

AUSTRALIA / JUDGMENT

Baxter v Willis (No 5)

[2026] NSWSC 1059**COURT**

Supreme Court

DECIDED

04 September 2026

BEFORE

Cavanagh J

CASE / FILE NUMBER

2023/159221

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Supreme Court

New South Wales

Medium Neutral Citation: Baxter v Willis (No 5) [2026] NSWSC 1059**Hearing dates:** 16 – 19 June 2026**Decision date:** 04 September 2026**Jurisdiction:** Common Law**Before:** Cavanagh J**Decision:** (1) Judgment for the plaintiff in the sum of \$1,429,911.47.
(2) The defendant's cross-claim is dismissed.
(3) The defendant is to pay the plaintiff's costs.**Catchwords:** CONTRACTS — breach of contract — claim in debt — telephone betting on credit — plaintiff a licensed bookmaker — defendant a customer of the plaintiff — defendant refused to pay amounts lost — approximately 6,250 bets — whether wagering contract was unlawful and unenforceable — onus of proving unlawful conduct — whether bookmaker must prove compliance with regulatory requirements to enforce debt**Legislation Cited:** Betting and Racing Act 1998 (NSW), Div 1 Pt 3, ss 4, 16, 16A, 17, 26GC
Civil Procedure Act 2005 (NSW), s 100
Commonwealth Constitution, s 109
Contracts Review Act 1980 (NSW)
Evidence Act 1995 (NSW), s 136
Interactive Gambling Act 2001 (Cth), ss 3, 4, 5, 8AA, 8E, 15, 15C, 15D, 69, 69AA
Judiciary Act 1903 (Cth), s 78B
Unlawful Gambling Act 1998 (NSW), ss 8, 9

Cases Cited:	Baxter v Willis (No 2) [2026] NSWSC 1056 Baxter v Willis (No 3) [2026] NSWSC 1057 Baxter v Willis (No 4) [2026] NSWSC 1058 Baxter v Willis [2026] NSWSC 634 Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34 Burns v Joseph [1969] Qd R 130 Forrest v Forrest Pty Ltd v Wilson (2017) 262 CLR 510; [2017] HCA 30 Hire Purchase Furnishing Co Ltd v Richens (1887) 20 QBD 387 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Thorn v Cavanagh [1972] 2 NSWLR 407
Category:	Principal judgment
Parties:	David Baxter (Plaintiff/Cross-Defendant) Robert Willis (Defendant/Cross-Claimant)
Representation:	
Counsel:	D Reynolds with J Chen (Plaintiff/Cross-Defendant) B K Nolan (Defendant/Cross-Claimant)
Solicitors:	Addisons (Plaintiff/Cross-Defendant) Enyo Lawyers (Defendant/Cross-Claimant)
File Number(s):	2023/159221

JUDGMENT

This is a dispute about the liability of the defendant, a stockbroker, to pay the plaintiff, a licenced bookmaker, in respect of bets placed by way of telephone betting. Although there is no dispute that the defendant placed the bets, the defendant asserts that he is not liable to pay for the losses made on the bets.

The case proceeded over four days, 16 to 19 June 2026. Mr Daniel Reynolds appeared with Ms Joy Chen for the plaintiff and Ms Bridie Nolan appeared for the defendant.

Background

The plaintiff is a licenced bookmaker, with over 30 years' experience. He conducts bookmaking services in respect of horseracing, both on-course and off-course. During the period at least 2020 to 2022, he conducted a telephone betting service from premises at The Rocks, which he maintains were authorised premises in accordance with his licence.

Little is known about the defendant, as he did not give evidence. He is a stockbroker. He applied to give evidence from London by audio visual link on the basis that it was necessary for him to be in London in June and July of this year for work and that it would cost him \$42,000 to fly home. Chen J rejected his application: see *Baxter v Willis* [2026] NSWSC 634. He must have decided not to give evidence thereafter.

During the period 3 November 2020 to 2 October 2022 (which is described in the statement of claim as “the relevant period”), the defendant placed bets with the plaintiff over the telephone to a total amount of \$26.3 million. The plaintiff provided his wagering services to the defendant on credit. That is, he did not require the defendant to pay him in advance in respect of each bet. He placed approximately 6,250 bets.

From time to time, the defendant was required to make payments to the plaintiff to cover accrued losses (he won some and he lost some). The defendant made those payments.

At the end of the relevant period, the plaintiff asked the defendant to bring his account up to date by paying the sum outstanding, being \$1,098,515.94. The defendant refused, expressing shock that his losses amounted to that amount. The plaintiff then commenced these proceedings, suing on the asserted contract, including alleging an implied term that the defendant would pay any losses arising from his betting and seeking payment of the amount owing at the end of the relevant period.

The defendant filed a defence not admitting or denying almost all matters of substance, including that there was any liability to pay and asserting that the wagering contract was unenforceable because the plaintiff had engaged in unlawful conduct in performing the services under the contract. The basis of that assertion was a combination of the legislation governing the plaintiff’s activities including the Unlawful Gambling Act 1998 (NSW), the Betting and Racing Act 1998 (NSW) and the Interactive Gambling Act 2001 (Cth).

On the defendant’s case, the plaintiff engaged in conduct expressly prohibited under each of those Acts. Indeed, at least some of the prohibited conduct is conduct which leads to a criminal sanction, having regard to the penalty provisions. The defendant asserts that this conduct renders the pleaded contract unenforceable.

