**32/88**

**SUPREME COURT OF VICTORIA**

# *THOMSON v BLAKEY and ORS*

**JH Phillips J**

**19 May 1988**

**GAMING AND BETTING – COMMON GAMING HOUSE – PLAYING STUD POKER – PAYMENTS MADE TO DEALER – WHETHER DEALER DERIVED A "PERCENTAGE OR SHARE" – WHETHER AN UNLAWFUL GAME: *LOTTERIES GAMING AND BETTING ACT* 1966, SS3, 11, 43, 44.**

Section 11 of the *Lotteries Gaming and Betting Act* 1966 ('Act') provides (so far as is relevant):

> "Each of the following games is declared to be an unlawful game: ...
> (11) Any game with cards wherefrom any person derives a percentage or share of the amounts wagered;"

The card game of stud poker was played at B.'s premises. At the completion of each hand, the winning player presented the dealer with a gambling chip (which had a monetary value). B. was subsequently charged with an offence under s44 of the Act in that he had the care and management of a common gaming house and was convicted. Upon order nisi to review—

**HELD: Order nisi discharged.**
**1. Section 11(11) of the Act applies to cases where variable payments of money are made to the card dealer.**

**2. In the present case, the payments made to the dealer were "a percentage or share" of the amounts wagered and accordingly, the game was unlawful.**

**JH PHILLIPS J: [1]** This is the return of orders nisi to review a decision of the Magistrates' Court at Sandringham of 17 May 1985, upon an information whereby the applicant was charged under s44 of the *Lotteries Gaming and Betting Act* 1966, namely that on 15 February 1984, he did have the care and management of a common gaming house, to wit, premises situated at 344 St. Kilda Road, Brighton.

After hearing evidence and submissions, the learned magistrate found the information proved against the applicant and ordered that the information be adjourned for 12 months upon the applicant entering into a recognisance in the sum of $500 to be of good behaviour and upon condition that he pay the sum of $300 into the court poor box. **[2]** Subsequently, on 13 June 1985, Master Brett made orders nisi in the following terms:

> "(a) That the stipendiary magistrate was wrong in ruling that the applicant had a case to answer, because:
> (1) there was no or adequate evidence supporting the finding that any of the games of poker which were observed by the informant was one whereby any person wagered so as to make the game illegal under s11(11) of the *Lotteries Gaming and Betting Act* 1966; and
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> (2) there was no adequate evidence that the premises at 344 St. Kilda Street, Brighton was a common gaming house within the meaning of s43(b) of the said Act.
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> (b) that the stipendiary magistrate was wrong in finding that there was sufficient evidence to justify a finding beyond reasonable doubt that the premises at 344 St. Kilda Street, Brighton, were a common gaming house within the meaning of s43(b) of the said Act."

The evidence before the learned magistrate was given entirely by police officers called for the prosecution. It established the police went to the applicant's premises at 344 St. Kilda Street, Brighton, around 11.00 pm. on 15 February 1984 and **[3]** two police, namely Senior Constable Brown and Sergeant Johnson, looked through a window of the applicant's house and saw a number of persons seated around a green covered table which was marked with numbers and lines. A

card game, apparently stud poker, was in progress. The players had coloured chips, marked in various denominations and a male person was dealing the cards to each player. At the completion of each hand, the winning player would present the dealer with a chip.

Upon entry to the premises, the applicant identified himself and said that he lived there. The card players were there as his guests and were playing poker which, the applicant added, was not illegal. He agreed that he was responsible for providing the table, cards and gambling chips for the game and when asked, "Do the chips have a monetary value?" he replied, "Yes, we settle up at the end of the night". At the conclusion of this evidence, which does not appear to have been disputed, counsel who then appeared for the applicant (and for others who had been found on the premises) submitted that there was no case to answer. The learned magistrate over-ruled this submission, whereupon counsel led no evidence but submitted that the Prosecution could only succeed if subsection (11) of s11 of the Act applied in this case.

