

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Grant & Anor v The Star Entertainment Qld Ltd* [2022]
QCAT 289

PARTIES: **MARK TIMOTHY GRANT**
NATHAN TRENT ANDERSON
(applicants)

v

THE STAR ENTERTAINMENT QLD LTD
(respondent)

APPLICATION NO/S: GAR098-18

MATTER TYPE: General administrative review matters

DELIVERED ON: 3 August 2022

HEARING DATE: 5 November 2020

HEARD AT: Brisbane

DECISION OF: Member Fitzpatrick

- ORDERS:
- 1. the Notification of Exclusion addressed to Mark Timothy Grant dated 2 March 2018 be set aside and a decision substituted that no grounds exist for a direction under s92 of the *Casino Control Act* 1982 (Qld) that Mark Timothy Grant is prohibited from entering or remaining in the Star Gold Coast and Treasury Brisbane Casinos because of alleged conduct on 18 and 19 February 2018.**
 - 2. The Notification of Exclusion addressed to Nathan Trent Anderson dated 2 March 2018 be set aside and a decision substituted that no grounds exist for a direction under s92 of the *Casino Control Act* 1982 (Qld) that Nathan Trent Anderson is prohibited from entering or remaining in the Star Gold Coast and Treasury Brisbane Casinos because of alleged conduct on 18 and 19 February 2018.**
 - 3. The application for miscellaneous matters filed 6 November 2020 is dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – Review of decision to exclude applicants from casinos – allegations of dishonesty and conduct affecting the integrity of gaming – anomaly in cards – game of chance and skill

Acts Interpretation Act 1954 (Qld), s 14A
Casino Control Act 1982 (Qld), s 3, s 58(b), s 62, s 91A, s 91B, s 92, s 103, s 110A
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 24

Ivey v Genting Casinos UK Limited T/A Crockfords Club
 [2014] EWHC 3394

Ivey v Genting Casinos UK Limited T/A Crockfords Club
 [2016] EWCA Civ 109

Ivey v Genting Casinos UK Limited T/A Crockfords Club
 [2017] UKSC 67

Macleod v The Queen (2003) 214 CLR 230

Peters v The Queen (1998) 192CLR 493

R v Dillon; Ex parte Attorney-General (Qld) [2015] QCA 155

R v Elizabeth Margaret Orchard [2018] QCA 058

APPEARANCES & REPRESENTATION:

Applicants: Self-represented

Respondent: D de Jersey QC instructed by King & Wood Mallesons

REASONS FOR DECISION

- [1] This is an application to review a notification of exclusion given by the respondent The Star Entertainment Qld Ltd (Star) with respect to the applicant Mark Timothy Grant dated 2 March 2018 and a notification of exclusion given by Star with respect to the applicant Nathan Trent Anderson, dated 2 March 2018. Each of the applicants filed an application for review and the proceedings were consolidated by Directions made 17 July 2018.
- [2] Both notifications prohibit Mr Grant and Mr Anderson from entering or remaining in The Star Gold Coast and Treasury Brisbane Casinos pursuant to section 92 of the *Casino Control Act 1982 (Qld)*. The direction under s92 of the *Casino Control Act* is said to remain in force until revoked by the casino operator.
- [3] The notification sets out the terms of s100 of the *Casino Control Act*, which provides for a penalty of then 40 penalty units if a prohibited person enters or remains in the casino.
- [4] The notifications of exclusion were also accompanied by notices of “withdrawal of licence under common law Jupiters Hotel & Casino and Treasury Casino & Hotel”, dated 2 March 2018. The withdrawal of licence does not form any part of these proceedings.

Background

- [5] Star operates the Treasury Casino in Brisbane and the Star Gold Coast Casino formerly known as Jupiter’s Casino at Broadbeach on the Gold Coast.

- [6] The applicants have been patrons of both casinos and relevantly attended the Star Gold Coast casino on 18 and 19 February 2018. The conduct of the applicants on those days forms the basis for Star's decision to exclude the applicants from its casinos.
- [7] Star provided statements of reasons for its decisions, dated 1 June 2018 setting out the following matters.
- [8] Mr Grant and Mr Anderson are each described as an associate of the other in the two statements of reasons.
- [9] It is asserted that on 18 and 19 February 2018, each were seated at table 214 at the Star Gold coast, and:
- (a) Mr Grant was observed staring at cards being dealt as they came out of the mouth of the dealing shoe.
 - (b) Mr Grant and the associate (Mr Anderson) did not acknowledge each other while at table 214;
 - (c) Mr Grant and Mr Anderson vacated the table at similar times and both appeared to be on their phones upon leaving the table;
 - (d) After vacating table 214 Mr Grant went to the hotel entry while Mr Anderson collected his car from the car park. Mr Grant was collected by Mr Anderson in the vehicle.
- [10] On 21 February 2018, Star conducted a review of Mr Grant and Mr Anderson's play while at table 214 to assess variations to the "Basic Strategy". Basic strategy refers to the way in which a player, who is familiar with the card game but is not playing with any advantage or additional knowledge, optimally plays the game so as to lessen the odds of the casino.
- [11] Star identified multiple deviations from the basic strategy which appeared to benefit both Mr Grant and Mr Anderson. It is said that a deviation from basic strategy indicates that a player may be employing other techniques to change the odds of the game.
- [12] Through the review it was identified by Star surveillance staff that Mr Grant and Mr Anderson had each used gestures to signal to the other concerning their play, namely to "hit", "split", "double" or "stand" in the associate's play strategy. Surveillance staff observed this occurred when Mr Grant was staring at the cards being dealt from the shoe.
- [13] As a result of the identified deviations, a surveillance manager and senior surveillance operator analysed the cards used at table 214 on 18 and 19 February 2018 and identified manufacturer abnormalities on the side of the cards. Two additional surveillance staff and a cage manager also examined the cards and identified the same manufacturer abnormalities on the sides of multiple low number cards.
- [14] On 22 February 2018 Mr Grant entered the Star premises at 00:20 and was identified as watching the shoe and the cards being dealt at table 102, in an unusual manner.
- [15] Star raised its investigation concerning the playing card manufacturer abnormality with the Office of Liquor and Gaming Regulation, and Star's General Manager of

Property Services Queensland and the General manager of Gaming and Director of Gaming of the Star Gold Coast. It was confirmed by all parties that the abnormality was consistent across the cards played on table 214 and 18 and 19 February 2018 and the cards used at the table Mr Grant had played on 22 February 2018.

- [16] On 23 February 2018 Star notified Mr Grant and Mr Anderson that their bets were restricted to the table minimum on all card games as Star believed that they were being unfairly advantaged in their play. Subsequently a decision was made to exclude both men as it believed that their conduct was either dishonest or had the potential to impact the integrity of gaming.
- [17] The acts in question which are said to give rise to the operation of s92 of the *Casino Control Act* are in the case of Mr Grant:
- (a) Card counting;
 - (b) Behaviour akin to “edge sorting”;
 - (c) Slouching in order to view the cards that are being dealt; and
 - (d) Collusion concerning play, through hand signalling and other gestures to Mr Anderson – positioning a closed fist or two fingers to indicate hit, split, stand or double.
- [18] It does not appear that all of this conduct is said to have occurred on the days in question, but in the case of Mr Grant has been observed over time.
- [19] As against Mr Grant it is said that he used a technique known as “edge sorting” in order to inform the signals provided to Mr Anderson within their play.
- [20] Edge-sorting is explained in the statement of reasons as a technique generally described by Lord Hughes in the majority decision of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*:¹

Edge-sorting becomes possible when the manufacturing process causes tiny differences to appear on the edges of the cards so that, for example, the edge of one long side is marginally different from the edge of the other...The difference is sub-millimetric, but the pattern is, to that very limited extent, closer to one long edge of the card than it is to the other. Before a card is dealt from a shoe, it sits face down at the bottom of the shoe, displaying one of its two long edges. It is possible for a sharp-eyed person sitting close to the shoe to see which long edge it is.

