PARTIES:	NEWHAM, Alan C
	v
	DIAMOND LEISURE PTY LTD
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	Appeals from Supreme Court exercising Civil Jurisdiction
FILE NOS:	No. AP10 OF 1993
DELIVERED:	5 September 1994
HEARING DATES:	9 and 10 March 1994
JUDGMENT OF:	ANGEL, MILDREN and PRIESTLEY JJ

CATCHWORDS:

Interpretation - Words and phrases - Whether instruments completed were "cheques" as defined - Whether "payable" constitutes an unconditional order in writing for the purposes of the Act - Interpretation - Determinability of an applicable interest rate - Whether rate can be varied - Whether a "cheque" is security for the fulfilment of an obligation to make payment to the payee - Two possible contracts (1) sale of goods for money lent, goods hired, or services rendered; (2) between the drawer and the payee by the cheque itself - Whether "cheque" is collateral security for a loan - Interpretation - no express prohibition of collateral security - prohibited recovery on contract of loan - Whether by its terms the contract of loan is illegal - Whether collateral contract is enforceable.

Statutes

Cheques and Payments Orders Act (C'wlth) 1986, ss4, 10, 11, 12, 13, 21, 22, 71 and 76
Cheques and Payments Orders Regulations (C'wlth) 1986, r4
Casino and Licensing Control Act 1984 NT, ss2, 3, 4, 5, 6, 11, 12 and 13
Bills of Exchange Act 1909 (C'wlth), ss8 and 89.

Cases

Glass v Defence Force Retirement and Death Benefits Authority (1992) 38 FLR 534 - followed.
Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1304; (1992) 4 All ER 408 - followed.
Rogers v Squire (1978) 23 ALR 1 at 11 - considered.
Upper Hunter County Districts Council v Australian Chilling and Freezing Company Ltd (1968) 118 CLR 429 - applied.
Attorney-General v Luncheon and Sports Club [1929] AC 400 - considered.
Fisher v Stanton (1910) 12 CLR 39 - considered.
Moulis v Owen (1907) 1 KB 746 - considered.
Read v Anderson (1884) 13 QBD 779 - followed.
Hamilton v Spottiswoode (1849) 4 Ex. 200 - considered.
Nawab Major Sir Mohammed Akbar Khan v Attar Singh (1936) 2 All ER 545 - followed.
Kimball v Huntington (1833) 10 Wendall's Reports 675 - considered.
Little v Slackford (1828) 1 Mood and M 171 - considered.
Ruff v Webb (1794) 1 Esp 129 - considered.

REPRESENTATION:

Counsel:

Appellant:	B Walker QC, R Brender, J Moore
Respondent:	G Hiley QC, M Spargo

Solicitors:

Appellant:	Barr Moore & Co
Respondent:	Mildrens

Judgment category classification: A

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No AP10 of 1993

IN THE MATTER of an APPEAL from the judgment of The Honourable Justice Thomas in proceeding No 689 of 1989 (8922512)

BETWEEN:
ALAN C NEWHAM
Appellant
AND:
DIAMOND LEISURE PTY LTD
Respondent

CORAM: Angel, Mildren and Priestley JJ

REASONS FOR JUDGMENT
(Delivered 5 September 1994)

ANGEL J: The facts and circumstances of this appeal and the issues argued are set forth in the reasons for judgment of Mildren J which I have had the advantage of reading and I will not repeat them.

Mildren J has set out the form of the instruments sued on by the respondent which were signed by the appellant. As Mildren J has related, the appellant contends, for reasons raised for the first time on appeal, that the completed instruments were not cheques as defined in the Cheques and Payments Orders Act, 1986 (Cwlth), the relevant provisions of which Mildren J has set forth.

I agree that the instruments are clearly addressed to the Commonwealth bank and that in that respect they comply with s10(1)(a) and s13 of the Cheques and Payments Orders Act, 1986.

The appellant's other contention was that because the instruments used the word "payable" rather than the word "pay" they did not amount to an order or direction to the Bank to pay. It was said that the word "payable" is not the imperative of the verb "to pay", and that therefore the instruments could not be said to be unconditional orders in writing for the purposes of s10.

I am of the view that this argument should be rejected.

The word "payable" means, inter alia, "that must be paid, due" (Concise Oxford Dictionary), "that is to be paid, due, owing" (OED), "that should be paid" (Chambers Dictionary), "to be paid, due" (Macquarie Dictionary). Thus in the context of these instruments the words "payable to" mean "that is to be paid to" or "to be paid to". The word "payable" in each instrument is an adjective - made from adding the living suffix "able" to the transitive verb "pay" - which qualifies the denoted monetary sum. Addressed as they are to the Bank, the instruments are to be construed as referring not to a sum payable by the appellant drawer but by the Bank to which they are addressed. Thus construed, ("payable to" meaning "to be paid by you to") each completed instrument is a direction to the Bank to pay the denoted sum i.e. it is imperative and more than a mere authorisation or request to pay. It is therefore an order for the purposes of s10 of the Act.

It may be true that other possible meanings are capable of being attributed to the word "payable" in the instruments. It may be construed in the sense of payable by the appellant drawer, ie no more than an acknowledgment of debt. Alternatively the word "payable" might be considered as having an alternative dictionary meaning, namely, "that can or may be paid" ie, as meaning that payment is optional rather than mandatory; but it is to be noticed that the Oxford English Dictionary describes such usage as rare. However I do not so read the instruments. Nor do I think they can properly be so read.

If there is any ambiguity in the matter (a view not shared by the appellant's Bank) the words of Barwick CJ in *Upper Hunter County Districts Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-7 are to be remembered - each instrument is capable of meaning and bears that meaning which the Court decides in its proper construction. In my opinion the instruments are a direction to the Bank to which they are addressed to pay the respondent the denoted sums upon due presentation of the instruments and that they are cheques as defined by s10 of the Act.

At the time of dishonour the appellant had received value for the cheques - he had received the "Cheque Credit Facility" forms; he had received the respondent's promise to give him chips in exchange therefor; he had received the respondent's promise to permit him to play lawful games at the respondent's casino; he had received the chips.

Discrete lawful value having been received, and, or alternatively, discrete lawful valuable consideration sufficient to support a simple contract (cf *Chappell & Co Ltd v Nestle Co Ltd*

[1960] AC 87) having been given for the cheques (ss 35, 36 Act), and the cheques having been dishonoured on due presentation, the appellant is liable on them; (ss 70, 71, 76 Act).

On the question of interest, I generally agree with Mildren J. I agree that the learned trial judge's discretion miscarried and that allowance should be made for the drop in interest rates since the date of dishonour.

In the circumstances, in lieu of the order of the learned trial Judge, I would order that the appellant pay the respondent interest at the rate prescribed by the regulations at the time of dishonour, viz. 16.95% from the date of dishonour until payment and further order that so much of that interest as exceeds the rate from time to time ruling by virtue of the regulations be withheld.