Further, as pleaded in his defence and cross-claim, the defendant relied on the Contracts Review Act 1980 (NSW) and asserted that the contract should be set aside as being unjust, contrary to public policy, inconsistent with the legislative intention of the various statutes on which the defendant relies and otherwise inequitable in the circumstances. The defendant also pleads other conduct of the plaintiff (see par (12) of the further amended defence dated 8 August 2025) and says that the contract is unenforceable having regard to that conduct. By his cross-claim, the defendant seeks the return of all of the money paid by him to the plaintiff during the relevant period to cover his bets.

For the reasons I will set out, none of the matters raised by the defendant have any merit. The defendant has not established that in accepting his bets the plaintiff was engaged in any prohibited conduct, even if that would provide any basis to excuse him from paying his debt to the plaintiff.

The defendant did not adduce any evidence to establish that the plaintiff was in fact engaged in conduct in breach of any statutory provision or regulation, falling back on the proposition that the onus remained on the plaintiff to prove that he had complied with the relevant provisions.

In my view, there is no basis for the suggestion that in order to enforce a debt owed to him, the plaintiff must prove that he was acting in compliance with statutory requirements as nominated by the defendant in his defence.

Statement of issues

On 2 June 2026, the defendant filed a statement of issues in the following terms:

“STATEMENT OF ISSUES

1. Whether the wagers alleged were accepted by a person who provided, facilitated or promoted a credit wagering service for the purposes of section 15C and section 15D of the Interactive Gambling Act 2001 (Cth), and what was the relevant turnover of that person or its related company group.
2. Whether the alleged wagers are void, unenforceable or otherwise not recoverable as a matter of statutory construction, illegality, or public policy.
3. Whether any State law is rendered inoperative by section 69 of the Interactive Gambling Act 2001 (Cth) or section 109 of the Constitution to the extent it would otherwise authorise conduct prohibited by the Interactive Gambling Act 2001 (Cth).
4. Whether the Contracts Review Act 1980 (NSW) applies to the alleged wagers in circumstances where the alleged wagers were accepted in New South Wales.
5. Whether the defendant was provided with regular or timely betting statements or other materials sufficient to verify the alleged wagers, the alleged account balance, and the terms of the alleged wagers.
6. If the Contracts Review Act 1980 (NSW) applies, whether the alleged wagers are unjust in the circumstances relating to them at the time they were made, inter alia, having regard to their alleged oral and informal nature, the absence of written terms, the use of asynchronous WhatsApp messages, the suggestion that the defendant was ‘more than capable of betting [him]self ‘out of trouble’, and the legality of the alleged wagers.
7. Whether the defendant is entitled to restitution of the payments made to the plaintiff with interest, or to set those payments off against any liabilities which may arise.”

Of the seven issues identified, numbers 3, 4, 5 and 6 were not pursued by the defendant, albeit the defendant only withdrew reliance on the Contracts Review Act claim after completion of the defendant’s closing submissions.

Other issues arising which were not pleaded under the Betting and Racing Act and the Unlawful Gambling Act were pursued.

The pleadings are of some significance, because at the commencement of the hearing, the plaintiff identified a number of matters set out in the defendant’s opening written submissions which the plaintiff asserted were not the subject of any pleading and to which no reference was

made in any version of the defence which had been filed. After Mr Reynolds had completed his opening submissions and raised his objection to the said-to-be new matters, I asked Ms Nolan whether she wanted to make any opening or address the matters raised by Mr Reynolds. Ms Nolan declined to do so.

The defendant did not seek to amend his pleadings.

At the end of the hearing, I asked the parties to again consider the pleading issue and specifically asked the plaintiff to identify whether all of the matters raised at opening were still the subject of objection. According to the document prepared by the plaintiff, most were.

The plaintiff maintained that the plaintiff was taken by surprise by the submissions of the defendant. The defendant rejected the suggestion that it was necessary to plead the matters complained of by the plaintiff.

In my view, the defendant raised a number of matters in his submissions which were not referred to in the defence and should have been pleaded. However, because of my findings rejecting the defendant's case, it is not necessary to further consider the plaintiff's complaint.

The evidence

The plaintiff prepared three affidavits, dated 6 September 2024 ("the principal affidavit"), 5 March 2025 and 27 October 2025. The defendant objected to nearly every paragraph, or part thereof, of the principal affidavit, as well as a number of paragraphs of the subsequent affidavits. The defendant sought a ruling pursuant to s 136 of the Evidence Act 1995 (NSW) in respect of parts of the plaintiff's evidence.

I refer to my ex tempore judgments dealing with these objections: see *Baxter v Willis* (No 2) [2026] NSWSC 1056; *Baxter v Willis* (No 3) [2026] NSWSC 1057; *Baxter v Willis* (No 4) [2026] NSWSC 1058 ("*Baxter v Willis* (No 4)").

There was very limited cross-examination. Despite Ms Nolan stating that she had found many errors in the betting account statement on which the plaintiff relied to establish the amount owing, no questions were asked of the plaintiff about the document. Only two topics were addressed, being whether the plaintiff had verified the defence to the cross-claim and whether he agreed as to the total amounts of payments made by the defendant during the relevant period. I assume these matters related to the cross-claim. The plaintiff was not questioned about any matter relating to his own claim.

As such there was no challenge to the evidence of the plaintiff other than on an admissibility basis.