- [21] It is asserted that the Court of Appeal in *Ivey’s* case found that by applying the technique the player will obtain an advantage which is unfair and by ordinary standards dishonest.²
- [22] Star contends as against Mr Grant and Mr Anderson that the behaviours it has identified, including collusion and edge-sorting are behaviours which when viewed objectively are dishonest in nature and affect or have the potential to affect the integrity of gaming. As against Mr Grant, Star also relies on his manner of play so as to obtain an advantage by “peeking” at the cards being dealt.

¹ [2017] UKSC 67, [9].

² *Ivey v Genting Casinos UK Limited T/A Crockfords Club* [2016] EWCA Civ 109, [113].

- [23] Star considers that both Mr Grant and Mr Anderson used techniques to obtain an advantage which Star was unaware of. Its opinion is that Mr Grant and Mr Anderson used an error or a fault in the gaming equipment to obtain a benefit and that this is not behaviour that upholds the integrity of gaming. It is said that neither Mr Grant nor Mr Anderson made Star aware of the techniques they were using at the time in which they were observed by surveillance staff.
- [24] As to the reasonableness of its beliefs, Star says as against Mr Grant that he has been observed and investigated in the past in relation to card counting in October 2003 and in May 2011. In May 2015 he was observed slouching in his chair in an attempt to view the dealer's hand and was excluded from the Star, Sydney as a result. In September 2017 he was suspected of advantage play and was observed slouching when cards were dealt and then leaning forward.
- [25] Those events appear to have informed the view taken of Mr Grant, however the conduct objected to by Star on 18 and 19 February 2018 relate to "edge sorting" techniques and collusion with an associate.
- [26] In relation to Mr Anderson the conduct objected to on 18 and 19 February 2018 of edge sorting and collusion is relied upon.
- [27] Observation of the behaviours of both men are said to form the reasonable basis for Star's belief that their behaviours were dishonest and have the potential to affect the integrity of gaming.
- [28] Star contends that once it formed its belief on these reasonable grounds it had fulfilled its obligations under s92 of the *Casino Control Act* and was within its rights to exclude Mr Grant and Mr Anderson from its premises.

Legislative framework

- [29] The *Casino Control Act* has as its object the protection of players and the community through, inter alia, ensuring the integrity and fairness of games and ensuring the probity of those involved in the conduct of casino gambling.
- [30] S92 of the *Casino Control Act* provides that a casino operator or casino manager may give a written direction prohibiting a person from entering or remaining in the casino., only if the operator or manager believes on reasonable grounds that, relevantly the person has engaged in dishonest acts in relation to gaming or has acted in a way affecting or potentially affecting the proper conduct or integrity of gaming.
- [31] S103 of the *Casino Control Act* which deals with cheating provides that a person is guilty of an offence if a person in a casino, inter alia, by any fraudulent act or the fraudulent use of an article of a type normally used in connection with gaming obtains for himself or another person any money, benefit or advantage.
- [32] S110A of the *Casino Control Act* provides that if a person knows he has obtained a benefit, relevantly, because of an error or oversight in the conduct of a game, the person must not dishonestly keep the benefit. This applies even if the benefit was originally obtained by the person without any dishonest intent. Benefit is defined for the purpose of the section to include money, chips, advantage, valuable consideration and security.

- [33] S91A(3) of the *Casino Control Act* enables the Tribunal to review a direction given pursuant to s92 of the Act as provided under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).
- [34] By s20 of the QCAT Act the purpose of the review of a reviewable decision is to produce the correct and preferable decision. The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits. By s19 of the QCAT Act the tribunal has all the functions of the decision-maker for the reviewable decision being reviewed. By s24 of the QCAT Act the tribunal may confirm or amend the decision; or set aside the decision and substitute its own decision or set aside the decision and return the matter for reconsideration to the decision-maker for the decision. The tribunal's decision is taken to be a decision of the decision-maker and has effect from when the reviewable decision took effect.
- [35] The respondent submitted and it was accepted at the hearing that this review should proceed as a fresh hearing on the merits and that the review is not of a decision to be reviewed under s91B of the *Casino Control Act*.

Issue

- [36] The issue is whether there are reasonable grounds for believing, in accordance with s92 of the *Casino Control Act* that:
- (a) Mr Grant and/or Mr Anderson has engaged in dishonest acts in relation to gaming; or
 - (b) Mr Grant and/or Mr Anderson has acted in a way affecting, or potentially affecting the proper conduct or integrity of gaming.

The game of Pontoon

- [37] The game played by the applicants at table 214 on 18 and 19 February 2018 was Pontoon. The respondents tendered Casino Gaming Rule 2010 for "Spanish blackjack" as setting out the rules for conducting and playing the casino game known as Spanish blackjack.³
- [38] Mr Grant accepted that apart from the name, the rules of Spanish blackjack are the same as the rules for Pontoon. He submitted that the table showed the name "Pontoon" not Spanish blackjack and suggested in submissions that the game played may have been illegal for that reason.
- [39] Mr Anderson raised no objection to reference by the Tribunal to these rules. For the purpose of this review and the issue to be determined, I find that the rules of Spanish blackjack are the same as the rules for Pontoon and that no illegal game was being offered by the respondent.
- [40] The respondent has summarised the rule in its submissions, which I adopt as follows.
- [41] The object of Pontoon is to draw cards with a total closer to 21 than the dealer's cards, without going over 21. Cards are dealt clockwise from a dealing device known as a shoe. Players are dealt two cards, while the dealer takes one. The

³ Exhibit 6 Statement of Gary Tootell, dated 2 November 2020 annexure GT 15.

players' cards are dealt face up so that all players can see the point value of the cards dealt to the players.

- [42] Picture cards (Jack, Queen and King) count as 10, Aces count as 1 or 11, whichever is to the player's advantage. All other cards count as their face value. 10s are removed from Pontoon decks.
- [43] If the first two cards dealt to a player are an Ace and any picture card, the player has "Pontoon". The dealer will announce "Pontoon" and the player wins. The dealer cannot beat this hand, even if the dealer achieves Pontoon.
- [44] If the player does not have Pontoon on their first two cards, they may decide to stand (draw no more cards) or hit (draw more cards). They may continue to hit until they decide to stand or until their total goes over 21, in which case the player loses.
- [45] The player may choose to stand on any total of less than 21. Where the player achieves Pontoon or a total of 21 they will win, regardless of the dealer's result.
- [46] Irrespective of the players' point totals, the dealer must stand on a hard total of 17. For example 8 and 9 = 17 or a soft total of 18, for example Ace and 7 = 18. If the dealer goes over 21 than all hands remaining on the table must be paid.
- [47] If the player finishes with a total closer to 21 than the dealer's the player wins and will be paid even money. If the player and the dealer have the same totals, they have a stand-off and neither win nor lose.
- [48] I note from the rules that the cards are face down in the shoe revealing their back. Only the dealer touches the cards.
- [49] By rule 12, cards must be inspected and shuffled under the provisions of the Schedule in which the rules appear and under the approved control system for the casino. By rule 15 a gaming manager may after a round of play direct that the cards are replaced.
- [50] There are up to 7 players at the table. The game is played with 5 to 8 decks of cards.
- [51] Control system is defined in the *Casino Control Act* to mean a system of internal controls for the operation of a casino by a casino operator.