Otherwise I would dismiss the appeal.

The interest point occupying very little time on the hearing of the appeal, I would order the appellant to pay the respondent's costs of the appeal.

The appeal should be dismissed with costs.

MILDREN J:

Between 3 and 8 August 1989, the appellant, his wife and sister-in-law came to Darwin as guests of the respondent for the Darwin Cup Carnival. The respondent paid for the appellant's and his family's first class return airfares and provided free accommodation, food, drinks and other services. The appellant had previously visited Darwin as a guest of the respondent on a similar basis.

At all material times, the respondent was the holder of a gambling casino licence pursuant to the provisions of the Casino Licensing and Control Act 1984, which permitted it, subject to the conditions of the licence, to organise and play certain authorised games. It will be necessary to discuss the terms of the respondent's licence and the legislative scheme which applied to the respondent's casino more fully later.

During the period of his stay in Darwin, the appellant played blackjack and baccarat at the respondent's casino. He ended up, in effect, with a loss of $620,000. However, the appellant had not given cash to the respondent in order to acquire the chips with which he needed to gamble. What he did was to sign a number of instruments, totalling in all $620,000, which the respondent claims were, or became, cheques within the meaning of the Cheques and Payment Orders Act 1986 (Commonwealth), in return for which he acquired cheque credit slips which he used to obtain chips to the same face value. The appellant stopped payment on these instruments when they were presented by the respondent to the appellant's bank. The respondent sued on these instruments as dishonoured cheques or alternatively promissory notes; alternatively the respondent claimed (a) restitution of the sum of $620,000 on the basis that the

appellant had been unjustly enriched or (b), the sum of $620,000 for goods sold and delivered, viz. the chips. The appellant raised a number of defences to the action. He denied that the chips were sold to him; he claimed that the instruments were never cheques or promissory notes; he claimed that the whole transaction leading to the grant of the instruments was tainted with illegality and that the respondent's causes of action were therefore unenforceable; and he also claimed that the actions were unenforceable because of the provisions of s12(5) of the Casino Licensing and Control Act, 1984, *inter alia* because the respondent lent the appellant $620,000 for the purposes of gambling. The respondent by its reply maintained that the appellant was estopped from denying that the instruments were cheques, and was estopped from asserting that the respondent lent the appellant the sum of $620,000.

The learned trial judge, Thomas J, held that the instruments were cheques, that all of the defences raised by the appellant failed, and accordingly, she entered judgment for the sum of $620,000 in favour of the respondent. Thomas J did not find it necessary to consider the alternative claim based on unjust enrichment. At a later time, Thomas J further awarded damages to the respondent in the amount of interest fixed by s76(1)(a)(ii) of the Cheques and Payment Orders Act 1986 and regulation 4 of the Cheques and Payment Orders Regulations.

The appellant appeals to this court both in respect of his liability to the respondent and in respect of the quantum of interest and damages awarded. The respondent has delivered a notice of contention, on two minor issues neither of which were pursued at the hearing of this appeal. It is important to note that the notice of contention does not raise for this court's consideration any alternative basis upon which the judgment might be supported if the instruments were not

cheques. In these circumstances, the appellant contended that if it is successful in persuading this Court that the instruments were not cheques or promissory notes, or, that if they were, and the appeal should be allowed on any other ground argued, the action should be remitted to Her Honour to enable formal findings to be made on the question of estoppel, and also on the cause of action based on unjust enrichment. At the hearing of the appeal, this Court indicated that it accepted that submission, and did not require Mr Walker S.C., who appeared for the appellant, to develop that submission further.

Were the instruments cheques?

Thomas J found that, during the relevant period, the appellant signed a number of instruments which he delivered to the respondent. These instruments, when delivered, were each in the form (of which instrument 6803 is an example) set out below:

6/8/1989

BANK

BRANCH ACCOUNT No.

Payable to **DIAMOND LEISURE PTY LIMITED**

AMOUNT IN WORDS THIRTY THOUSAND DOLLARS

$30,000---

A. NEWHAM
PRINTED NAME

A. NEWHAM (Signed
SIGNATURE

6803 CAS 410

Once these instruments, or `house cheques' as they were called, were delivered to the respondent, the respondent gave to the appellant cheque credit slips to the same value. For example, in relation to instrument 6803, the appellant gave the respondent four cheque credit slips, two for $10,000 and two for $5000. An example of one of these slips is set out below:

DIAMOND BEACH CASINO

N.T.R.G.C.

	(STAMPED) $5,000and00cts	**33849**
CHEQUE CREDIT	**ISSUED: 6/8/89 10.45PM**	

NAME A NEWHAM

AMOUNT IN WORDS FIVE THOUSAND DOLLARS $ 5000 ---

CASHIER D2277

INSPECTOR (Signed) 0190
DEALER (Signed) 2413
PIT BOSS (Signed)

THIS VOUCHER IS VALID FOR CHIPS AT THE GAMING TABLES ONLY AND SHOULD BE EXCHANGED ON DAY OF ISSUE. TABLE B3 16

CHQ

T/CQ

F/c

29-57 Government Printer of the Northern Territory

The appellant then exchanged at one of the gaming tables each cheque credit slip for an equivalent face value in chips.

Thomas J found that the appellant and the respondent entered into a cheque cashing contract, which contained a term that each `house cheque' could be redeemed by the appellant within 14 days of the transaction, at the end of which time the respondent was authorised to complete these instruments as cheques and, if not redeemed, would present them for payment. It was an agreed fact that the instruments were completed on 30 August 1989 by a member of the respondent's staff. For example, instrument No. 6803 when completed, is set out below:

6/8/1989

BANK COMMONWEALTH BANK
BRANCH CIRCULAR QUAY 062 004 ACCOUNT No. 400 123

Error! Bookmark not defined.
Payable to **DIAMOND LEISURE PTY LIMITED**

AMOUNT IN WORDS THIRTY THOUSAND DOLLARS

$30,000---

A. NEWHAM (Signed A. NEWHAM)

PRINTED NAME SIGNATURE

0003000000
6803 062 004 400 123 CAS410

Thomas J found that on 31 August 1989 the appellant signed a direction to his bank to stop payment of the `cheques'; that the `cheques' were presented for payment and subsequently dishonoured. Thomas J also found that the instruments, when completed, were cheques within the meaning of the Cheques and Payment Orders Act 1986 and that, up until 31 August 1989, the appellant intended to honour them.

The appellant contends that the instruments, when completed, were not cheques for two reasons: (a) because they did not name the drawee bank on their face, and (b) because they were not unconditional orders requiring a bank to pay on demand. I should add that the appellant did not contend that the respondent was not authorised to complete the instruments from their inchoate state, nor did the appellant contend that the appellant had revoked the respondent's authority to do so at any relevant time.