The plaintiff relied on an expert report from a chartered accountant, Heath Stewart, dated 5 December 2025. The defendant objected to the tender of his report and the annexures thereto.

After extensive submissions on the admissibility question, Mr Stewart was called on the voir dire and the defendant cross-examined him on matters relating to admissibility. He was not taken to any asserted errors in the document so as to undermine the assumptions behind his opinion. Instead, he was challenged on the basis that he was not an information technology expert and that the preparation of his report involved the use of computer software such as Microsoft Excel and Tabula. It was suggested that his report would not be admissible because he had not identified those junior employees who had assisted in the task of preparing it, including a bookkeeper, and specified their qualifications and expertise to undertake such tasks as data entry.

I admitted the report and the annexures thereto: see *Baxter v Willis* (No 4). Other than on the voir dire, Mr Stewart was not asked any question in cross-examination. Like the plaintiff's evidence, the content of his report was not challenged other than on an admissibility basis. It was not put to him that there were errors in the source documents on which he relied for the formation of his opinion.

The betting process

The plaintiff conducted both on-course and telephone betting. The plaintiff held bookmaking licences issued by Racing New South Wales ("Racing NSW"). He conducted on-course betting from racetracks across New South Wales. The plaintiff was also authorised to conduct telephone betting from authorised premises at The Rocks. He provided that service through the use of bookmaker's clerks employed by Tarpin Finance Pty Ltd ("Tarpin") said to be acting as his agent. All bets were required to be recorded. This was outsourced by Tarpin to a third-party provider, EscapeNet, which was approved both by Racing NSW and the New South Wales Bookmakers Co-operative.

During the hearing, the plaintiff played sample recordings of bets placed by the defendant. Each call commenced with the announcement "Dave Baxter, phone betting". The defendant would simply state the venue, the race number and the horse number. The bookmaker's clerk would provide the odds and repeat the bet. Each call only took a few seconds. Each time a bet was accepted over the phone, a corresponding bet would then be placed with an internet bookmaker, robwaterhouse.com (a bet back arrangement). In other words, the bet placed by the defendant with the plaintiff was covered by robwaterhouse.com.

A sample application for registration of a bookmaker's clerk was admitted into evidence. The defendant did not accept that Tarpin was acting as the plaintiff's agent or that all of the bookmaker's clerks were appropriately registered, although again no evidence was called to the contrary.

The plaintiff's contentions

The plaintiff maintains that he provided wagering services to the defendant on credit during the relevant period. He says that there was an implied term of the agreement between the parties that the defendant would pay amounts owing, outstanding, or in arrears. The defendant did make payments but has declined to make the payment sought at the end of the relevant period. The plaintiff says that he has made a demand for payment and the defendant has refused to pay (which is so).

In the circumstances, he seeks payment of the amount owing plus interest.

The defendant's contentions

The defendant accepts that he placed bets over the phone. He does not dispute, in the sense of adducing evidence to the contrary, even the placing of one bet of the approximately 6,250 bets he placed. During final submissions, the defendant conceded that the defendant would be liable to pay the amounts sought, accepting that there would be an implied term of the agreement between the plaintiff and the defendant to support that, subject to all of the other defences raised by him.

Having regard to the position the defendant came to by the end of the hearing, it follows that the defendant would be liable to pay the amount claimed, subject to:

The plaintiff establishing that amount;

The issues of enforceability pleaded by the defendant, including alleged non-compliance with all of the Unlawful Gambling Act, the Betting and Racing Act and the Interactive Gambling Act; and

The pleading in par (12) of the further amended defence, which pleads aspects of the plaintiff's conduct which are said to render the contract unenforceable.

The defendant also pursues a cross-claim, seeking restitution of all of the amounts paid by the defendant during the relevant period (\$1,453,539) on the basis that those payments were paid by mistake of law because there was never any obligation to make any payments under the contract, as the contract was unlawful.

It will be necessary to consider the legislation upon which the defendant relies in some detail, as absent a finding that the contract was unlawful or unenforceable in some other way, the defendant's case falls back on an onus of proof-type defence, that is, that the plaintiff has not established the amount owing. I should add that the onus of proof-type defence went further than that, as, not having adduced any evidence himself, and having made positive assertions of non-compliance with the legislative requirements in his defence, the defendant asserted that it was up to the plaintiff to prove compliance with the legislative requirements to establish that the contract was not unlawful.

Although the issue was not addressed in closing submissions, the defendant also raised a constitutional issue and gave notice under s 78B of the Judiciary Act 1903 (Cth). The matter arising is set out under par (2) of the notice, as follows:

“Nature of Constitutional Matter

2. The matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the Judiciary Act is whether the provisions of the Betting and Racing Act 1998 (NSW) (BRA), insofar as they purport to authorise a licensed bookmaker to accept bets on credit by telephone while not physically present at a licensed racecourse or approved premises, are inconsistent with sections 15C, 15D and 69 of the Interactive Gambling Act 2001 (Cth) (IGA), and thereby invalid or inoperative by reason of section 109 of the Constitution.” (emphasis in original)

As set out in the notice, the defendant contends that the plaintiff’s conduct was prohibited under s 15C of the Interactive Gambling Act, which prohibits the provision of credit for interactive wagering services in certain circumstances, unless the provider satisfies the statutory exemption in s 15D (which the defendant asserts the plaintiff has not established). The defendant also contends that, to the extent that s 17 of the Betting and Racing Act is relied upon despite s 15C of the Interactive Gambling Act being engaged, s 69 of the Interactive Gambling Act expressly renders any State or Territory law authorising prohibited conduct inoperative to the extent of inconsistency with the Commonwealth Act. The defendant submits that any such authorisation is inoperative by reason of s 109 of the Commonwealth Constitution.