Observations as to edge sorting from Ivey's case

- [52] *Ivey's* case is useful in this analysis because it has some marked factual similarities to this matter. There are also distinguishing features. The case was relied on by the respondent as analogous to the circumstances involving Mr Grant and Mr Anderson so as to found the belief that their conduct was dishonest and that they engaged in a type of edge sorting. The edge sorting carried out by Mr Ivey resulted in a finding that he had cheated.
- [53] A good understanding of the facts comes from the decision at first instance before Mr Justice Mitting, in the High Court of Justice Queen's Bench Division.⁴
- [54] The game relevant to *Ivey's* case was Punto Banco, a variant of Baccarat, which is described as not normally, to any extent, a game of skill. The basic object of the game is to achieve, on one of the two positions, a combination of two or three cards

⁴ [2014] EWHC 3394 (QB).

which, when added together, is nearer to nine in total than the combination of the other position. Cards with a face value of 7, 8 and 9 are high value cards. A punter who anticipates a card is a 7, 8 or 9 will more than likely win.

- [55] The cards in use at Crockfords Club were Angel manufactured playing cards and from the description appear to bear the same pattern on their back as the cards in question in this matter. Tiny differences were evident on one long edge of some cards. The evidence in *Ivey's* case was that the manufacturers assert this is not a defect, but is within a contractually specified tolerance of up to 0.3 millimetres.
- [56] Justice Mitting said that it is possible for a sharp-eyed person sitting close to the shoe to see the differences in the long edge of a card. His Honour said that the information thus gained is only useful to the punter if he knows or has a good idea of what the card is.
- [57] His Honour said that three conditions must occur before the punter can gain that knowledge: (1) the same shoe of cards must be used more than once; (2) cards with a face value of 7, 8 or 9 must be turned through 180 degrees by comparison with all other cards; (3) when reshuffled no part of the shoe must be rotated. Step (2) is the process known as edge-sorting.
- [58] Many hands were played. As a 7, 8 or 9 was exposed the dealer agreed, when placing the cards in the pile of used cards, to turn the cards so that the long edge was oriented in a different way to other cards. That orientation remained when the cards were reshuffled by a machine and put back into play. This enabled Mr Ivey to recognise the cards sitting at a different orientation and to accurately place bets with the expectation of a 7, 8 or 9 card. The dealer agreed to turn the cards at the request of Mr Ivey's companion, in order to "change the luck". The ploy played up to Crockfords' staff's perception of what influenced Mr Ivey's play, that is, superstition. Mr Ivey admitted in the proceedings that he used the technique of edge-sorting.
- [59] Justice Mitting noted that the dealer did not realise what she had done and that if she had, she would have immediately stopped play and sought the advice of her supervisors who would have put an end to it.
- [60] His Honour said that it is ultimately for the court to decide whether the conduct amounts to cheating. The standard is objective. The fact that the claimant is genuinely convinced that he is not a cheat and even that that opinion commands considerable support from others is not determinative. It is necessary to analyse what the consequences are of what he did in relation to the game that he was playing.
- [61] Justice Mitting said that there were three consequences:
- (a) he gave himself an advantage, throughout the play, knowing or having a good idea, whether the first card was or was not a 7, 8 or 9. That is quite different from the advantage which may accrue to a punter as result of counting the cards, so that very near to the end of the shoe he may obtain a legitimate advantage by doing so.
 - (b) He used the croupier as his innocent agent or tool by turning the 7s, 8s and 9s differentially. He was not simply taking advantage of an error on the part of

the croupier or an anomaly produced by a practice of the casino for which he was not responsible.

- (c) He was doing so in circumstances in which he knew that the croupier and her superiors did not realise the consequence of what she had done at his instigation.

[62] Justice Mitting concluded that the conduct was cheating for the purposes of civil law. His Honour found that it is immaterial that the casino could have protected itself against it by simple measures. The casino can protect itself by simple measures against cheating or legitimate advantage play. The fact that it can do so does not determine which it is.

How did Mr Grant and Mr Anderson play the game?

Mr Grant's evidence

- [63] Mr Grant impressed me as a man with a detailed knowledge of gambling and casino operations. He describes himself as an advantage player. That is, a patron of a casino who tries to win at casino games by exploiting either flawed game design or sloppy/incompetent staff behaviour. The respondent did not dispute that characterisation and definition. Mr Grant submits that advantage players are not a threat to casinos where the staff are competent, and the games are operated correctly. He submits that advantage play is not cheating or dishonest. He gives examples of cheating such as marking cards or placing bets after the roulette ball has already landed, to be contrasted with his method of playing the game on the cards presented to him.
- [64] In Mr Grant's evidence in chief,⁵ he admits that he and Mr Anderson played Pontoon together. Mr Grant admits that he advised Mr Anderson on strategy through use of hand signals and verbal communications.
- [65] Mr Grant says that it is common for both staff and players to communicate strategy advice to each other across the table. Patrons do so either verbally or by hand signals. In Pontoon all the cards are dealt face up and the same information is available to all players.
- [66] The respondent does not deny that players do tend to collaborate to some extent when playing Pontoon because the players are pitted against the dealer and they want the dealer to "bust" but says the problem in this case is collaboration in order to pass on information obtained in circumstances where it ought not to have been obtained and used.
- [67] Mr Grant denies "edge sorting" and says that it is impossible to edge sort while playing Pontoon, because players do not touch the cards.
- [68] Finally, he says that he never observes any player playing by a basic strategy and that not playing by a basic strategy is not proof of cheating.

⁵ Exhibit 1.

- [69] In cross-examination Mr Grant was shown photographs of the cards in question annexed to the statement of Gary Tootell, surveillance manager, dated 6 December 2018.⁶
- [70] The photographs show a card which does not contain an anomaly on its back, and a card which does contain an anomaly on its back. The anomaly appears on one long edge of the card. The pattern of small white ellipses which runs across the back of the card from edge to edge is cut on one long edge so that only the tip of the ellipse is evident rather than a longer part of the ellipse, as is the case with the unaffected cards. The anomaly is evident to the naked eye despite the difference in size of the cut ellipses being very small.
- [71] Mr Tootell's statement also annexes a photograph showing ninety-six cards from the cards in use in the shoe on the days in question, which are affected by the anomaly. Mr Tootell did not give evidence as to the actual number of affected cards. I have counted the cards as best I can from the photograph. I also note that two-hundred and eighty-eight cards are used for the game, being six decks with all the ten value cards removed.⁷ So, the annexure discloses that ninety-six of a possible two-hundred and eighty-eight cards are affected by the anomaly. The annexure also discloses that none of the diamond suit is affected. Finally, looking at the ninety-six cards, fifty-eight have a number on their face which is less than seven. Thirty-eight cards have a number on their face of seven or above. I have selected that range of numbers for the purpose of a rough calculation of the proportion of affected cards to unaffected cards. Of course, a different proportion results if low numbers are counted below, say six. On my calculation approximately 33% of the cards were affected by the asymmetry. The asymmetrical low cards represent 20% of the total. The asymmetrical high cards represent 13% of the total.
- [72] Mr Grant agreed that he did notice the cards were asymmetrical when he was playing on 18 and 19 February 2018.⁸ It was put to him that a card with a different margin on its back would tend to be a card with a lower face value. Mr Grant refused to agree with the proposition, saying it was not as clear and as simplistic as that.⁹ He was prepared to say that he had a view on the night of possibly what he thought the edges meant and that if you look at it in a very, very vague way you might be able to draw the conclusion that the more asymmetrical edges corresponded to low cards.¹⁰
- [73] It was put to Mr Grant that he was edge sorting the cards in his head. Mr Grant denied that. He said that edge sorting occurs where cards are physically rotated, hence "sorting".¹¹ Mr Grant said that he was an observant player and he observed there were differences, but he was not involved in edge sorting.
- [74] In cross-examination Mr Grant agreed that he had discussed the fact the casino used asymmetrical cards with Mr Anderson. He agreed that if he saw an asymmetrical

⁶ Exhibit 4, annexures at page 48, 49 and 50.

