclaimed against the appellant for $1 million, being the interest in respect of a cheque which had been dishonoured on presentation. The hearing ran for 27 days in May and August 2009: the judge handing down his decision on 8 December 2009. The appellant's claim was dismissed and the respondent's counterclaim was upheld, with interest and costs being awarded to it.

The appellant's appeal to the Supreme Court of Victoria, Court of Appeal was dismissed on 12 May 2012 and thereafter he filed an application for Special Leave to Appeal to the High Court, which was granted on 14 December 2012.

IV THE HIGH COURT JUDGMENT

The High Court dismissed the appeal on the following grounds:

- Although the Court found that it was likely that the appellant was suffering from a pathological gambling disorder, it held that he did not have a special disability or disadvantage, for the purposes of unconscionable conduct, because he was capable of making decisions in his own best interests.
- There was no inequality of bargaining power between the appellant and the respondent because the appellant negotiated the terms of his readmission to the casino with the respondent and because he was what is known as a high roller, i.e. a gambler who wagers very large sums of money.
- The respondent was not taking advantage of the appellant's special disadvantage, disability or weakness of the appellant by encouraging and allowing him to gamble in the casino. It was merely pursuing its normal course of business.

In its judgment the Court also addressed three ancillary issues:

- whether the respondent had received constructive notice of the appellant's pathological gambling problem;
- whether the respondent received constructive notice of the IEO issued against the appellant in NSW; and
- whether the IEO, in itself, constituted a special disability.

These ancillary issues were dealt with cursorily by the Court and did not have any relevance to its final decision.

As noted above, the major issues to be decided by the Court were:

- whether the respondent had conducted itself unconscientiously in its dealings with the appellant; and
- whether the appellant suffered from a special disability or disadvantage which would attract equitable relief.

These issues are inextricably related and will therefore be discussed together in the section below.

V UNCONSCIONABLE CONDUCT

Unconscionable conduct is a 'species of equitable fraud,'[19] which seeks to prevent a wrongdoer from profiting from advantage taken of another's disability. As noted in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*:

> The notion of fraud is deeply embedded in equity; it is perhaps the clearest reminder today of the origins of Chancery as a court of conscience, acting in personam by the grant of relief to the victim or denial of it to the perpetrator of conduct which came within the Chancellor's view of fraud.[20]

It must be remembered that in general equitable fraud is not the same as common law fraud.[21] Whilst common law fraud requires a conscious decision 'to do wrong,' '[m]any activities regarded as fraudulent [in equity] were not done with the intention to cheat or deceive.'[22] Thus, equitable fraud may be perpetrated inadvertently or even when the fraudulent party was acting bona fide.[23] In a situation of unconscionable conduct, however, there needs to be some intention on the part of the wrongdoer to take advantage of another. Thus, relief for unconscionable conduct may be sought

> . . . whenever one party to a transaction is at a special disadvantage with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances [which] affect his ability to conserve his own interests. And the other party

[19] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [16].
[20] Roderick Meagher, Dyson Heydon and John Lehane, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4th ed, 2002) 445, [12-005].
[21] Ibid.
[22] Ibid.
[23] See *Boardman v Phipps* [1967] 2 AC 46; 3 All ER Rep 721, in which a trustee and solicitor for a trust acted in what they believed to be the best interests of the beneficiaries. They had, in fact, placed themselves in a position of conflict of duty, and thereby breached their respective fiduciary duties.

> unconscientiously takes advantage of the opportunity thus placed in his hands.[24]

In the same case, Fullager J gave examples of special disadvantages which would attract the protection of equity. These include:

> . . . poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic is that they have the effect of placing one party at a disadvantage vis-à-vis the other.[25]

Fullager J was merely using these as examples, since '[t]he circumstances adversely affecting a party, which may induce a court to either refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified.'[26] Thus, it was made clear that the categories of special disadvantage are not closed and since the judgment in *Blomley*, other disadvantages have been added to the list, such as the inability to understand English[27] and emotional/sexual obsession.[28] The disadvantage must therefore constitute more than 'some difference in bargaining power of the parties,'[29] but should be a 'disabling condition or circumstance . . . 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 its affect on the innocent party.'[30]

On the basis of the principles set out above, and as a result of the diagnosis of the appellant as a pathological gambler,[31] the inducements offered by the respondent to gain his patronage when its management learned that he had been losing heavily in Las Vegas, together with Crown's knowledge of the appellant's psychological condition,[32] it would appear that there would have been a strong claim against the respondent founded in unconscionable conduct. However, this was not the case.

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[24] *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J).
[25] Ibid 405 (Fullager J).
[26] Ibid.
[27] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[28] *Louth v Diprose* (1992) 175 CLR 621.
[29] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J).
[30] Ibid.
[31] Certainly, it appears that copious psychological evidence was adduced by the appellant at first instance.
[32] Evidence was adduced at the hearing at first instance that Crown had required the appellant to present a psychologist's report in regard to his addiction.