As set out in the notice, the defendant further contends that it will be necessary for this Court to determine:

Whether the State legislation purports to authorise conduct which is expressly prohibited by a Commonwealth law;

Whether that purported authorisation is displaced by s 69 of the Interactive Gambling Act; and

Whether by operation of s 109 of the Commonwealth Constitution the State laws are inoperative to the extent of any inconsistency.

Although squarely raised in the further amended defence, the s 78B notice and referred to in both written and oral opening submissions, the defendant effectively resiled from relying on the constitutional issue in his closing address. For reasons which will be apparent from this judgment, I need not refer to that aspect of the defence again.

As subject to establishing loss, the matters raised by the defendant provide the only basis on which the plaintiff might not succeed, the approach to this judgment must necessarily be to consider each of those matters in turn.

Onus of proof

The defendant's case was very much based on the assertion (made many times during the hearing) that it was for the plaintiff to prove compliance with the relevant legislation. That is, that the plaintiff was acting lawfully and that absent such proof, the contract sued upon was unenforceable. On the defendant's case, having raised in the defence the positive assertion that the plaintiff had failed to comply with all of the Unlawful Gambling Act, the Betting and Racing Act and the Interactive Gambling Act, it was not for the defendant to adduce evidence to support such assertions, but it was up to the plaintiff to prove compliance with those Acts.

In my view, there are some fundamental problems with that assertion, being:

Firstly, there is nothing in any of the legislation relied upon by the defendant which might lead to the conclusion that a licenced bookmaker, who seeks to recover a debt arising from the placement of bets by a customer, must prove compliance with the regulatory requirements which govern his conduct to enforce the debt. The fact that the plaintiff is working in a highly regulated industry and that his own services are governed by the conditions of a licence issued under statutory authority does not impose an evidentiary obligation on him to satisfy every aspect of his licence or authority as part of the process of enforcing a debt;

Many self-employed persons work in highly regulated industries. I am not aware of any case (and I was not directed to any by the defendant) which suggests that a person who operates under the conditions of a licence must demonstrate compliance with the conditions of the licence as a pre-requisite to enforcing an ordinary debt incurred in the course of business. Indeed, as pointed out by the plaintiff, similar arguments have been rejected in other cases and there appears to be no case which would support the defendant's approach;

At one stage, Ms Nolan suggested that the plaintiff was exercising a statutory power and thus was required to demonstrate compliance with that power. The idea that a person who works under the conditions of a licence is himself exercising a statutory power seems novel. I reject it as a basis for imposing some additional evidentiary burden on the plaintiff seeking to enforce a debt;

Indeed in *Thorn v Cavanagh* [1972] 2 NSWLR 407 ("*Thorn v Cavanagh*"), a case in which the defendant (a punter) sought to rely on a provision of the Gaming and Betting Act 1912 (NSW) which, on the defendant's case, rendered the plaintiff's (a bookmaker) claim in debt for unpaid betting losses unenforceable on the basis of non-compliance, the Court of Appeal (Hardie JA with whom Kerr CJ and Moffit JA agreed) said, at 409:

"The making of the wagering contracts sued upon was not forbidden by the Act, but this does not mean that those contracts were made under or pursuant to the Act. The parties entered into the betting transactions under and by virtue of their personal powers and capacities. The relevant statutory provisions are in no sense the source of the power of the parties to engage in these transactions, nor do those provisions provide the basis or authority for the defendant's breaches of his betting contracts (which are in fact the omissions on which the action is based)."

The decision in *Thorn v Cavanagh* followed an earlier decision to the same effect of the Full Court of the Supreme Court of Queensland in *Burns v Joseph* [1969] Qd R 130 (“*Burns v Joseph*”), which considered equivalent legislation in Queensland.

Whilst Ms Nolan maintained that the defendant’s primary position was that the contract was unenforceable (rather than unlawful), it is clear from the further amended defence and the defendant’s submissions that the basis on which the contract was said to be unenforceable is that the conduct engaged in by the plaintiff in accepting the bets was unlawful, being contrary to the prohibitions in the legislation upon which the defendants seeks to rely. In his further amended defence, the defendant put in issue the legality of the conduct of the plaintiff in providing the wagering services to him.