⁷ T2-8, L46. T2-9, L1-2.

⁸ T1-31, L16-19.

⁹ T1-38, L 15-16.

¹⁰ T1-37, L41-46.

¹¹ T1-44, L15-17.

card he would take that into account in his play if he thought he could identify the card.¹²

- [75] Mr Grant agreed that his plays deviated from the basic strategy and that he communicated strategy advice to Mr Anderson. He said that very few players play basic strategy in the casino. Mr Grant said that he is a very competitive player, and he will take into account all legally and publicly available information and that he is allowed to make assumptions about what card is coming next.¹³
- [76] Despite being pressed with various scenarios about unfairness, Mr Grant did not consider he was obliged to disclose the anomaly on the cards to the casino.
- [77] After cross-examination Mr Grant was given an opportunity to clarify matters arising out of cross-examination. In summary, Mr Grant said that:
- (a) the cards in question are made by the Angel card company of Japan. That information is printed on the ace of spades. The printing phenomena occurs in the process of manufacture. It is well known, particularly after the *Ivey* case.
 - (b) The degree to which the borders vary is a big mix and also within a given set of cards.
 - (c) Throughout Australia this phenomenon comes up frequently.
 - (d) Sometimes in some situations the asymmetries correspond to a certain group of cards, but there is no guarantee of this. The manufacturing process randomises that outcome.
 - (e) If the casino is very sloppy in its handling of the cards and deliberately left the same group of cards in the machine for days and days and days at the same table, then a player would know: "I played those ones yesterday." But if a player goes to the casino and notices this asymmetry, they are entitled to make their own assumptions about what it means. It may mean nothing. There may be a deck of cards with lots of cards that look like this and no clear correlation of what's underneath them.
 - (f) He is not obliged to notify the casino of anomalies. The responsibility of managing the game is on the casino and the inspectors too.
 - (g) He simply played the game as given to him.
 - (h) He did not know these cards were going to be present at a certain table or that cards as asymmetrical as this were around.
 - (i) There is no way to mathematically quantify how much difference he was making on the game by attempting to guess cards, based on so few hands as were played.
 - (j) He noticed that the cards were asymmetrical and he is free to speculate on what the next card is, just like any other player at the table who has that information, but at no time did he know exactly what the next card was. Any

¹² T1-53, L31-34.

¹³ T1-62, L44, T1-63, L4.

time he made a speculation about what was coming next it was his own best guess at the situation.¹⁴

- [78] The statement that Mr Grant did not know the asymmetrical cards were at the table in question is somewhat at odds with his evidence that he knew asymmetrical cards were in use in the casino and that he had discussed that fact with Mr Anderson. I take the evidence to mean that he did not know if the asymmetrical cards would be presented for play on the nights in question at table 214.
- [79] I consider that Mr Grant was a truthful witness. He acknowledged his conduct. Mr Grant was not prepared to agree that he was dishonest in playing the games on 18 and 19 February 2018. He maintains that advantage play is legitimate and not dishonest. In the end that is the question I must decide.

Mr Anderson's evidence

- [80] Mr Anderson's evidence in chief is that he and Mr Grant are friends and enjoy gambling together from time to time. If asked by the casino he would disclose that fact. He acknowledges that he received strategy advice from Mr Grant when they were playing Pontoon at table 214. The advice was either verbal or by hand gestures. Mr Anderson says that hand signals are a normal part of the Pontoon game, used by almost everyone. Unlike other games all cards and information are available to players during the hand. Mr Anderson denies acting dishonestly or affecting the integrity of the game.
- [81] In cross-examination Mr Anderson agreed that he was following Mr Grant's directions and they stayed at the table together because he knew that this particular table had the cards with this particular anomaly.¹⁵
- [82] Mr Anderson agreed that they did well from the game. The evidence is not clear as to which night in particular resulted in more winnings than losses.
- [83] Mr Anderson did not consider he was obliged to report the anomaly to the casino. He did however agree that if he felt a game was not fair he would not play.
- [84] I accept Mr Anderson as a truthful witness.

Mr Petersen's evidence

- [85] The applicants rely on evidence of Mr Colin Petersen who was not required for cross-examination. Mr Petersen's statement¹⁶ sets out his observation from working as a casino dealer that the use of hand gestures and body language are common between players of Pontoon. As all cards are dealt face up in ponton there is no restriction on players sharing information about their hand or strategy with other players. It is not expected that players declare any relationship to other players.
- [86] Mr Peterson's evidence is accepted on the basis that it was not challenged.

¹⁴ T1-64-T-167.

¹⁵ T1-77, L14-16.

¹⁶ Exhibit 3.

Evidence of Gary Tootell

- [87] Mr Tootell gave three statements in the proceeding.¹⁷ Mr Tootell was at relevant times the surveillance manager employed by Star. Mr Tootell was one of a group of senior employees of Star responsible for making the decision the subject of the review.
- [88] Mr Tootell's evidence is that Star was aware Mr Grant engaged in advantage play and prior to February 2018 prepared a special surveillance operation plan (SSOP) which is a running sheet to track the movement of Mr Grant, to review and ultimately determine if he is engaging in improper conduct.
- [89] On 20 February 2018 Mr Tootell's surveillance team provided observations of Mr Grant's conduct on 18 and 19 February 2018, resulting in CCTV footage being reviewed, and the cards from the table being retained.
- [90] On 21 February 2018 Mr Grant was again observed playing Pontoon. The cards from that table were retrieved.
- [91] An inspection of the cards revealed that there were anomalies on the backs of cards used on 18, 19 and 21 February 2018. Mr Tootell's evidence in chief is that the anomaly would allow a patron who knows of the anomaly to closely observe the pattern on the back of each card coming out of the mouth of the shoe and from that observation understand with some degree of probability the strength of the card, that is whether it is high ranking or low ranking. CCTV footage revealed Mr Grant deviating from basic strategy during play and hand signalling to Mr Anderson.
- [92] On 2 March 2018, Mr Tootell, together with the respondent's General Counsel, General Manager Gaming, General Manager Gaming Operations and Director of Gaming met and formed the view there was a strong basis to conclude that Mr Grant and Mr Anderson would use to their advantage the anomalies of the cards being played and that they had engaged in dishonest acts in relation to gaming and/or acted in a way that affected, or potentially affected, the proper conduct or fairness and the integrity of gaming. On that basis the decision was made and issued.
- [93] In cross-examination Mr Tootell said that after the *Ivey* case:
- ...we checked our cards and didn't believe that we had cards that would be susceptible to card edge sorting¹⁸
- [94] Mr Tootell said he was surprised when he analysed the cards from the game. He thought their cards were totally symmetrical.¹⁹
- [95] Other evidence given by Mr Tootell in cross-examination is that he did not think Mr Grant was edge sorting, rather using a different type of edge sorting, in relation to the same back of the card anomalies. He acknowledged that Mr Grant was a very observant player.
- [96] Importantly, Mr Tootell said that he did not think the conduct of Mr Grant and Mr Anderson was cheating. He said that if he had thought so he would have called the police and pressed charges.²⁰ Mr Tootell said that he thought the applicants were

¹⁷ Exhibit 4, Exhibit 5 and Exhibit 6.