The Cheques and Payments Orders Act 1986, provides:

Cheque defined

10.(1) A cheque is an unconditional order in writing that:

(a) is addressed by a person to another person (being a bank);
(b) is signed by the person giving it; and
(c) requires the bank to pay on demand a sum certain in money.

(2) An instrument that does not comply with subsection (1), or that orders any act to be done in addition to the payment of money, is not a cheque.

Order to pay

11. An order to pay must be more than an authorisation or request to pay.

Unconditional order to pay

12.(1) An order to pay on a contingency is not an unconditional order to pay and the happening of the event does not make the order an unconditional order to pay.

(2) An order to pay shall not be taken not to be an unconditional order to pay by reason only that the order is coupled with either or both of the following:

(a) an indication of a particular account to be debited by the bank to which the order is addressed;

(b) a statement of the transaction giving rise to the order.

Order addressed to a bank

13.(1) An order to pay is not addressed to a bank unless:

(a) the order is addressed to a bank and to no other person;

(b) the order is addressed to one bank only; and

(c) the bank is named, or otherwise indicated with reasonable certainty, in the instrument containing the order.

(2) An order to pay may be an order to pay addressed to a bank notwithstanding that a person other than the bank on which the instrument containing the order is drawn, the payee or the drawer is specified in the instrument.

The appellant's first contention may be shortly disposed of. The instrument, in my opinion, is clearly addressed to the Commonwealth Bank. It is true that words on the instrument do not include the word "to" immediately before the word "bank", but in my opinion, that does not matter. It is common knowledge that printed cheque forms provided by Australian banks contain no more than the name of the bank to whom a cheque is intended to be addressed. I have no doubt that the instruments complied with s.10(1)(a) and s.13 of the Cheques and Payments Orders Act, 1986.

The appellant's second contention was that because the instruments used the expression "payable to Diamond Leisure Pty. Limited" rather than "pay to ....", there was no order to pay within the meaning of the Act. This point was not argued before Thomas J, but the question being a pure question of law I think that it is proper that we should deal with it. It was submitted that the word "payable" describes a characteristic or potential of the particular sum, rather than unequivocally conveying a command to the bank to pay. Mr Walker submitted that the use of the word "payable" characterised these instruments as IOUs, or alternatively, as promissory notes. The only case Mr Walker was able to find touching upon the topic was an *obiter dictum* of Nelson J in the Supreme Court of New York, in *Kimball v Huntingdon* (1833) 10 Wendall's Reports 675; 25 American Decisions 590, to the effect that an instrument which read `Due

Kimball and Kinnerston, $325 payable on demand' was a promissory note. Mr Walker frankly conceded that this case was of no assistance, and I agree with him. Clearly the circumstances of the instrument in that case are distinguishable from the present case.

The Cheques and Payments Orders Act 1986 does not specifically require the use of the word `pay'. No particular form of words is required so long as it is an order to pay; and is something more than an authorisation or request to pay. As a matter of English grammar, `pay' or `pay to' is the imperative of the verb `to pay' whilst `payable to' is not imperative in form. In *Glass v Defence Force Retirement and Death Benefits Authority* (1992) 38 FCR 534, at 537, the Full Court of the Federal Court of Australia held that, the word `payable' is an ordinary English word signifying that something is capable of being paid. Thus, it might be thought that `payable to' is a mere authorisation to pay. In *Glass'* case, the Full Court held that the word `payable' as used in the context of an Act did not indicate a discretion to pay. At p538, their Honours said:

> "The appellant did not deny that the ordinary English meaning of "payable" is "capable of being paid" as indicated by a number of general and legal dictionaries. Nevertheless, he went on to submit that "capable" in that definition implies only a discretionary power or capacity to act. However, the epithet "payable" is attached as a matter of ordinary usage to an inanimate object, as it is in this legislation to a "lump sum" and a "transfer value". Used in that way, it imports no discretion or choice in the presumptive payer whether or not to make the payment. Any discretion is only as to whether or not to require payment and resides solely in the presumptive payee."

All this case demonstrates is that `payable' may, in context, amount to more than an authority or request, both of which confer a discretion on the part of the payer.

There is remarkably little authority which discusses the circumstances under which words used have been construed to be unconditional orders, as opposed to an authorisation or request. We were referred to a few ancient authorities, *Ruff v Webb* (1794) 1 Esp 129, *Little v Slackford* (1828) 1 Mood and M. 171 and *Hamilton v Spottiswoode* (1849) 4 Ex.200, but I have gained little assistance from them. That mere fact that the imperative form of the verb `to pay' is not used does not necessarily mean that the instrument is not an unconditional order to pay. I consider that it is necessary to look at the whole instrument to see what is intended. The

instrument is a formal looking document made out on a printed form with pre-printed numbering. In appearance it is like a cheque. There is nothing about the instrument to give it the appearance of an authorisation or request. The words `payable to' are not words of courtesy and are not the equivalent of `please pay': c.f. *Little v Slackford*, *supra*. I think it is clear that the instruments are not mere requests. Are they mere authorities to pay?

Dictionary definitions of `payable' include, in reference to a sum of money, or a bill, that which is due to a specified person (Shorter Oxford); owed, to be paid or due (MacQuarie Dictionary). In the context of cheques, the word is often used in the context of indicating the payee: e.g. "to whom shall I make the cheque payable?" If the word was intended to mean no more than `due to' or `owed to', it might signify that the instruments were acknowledgments of debts. Although an acknowledgment of debt would not require any reference on the form of the instrument to a bank, this does not necessarily mean that the instruments are not acknowledgments of debts.

The word `order' contained in s.10(1) also needs to be considered. The words used are "an unconditional order in writing that .... requires the bank to pay on demand a sum certain in money." "Order" is defined to mean `a command' or `direction' or `mandate' (Macquarie Dictionary; see also Shorter Oxford Dictionary). S11 provides that an order to pay "must be more than an authorisation ..." presumably because an order to pay is in itself an authorisation to the bank.

My conclusion is that the instruments are not cheques because they are not orders in writing requiring the bank to pay the respondent.

In my opinion, for an order to exist within the meaning of the section, given that cheques are negotiable instruments, it must be clearly expressed on the face of the instrument and cannot be implied from the appearance of the rest of the document or the circumstances generally. I do not see how the words "payable to" in themselves can amount to an order, and there is nothing else

on the face of the instrument which amounts to an order or which would give the words `payable to' such a context.

These words, as they are addressed to the bank, indicate to the bank that the relevant amounts are due to the respondent by the appellant, and authorise the bank to pay the amounts and debit the appellant's account, but they do not command the bank to pay. It is one thing to say to one's bank that a sum ought to be paid to another; it is quite another thing to say to the bank, `and you must pay it.' Similarly the instruments are not bills of exchange which also require there to be an unconditional order in writing: s8(1) of the Bills of Exchange Act 1909.