I reject the submission that the onus then fell on the plaintiff to prove that his conduct was legal. Such a proposition is contrary to well established principle. The onus is on a party that seeks to assert unlawfulness and consequent unenforceability to prove it: *Hire Purchase Furnishing Co Ltd v Richens* (1887) 20 QBD 387;

Of course, should the defendant prove that in providing his wagering services the plaintiff was acting contrary to any legislative prohibition and there is an exemption (for example, s 15D of the Interactive Gambling Act), it is up to the plaintiff to prove the exemption. That applies in respect of the plaintiff’s reliance on his wagering turnover being less than \$30 million within the meaning of s 15D, should the defendant establish that s 15C applies;

The conduct asserted in the further amended defence as rendering the contract unenforceable was conduct which exposed the plaintiff to a criminal penalty. For example, this is evident from s 15 of the Interactive Gambling Act, which refers to the Criminal Code (Cth). The defendant not only submitted that the plaintiff bore the onus of proof, but that it was in accordance with the *Briginshaw* standard (see *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34). I reject the submission that the plaintiff had to prove that he did not engage in conduct constituting criminal conduct, which was the effect of the defendant’s submission; and

Finally, the proposition that, because the defendant raised a failure to comply with various statutory provisions (however that was dressed up or described), it was then up to the plaintiff to prove compliance. This is inconsistent with the general proposition that who asserts must prove. To the extent that the defendant wished to run a defence of unenforceability based on illegality, it was up to the defendant to prove the basis of that defence. If the defendant’s assertions as to the onus of proof were correct, it would result in the onus being on the plaintiff to prove matters such as:

That the defendant was physically present in Australia each time he placed a bet (s 15C); and

The identity of each of the bookmaker’s clerks who took each bet and then that each bookmaker’s clerk was registered.

Both those burdens would have been impossible to fulfil.

In my view, if the defendant wished to run a case that the wagering contract was unenforceable and that the plaintiff must return all money already paid in respect of the bets made, it was up to him to prove that the plaintiff was engaged in prohibited conduct (and of course then prove that that conduct rendered the contract on which the plaintiff sued unenforceable). The defendant made no attempt to do so, incorrectly relying on arguments about onus of proof and statutory construction.

Unlawful Gambling Act

The defendant submits that “the first statutory question is that whether the alleged betting was lawful under New South Wales law”.

The plaintiff does not accept that any such question arises, but I will deal with the so-called statutory questions said to arise under the further amended defence.

The defendant suggests that the starting point is the prohibition in respect of off-course betting with bookmakers under s 8 of the Unlawful Gambling Act and further suggests that s 9 of that Act reinforces the same point.

The long title of the Unlawful Gambling Act is as follows:

An Act to impose prohibitions on certain gambling activities and in relation to premises used for gambling; to repeal the Gaming and Betting Act 1912; to amend the Crimes Act 1900 to create an offence of conducting an unlawful gambling operation; to amend certain other Acts; and for related purposes.

The objects of the Act are to prohibit in the public interest certain forms of gambling, to prevent loss of public revenue that is derived from lawful forms of gambling and to deter criminal influence and exploitation in connection with gambling activities.

Section 8 is in the following terms:

8 Offences relating to unlawful betting

- (1) For the purposes of this section, the following forms of betting are prohibited—
- (a) betting on any event or contingency if the person is not present at a licensed racecourse and the bet is made with a bookmaker,
 - (b) betting on any event or contingency (other than a horse race, harness race, greyhound race or declared betting event) when the person is present at a licensed racecourse,
 - (c) betting on any event or contingency when the person is present at a racecourse and a trial meeting (within the meaning of the Betting and Racing Act 1998) is being held at that racecourse,
 - (d) betting on any event or contingency when the person is present at a racecourse and a race meeting is being held at that racecourse in contravention of the Betting and Racing Act 1998.

Section 8(2) provides that a person who engages in betting that is prohibited by s 8(1) is guilty of an offence. The maximum penalty is 50 penalty units or imprisonment for 12 months, or both.

Section 8(6) specifies forms of betting that are not prohibited under s 8, including:

...

(d1) betting on any event or contingency if the betting is made by telephone or electronically with a person who is authorised under the law of any other State or Territory, or any other jurisdiction, to carry on bookmaking activities ...

Section 9 prohibits a person carrying on bookmaking unless that person is a licenced bookmaker. Further, as set out in s 9(2), a person who is a licenced bookmaker must not carry on bookmaking except:

- (a) at a licensed racecourse when it is lawful for betting to take place at the racecourse, or
- (b) as permitted under section 16 (Authority to conduct telephone or electronic betting) of the Betting and Racing Act 1998.

The defendant submits that the Unlawful Gambling Act prohibits the conduct of the plaintiff, that is, accepting bets over the telephone, unless “the s 16 [of the Betting and Racing Act] pathway is made good”. As such, the defendant submits that s 16 is the statutory permission “on which the plaintiff must rely” (meaning that it is up to the plaintiff to establish reliance on s 16 of the Betting and Racing Act or else he cannot succeed). I reject the suggestion that the plaintiff must establish compliance with s 16 of the Betting and Racing Act to enforce the debt but will deal with the argument raised in any event.

The defendant’s point is that on a proper construction of the Betting and Racing Act, while also having regard to the Rules of Racing of Racing NSW (“NSW Racing Rules”), the bookmaker’s clerks who answered the phone and took the bets from the defendant were not authorised to do so. That is, the authority issued to the plaintiff did not permit him to allow the bookmaker’s clerks employed by Tarpin to take the bets over the phone.

Division 1 of Pt 3 of the Betting and Racing Act governs the making of bets over the telephone by licenced bookmakers. Section 4 of that Act is the definition section. A “bookmaker” includes any person who:

- (a) carries on the business of, or who acts as, a bookmaker, bookmaker’s clerk or turf commission agent, or
- (b) gains, or endeavours to gain, a livelihood wholly or partly by betting or making wagers.

A “licenced bookmaker” is “a person who is authorised by a racing controlling body to carry on bookmaking”. In this matter, the racing controlling body is Racing NSW. Section 17 of the Betting and Racing Act again makes it an offence for a licenced bookmaker to accept or make bets by telephone without appropriate authorisation under s 16.