Whilst Fullagar J and Mason J's explanations of the principles upon which unconscionable conduct are based, discussed above, appear to be fairly clear, they are, nevertheless, open to interpretation. Whilst it is clear that the innocent party must have a special disadvantage which renders him or her incapable of making a judgment in his or her 'best interests,' it also raises an important question.[33] This question is as follows: to constitute a 'special disadvantage' must the disability operate or be apparent only in a particular context or in regard to a particular set of circumstances, or must it affect the ability of the innocent party to take care of their own best interests in a broader social context. It is argued here that the former interpretation should be accepted. For example, in *Louth*[34] there was no suggestion that the solicitor, who had given thousands of dollars to a client with whom he was infatuated, was unable to conduct his legal practise efficiently or even profitably. It was only when confronted by the object of his obsession that he became unable to take care of 'his own best interests.' Similarly, in *Amadio*,[35] there was no suggestion that Mr and Mrs Amadio were prevented from carrying out their day to day lives by their lack of proficiency in English. Their 'disability' was therefore only 'special' when they were required to understand the complex provisions relating to their guarantee of their son's loan.

In *Kakavas*, however, the courts at all three levels of the proceedings appear to have taken the latter view in regard to the appellant's gambling addiction, and found therefore, that because he was able to function normally in his everyday life when away from the casino, he did not suffer from a 'special disability or disadvantage' siufficient to attract equitable relief. For example, Bongiorno JA notes that:

> The trial judge found that in late 2004 and early 2005 the appellant was functioning at an unremarkable level with respect to his personal, familial, vocational and legal affairs. He had a stable family life and when his father fell gravely ill he devoted much of his time to caring for him. He had great wealth, as high-rolling gamblers often do.[36]

Indeed, the High Court notes this, but goes further and comments that in his negotiations with Crown, and, one might add **because** of the fact that he negotiated, 'the appellant was capable of making rational decisions in his own interests.'[37] With great respect to this honourable tribunal, this latter pronouncement appears to disregard completely the nature and affects of pathological addictions. Certainly, not only

[33] Certainly, it is an important question in regard to the High Court's assessment of Mr Kakavas' alleged special disability.
[34] *Louth v Diprose* (1992) 175 CLR 621.
[35] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[36] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [173].
[37] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [73].

the judges on appeal, but also the justices of the High Court appear to have unwittingly or deliberately misinterpreted the psychological evidence presented to the court.[38] There appears to be a misconception amongst certain members of the judiciary that a person suffering from a pathological psychological disability must necessarily be indigent, marginalised and unable to function within society and that an addiction can be easily resisted.[39]

However, the decision of the High Court has implications beyond those of the case under discussion. If, as argued here, the High Court has taken the concept of 'special disadvantage' to indicate a general inability to function within society, then it is also highly arguable that the decision has effectively overturned the judgments in all those cases, such as *Louth*[40] and *Amadio*,[41] in which the weaker party's disability related to a specific situation or condition and/or in which no evidence was presented in regard to the innocent party's inability to function efficiently within society. If this is the case, then the High Court has effectively circumscribed the application of the principles relating to unconscionable conduct.

A further indication for the Court that the appellant was capable of looking after his own interests was the fact that he entered negotiations with the respondent in regard to the terms upon which he would be admitted back into the casino. The Court demonstrates this view by stating that: 'these negotiations reveal that the appellant was capable of making rational decisions in his own interests, and of bargaining in pursuit of these interests.'[42] Apart from the fact that it is highly questionable whether negotiations entered into by a pathological gambler to gain re-admittance into a casino are actually in his best interests, it is fairly evident from the facts that the negotiations were entered into by the appellant to enable him to satisfy the addiction. One could not state that a heroin addict negotiating with a drug dealer

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[38] See *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [3] (Mandie JA), [23] (Bongiorno JA) and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [126]-[135].

[39] The High Court, in its preliminary discussion of the appellant's compulsion to gamble, at [24] cites Speigelman CJ in *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43, 53 [48], who states, in relation to an appellant's claim in negligence against an RSL club: 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.' One could add here: nothing, apart from his addiction. The Honourable judiciary mentioned in this case note are indeed fortunate to have such strength of will that they are unable to comprehend the nature and effects of addiction.

[40] *Louth v Diprose* (1992) 175 CLR 621.

[41] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

[42] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [73].

was 'bargaining in pursuit' of his own interests. It is arguable that in terms of addiction, the appellant's situation was the same as that of the hypothetical heroin addict.