Are the instruments promissory notes?

A promissory note is defined by s89(1) of the Bills of Exchange Act 1909 as an "unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

The question is whether the instruments are unconditional promises in writing. Chalmers and Guest on Bills of Exchange, 14th Edition, at p658 state:

> "The subsection requires a note to contain a promise to pay. The actual word "promise" need not, however, be used, and any other words which clearly constitute a promise to pay are sufficient. But a mere acknowledgment of indebtedness, though it imports a promise to pay, is not a note."

Byles on Bills of Exchange, 26th Edition, at 338, is to similar affect, the learned authors adding, however, that there must be evidence of the intention of the parties to make a promissory note: see also Riley, Bills of Exchange, 2nd Edition, p277; Conrick, The Law of Negotiable Instruments in Australia, 2nd Edition, at 158.

In my opinion, the words used in the instruments do not clearly constitute a promise to pay. In *Nawab Major Sir Mohammed Akbar Khan v Attar Singh* (1936) 2 All E.R. 545 at 549, in respect of a document which stated `this amount to be payable after 2(two) years', Lord Atkin observed that

> "it is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice ..."

Mr Walker SC submitted that the instruments were probably I.O.U.s. In my opinion that is not strictly correct. An I.O.U. is an abbreviated form of an acknowledgment of debt: see Byles on Bills of Exchange, 26th Edition, at 348-9. None of the instruments are in this form, but they are, by implication an acknowledgment of the appellant's indebtedness to the respondent in that they authorise the Commonwealth Bank to pay monies to the respondent and to debit the appellant's account.

The instruments, therefore are not negotiable instruments, and cannot be sued upon, although they are evidence of a debt but not of a loan: see Byles, *supra*.

Counsel for the respondent did not seek to argue that a cause of action based on any sale of the chips was reasonably open on the evidence. In the result, the judgment in favour of the respondent cannot be supported because none of the causes of action upon which the respondent sued were made out, unless the appellant is estopped from denying that the instruments were cheques, or unless the respondent's claim based on unjust enrichment is successful. As these issues were not decided by Thomas J and not argued in this Court, in my opinion the only course now open is to allow the appeal and to remit the matter back to Thomas J to determine the outcome of these issues and to pronounce such judgment as the parties may be entitled to in accordance with the decision of this Court.

As the question of estoppel is still alive, and as a number of other issues were fully argued at the hearing of the appeal on the assumption that the instruments were cheques, I think it is desirable that these issues be dealt with at this stage, particularly if, assuming that the appellant is estopped from denying that the instruments were cheques, the appellant is correct in his submission that the actions based on the cheques are not maintainable. I will therefore deal with these issues, including the issue as to interest.

The credit illegality issue

The appellant's submission was that the instruments were not cheques at the time they were delivered to the respondent because, at that time, they were not addressed to a banker. This was properly conceded by Mr Hiley Q.C., counsel for the respondent. Mr Walker S.C. submitted that the consequences of this were that the respondent was seeking to recover contrary to s.12(5)(a), (b) and (c) of the Casino Licensing and Control Act.

At this point, it is convenient to refer to the provisions of that Act as it existed in August 1989. Section 4 permits the Minister to grant a licence under the Act to conduct a casino for the playing of games to a person who had entered into an agreement in accordance with s.3 of the Act. Section 4(2) provides that the licence shall be subject to the terms and conditions of the agreement. "Casino" is defined by s.2 to mean premises licensed under the Act for the playing of games, and `game' is defined to mean a game of chance. Section 5 empowers the Minister to terminate a licence by notice in writing to the licensee on the ground, *inter alia*, that the licensee has failed to comply with a condition of the licence or has failed to comply with a direction lawfully given by the Minister pursuant to an agreement relating to the licensing and conduct of a casino. Section 6 empowers the licensee, notwithstanding any other law of the Territory, to conduct a casino in accordance with the terms and conditions of the licence, and "to the extent that any such condition would, but for this section, be in conflict with a law of the Territory, that law shall be deemed to be of no effect." Section 11 empowers the Minister to declare a game to

be an authorised game for the purposes of the Act, provided that the Minister has approved the rules under which the game is to be played. Section 11(3) empowers the Minister to alter the rules of a game by notice in writing. Section 11(6) requires a licensee to ensure that an authorised game conducted in the casino is conducted in accordance with the approved rules of the game.

Section 12 provides as follows:

"12. PLAYING OF AUTHORISED GAMES

(1) Notwithstanding any other law of the Territory, it is lawful in a casino for -

(a) the licensee and his employees and agents to organise or play an authorised game; and

(b) a person, except a person in respect of whom a direction under section 15 is in force or who has not attained the age of 18 years, to play any such game.

(2) A casino shall not be deemed to be a nuisance, public or private, by reason only that it is used as a gaming house.

(3) The *Police Administration Act* does not apply to or in relation to implements or articles used or intended to be used in the playing of authorised games in a casino.

(4) The *Lotteries and Gaming Act* does not apply to or in relation to a casino or an act performed in a casino.

(5) A person shall not, except against a licensee, bring legal proceedings to recover -

(a) money won at gaming in the casino;

(b) money on a cheque or other instrument given in payment of money so won; or

(c) a loan of money with which to play a game in the casino,

that could not be brought if this Act had not been enacted."

Section 13 empowers the Minister to give directions to a licensee in relation to certain matters. There are no other relevant provisions. The Act has since been repealed and replaced by a new Act.

As envisaged by s.3 of the Act, the respondent and the Minister (as well as other parties) had entered into an agreement relating to the licensing and conduct of the casino. This agreement became Exhibit P20 at the hearing. Clause 8.3 of the agreement required the respondent to comply with certain ministerial directions. Clause 9.1 conferred upon the Minister an absolute discretion to cancel the licence and terminate the agreement or to suspend the licence in certain circumstances, including, vide Clause 9.1(m) in the event of default in due compliance with the agreement, if action has not been taken to remedy the default within 14 days of notice of the default having been served by the Minister upon the respondent.

The Minister had also issued certain directions to the respondent which became Exhibit P6 at the hearing. These directions are stated to have been given pursuant to s.13 of the Act, but no doubt, could also have been given pursuant to Clause 8.3 of the agreement. Clause 3(7) of the directions provides that, "subject to subclause (8), the licensee shall not accept a credit bet for any game and shall ensure that credit for the purpose of gaming is not extended to any person." Clause 3(8)(a) provides:

> "(a) Sub-clause 7 does not prevent the cashing of personal cheques, travellers cheques or bank cheques, except that -
>
> i) cheques shall not be exchanged for chips at a gaming table
> ii) personel (sic) cheques shall not be exchanged for cash, but will be exchanged for cheque credit slips issued at the cash desk to the value of the cheques tendered
> iii) personal cheques are redeemed by the drawer of the cheque before any winnings are paid
>
> iv) patrons shall not be permitted to consolidate or redeem personal cheques with later dated cheques for the purpose of evading cheque presentation requirements."