Section 16(1) of the Betting and Racing Act is relevantly in the following terms:

16 Authority to conduct telephone or electronic betting

- (1) The Minister may, in writing, authorise a licensed bookmaker to accept or make bets—
- (a) by telephone, or
- (b) electronically by means of the Internet, subscription TV or such other on-line communications systems as may be approved by the Minister,

while the bookmaker is at a licensed racecourse or on premises approved under section 16A as premises at which the bookmaker may conduct telephone or electronic betting.

The premises at which the bets were taken were the authorised premises.

The plaintiff had received written authorisation from an authorised delegate of the Minister to conduct telephone betting from those premises, as follows:

“BOOKMAKER TELEPHONE BETTING AUTHORITY

In accordance with the provisions of Part 3, Division 1 (Authorised telephone or electronic betting) of the Betting and Racing Act 1998, I [the Minister’s delegate] hereby authorise David Baxter to accept or make bets by telephone while:

...

- operating from your Racing NSW approved premises at Suite 1, 185 Gloucester Street, The Rocks NSW 2000.”

(emphasis in original)

Further:

Each bet was taken by a registered bookmaker’s clerk;

Each bet was taken at the premises; and

Each bet was recorded.

As I have already indicated, I do not accept that there was any onus on the plaintiff to prove that this occurred in respect of each bet. To the extent that the defendant wished to prove that it did not and that the bets were taken contrary to the authority, that was a matter for the defendant to prove.

The defendant submits that the authority granted under s 16 is directed only to the licenced bookmaker and is not a general permission for another person or entity to conduct the bookmaker’s betting operation. Further, as s 16(9) provides that a bet made or accepted by a licenced bookmaker by telephone or electronically is taken to be made or accepted at the place where the bookmaker is located when the bet is made or accepted, the location of the bookmaker at the time of acceptance is said to be “a statutory fact”. The defendant submits that the plaintiff

must prove how the acts and location of the bookmaker's clerks are to be attributed to the plaintiff for the purposes of s 16. Again, I reject the suggestion that in order to enforce a debt the plaintiff must prove what the defendant describes as a "statutory fact".

However, the point is, according to the defendant, whilst the Minister authorises a licenced bookmaker to accept or make bets by telephone or electronically, a bookmaker's clerk does not become the holder of the s 16 authority. The defendant further submits that the Racing NSW Rules do not permit a freestanding agency arrangement, by which a separate corporate identity conducts a separate betting operation for a licenced bookmaker.

Whether the defendant relies on s 8 or s 9 of the Unlawful Gambling Act, he has put in issue whether the plaintiff was accepting the defendant's bets in accordance with the authority granted to the plaintiff pursuant to s 16 of the Betting and Racing Act.

The plaintiff is a licenced bookmaker. As set out in s 16, he thus may be authorised to accept or make bets by telephone, either at a licenced racecourse or at premises approved under s 16A. The premises where the bets were taken were approved under that section. Importantly, as set out in s 16(9):

A bet made or accepted by a bookmaker by telephone or electronically is taken to have been made or accepted at the place where the bookmaker is located when the bet is made or accepted.

As I have previously set out, a "bookmaker" is defined in the Betting and Racing Act to include a bookmaker's clerk, and as s 16(9) deems a bet to be made by "a bookmaker by telephone" as being made where the bookmaker is located when the bet is made or accepted, it follows that the acceptance of the bet by a bookmaker's clerk whilst he or she was at the authorised premises means that the bet is taken to have been made or accepted at those premises.

It also follows that, having regard to the definitions of "licenced bookmaker" and "bookmaker" and s 16(9), it must be that persons other than the actual licenced bookmaker are permitted to take bets. This rather detracts from the defendant's proposition that in relying on registered clerks to take the bets, the plaintiff was acting contrary to the terms of the approval.

Further, the defendant's submission, that a separate corporate identity was conducting a separate betting operation for the plaintiff (meaning I assume, that the defendant was not actually placing bets with the plaintiff but someone else), is inconsistent with the following:

When the defendant rang, the bookmaker's clerk answered the phone with the words, "Dave Baxter, phone betting", plainly identifying that it was the plaintiff who was providing the wagering service;

Although the plaintiff had a bet back arrangement, it was the plaintiff who became responsible to the defendant should the defendant win and it was the defendant who became responsible to the plaintiff should the defendant not win on the bet placed;

The records of the bets were held by the plaintiff, weekly statements were provided by the plaintiff to the defendant and payments were made by the defendant to the plaintiff; and

The contract was between the plaintiff and the defendant (the defendant does not suggest to the contrary but merely suggests that the contract was unenforceable).

None of this supports the defendant's assertion that Tarpin was conducting a separate betting business and that the defendant was dealing with Tarpin in the sense of placing bets with Tarpin rather than the plaintiff.

Further, nothing in the plaintiff's bookmaker licence or in the authority granted to the plaintiff under s 16 of the Betting and Racing Act to conduct telephone betting suggests that the only permissible way of providing the telephone betting service was for the plaintiff to personally answer each phone call. Nothing in the licence or authorisation would lead to the conclusion that the plaintiff was prohibited from engaging bookmaker's clerks not actually employed by him. Apart from anything else, this would place an unnecessary restriction on the ability of the plaintiff to conduct his business.

