

24/84

## SUPREME COURT OF VICTORIA

**DREW v BRISCOE**

Gray J

15 August 1983

**GAMING AND BETTING – OCCUPIER OF PREMISES KEEPING CONTRIVANCE FOR GAMING – DOUBLE UP POKER CLUB VIDEO COIN MACHINE – WHETHER "DEALING" OF FRESH "HANDS" AMOUNTS TO A "RE-PLAY" – WHETHER "MULTIPLE COIN MACHINE": LOTTERIES GAMING AND BETTING ACT 1966, SS3, 68.**

B. was charged with keeping a contrivance for gaming at premises of which she was the occupier. The contrivance was a "Double Up Poker Club Video Coin Machine". The machine had a video screen with buttons which allowed the machine player to engage in a game which consists of a form of Poker. Depending on the player's luck, the machine allowed a player to start an indefinite number of "new hands" without inserting another coin. As to the question whether each fresh "hand" amounted to a "replay" within the meaning of the *Lotteries Gaming and Betting Act 1966*, the magistrate dismissed the information, not being satisfied that the machine granted replays. On order nisi to review—

**HELD: Order nisi discharged.**

**(1) On the evidence, the conclusion which was open was that, as a question of fact, the operation of the machine produced "replays".**

**(2) Therefore, the machine was within the definition of "multiple coin machine" and accordingly, was a contrivance for gaming.**

**(3) However, as it was not shown that the magistrate made an error of law, or made a finding of fact which had no evidentiary support, the decision of the magistrate could not be disturbed.**

**GRAY J:** [1] This is the return of an order nisi to review a decision of the Magistrates' Court at Williamstown. On 28th April 1983, the Magistrates' Court dismissed an information laid against the respondent under s68(1)(c) of the *Lotteries Gaming and Betting Act 1966* ("the Act"). The respondent was charged with keeping a contrivance for gaming at premises in Altona, of which she was the occupier. The contrivance in question was a "Double Up Poker Club Video Coin Machine". The issue raised by these proceedings makes it necessary to describe the way in which the machine operates.

The machine has a video screen and twelve buttons. The game consists of a form of poker. The value, expressed in points, of various combinations of cards is recorded on the screen as follows:

Royal Flush	500
Straight Flush	100
Four of a Kind	40
Full House	10
Flush	7
Straight	5
Three of a Kind	3
Two Pairs	2

[2] The screen depicts five cards placed face down. A player starts by putting one 20 cent coin in a slot in the machine. The player then pushes the "BET" button and then the "DEAL-DRAW" button. Five cards are then depicted face up on the screen. By pushing appropriate buttons the player can retain some cards and receive new cards in place of the cards not retained. All this is depicted on the screen. If the player has not then achieved a winning hand, the word "LOSE" flashes on the screen and the cards resume a face down appearance. No further play is possible until another 20 cent coin is inserted. If, however, the player is left with a winning hand after the substitution of fresh cards for the rejected cards, he is given a choice. The words "DOUBLE UP OR

"TAKE SCORE" appear on the screen. Assuming the player has two pairs, he can push the "TAKE SCORE" button, in which event a score of 2 will appear in a box on the top left of the screen. If he pushes the "DOUBLE UP" button, the screen indicates that the player should bet "BIG" if he guesses that the next card will be over 8 or "SMALL" if he thinks the card will be below 8. If the player makes the correct guess the word "WIN" appears. The player again is faced with a choice of taking the score (now doubled) or going through the "DOUBLE UP" procedure again. If he takes the score, the score (now 4) appears in the scoring box. This will enable the player to [3] play four free games before he is required to insert another 20 cent coin. If he plays four losing hands the score will revert to zero and a further coin is required for further play. If a player has accumulated a points score, he can increase the points value of each card combination by pushing the "BET" button a number of times. Assuming a player has accumulated a score of 100, he might push the "BET" button ten times. Then the Royal Flush would increase from 500 to 5000 and the other combinations would also increase in value tenfold. The points score in the frame would reduce from 100 to 90. This means one game now be played at ten times the values or odds. If a player reaches a score of 500, a figure 1 appears in a frame marked "REPLAY". This entitles the player to one free game if and when his score reverts to zero.

From the foregoing description of the operation of the machine, it can be seen that the machine allows a player, depending upon his fortunes, to start an indefinite number of new hands without the insertion of a 20 cent coin. The central question in these proceedings is whether each fresh hand amounts to a "replay" within the meaning of the Act. The respondent was charged with keeping "a contrivance for gaming" contrary to s68(1)(c) of the Act. Section 68(2) provides:-

**[4]** "Without affecting the generality of the provisions of sub-section (1) the following machines devices or contrivances shall be deemed to be machines devices or contrivances for gaming, namely machines devices or contrivances known respectively as crane machines fruit machines poker machines golf ball machines race machines flag machines jumbo machines or multiple coin machines and any other machines of a similar nature or having a similar object, and whether such machines are actually used for gaming or not."