A further concern in regard to the judgment is the High Court's view[43] of the appellant's behaviour as a gambler and the resultant characterisation of Mr Kakavas as a 'high-roller. The examination it undertakes as to the appellant's character and behaviour is prefigured by the citation from Pommeroy's *A Treatise on Equity Jurisprudence,*[44]which states:

> . . . the 'conscience' which is an element of the equitable jurisdiction came to be regarded, and has so continued until the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors – a juridical and not a personal conscience.

The Court goes on to note that '[t]he conscience spoken of here is a construct of values and standards against which the conduct of "suitors" – not only defendants – is to be judged.'[45] This approach is consistent with the equitable maxims that 'he who comes to equity must come with clean hands' and 'he who seeks equity must do equity.' Further, where the 'suitor's' claim is based in unconscionable conduct, it would be expected that the conduct to be examined by the court is that which forms the basis of the claim of 'special disability or disadvantage.'

In the appellant's case, the High Court examined his conduct, and, taking its cue from the judgments in the lower courts,[46] characterised him as a 'high roller,' a description which necessarily carries negative connotations. As their Honours explain:

> High rollers typically exhibit an abnormal interest in gambling. That abnormality might be described as pathological . . .. That a high roller may incur substantial losses is always, and obviously (and quite literally) on the cards. . . . Whatever a high roller's motivation may be, members of that class of gambler present themselves to the casino, are welcomed by it in the ordinary course of its business, as persons who can afford to lose and to lose heavily. It is for that reason that

[43] And the view of the two lower courts.
[44] John Norton Pommeroy, *A Treatise on Equity Jurisprudence* (Bancroft-Whitney, 5th ed, 1941) vol 1, 74.
[45] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [15]-[16].
[46] Ibid [44].

> operators of casinos are prepared to incur heavy expenses to attract their patronage away from other casinos.[47]

Apart from the fact that, by implication, this statement appears to be condoning the exploitation by casinos of persons with a pathological psychological condition purely on the basis that such exploitation is in 'the usual course of business,' it also suggests that high rollers, because they can 'afford to lose and to lose heavily,' are not entitled to the protection of equitable principles. This implication is further supported by the following comment made two paragraphs later:

> It is necessary to be clear that one is not concerned here with a casino operator preying upon a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds. One might sensibly describe that scenario as a case of victimisation.[48]

Evidently, therefore, a widowed pensioner could seek equitable relief under such circumstances, but not a wealthy, pathological gambler. It is highly arguable that the only difference between a casino's exploitation of a widowed pensioner and its exploitation of a wealthy pathological gambler lies merely in the amount of the losses and the victim's ability to afford them, rather than any difference in the conduct of the casino.

This approach to the determination of who 'deserves' equitable relief is of concern. By denying the appellant access to the protection of equity, merely because he could afford to lose, whilst stating that a widowed pensioner in a similar situation would be entitled to relief, is setting what can only be called a dangerous precedent. Such a precedent holds that in determining a claim for relief based upon unconscionable conduct, the court should not only ask whether the weaker party has a special disability, but should also scrutinise that party's assets. It suggests that only the poor are entitled to protection and that the rich must bear the consequences of their disability or disadvantage. Naturally, in circumstances other than a court of equity, this might be an admirable sentiment.[49] The poor need greater protection from the exigencies of the world than the rich. However, this is not the spirit of equity and constitutes a further attempt to circumscribe the ambit of the availability of equitable relief.

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[47] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013)[28]. It should also be noted that the Court's assertion that because a person is a "high roller", even though they have a pathological gambling compulsion, they are not worthy of equity's protection and may be exploited by casinos at will is, at best, illogical and at worst, inhumane.

[48] Ibid [30].

[49] It is also a fairly comfortable assertion for the casinos, given that a widowed pensioner would probably be unable to afford the cost of litigation.

VI THE RESPONDENT'S NOTICE OF THE APPELLANT'S GAMBLING PROBLEM

What was effectively a side issue in the appeal related to the appellant's claim that the respondent had constructive notice of his gambling problem. Whilst this was discussed at all three levels of the litigation, it appears to have been a side-issue in the High Court appeal, in that the respondent had admitted to being, and evidence had been adduced that, it was aware of the appellant's problem.[50] The knowledge of the respondent would only have been relevant had the High Court found that the appellant suffered from a special disability or disadvantage which adversely affected his bargaining position vis à vis the respondent.

VII THE FINGER IN THE DAM WALL – STEMMING THE FLOOD

Australia is known as a 'gambling nation.' In 2010 the Productivity Commission estimated that approximately 70% of Australian adults engage in some form of gambling activity every year.[51] It is conservatively estimated that of this 70%, 115,000 people are pathological or problem gamblers, whilst a further 280,000 are deemed to be 'at risk' of developing a pathological problem.[52] In 2010 gambling in some form consumed on average 3.1% of household income.[53] Furthermore, between 2008 and 2009, all forms of gambling generated $19 billion dollars in income for gambling venues.[54] Thus, it is possible to conclude, without the slightest exaggeration, that not only is gambling a major industry in Australia and but also that pathological gambling disorders constitute a major problem within Australian society.