Mr Walker submitted that

(1) from the time the instruments were handed over by the appellant until the time the instruments were completed by the respondent's staff, (and at all times when the appellant gambled at the tables) the instruments were not "cheques" within the meaning of the Commonwealth Act.

(2) the subsequent completion of the inchoate instruments did not relate back in time to, as it were, require the instruments to be treated as if they were cheques during the period of gambling;

(3) therefore, at the relevant times, the respondent had breached Clause 3(7) of the directions by accepting "credit bets".

(4) consequently,

(i) each transaction evidenced by an instrument was a loan of money within which to play a game at the casino "within the meaning of S12(5)(c); and

(ii) the loans were not protected by s.6 of the Act as the breach of directions was a breach of the agreement and hence a breach of the terms and conditions of the licence.

(5) the respondent could not have brought legal proceedings to recover the loans if the Act had not been enacted.

(6) therefore the action was precluded by S12(5)(c).

The respondent disputes each of steps (3) to (6) (both inclusive) of this argument. In addition, the respondent submits that as the cause of action upon which it succeeded was an action upon the cheques, S12(5)(c) did not apply as the respondent had not sued to recover money lent.

Whenever a cheque is drawn, the usual reason for drawing the cheque is to make payment of a debt owing to the payee. In some cases a cheque may be given as security for the performance of an obligation to make a payment to the payee. In either event, there are two contracts, each of which give rise to separate causes of action. The first contract is commonly a contract for the sale of goods, for money lent, for goods hired or services rendered. The second contract is the contract created between the drawer and the payee by the cheque itself. The Cheques and Payments Orders Act 1986 ("CPOA") provides certain rights, duties and liabilities between the various parties to a cheque, which subject to s.6(2), the parties themselves may contractually alter: see s.6(1). Furthermore, the laws of the Northern Territory, including the common law, continue to apply to cheques, except insofaras those laws are inconsistent with the CPOA: see s.4(2). S.71 of the CPOA provides that, subject to certain irrelevant exceptions, the drawer of a cheque undertakes that on due presentment for payment, the cheque will be paid according to its tenor, and that if the cheque is dishonoured when duly presented for payment, the drawer will compensate the holder. In the circumstances of this case the respondent as payee was the holder: See CPOA, s.21 & 22 in the definition of `holder' in s.3(1). S76(1) provides the holder of a dishonoured cheque with the remedy - the holder may recover as damages from any person liable on the cheque, the sum ordered to be paid by the cheque together with interest. Damages under S76(1) are deemed to be liquidated damages: S76(8).

In this case Thomas J held that the inchoate instruments, which later became cheques, were not given by the appellant as security for loans made by the respondent. Her Honour found that the consideration for the instruments was the provision by the respondent of the cheque credit slips, and that this contract was completed before any gaming chips were obtained by the appellant. I do not accept this analysis. In my opinion the instruments were plainly given as collateral security for loans made on credit given by the respondent for the purpose of gaming. In *Lipkin*

Gorman (a firm) v Karpnale Ltd [1989] 1 WLR 1340; (1992) 4 All ER 408, Nicholls LJ (dissenting) at (WLR) 1383; (All E.R) 446 observed in relation to a similar system:

> "The cheque credit slips were no more than receipts for the cash handed in at the cash desk. Likewise the chips. They were no more than tokens which it was convenient to use in play in preference to cash. As Davies LJ observed in *CHT Ltd v Ward* [1963] 3 All ER 835 at 838, [1965] 2 QB 63 at 79, the chips were not money or money's worth; they were mere counters or symbols used for the convenience of all concerned in the gaming. As tokens, the chips indicated that the holder had lodged cash with the club or, when a cheque had been used, had been given credit by the club, to the extent indicated by the tokens. It is as though the customer had been given a series of receipts in respect of the money handed over by him prior to beginning to play. The money was to go to the winners, or be returned to the customer if not spent on gaming. When the customer played at the table he was playing with the money had had brought with him to the casino, just as much as if he had used the banknotes themselves rather than the chips for which he had exchanged the banknotes preparatory to the start of play." (emphasis mine)

This passage was expressly approved by Lord Templeman, on appeal to the House of Lords, (1991) 2 AC 548 at 567. I am unable to distinguish the conclusions reached by Nicholls LJ from the facts of this case, and although this is not binding authority, with respect, I consider it to be correct.

The question then is, whether, the cheques having been given as security for a contract to give credit for the purpose of gaming, an action on the cheques is unenforceable. S12(5)(c) of the Casino and Licensing Control Act does not expressly prohibit the recovery of monies on such a collateral security. Leaving aside the pendant words to the section, S12(5)(c) only prohibits recovery on the contract of loan itself by the respondent. It does not by its terms make the contract of loan illegal, but only unenforceable by the Casino.

At a very early time, a clear distinction was made between the enforceability of gaming contracts and other collateral contracts. At common law, neither gaming, nor gaming contacts were illegal and were enforceable in the courts: *Moulis v Owen* (1907) 1 KB 746 at 758 per Fletcher Moulton LJ, who traces the history of statute law in England relating to gaming, gaming contracts and collateral contracts relating to gaming and betting. As Fletcher Moulton LJ points

out, the earliest statute which dealt with gaming properly so called is 16 Car.2, c.7 which is not directed at gaming in general, but only against such gaming as is "unfair and excessive". This Act had two operative sections, the first of which dealt with cheating at games, the second of which dealt with the case of persons playing at games "other than with and for ready money" and losing more than £100 on credit. With respect to the latter, the statute provided that the loser would not be compelled to pay, and the winner could be sued and required to forfeit three times so much of the winnings as exceeded £100. Therefore, as Fletcher Moulton LJ observed, at 760-761, up to the time of the The Gaming Act 1710 (9 Anne, c.14) it was "perfectly legal to play for ready money to any amount, and the winner could keep the winnings. The loser might also go to the limit of £100. on credit and still be liable to have his debts enforced against him by action at law. But if the losses on credit exceeded this sum, no portion could be recovered by process of law, and the winner was liable to serious penalties". The Statute of Anne, however, not only limited winnings for ready money to £10, and provided a right of recovery from the winner of any excess, but also, by s1, made `all notes, bills, bonds, judgments, mortgages, or other securities or conveyances' for a gaming consideration or for the reimbursement of any money knowingly lent or advanced for gaming or betting void. Thus collateral securities for any amount of what I might loosely call a gaming debt were void, but as Fletcher Moulton LJ demonstrates, (at 763), an action would still lie to enforce a gaming debt for less than £10. Then came the Gaming Act 1835 (5 & 6 Will 4, c.41) which was passed to remedy the injustice that a holder in due course of a bill or cheque given for a gaming consideration without notice could not enforce it. By this Act, it was provided that so much of the Statute of Anne as enacted that any note, bill or mortgage (but not bonds, judgments etc) so given was absolutely void, was repealed, and instead enacted that any such note, bill or mortgage was deemed to have been given for an illegal consideration: see *Fish v Stanton* (1910) 12 CLR 39 at 48. Thus these collateral securities were unenforceable in the hands of the payee or a person taking with notice of the illegality of the consideration, but the rights of an innocent holder for value were left unaffected. But still the winner of a gaming debt could sue so long as the debt did not exceed £10.