The plaintiff obtained a bookmaker licence as a sole trader, rather than through a corporate entity. Construction of the legislation in such a way which would preclude a sole trader from ever utilising other persons to assist in the running of their business would place a significant restriction on a person such as the plaintiff. Nothing in the legislation points towards that limitation.

Significant emphasis was placed on the principles of statutory construction by the defendant, reference being made to for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 and *Forrest v Forrest Pty Ltd v Wilson* (2017) 262 CLR 510; [2017] HCA 30 but neither of those well-known cases support the essential proposition being relied on by the defendant.

Nor is there anything in the Betting and Racing Act or Unlawful Gambling Act, read together or individually as a whole, which suggests that the plaintiff could not recover a debt owing to him in proceedings such as this without firstly establishing that he has complied with all aspects of the legislation governing his conduct. This proposition is also inconsistent with what has been said in cases such as *Thorn v Cavanagh* and *Burns v Joseph*, to which I have already referred.

In any event, I am not satisfied that, in conducting his business in the way that he did, the plaintiff was acting contrary to the terms of his approval or the Unlawful Gambling Act.

The Interactive Gambling Act

The defendant asserts that in providing services to him, the plaintiff was acting contrary to s 15C of the Interactive Gambling Act and that the plaintiff has not established the exemption available under s 15D of that Act.

I should emphasise that the primary submission of the defendant was that the plaintiff is not “the person” as referred to in s 15C of the Interactive Gambling Act, because the relevant “person” is Tarpin rather than the plaintiff. As such, the primary submission was that s 15C does not apply at all to the plaintiff, but rather, applies to Tarpin. This relates back to the issue that I have just considered and rejected in respect of the Unlawful Gambling Act.

The defendant’s contention in respect of the Interactive Gambling Act is an alternative contention. That is, if the defendant is not successful in its contention about a lack of authority, then it contends that the plaintiff’s conduct was contrary to s 15C. I will deal with s 15C firstly.

Section 3 of the Interactive Gambling Act provides a simplified outline of the Act and is in the following terms:

3 Simplified outline of this Act

- This Act imposes the following prohibitions:
 - (a) a prohibited interactive gambling service must not be provided to customers in Australia;
 - (b) unlicensed regulated interactive gambling services must not be provided to customers in Australia;
 - (c) an Australian-based prohibited interactive gambling service must not be provided to customers in designated countries;
 - (ca) credit must not be provided to customers of certain interactive wagering services;
 - (cb) certain interactive wagering services must not accept or offer to accept payment using specified methods, including credit cards and digital currency;
 - (d) prohibited interactive gambling services must not be advertised;
 - (e) unlicensed regulated interactive gambling services must not be advertised;
 - (f) licensed interactive wagering services must not be provided to an individual who is registered in the National Self-exclusion Register.

Section 5(1) of the Interactive Gambling Act provides a general prohibition, in the sense that a prohibitive interactive gambling service is a gambling service where:

5 Prohibited interactive gambling services

- (1) For the purposes of this Act, a prohibited interactive gambling service is a gambling service, where:
 - (a) the service is provided in the course of carrying on a business; and
 - (b) the service is provided to customers using any of the following:
 - (i) an internet carriage service;

- (ii) any other listed carriage service;
- (iii) a broadcasting service;
- (iv) any other content service;
- (v) a datacasting service.

Section 5(3) excludes certain services from being a prohibited interactive gambling service. A telephone betting service is excluded from the operation of s 5(1).

Section 8AA defines a telephone betting service to include where “the service is provided on the basis that dealings with customers are wholly by way of voice calls made using a carriage service”.

Suffice to say that the services provided by the plaintiff would not fall within s 5. It was not asserted that they did.

However, the Interactive Gambling Act contains other prohibitions. The defendant relies on s 15C, which is in the following terms:

15C Prohibitions relating to credit and digital currency for certain interactive wagering services

Offences

- (1) A person commits an offence if:
 - (a) the person intentionally provides a regulated interactive gambling service that is a wagering service; and
 - (b) either:
 - (i) the person provides, or offers to provide, credit in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia; or
 - (ii) the person facilitates or promotes the provision of credit, by a third person, in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia.

Penalty: 500 penalty units.

(1A) A person commits an offence if the person:

- (a) intentionally provides a regulated interactive gambling service that is a wagering service; and
- (b) accepts, or offers to accept, payment in connection with the service using a method mentioned in subsection (4A) from a customer, or prospective customer, of the service who is physically present in Australia.

Penalty: 500 penalty units.

- (2) A person who contravenes subsection (1) or (1A) commits a separate offence in respect of each day (including a day of conviction for the offence or any later day) during which the contravention continues.

Civil penalty provisions

- (3) A person who provides a regulated interactive gambling service that is a wagering service must not:
- (a) provide, or offer to provide, credit in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia; or
 - (b) facilitate or promote the provision of credit, by a third person, in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia.

Civil penalty: 750 penalty units.

(3A) A person contravenes this subsection if the person:

- (a) provides a regulated interactive gambling service that is a wagering service; and
- (b) accepts, or offers to accept, payment in connection with the service using a method mentioned in subsection (4A) from a customer, or prospective customer, of the service who is physically present in Australia.

Civil penalty: 750 penalty units.

- (4) A person who contravenes subsection (3) or (3A) commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant civil penalty order is made or any later day).