In this context, the High Court decision appears to exonerate Crown's attempts to induce the appellant to satisfy his addiction on its premises on the basis that the respondent was pursuing its normal business practice, rather than exploiting a psychological weakness of a pathological gambler. Whether this type of 'business' is unconscionable, if not reprehensible, must be an individual moral judgment. However, it is arguable that in its decision, the High Court has set a dangerous precedent. By removing the protection of the equitable principles of unconscionability from a particular (and

[50] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [71]-[74].
[51] Productivity Commission, Commonwealth, *Inquiry Report: Gambling* 50 (2010) 5.
[52] Ibid 11.
[53] Ibid 6.
[54] Ibid. The term 'gambling venues' includes casinos, clubs and public houses.

increasing) section of society, viz: those with a pathological gambling problem, the High Court has, in effect, condoned the 'business' of gambling. It is true that the Court would extend equitable relief to a widowed pensioner, but this leaves open the question as to what degree of impecuniosity is sufficient to attract equity's protection. Further, it is highly arguable that the decision could be used as a basis to challenge the efforts of State and Territory governments to impose limits upon the gambling industry.

It is possible that had the High Court allowed the appeal, the decision could have 'opened the floodgates' of litigation. It would have provided a precedent pursuant to which problem gamblers could commence proceedings against gambling corporations on the basis of unconscionable conduct. It is not suggested here that the High Court was in any way conscious of the potential for such a deluge of litigation, had it allowed the appeal. However, it is undeniable that the decision in *Kakavas* has effectively thwarted any further attempts by problem gamblers to bring the casinos and other gambling venues to account for the manner in which they operate their businesses. Undoubtedly, the opportunity still exists for the widowed pensioner to take action and claim equitable relief. But, as noted above, this is highly unlikely, since she would be unable to afford the legal costs involved. It is only the wealthy gamblers, like the appellant, who could afford to do this, and the floodgates, for them have been effectively closed.

VIII CONCLUSION

In *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, James Boyd Wright notes that:

> Every legal case starts with a story – the client's story – and it ends with a legal decision that, in effect, offers another version of that story, one cast into a legal framework. In between, in the middle, lies the story told at trial – or rather the stories told at trial, since most stories contain competing narratives.[55]

Usually, it is the narratives of the opposing parties which conflict with each other. Each side tells a different tale, and it is the court which must mediate between the two and devise a moderated version. In *Kakavas*, however, there was little dispute about the facts, nor even as to the nature of the appellant's gambling problem. It was the High Court which developed a third story and version of the appellant's character and conduct. Using what was arguably semantic sleight of hand, it changed a gambler with a pathological psychological condition

[55] James Boyd Wright, *Heracles' Bow: essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 174.

into a 'high roller,' a professional gambler. Rather than having succumbed to the categorical imperative of his addiction and attempting by any means to gain re-entry into Crown's casino, the Court saw the appellant as a cunning negotiator who was able to bargain with Crown on an equal footing. The respondent, in its turn, was not exploiting the appellant's weakness, but merely conducting its usual business.

It is argued above[56] that in the process of constructing this third narrative, the High Court severely circumscribed the equitable principles of unconscionable conduct. Not only is the relief available only to the 'widowed pensioners' of society, but is arguably not available to those who can afford to litigate to preserve their rights. It is further arguable that a plaintiff claiming relief from the consequences of the unconscionable conduct of a defendant must now prove not only that he or she is affected by a special disability or disadvantage in regard to his or her dealings with the defendant, but also that this disability affects all other areas of their everyday life. Thus, if the plaintiff, like the solicitor in *Louth,*[57] is suffering from an infatuation of such severity that it leads him to give tens of thousands of dollars to the object of his affections, he must prove that other aspects of his life were affected by the special disability – not merely his dealings with the defendant. This is a further narrowing of the ambit of the availability of equitable relief.

Finally, whilst the decision has firmly closed the floodgates of possible future litigation against gambling venues founded in unconscionable conduct, it has also placed a dangerous precedent in the hands of those who may wish to challenge gambling control measures implemented by States and Territories.

Not only is the decision in *Kakavas* arguably one based upon misconceptions and preconceptions at all stages of the litigation, but it is also a powerful example of the danger of the misinterpretation of a narrative. It is a danger compounded by the fact that the misinterpretation of the facts was perpetuated by the High Court. The play, therefore, is not the thing, wherein we'll catch the conscience of the king.[58] The conscience of the Crown, in this particular case, is made of far sterner stuff than envisaged by the Bard.

[56] In section V UNCONSCIONABLE CONDUCT.
[57] *Louth v Diprose* (1992) 175 CLR 621.
[58] Profound apologies to William Shakespeare.