It was not until the Gaming Act 1845 (8 & 9 Vict c.109, s.18) that all gaming and wagering contracts were made null and void and unenforceable in any court, although not illegal, and by the same section it was provided that no action could be brought to recover any money won upon any wager, or deposited in the hands of any person to abide the event of any wager. By the same Act, the Act of Anne, (but not the Gaming Act 1835) was repealed by s.15.

But still the distinction between the enforceability of contracts collateral to unenforceable gaming contracts was an important one. For instance, in New South Wales, the Statute of Anne was part of that state's received law, but the Gaming Act 1835 was not. In 1850, New South Wales passed an Act in terms similar to the Gaming Act of 1845. The question arose as to whether the holder in due course for value of a promissory note without notice that was given as security for money won by gaming could enforce it. In *Fisher v Stanton*, *supra*, a majority of the High Court held that the Statute of Anne had been wholly repealed by the Act of 1850, and at least one member of the Court, Barton J, thought that the Act of 1850 applied the provisions of the Gaming Act 1835 to New South Wales, so that the consideration for the promissory note from 1850 onwards was illegal. But, as His Honour points out, at 52, New South Wales in 1902 repealed the Gaming Act 1835, so that in that State `there was nothing in the Statute law which makes a promissory note sued on void, or which requires it to be treated as given for an illegal consideration.'

The position in the Northern Territory is somewhat convoluted. When the Northern Territory ceased to be a part of South Australia, s.7 of the Northern Territory Acceptance Act (Commonwealth) continued in force the laws of South Australia applying in the Territory as at 1 January 1911, and by s.5 of the Northern Territory (Administration) Act 1910, such laws had effect as if they were laws of the Northern Territory. So far as the laws of South Australia are concerned up to this time, both the Statute of Anne and the Gaming Act of 1835 were part of that State's received law as at the foundation of the province on 28 December 1836; but the Gaming Act 1845, having been passed some 9 years later, was not. There do not appear to have

been any Statutes passed by South Australia on the subject up until the time that the Northern Territory became annexed to South Australia on 6 July 1863. In *Rogers v Squire* (1978) 23 ALR 111, Gallop J held that none of the laws of South Australia in force immediately before 6 July 1863 became part of the received law of the Northern Territory upon its annexation, but that all of the law of New South Wales in force immediately before that date, except such Statutes as were passed by New South Wales during the brief life of the colony of North Australia between 17 February 1846 and 28 December 1847 were in force, subject to such repeal and amendment by the relevant legislative authorities as had occurred since that time. If this view be correct, the position in the Northern Territory as at the date of annexation would have been the same as that of New South Wales. However, Gallop J was not advised of the provisions of s.2 of the Northern Territory Justice Act 1884, (SA) which provided that the laws of South Australia, except the Statutes set forth in the Schedule to the Act, shall be and since 22 September 1863, were deemed to have been the law of the Northern Territory so far as applicable thereto. None of the Acts in the Schedule relate to gaming or wagering. Consequently, the Northern Territory inherited South Australian law as it existed on 22 September, 1863. In consequence of this oversight, the Parliament passed a further Act, the Sources of Law Act 1985, s.2(1) of which provided in effect that the laws of South Australia immediately before 22 September 1863, including the common law and the Statutes of England applicable to the colony, shall be taken for all purposes to the exclusion of any other laws that were in force in any part of the Territory prior to that date, to be the laws in force on that date. As to the Statutes of England, s.3 provided that on all questions as to the applicability of English law, the Territory was deemed to have been established on 28 December 1836. The Act also excepted certain South Australian statues, which are the same as those contained in the schedule to the Northern Territory Justice Act. Consequently, as at 22 September 1863, the Statute of Anne and the Gaming Act 1835 became part of the law of the Northern Territory, but the Gaming Act of 1845 did not.

The first South Australian Act to deal with the subject of gambling was the Lottery and Gaming Act 1875. S.10 of this Act which was identical to s.18 of the Gaming Act, 1845 (UK) provided as follows:

> 10. All contracts or agreements, whether by parol or in writing by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this section shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner of any race, or lawful game, sport, pastime, or exercise.

However, the Act did not adopt s.15 of the Gaming Act of 1845, which repealed the Statute of Anne nor did it otherwise expressly repeal any of the earlier English Acts. Consequently, the position in South Australia was that the Statute of Anne and the Gaming Act 1835 continued to apply, at least so far as collateral contracts were concerned, so that the consideration on a cheque given for money lent or advanced for gaming was illegal not void. The Act did not make gaming, per se, an offence, although common gaming houses were suppressed and the owners of such houses could be sued to recover any money, valuable thing, or the consideration for any assurance, undertaking promise or agreement, deposited on the outcome of any bet. A number of amendments to the Act of 1875 were passed prior to 1 January 1911, but none of these amendments appear to have affected the position. I note that the author of an article `Cheques and Promissory Notes Given For Gambling Debts (1927) 1 ALJ 40 and 77 (whom I suspect was Sir Victor Windeyer) reached the conclusion that these English Acts still applied in South Australia in 1927. Be that as it may, it is clear that they were still in force as at 1 January 1911.