The allegation is that the respondent kept a "multiple coin machine" and this is defined in s3 as being -

"any machine device or contrivance used for playing a game with the object of registering a score or succeeding in a game or contest and which is fitted with a recording or scoring device or is operated independently from but in conjunction with another machine or device capable of recording or scoring and which is of itself or in conjunction with the other machine or device capable of—

(a) recording or granting more than four re-plays to any person using or playing the machine device or contrivance.

(b) ...

(c) recording or granting an entitlement to any person of any money or moneys worth or the use of or right to play the machine device or contrivance for longer than the initial entitlement paid for or for four additional re-plays."

At the hearing of the prosecution on 28th April 1983, there was undisputed evidence that the respondent was the occupier of premises at 28 Pier Street, Altona, and that she kept thereon a Double Up Poker Video Coin Machine. There was evidence that on 27th January 1983 a customer was found playing the machine. He had accumulated a points score of 106 at the time of the police visit at 11.10 pm. There was evidence that **[5]** the machine operated in the way that I have endeavoured to describe. There was no evidence of the actual use of the machine for gaming. At the hearing, the issue was confined to the question whether the machine was capable of granting more than four "re-plays" within the meaning of that expression in s3 of the Act. After hearing argument, the learned magistrate dismissed the information. He gave the following reasons:-

"My job is to determine whether the machine was a multiple coin machine. This would be determined by deciding when it is playing a game or playing a replay. I am not satisfied beyond reasonable doubt that the machine granted replays. On the evidence before me the machine played a game with symbols and points were scored. There was no expert evidence before the Court as to what was a replay and my finding is that a game is completed when the cycle of the machine is completed, that is when the score ends at zero."

On 9th June 1983, Master Barker granted an order nisi to review the decision upon a number of grounds. The grounds allege, in substance, that the learned magistrate erred in finding that the machine was not a multiple coin machine within the meaning of the Act. Before me, Mr Adams of Counsel appeared for the applicant and Mr Knott of Counsel appeared for the respondent. The arguments presented make it necessary to consider what is the initial entitlement which the player gets for inserting 20 cents. The applicant's case is that the player's initial entitlement is to play a hand of poker and that accordingly every time a fresh hand is [6] "dealt" the machine is granting a "re-play". As this machine is capable of granting more than four such re-plays it is a multiple coin machine. The respondent's contention is that the initial entitlement is to play the machine until the score returns to zero. Upon this analysis, the only replay is that granted when a player's score returns to zero after having earlier reached 500. There is no evidence that this machine is capable of granting more than four of such replays.

The ordinary meaning of "re-play" is perfectly clear. In the context of a game, it means to play it again. The problem is to determine what constitutes "the game". I am disposed to accept the applicant's case that the machine grants a replay on each occasion when a fresh hand of cards appears on the screen. Looking at the problem in the light of the legislative framework, it can be said that the purpose of the Act is to prohibit the use of machines which are readily able to be used for gaming or betting. In my opinion, this is such a machine. It enables a player to accumulate a substantial points score which, given the necessary arrangements, is capable of being converted into money or money's worth. It seems that the Act intended to prohibit a machine which has this capacity. The limitation on the number of replays is the method adopted to achieve this intention. Looked at in that [7] light, I consider that this machine is capable of granting more than four "replays" within the meaning of that expression in the Act.

At the hearing in the Magistrates' Court, the prosecutor drew an analogy between this machine and a standard pin-ball machine. In the latter case the machine gives the player five balls upon insertion of his coin. If the player reaches a certain score he is allowed to play the game again and receives a further five balls. It was said that one would ordinarily describe the second game as a "replay". Factually, the analogy is a close one. I see nothing in the context which points against construing as a "replay" each fresh hand of cards provided by the subject machine.

It is, I think, a reasonable inference that the designer of the machine was alert to the difficulty created by the legislation. The machine provides expressly for a "replay", but it is only to be granted in most unusual circumstances. To earn a replay, a player must not only survive the vagaries of chance until his score reaches 500, he must then go on playing the machine until his score returns to zero. He is then entitled to one free game. It was said, but not proved, that the machine will grant only four such replays. If this is so, it must be rare for a player to be affected by this limitation. To get to 500 and back four times must require a purposeful player with a [8] lot of time to spare. He would certainly be getting a lot of play for his initial outlay of 20 cents. To my mind, the machine's express provision for a replay is an obvious device intended to surmount the difficulties created by the legislation. In a different context it might be said to evidence a consciousness of guilt. In the present context it does nothing to further the respondent's argument.

Accordingly, I find myself in disagreement with the conclusion reached by the learned magistrate that the machine does not grant replays. The next question is whether, having differed from the learned magistrate, it follows that he erred in law. It is well established that the order to review procedure can only be employed to correct errors of law, which errors include cases where a finding of fact is made which has no evidentiary support. *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301.

*[His Honour then discussed this question and discharged the order nisi on the ground that he was not satisfied that the magistrate erred in law]*

**APPEARANCES:** Mr M Adams, counsel for the applicant Drew. Mr M Knott, counsel for the respondent Briscoe.