¹⁸ T1-92, L38-40.

¹⁹ T1-93, L4.

²⁰ T1-99, L 41-43.

impacting the integrity of the game and playing in an unfair way which he deemed to be dishonest.²¹

[97] It was put to Mr Tootell that he had no statistical evidence to show Mr Grant and Mr Anderson's decisions were having any effect on the profitability of the game in the long run.

[98] Mr Tootell said:

...You gain an advantage by card counting. You gain an advantage by knowledge of cards. So I know that you obtained an advantage by the knowledge of those cards that you shouldn't have had, that is not part of the game and I know you were making decisions on that and I know that especially with Mr Anderson in box 7, occasions like when he's sitting on 17 against the dealer 4, which is something that no one would do, you were steering different cards to the dealer and you were changing the outcome of what the dealer would get...based on your information you shouldn't have had.²²

[99] Mr Tootell agreed that Mr Grant was not the only person who could view the back of the cards, possibly notice that the cards were asymmetrical or notice that last time a card that looked like that came, it was a high.²³ In re-examination Mr Tootell said that a player sitting where Mr Anderson was sitting (that is not at box 1 or 2), would not be able to see the back of the cards.²⁴ In response to a question from me Mr Tootell said that the dealer could see the anomaly on the back of the cards.²⁵

[100] In re-examination Mr Tootell was asked to read s110A of the Casino Control Act. He said that he did not read the section at the time the decision was made, but he did know the Act dealt with fairness and integrity of the game.²⁶

[101] Mr Tootell said that the oversight referred to in the section would be that there is an anomaly on the back of the cards that should not have been there and the respondent was not aware that it was there, that allowed someone to gain some knowledge of the cards through observing and identifying the oversight.

[102] In response to a question from me as to how many games would need to be played for a player keeping a watch to get a sense of what might be coming next, being a high or a low card, Mr Tootell said that it could be hours, it could be days of watching. He was not sure how long it would take. To actually track the cards, he imagined that a player would have an idea after a couple of hours of play, potentially shorter, depending on how many anomalous cards came out. He said, the more you watch the better idea you would have in relation to those cards.²⁷

[103] Whilst Mr Tootell was giving evidence, the CCTV footage of Mr Grant and Mr Anderson playing Pontoon was played and an explanation given of the game. Mr Tootell said that because Mr Grant has observed the cards continuously coming out

²¹ T1-100, L1-3.

²² T1-105, L41-47

²³ T1-110, L35-42.

²⁴ T1-125, L9-17.

²⁵ T1-129, L33-40.

²⁶ T1124, L16-19.

²⁷ T1-129, L6-14.

he has the advantage of a possibility that a card with the anomaly will be a small card, because the majority of them are going to be small.²⁸

[104] On that point, Mr Grant said that he never knows what the next card is and he is entitled to speculate on the next card just like everyone else. He insisted that he was merely making a guess and that every set of cards is different.²⁹ He also says that it is easy to cherry pick a few hands, but he does not always make good decisions.³⁰

Findings of fact

[105] On the evidence I find that:

- (a) Star was aware of the manufacturing anomaly associated with Angel manufactured playing cards. Further, Angel manufactured playing cards were in use in the Star casinos including on table 214 on 18 and 19 February 2018.
- (b) All cards in use in Star's casinos were checked by Star and considered to be appropriate for play after the *Ivey* decision. All cards used in the game are required to be inspected under Star's internal control system and may be changed by a gaming manager.
- (c) The backs of the cards were fully visible at all times to the dealer working on table 214 on 18 and 19 February 2018.
- (d) By s58(b) of the *Casino Control Act* Star must ensure that the operation of the casino is conducted at all times in a proper and competent manner. By s62 of that Act, Star must ensure that all gaming equipment in a casino is of a high standard of manufacture and is maintained in good order and condition. I find that Star did conduct its casinos in a proper and competent manner and that its cards were of a high standard of manufacture, maintained in good order and condition. There is no evidence to the contrary. There is no evidence from Star that there had been a breakdown in their system of internal control which resulted in cards being used which they would not otherwise have used. That is evidence which could only have come from Star and it was not adduced.
- (e) On the basis of these findings, the playing cards used on table 214 on 18 and 19 February 2018 were of a high standard of manufacture and therefore could not be described as defective.
- (f) Ninety-six of the cards used on table 214 on the days in question bore an anomaly in the sense of a small difference (or asymmetry) in the pattern on the back of the cards which appeared on the long edge of one side of the cards compared to the other side of the long edge. The asymmetry was not present on the remaining cards dealt in the game. The anomaly arose from the process of manufacture by the Casinos' card manufacturer.
- (g) 20% of the cards in play were affected by the anomaly and were low cards with a value below 7. 13% of the cards in play affected by the anomaly were high value cards.

²⁸ T1-136, L19-21.

²⁹ T1-137, L25

³⁰ T1-138, L40-42.

- (h) The game played by Mr Grant and Mr Anderson on the days in question was Pontoon, which requires players to make a decision as to whether to stand (draw no more cards) or hit (draw more cards) in meeting the object of the game. Players also choose to “split” or “double”. From these facts I infer that the game requires powers of observation as to cards dealt to other players and an ability to calculate the probability of particular value cards being dealt, in order to make the decisions required in the game. On this basis I find that the game is not only a game of chance but is also a game of skill.
- (i) Mr Grant identified the anomaly on some of the cards used on table 214 on 18 and 19 February 2018.
- (j) The anomaly was observable from the position where Mr Grant was sitting in front of the shoe. The anomaly may have been observable by another player nearby. The anomaly was observable to the dealer. The anomaly was unlikely to be observable by other players seated further from the shoe.
- (k) Mr Grant used his observation as to the asymmetry on some of the cards to assist in his speculation as to what the card might be and he would take it into account in his play, if he thought he could identify the card.
- (l) Mr Grant used all the information available to him to form his strategy for play. I infer from Mr Grant’s evidence, and the rules and objects of the game, that Mr Grant used his observation of cards dealt to other players, his observation of what cards bearing the asymmetry were dealt to all players, his powers of recall and that he engaged in calculations of probability.
- (m) Mr Grant had a view as to what the asymmetrical edged cards might be. I do not go so far as to find that Mr Grant knew with any certainty what the cards might be or that Mr Grant thought it probable the affected cards were more likely to be of a low value. Mr Grant’s evidence did not go this far, and he was at pains to stress there is no guarantee as to what group of cards may bear the asymmetry, because the manufacturing process randomises that outcome. Although there is no other evidence on that latter point, I note that it was not challenged by Star. I do not find that Mr Grant accepted that it was more probable that affected cards were of a low value. Mr Grant’s answer to the question, referred to earlier, was not that clear cut and he sought to make his position plain following cross-examination.
- (n) Mr Grant communicated playing strategy to Mr Anderson based on what Mr Grant predicted the value of each card would be, by using hand signals.
- (o) Mr Anderson knew that Mr Grant was communicating a playing strategy to him which included use of information as to the asymmetrical back of some cards. Because there is insufficient evidence from Mr Anderson, I do not find that Mr Anderson knew that affected cards were more likely to be of a low value.
- (p) Mr Anderson did not always follow the strategy communicated by Mr Grant.
- (q) The use of hand signals between players in a game of Pontoon is not unusual because of the objects of the game which includes an outcome where the players bust the dealer.