The Act of 1875 as amended, was further amended by several ordinances passed between 1924 to 1933, none of which materially altered the position until the whole of the South Australian Acts and the Territory ordinances were repealed and replaced by the Lottery and Gaming Ordinance 1940. This ordinance, by s.40, repeated s.10 of the Act of 1875, did not otherwise effect any significant change to the position until the Territory, in 1964, introduced significant amendments to permit the licensing of off-course bookmakers. The Lottery and Gaming Ordinance 1964 introduced into the ordinance Part VIIA headed "Betting Control". The

ordinance established a Betting Control Board which was empowered to grant licences to persons to conduct the business of licensed bookmakers at approved (off course) premises. S.94AA(1) made it an offence for any person to bet with or offer to bet with any person who was not a licensed bookmaker or a registered bookmaker. (Registered bookmakers were `on course' and were granted permits by a racing club). The ordinance did not define what a `bet' was. A licensed bookmaker could not accept bets, except upon licensed premises (or upon a licensed race-course if lawfully operating there as a registered bookmaker), (s.94AD), and were prohibited from permitting on their premises any game of chance or skill to be played or to have or permit on their premises any gaming machine or device (s.94AF). The ordinance did not confine licensed bookmakers to accepting bets on any particular event, or game or wager. s.94AM(1) prohibited any person from taking any proceeding "for the recovery of or with respect to or arising out of any bet or wager." S.34 also made it an offence for any person to bet or wager on any ground not being a licensed race-course or licensed dog-racing ground or not being a licensed bookmaker's shop. Subject to these matters, and other sections dealing with common gaming houses and games declared to be unlawful games by the regulations, gaming as such was not illegal, although very greatly restricted. The Lottery and Gaming Ordinance was further amended in 1974 by the insertion of s.94AM(1A) which provided that nothing in s.94AM prevented a person from taking proceedings for the recovery of moneys due on a cheque, promissory note or bill of exchange. I consider that the intention was for the Northern Territory Ordinance to cover the field by enacting the Lottery and Gaming Ordinance, and to deal exclusively with lotteries, gaming and betting to the exclusion of all previous Imperial legislation, so that, at least by 1974, if not earlier, the Statute of Anne and the Gaming Act 1835 had been repealed by implication. As things stood, by 1974, gaming and wagering contracts were, by s.40, null and void but not illegal, and s.94AM precluded recovery of a bet or wager, but not moneys due on collateral securities which were cheques, promissory notes or bills of exchange. Although the word "bet" was not defined, the common meaning given to that word in legislation relating to gambling was to stake something to be won or lost on the result of a doubtful issue: see *Attorney-General v Luncheon & Sports Club* (1929) AC 400 at 405 per Lord Buckmaster and therefore covers both gaming and wagering.

In 1982, two cognate Acts, Nos 32 of 1982 and 33 of 1982 were passed, both of which came into force on 30 June 1982. The second of these Acts was the Racing and Betting Act 1982. This Act changed the title of the Lotteries and Gaming Act 1940 as amended to the Racing and Betting Act and repealed part II of the Act which dealt with lotteries. The other Act was the Lotteries and Gaming Act 1982 which dealt with lotteries, gaming machines and the control of gaming. As things stood at that time, gaming was dealt with by both of these Acts as Part III of the Racing and Betting Act still dealt with that subject matter. The Lottery and Gaming Act 1982 did not have any provisions in it dealing specifically with the illegality, or unenforceability of gaming or wagering contracts, this still being dealt with by s.34 and 94AM of the Racing and Betting Act. Then, in 1983, two further cognate Acts were passed, both of which came into force on 26 October 1983. The first was the Racing and Betting Act 1983, which repealed the old Lottery and Gaming Ordinance 1940 as amended and renamed, and the second was the Lotteries and Gaming Act Amendment Act 1983 which substantially amended the Lotteries and Gaming Act 1982. One of the consequences of this was that lotteries and gaming were dealt with by the Act of that name, whilst the Racing and Betting Act dealt with horseracing, greyhound racing, bookmakers (both on and off course) totalizers and unlawful betting. Of the two Acts, only The Racing and Betting Act purported to deal with gambling contracts, the relevant section being s.135 which was in the following terms:

> 135. BETTING CONTRACTS
>
> (1) All contracts or agreements, whether parol or in writing, in relation to unlawful betting are null and void, and no action shall be brought or maintained in a court for recovering money or a valuable thing alleged to be won on an unlawful bet or which has been deposited with a person to abide the event or contingency on which an unlawful bet has been made.
>
> (2) This section does not apply to a subscription or contribution, or agreement to subscribe or contribute, for or toward a plate, prize or an amount of money to be awarded to the winner of a lawful sporting event.

This section makes betting contracts unenforceable, but not illegal, but does not, by its terms, make collateral contacts, such as cheques given as security for a loan made, irrecoverable. The

section is in the same form as the Gaming Act 1845 (Imp) and did not extend, as the Statute of Anne did, to securities given for loans made for the purpose of gaming. It would be amazing if Parliament intended to make collateral securities given unenforceable having regard to the history of the various Acts on this subject canvassed above, and the mischief this would cause to innocent third parties. The position is in my opinion therefore the same as it was in New South Wales when *Fisher v. Stanton*, *supra* was decided, and as Barton J observed at 52,

> "It follows that there is now nothing in the Statute law which makes the promissory note" (for which, read "cheque") "sued on void, or which requires it to be treated as given for an illegal consideration."

Thomas J found that valuable consideration was given for the instruments in that the respondent gave to the appellant the cheque credit slips which the appellant could exchange for chips. Although this finding was challenged in ground 28 of the Notice of Appeal, that point was not developed at the hearing of this appeal. Ss.35 and 36 of the CPOA raise a presumption that value had been given for the cheques. The appellant did not try to show that no consideration was given. For example the consideration may have been that the appellant was thereby able to play lawful games, or there may have been some other consideration (see, for example, the Minister's directions relating to returned cheques). It is well established that collateral contracts given for a consideration in addition to an unenforceable consideration are enforceable, see: *Read v Anderson* (1884) 13 QBD 779.

The appellant maintained that the proceedings were caught by s.12(5) of the Casino Licensing and Control Act 1986, and that reliance upon the cheques was precluded by the respondent's alleged unlawful conduct in acting contrary to the Minister's directions in extending credit to the appellant otherwise than by accepting a fully completed cheque.

Even if the instruments, because they were inchoate, were not "cheques", and therefore there was a technical violation of Cl.3(7) of the Minister's directions at the time credit was given, it does not follow that the consideration for the cheques was illegal. The Casino Licensing and Control Act 1986 does not provide that the failure to strictly observe a ministerial direction is illegal conduct or conduct for which the casino may be subjected to a penalty. The potential consequences of a failure to observe such a direction are (a) the Minister may take steps, if so minded, with a view to revoking the licence, and (b) the Casino operators may lose the protection of s.6 of that Act if what they were doing might otherwise be unlawful. The Act does not expressly provide that the Casino must comply with the Minister's directions given under s.13. The appellant argued that the directions in question were required to be observed because of s.11(6), but that subsection deals with the rules of a particular game: see also s.11(1) and (2). The directions we are concerned with were plainly given under s.13, because the instrument pursuant to which they were given specifically refers to s.13 and not to s.11 and because the approved rules for the games blackjack and baccarat do not deal with credit betting. In my view, any failure to comply with the Minister's directions did not have the consequence that the giving of the instruments was illegal because it was contrary to that Act. Nor did that conduct violate any provision of the Racing and Betting Act, the only relevant section of which is s.135, which I have already discussed.