He further contended that the subsection could only operate if a defined or specified percentage or share of the amount wagered was paid to some person **[4]** and that there was no evidence before the learned magistrate that this had occurred. This submission was over-ruled and the learned Magistrate proceeded to find the charges proved, including the charge against the applicant, the subject of this proceeding. Later, in the applicant's case, he imposed the penalty I have earlier described. Before me, Mr Gebhardt for the applicant, reiterated the submission that had been put to the learned magistrate. Section 44 of the Act reads:

> "If any house or place is a common gaming house or place, the keeper or other person having the management thereof, and also every banker croupier and other person who acts in any manner in the conduct thereof shall be liable for a first offence to a penalty of not more than 15 penalty units or to imprisonment for a term of not more than three months and for a second offence to a penalty of not more than 25 penalty units or imprisonment for a term not more than six months and for any subsequent offence to a term of imprisonment for a term of not more than twelve months."

Section 43 of the Act defines common gaming houses and the relevant subsection for present purposes is paragraph (b), which adds to the definition of common gaming house to be derived from the common law principles:

> "Every house or place where any unlawful game is carried on or played or which is opened kept or used for the purpose of playing therein or thereon at any unlawful game."

Other provisions of the Act expressly declare certain games to be unlawful but stud poker is not one of them. However, pursuant to subsection (11) of s11 of the Act:

> **[5]** "Any game with cards or other instruments of gaming wherefrom any person derives a percentage or share of the amount or amounts wagered."

is declared an unlawful game.

Mr Gebhardt submitted a percentage or share means a fixed and not variable amount and the evidence before the learned Magistrate did not enable him to find that the dealer received a fixed amount on each occasion. Both Mr Gebhardt and Mr Bristow, who appeared for the respondent, drew my attention to various dictionary definitions of 'share'. They included: "the portion or part allotted or belonging to or contributed or owed by an individual or group; one of the equal fractional parts into which the capital stock of a limited company is divided" (the *Macquarie Dictionary*); and "the part or portion of something which is allotted or belongs to an individual when distribution is made among a number; a part, piece or portion of anything" (the *Shorter Oxford Dictionary*); and "a part or definite portion of a thing owned by a number of persons in common" (*Black's Law Dictionary* 4th ed. 1951); and "the full or proper portion or part allotted or belonging to or contributed or owed by an individual or group, allotment, allocation, quota, lot" (*Random House Dictionary* 1953).

Mr Gebhardt argued that the evidence before the learned Magistrate suggested voluntary rather than compulsory payments to the dealer and this circumstance made variation in the amount of the payments, more likely. **[6]** I use the word 'payments' because the applicant admitted to the police that the chips handed to the dealer had a monetary value.

Mr Gebhardt also drew my attention to the circumstance that 'share' appears in the definition of 'profit' in s3 of the Act, in that profit includes "fee, commission, reward, payment, advantage, share or interest". Mr Gebhardt contended that this, as he put it, "set apart" share from other matters such as reward or payment which were appropriate to describe what was given to the dealer, on the evidence. He accepted that in s11(11) there was no express mention that the percentage or share had to be fixed and not variable, but submitted that that conclusion necessarily followed by implication.

I cannot accept that Parliament intended the words 'percentage' or 'share' to have the meaning Mr Gebhardt ascribes to them. In my opinion, to thus construe them would be to defeat the intention to proscribe, in the public interest, various games which permeates important parts of the Act. This view is, in my opinion, consistent with the definitions from the various dictionaries to which I have been referred. A card game could be removed from the ambit of the Act by the simple device of making variable payments to the dealer. I have come to conclude therefore that the order nisi in this matter should be discharged. I order that the applicant pay the respondent's costs which I fix at $500.

**APPEARANCES:** For the applicants/defendants Blakey and Ors: Mr M Glen (solicitor). Kiddle Briggs & Willox, solicitors. For the informant/respondent Thomson: Mr A Bristow, counsel. Victorian Government Solicitor. Mr SP Gebhardt, counsel, appeared on behalf of the applicant/defendant during the course of the hearing.

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