- (r) Mr Grant and Mr Anderson did not engage in edge sorting as described in *Ivey's* case. At no time did they identify particular numbered cards and then trick the dealer into displaying the cards so that they could later be identified in playing the game. The only parallel with *Ivey's* case is the type of card used in the game and a similar asymmetry of pattern on the backs of some of the cards.

Was the conduct of Mr Grant and Mr Anderson dishonest?

[106] The respondent says that the test to be applied to determine dishonesty requires:

- (a) ascertaining the actual subjective state of an individual's knowledge or genuinely held belief as to the facts; and
- (b) whether the individual's conduct was honest or dishonest applying the objective standards of ordinary decent people. There is no requirement that the individual must appreciate that what he has done is by those standards, dishonest.

[107] The test for dishonesty is articulated by the High Court in *Peters v The Queen*³¹ and *Macleod v The Queen*.³² The respondent's formulation of the test is a fair encapsulation of the law. The word dishonest must on this test bear its ordinary meaning, known to all. The Macquarie Dictionary definition³³ dishonesty is:

1. not honest, disposed to lie, cheat, or steal...2. Proceeding for or exhibiting a lack of honesty; fraudulent...

[108] The definition of honesty is:

2. showing uprightness and fairness ...

What did Mr Grant and Mr Anderson know?

[109] I have found, on their own evidence, that Mr Grant and Mr Anderson knew that asymmetrical backed cards were being dealt in the games of Pontoon they played on 18 and 19 February 2018.

[110] Further, I have found that Mr Grant and Mr Anderson did not know for sure what value card had an asymmetrical back. I have previously set out the range and number of affected cards. Mr Grant made a guess as to the value of a card with an asymmetrical back by reference to his observation of its back together with the other information available to him in the game, namely the cards dealt to players, his memory and probability calculations.

[111] Mr Grant and Mr Anderson may have believed that Mr Grant was able to make a better guess than he otherwise would have by applying his mind to the asymmetrical backed cards as the games progressed. The evidence is that Mr Grant and Mr Anderson won some money playing the games. The evidence is that there was no certainty in Mr Grant's process and not every decision made was successful.

³¹ (1998) 192 CLR 493 at 504, [18].

³² (2003) 214 CLR 230, [100]; See also *R v Dillon; Ex parte Attorney-General (Qld)* [2015] QCA 155, [43], [48] and *R v Elizabeth Margaret Orchard* [2018] QCA 058, [29] – [34].

³³ *Macquarie Dictionary* (4th ed, 2007) 'dishonest' (def 1, 2); 'honest' (def 1).

Dishonesty

- [112] The question is, in the terms of s92 of the *Casino Control Act*, whether it can be inferred from what Mr Grant and Mr Anderson knew, that Mr Grant and/or Mr Anderson have engaged in dishonest acts in relation to gaming? Would ordinary decent people applying objective standards think so?
- [113] At least one ordinary decent person doubted such conduct would be cheating (and dishonest). I note the view expressed in the Supreme Court in *Ivey's* case by Lord Hughes that:
- ...it may be that it would not be cheating if a player spotted that some cards had a detectably different back from others, and took advantage of that observation, but Mr Ivey did much more than observe; he took positive steps to fix the deck...³⁴
- [114] Star submits that dishonesty can be inferred from the applicants using to their advantage anomalies in the printing on the back of the playing cards to engage in a practice akin to “edge sorting”. That is, Mr Grant and Mr Anderson identified the anomaly on the back of some playing cards. Only Mr Grant had a vantage point by which he could observe cards released from the shoe. That information was used to predict whether the value of cards dealt would probably be high or low. That information was conveyed to Mr Anderson by hand signals.
- [115] Further, Mr Grant and Mr Anderson did not inform the dealer that the edge marking on the long sides of some of the playing cards in use were observably different from the edge of the other cards as cards were being dealt from the shoe, and Mr Grant and Mr Anderson did not inform the dealer that by using the information they had regarding the manufacturing defect, Mr Grant could reasonably predict whether the value of cards dealt from the shoe would probably be high or low.
- [116] It is said that Mr Grant and Mr Anderson had an advantage which was unfair and according to ordinary standards of right-thinking people dishonest, because they converted a game in which the knowledge of both sides as to the likelihood that the player or house would win was equal, into a game in which their knowledge was greater than that of the house and greater than that which the house could reasonably be expected them to have. In short, they disturbed the balance of chance.
- [117] Star says that both Mr Grant and Mr Anderson accepted that if they had conveyed to the dealer Mr Grant’s initial knowledge, the dealer would have taken steps to withdraw the cards. I note that neither thought it was a matter for them to raise with the dealer.³⁵
- [118] I do not accept Star’s submission that the acknowledgment is evidence of dishonesty. Whatever Mr Grant and Mr Anderson think about what the casino may have done if informed that asymmetrical backed cards were present in play, has little weight.
- [119] There is no evidence from Star that, if it knew asymmetrical backed cards were being played, it would have removed them. On the contrary, it is reasonable to infer that the casino did know the cards were being played. The cards were under the

³⁴ *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, [50].

³⁵ T1-74, L3; T-1-78, L46-47; T1-79, L1-8; T1-45, L16-20; T-1-47, L41-43; T1-48, L8-12; T1-57, L32-38.

nose of the dealer, fully observable at all times and being handled by the dealer. No steps were taken to remove the cards.

- [120] If the presence of asymmetrical backed cards was so prejudicial to the casino that it would have immediately removed the cards from play upon notice, I would have expected Mr Tootell to give that evidence. He did not.
- [121] Star is taken to have properly conducted the operations of its casinos and to have inspected the cards in play. No steps were taken by it to remove the cards.
- [122] Senior Counsel for Star said that if the case was determined on the basis that dishonesty is answered by the factual proposition that the house might have known, there wouldn't be any evidence to support that finding. That submission is not accepted on the basis of the foregoing reasoning and the inferences I have drawn from the evidence.
- [123] Star submits that there was positive conduct on the part of Mr Grant and Mr Anderson which puts it on all fours with *Ivey's* case – the deliberate seating of Mr Grant as close as he could to the shoe, the communication of information to Mr Anderson; the agitation when asked to move from Mr Grant, the carrying of the dishonest stratagem into effect to outwit the house. They are the elements said to align with *Ivey* where the cards were rotated.
- [124] I do not accept that comparison. Mr Grant was free to sit where he chose. Obviously, his seat gave him the best view of the cards and to then use any information he observed in his playing strategy. I do not consider that is of itself dishonest, particularly as playing the game involved a number of other skills. Communication with Mr Anderson was not play out of the ordinary. I do not consider that conduct to be dishonest.
- [125] I have previously found that Mr Grant and Mr Anderson did not engage in edge sorting as occurred in *Ivey's* case. Their conduct was entirely different. Mr Grant and Mr Anderson did not interfere with the presentation of the cards in the game. I do not accept the submission that Mr Grant and Mr Anderson engaged in conduct “akin” to edge sorting.
- [126] I do not think any dishonest stratagem was used by Mr Grant and Mr Anderson in the sense of observing an affected card, as a result of that observation knowing the card's value and using that knowledge to defeat the house. That is because I find that it was not possible to know the value of the card by mere observation.
- [127] Senior Counsel for Star submitted that the *Casino Control Act* governs the obligations of players and that is the law to which the Tribunal should have regard.
- [128] In particular, I was referred to s110A of the *Casino Control Act* – offence about keeping particular benefit. The section provides that a person must not dishonestly keep a benefit if they know they have obtained the benefit because of an “error or oversight” in the conduct of a game.
- [129] The respondent submitted that Mr Grant's evidence that he is an advantage player who will maintain a benefit if for example a dealer was sloppy or grease was found on the back of a card, is consistent with a contravention of s110A of the *Casino Control Act*. They are not the facts before me.