In summary the conclusions I have reached are as follows:

(1) the causes of action upon which the respondent sued were actions on the cheques, and not for moneys lent;

(2) Assuming that the appellant is estopped from denying that the instruments were cheques, the cheques were given as collateral security for loans made on credit given by the respondent to the appellant in order for the appellant to participate in lawful gaming;

(3) the loans so given were not illegal even if the Minister's directions were not complied with;

(4) cheques so given are not illegal at common law nor by statute, nor is an action on such cheques unenforceable;

(5) Thomas J's finding that the cheques were given for valuable consideration ought not be disturbed.

I turn now to consider s.12(5) of the Casino Licensing and Control Act in the light of these conclusions. In my opinion the causes of action sued upon are not caught by those provisions. The actions are not legal proceedings to recover "moneys won at gaming." Nor are they actions for money on a cheque given in payment of money won at gaming. The cheques were not given for that purpose at all. The actions are not legal proceedings to recover "a loan with which to play a game in the casino." There were such loans, but the causes of action sued upon are not to recover the loans but to enforce securities given as collateral to those loans, and do not come within the words of the section. If I am wrong in this conclusion and if the causes of action could be characterised as legal proceedings to recover "moneys lent with which to play a game in the casino", it is my opinion that such causes of action were not caught by the pendant words of s.12(5) as being "legal proceedings ... that could not be brought if this Act had not been enacted". The history of s.135 of the Racing and Betting Act shows that it does not apply to cheques given as collateral security to such loans.

Interest

The appellant submitted that Thomas J had erred in awarding as part of the respondent's damages, the full amount of interest at the rate prescribed by regulation 4 of the Cheques and Payment Orders Regulations.

S.76(1)(a) of the Cheques and Payment Orders Regulations provides, *inter alia*, that the holder of a cheque which is dishonoured may recover as damages from the drawer "the amount of

interest that, in accordance with the regulations" is payable in respect of the sum ordered to be paid by the cheque.

Regulation 4 prescribes the interest payable as being "an amount calculated, in respect of the period commencing on the day on which the cheque is dishonoured, at a rate equal to the latest weighted average yields published before that day by the Reserve Bank of Australia for an issue of 13 week Treasury Notes in the form of inscribed stock under the Commonwealth Inscribed Stock Act 1911."

It was agreed by the parties in the Court below that for the purposes of regulation 4 the interest rate prescribed was 16.965% i.e. that was the rate in late August 1989. The problem which arises is that the regulation does not permit the rate to be adjusted as time passes. There was evidence before Thomas J that the yield rates for 13 weeks Treasury Notes had fallen considerably since August 1989; so much so that by June 1993 the rate had fallen to 5.08%.

S.76(2) of the Cheques and Payment Orders Regulations provides:

> "Where an action or proceeding is brought in a court for the recovery of damages under subsection (1), the court may, if it is of the opinion that justice so requires, direct that interest payable under that subsection be withheld in whole or in part."

Thomas J held that she had no discretion over the rate of interest to be applied, that having been fixed by statute, and that the appellant could not claim as an injustice the rate so fixed. There being no other injustice established, Her Honour ordered interest to be paid at the rate of 16.965%.

The appellant submitted that the discretion conferred by s.76(2) was broad enough to permit the Court to allow interest at a lesser rate than that fixed by the regulation if it was of the opinion that justice so requires. I do not agree. All that s.76(2) permits is the withholding of the whole or some part of the interest. However, in my opinion, in deciding whether or not justice required that course, the Court could look at the whole of the circumstances, including the rate to be applied, the rate which was applicable at times after August 1989 and the period of time over which the rate was to be calculated, as well as any other relevant factors.

It is well established that damages are compensatory and that awards of interest are designed to compensate plaintiffs for being kept out of the moneys to which they are entitled.

Mr Hiley submitted that there was no injustice to the appellant, who could have avoided this liability by paying the monies claimed earlier. However the appellant does not contend that he should pay no interest at all. His complaint is that the interest awarded is so excessive as to exceed that which in justice would be proper compensation for the respondent being kept out of its monies. Mr Hiley also submitted that, as the regulations do not fix a rate which adjusts with time, if rates rose, plaintiffs would not get proper compensation, as there was no discretion to award more than the amount fixed by the regulations in these circumstances. There are two answers to this argument. The first is that the fact that injustice may be caused when the rate is rising is hardly a sufficient reason for permitting an injustice in circumstances where the rate is falling. The second is that the broad discretion conferred by the words of s.76(2) of the Act cannot be read down by reference to the provisions of subordinate legislation.

In my opinion it was open to Her Honour in the proper exercise of her discretion, having regard to the rate at which bond rates had fallen since August 1989 and the period in question (in excess of 4 years) to have made an order that part of the interest payable under s.76(1) be withheld to reflect the injustice which would be caused to the appellant if the court awarded interest at the

full rate. I am therefore of the opinion that Her Honour's discretion miscarried, and that if the respondent is successful on the estoppel point, Her Honour ought to award interest in accordance with these reasons.

Accordingly, I would allow the appeal and remit the action back to Thomas J to be dealt with according to law in the light of the decision of this Court.

The appellant has succeeded on a point which was not argued before Thomas J, and on the interest point which did not occupy much of this Court's time on the hearing of the appeal. In these circumstances the appellant should pay 80% of the respondent's costs of this appeal.

PRIESTLEY J: The facts and circumstances of this case and the issues which were argued in the appeal are set out in the reasons of Mildren J.

The first principal question in the appeal is whether the instruments upon which the respondent brought its action against the appellant were cheques as defined in the Cheques and Payments Orders Act 1986 (Cth).

On this question I agree with the reasons given by Angel J which lead to the conclusion that the instruments were cheques as defined in the mentioned Act.

As to the word "payable", there are many contexts in which its meaning is plainly "to be paid". Stroud's Judicial Dictionary (5th ed) 1986, gives many examples: see vol 4 at pp 1875-1877. In the same work, under the entry, "to be paid" (vol 5, p2648) it is said that in a will, "payable" is generally synonymous with "to be paid". In the second edition of the Oxford English Dictionary the first meaning given of "payable" is "Of a sum of money, a bill, etc: that is to be paid; ..."

It seems to me that everyone handling the instruments in the present case would understand the word "payable" in them in this sense. This seems to me to bring it within the meaning of cheque as defined in the relevant Act.

The second principal question is, assuming the cheques were given as security for a contract to give credit for the purpose of gaming, as Mildren J has concluded, could the respondent bring an action on them? For the reasons given by him, it seems to me that s12(5) of the Casino Licensing and Control Act gave no answer to the action on the cheques.

The final question is that of interest. Here, I agree with Mildren J's reasons for thinking that allowance should have been made for the drop in interest rates after the date of the dishonour. I further agree with the order concerning interest suggested by Angel J in lieu of the order made by the trial Judge.

In my opinion, subject only to the variation of the order concerning interest, the appeal should be dismissed with costs.

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