- [130] Mr Grant's submission that the section is directed to an overpayment having been made was rejected by Star on the basis that a reading of the explanatory memorandum demonstrates that the section is in no way limited to an overpayment being made. My reading of the explanatory memorandum is that it does not give any explanation for the wording of the section, however, in a description of the principal changes in the Bill, it is said that an offence is created for situations where an overpayment to patrons is made at a casino by employees of the casino operator and the patron does not return the amount. When the section is discussed, the memorandum gives that situation as an example of the offence. I find that an overpayment is a key mischief to which the section is directed, however, the words are broad enough to catch other scenarios.
- [131] By reference to the facts as found in this case, Senior Counsel was asked by me if there was evidence that Mr Anderson and Mr Grant had obtained a benefit. It was acknowledged that there is no evidence other than the fact that the balance of chance was disturbed.
- [132] The section requires a "benefit" to have been gained. It must be something capable of being kept because it is the "keeping" of a benefit which is an element of the offence.
- [133] Mr Grant's evidence is that he did not know if he had gained any benefit from knowledge of the asymmetrical cards. Other factors such as Mr Grant's skill and luck may well have been at play in the results achieved by him and Mr Anderson. It is necessary for the offence to be established that the benefit is "because" of an error or oversight. There is no evidence that is the case.
- [134] In response to a question from me as to the meaning of "an error or oversight in the conduct of the game" as it appears in s110A of the *Casino Control Act*, Senior Counsel said those words encompass anything which removed the element of chance or removed the expected conditions. In this regard Senior Counsel is referring to the conduct of Mr Grant and Mr Anderson having the result of removing the element of chance or expected conditions in the game. I do not think that is the meaning of the section. The conduct of the game must relate to the party conducting or having control over the operation of the game. That is Star. I do not find that any action by Star in the conduct of the game resulted in a removal of the element of chance or expected conditions, even if that is what the words mean.
- [135] Finally, although Senior Counsel confirmed it was his submission that placing asymmetrical cards out for play was an error or oversight, there is no evidence on that point. My earlier discussion has concluded that there has been no error or oversight in Star's management of the operations of the casino. Mr Tootell did not give any evidence that an error had occurred in Star's internal control system.
- [136] Star submits that Mr Grant and Mr Anderson have acknowledged that if the boot were on the other foot, they would consider it unfair. I do not consider that is the evidence given by Mr Grant and Mr Anderson. I do not think, as submitted by Star that Mr Anderson all but admitted that his conduct was not the right thing to do. In any event, on the test for dishonesty set out earlier, the subjective views of Mr Grant and Mr Anderson as to whether their conduct was dishonest, or unfair or not the right thing to do is irrelevant.
- [137] I find that neither Mr Grant nor Mr Anderson engaged in dishonest acts in relation to gaming by using knowledge of the presence of asymmetrically backed cards to make

what Mr Grant considered to be a better guess as to the value of cards about to be dealt. That is particularly so because the knowledge was used in combination with other information apparent in the games played and by the application of natural card skills and intelligence. It is not possible to tease out what consideration resulted in what outcome.

- [138] I find that the conduct of Mr Grant or Mr Anderson did not involve any form of dishonesty, involving lying, cheating, stealing or fraud by the ordinary meaning of the word, or that they were not honest.
- [139] I find on the facts that a reasonable belief could not be formed that Mr Grant and/or Mr Anderson engaged in dishonest acts in relation to gaming.

Have Mr Grant and/or Mr Anderson acted in a way affecting, or potentially affecting the proper conduct or integrity of gaming?

- [140] There was debate during the proceeding as to the meaning of “proper conduct or integrity of gaming”. By reference to the objects of the *Casino Control Act* and the obligations cast on casino operators,³⁶ I consider that “proper conduct” means the presentation of games to players which are run in accordance with their rules using high quality equipment and where casinos operate in accordance with their internal controls. “Integrity of gaming” means by reference to the objects of the Act and by its ordinary meaning³⁷—fairness and honesty (an absence of deceit) in the conduct of gaming. I do not accept as submitted by Star that integrity of gaming does not necessitate honesty. I do not accept as submitted by Star that because s92(3)(a) referencing dishonesty is separate to s92(3)(b) referencing proper conduct and integrity that dishonesty is not required to satisfy this element of s92. The ordinary meaning of integrity encompasses honesty.
- [141] Star’s main submission is that by using knowledge of the presence of asymmetrically backed cards in the game, Mr Grant and Mr Anderson affected the balance of chance in the game and thereby affected or potentially affected the proper conduct or integrity of gaming.
- [142] Star submits that it does not have to prove as a matter of law, or as a matter of mathematical certainty the outcome of the game was affected by the conduct of Mr Grant and Mr Anderson, nor that it must assign a percentage to the probability that the outcome of the game was affected, nor to give a dollar figure to the winnings. It is submitted that the issue is simply, by reference to *Ivey*, that the element of chance and randomness is gone to some extent and that is enough.
- [143] Star relies on the judgment of Lady Justice Arden and Lord Justice Tomlinson in the Court of Appeal in *Ivey*’s case and says that the relevant statements of principle are:
- (a) the stratagem adopted removed the pure chance from the game being played.
 - (b) the house (Crockfords) did not know of the added knowledge Mr Ivey had as a result of his stratagem, the asymmetric information removed the pure chance from the game which a punter would expect to have when they play.
 - (c) it is no answer to an allegation of cheating that a player is doing no more than taking advantage of the shortcomings in the procedures of the casino.

³⁶ *Acts Interpretation Act* 1954 (Qld), s14A.

³⁷ Macquarie Dictionary (4th ed, 2007) ‘integrity’ (def1).

- [144] Senior Counsel for Star referred to rule 11, subrule 3 of the gaming rule which enables a gaming manager to give a direction if the gaming manager reasonably believes the player is playing the game in a way that affects or could potentially affect the randomness of the outcome of the game as intended by the rule.
- [145] I note that randomness is part of the game. It is not however the entire basis of the game. I have previously found that the game of Pontoon is not a game of pure chance.
- [146] Because Pontoon is not a game of pure chance, the principles set out in *Ivey's* case, directed to interference with the element of chance, are not relevant on the facts of this case. Obviously if someone alters the cards so that it is known what the cards are when they appear, the pure chance in a game of chance is affected. That did not occur on these facts. At best sighting an asymmetrically backed card may have given Mr Grant an opportunity to make a better guess as to the value of a card, but only if combined with the successful exercise of other skills.
- [147] Senior Counsel for Star emphasised that the crucial factor in *Ivey's* case is the game is a game of pure chance. Senior Counsel drew a comparison with card counting which is in a different category because the punter is using their mental faculties and the dealer could do the same. It is not using an unexpected condition. Someone just uses their powerful mind to expected conditions. It is argued by Star that in *Ivey* and in Mr Grant and Mr Anderson's case the players got a leg up on information they had, which the casino and other players did not have. Star says that Mr Grant has not just applied his mental faculties to expected conditions.
- [148] I do not accept those submissions. Noting an asymmetrical back on a card is of no use unless one knows what lies beneath. A range of skills must be applied by Mr Grant to make his guess. He is confronted by 33% of the cards in play bearing an asymmetrical back, 20% with a low value and 13% with a high value. Gaining any sort of "leg up" in those circumstances would seem to be extraordinarily difficult. The cards were in plain view of the dealer and subject to the casinos' inspection regime. Mr Grant, the dealer and the casino had the same information. Mr Tootell acknowledges that players other than Mr Grant, could have observed the asymmetrical backs of cards. Star submitted in its closing submissions that it was not its contention that it was impossible to see the anomaly from any other location other than the position that Mr Grant chose to sit at, however it would be more difficult.
- [149] I do not consider, as submitted by Star that Mr Grant and Mr Anderson used information not known to the casino or other players so that the proper conduct or integrity of gaming was affected by use of the information. How could one know whether noting the card or exercising skill gave rise to the outcome of the game? I think it is impossible to know on the evidence in this case.
- [150] Star further submits Mr Anderson accepted in cross-examination that when Mr Grant gave his hand signals, he would choose whether to act on them, but he knew that the signals were conveying information Mr Grant ascertained from looking at the cards as they were dealt from the shoe, that is the probability the card would be high or low face value. Again, the answer to this submission is that the question of probability is informed not just by noting the asymmetrical back but also by the exercise of some skill. There is no way of knowing whether the guess was correct or

whether the guess was arrived at by skill and luck. The probability that a card would be high or low could not have been arrived at by merely noting the back of the card.

[151] It is submitted that evidence Mr Grant and Mr Anderson disturbed the balance of chance comes from Mr Anderson who accepted that if the shoe was on the other foot and the casino had the particular knowledge that Mr Anderson and Mr Grant had, the game would become unfair.

[152] In this regard both Mr Grant and Mr Anderson struggled with the practical application of the scenario Senior Counsel for Star was putting to them. Mr Grant trenchantly denied the proposition put by senior counsel on the basis that it had no application to the game of Pontoon. Mr Anderson formed the same view but was prepared to admit in general terms that if he thought a game was unfair, he would not play and that if the element of chance was to some extent gone, that would be unfair.

[153] I do not consider the evidence from Mr Anderson is clear enough to amount to an acknowledgement that he and Mr Grant had disturbed the balance of chance and that was unfair.

[154] Senior Counsel said:

Now, if the effect on randomness was simply a – an unpredictable effect, then, in my submission, the point that's made against me would be a good one. It would have to be: well, if you don't have evidence about how the anomaly translates to results, how can you prove that the anomaly did translate into results? But the difference in this case is that both witnesses accepted that they knew that, probably, if you got a card with an anomaly in it, it would be a lower numbered card. And that's the key. Without that evidence, then 1-1-1 would have problems...

[155] I have found that there is not sufficient evidence to establish that Mr Grant and Mr Anderson knew that, probably, if you got a card with an anomaly in it, it would be a lower numbered card.

[156] In all, I do not consider there is sufficient evidence on a review of the decision, to draw an inference that observing the asymmetry on the back of cards and attempting to use that information has affected or potentially affected the integrity of the game, by tipping the chance of success in the game in favour of Mr Grant and Mr Anderson. Any good fortune they enjoyed may just as easily have been from skill or luck.

[157] I find that there was no sound basis for Mr Tootell to form a reasonable belief that the conduct of Mr Grant and Mr Anderson affected the proper conduct or integrity of gaming for the reasons submitted by Star. In addition, for the reasons given when addressing the question of dishonesty, I do not consider that there has been any lack of fairness or honesty in the conduct of Mr Grant and Mr Anderson which go to the question of integrity of gaming, and I so find.

Applicants' submissions

[158] On the basis of my findings and conclusions it is not necessary to address the applicants' submissions in detail.

[159] I do however say that I do not consider it relevant to my findings in this matter that Mr Grant has been the subject of surveillance by Star. It is not necessary to speculate

as to whether Mr Tootell's belief as to Mr Grant's conduct may have been tainted in some way.

[160] In coming to a conclusion as to the correct and preferable decision, I stand in the shoes of the decision maker. It is a matter for me as to whether I am able to form a reasonable belief on the facts that Mr Grant and Mr Anderson were dishonest or affected or potentially affected the proper conduct or integrity of gaming when playing on 18 and 19 February 2018.

Non-publication orders

[161] Mr Grant and Mr Anderson have applied pursuant to an application for miscellaneous matters filed 6 November 2020 to have all non-publication orders made in the proceeding vacated. The parties exchanged submissions.

[162] Non-publication orders were made:

- (a) on 16 January 2019 in relation to Part 2 of the documents filed by the respondent on 1 June 2018 in GAR 098-18 and GAR101-18 and the affidavit of Justine Russell filed on 20 September 2018 in the consolidated proceedings;
- (b) on 18 August 2020 in relation to the content of GT-12 of the statement of Gary Tootell dated 30 July 2020; and
- (c) on 4 November 2020 in relation to the transcript of the hearing on 5 November 2020

[163] The application is dismissed for the following reasons:

- (a) the applicants have not filed an application for leave to appeal or appeal in relation to any order.
- (b) I am not prepared to re-visit the decisions made in relation to non-publication orders as part of this proceeding. There has been no lack of procedural fairness to the applicants in terms of access to relevant material to conduct their application.
- (c) The applicants attended an oral hearing in relation to the first non-publication order, they were heard, and a written decision was made. The applicants were given an opportunity to make submissions in relation to the second order. At the hearing the applicants were given an opportunity to make submissions in relation to the last order. Mr Grant consented to the form of words used in the order on behalf of both applicants.
- (d) The orders were made in accordance with the Tribunal's discretion under s66(2)(d) of the QCAT Act, on the basis of submissions made to it.

Conclusion

[164] I conclude that there are no reasonable grounds for a belief that the terms of s92 of the *Casino Control Act 1982 (Qld)* are met. The correct and preferable decision is that there is no basis to exclude Mr Grant and Mr Anderson from The Star Gold Coast and Treasury Brisbane casinos pursuant to s92 of the Act.

[165] It is ordered that:

- (a) the Notification of Exclusion addressed to Mark Timothy Grant dated 2 March 2018 be set aside and a decision substituted that no grounds exist for a direction under s92 of the *Casino Control Act* 1982 that Mark Timothy Grant is prohibited from entering or remaining in the Star Gold Coast and Treasury Brisbane Casinos because of alleged conduct on 18 and 19 February 2018.
- (b) The Notification of Exclusion addressed to Nathan Trent Anderson dated 2 March 2018 be set aside and a decision substituted that no grounds exist for a direction under s92 of the *Casino Control Act* 1982 (Qld) that Nathan Trent Anderson is prohibited from entering or remaining in the Star Gold Coast and Treasury Brisbane Casinos because of alleged conduct on 18 and 19 February 2018.
- (c) The application for miscellaneous matters filed 6 November 2020 is dismissed.