Methods of payment

(4A) For the purposes of paragraphs (1A)(b) and (3A)(b), the methods of payment are as follows:

- (a) a credit card;
- (b) an account, service or facility in which payment is made from a credit card linked to the account, service or facility;
- (c) digital currency;
- (d) a method of a kind determined by the Minister by legislative instrument for the purposes of this paragraph.

Exceptions

- (5) Subsections (1), (1A), (3) and (3A) do not apply if the person:
- (a) did not know; and

(b) could not, with reasonable diligence, have ascertained;

that the customer, or prospective customer, as the case may be, was physically present in Australia.

Note: A person who wishes to rely on this subsection bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act).

(5A) Subsections (1A) and (3A) do not apply if the person:

(a) did not know; and

(b) could not, with reasonable diligence, have ascertained;

that the person was accepting, or offering to accept, payment using a method mentioned in subsection (4A).

Note: A person who wishes to rely on this subsection bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act).

(6) For the purposes of subsection (5), in determining whether the person could, with reasonable diligence, have ascertained that the customer, or prospective customer, as the case may be, was physically present in Australia, the following matters are to be taken into account:

(a) whether the customer, or prospective customer, as the case may be, was informed that Australian law prohibits the provision of credit to, or payment by the methods mentioned in subsection (4A) from, customers, or prospective customers, who are physically present in Australia;

(b) whether the person required customers to provide personal details and, if so, whether those details suggested that the customer was not physically present in Australia;

(c) whether the person has network data that indicates that customers were physically present outside Australia:

(i) when the relevant customer account was opened; and

(ii) throughout the period when the service was provided to the customer;

(d) any other relevant matters.

Extended geographical jurisdiction of offences

(8) Section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (1A).

A “regulated interactive gambling service” is defined in s 8E to include a “telephone betting service” within the meaning of s 8AA. “Wagering service” is also defined in s 4 to mean a service covered by pars (a) or (b) of the definition of “gambling service”. “Gambling service” is defined, also in s 4 to include a service for the placing, making, receiving or acceptance of bets.

Much of the focus during the case was on s 15D, which is in the following terms:

15D Exception—provider’s annual wagering turnover less than \$30 million

- (1) Subsections 15C(1) and (3) do not apply to conduct engaged in by a person at a particular time (the relevant time) in a financial year (the current financial year) in relation to a regulated interactive gambling service if:
- (a) the service is a telephone betting service; and
 - (b) both:
 - (i) the conduct involves providing, or offering to provide, credit in connection with the service to a customer, or prospective customer, of the service; and
 - (ii) dealings with the customer, or prospective customer, as the case may be, in relation to providing, or offering to provide that credit are wholly by way of one or more voice calls; and
 - (c) in a case where:
 - (i) the person is not a member of a related company group at the relevant time; and
 - (ii) the person was a wagering service provider throughout the last financial year that ended before the relevant time;the wagering turnover of the person for that financial year was less than \$30 million; and
 - (d) in a case where:
 - (i) the person is not a member of a related company group at the relevant time; and
 - (ii) the person was not a wagering service provider throughout the last financial year that ended before the relevant time;it is reasonably likely that the wagering turnover of the person for the current financial year will be less than \$30 million; and
 - (e) in a case where:
 - (i) the person is a member of a related company group at the relevant time; and
 - (ii) the person was a wagering service provider throughout the last financial year that ended before the relevant time;the total wagering turnover of the members of the group for that financial year was less than \$30 million; and

(f) in a case where:

(i) the person is a member of a related company group at the relevant time; and

(ii) the person was not a wagering service provider throughout the last financial year that ended before the relevant time;

it is reasonably likely that the total wagering turnover of the members of the group for the current financial year will be less than \$30 million; and

(g) in a case where, during the whole or a part of the last financial year that ended before the relevant time, the person had one or more employees whose duties involved the provision of wagering services—during the whole or a part of that financial year, at least one of those employees performed those duties at a racecourse in Australia; and

(h) in a case where:

(i) the person is an individual; and

(ii) the person did not, at any time during the last financial year that ended before the relevant time, have any employees whose duties involved the provision of wagering services;

during the whole or a part of that financial year, the person provided wagering services at a racecourse in Australia; and

(i) the other conditions (if any) determined under subsection (2) have been satisfied.

Note: A person who wishes to rely on this subsection bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act).

(2) The Minister may, by legislative instrument, determine one or more conditions for the purposes of paragraph (1)(i).

(3) For the purposes of this section, voice call means a voice call (within the meaning of section 8AA) that is made using a carriage service.

Plainly, the intent of the exemption under s 15D is to exclude from the operation of s 15C telephone betting conducted by businesses with a turnover of less than \$30 million. Despite the only evidence being that the plaintiffs' turnover was always substantially less than \$30 million, the defendant put the plaintiff's entitlement to rely on s 15D in issue and objected to the evidence relied on by the plaintiff to prove his turnover.

The defendant submitted that the plaintiff had not established his entitlement to rely on s 15D and as such, the provision of wagering services to the defendant contrary to s 15C(1) was unlawful or illegal and, in those circumstances, unenforceable. I accept that should the plaintiff seek to rely on s 15D as an exception to s 15C, the plaintiff must prove the exemption, but s 15D is irrelevant unless the plaintiff is shown to have been acting contrary to s 15C. The defendant bore the onus of establishing that non-compliance.

There are a number of problems with the defendant's reliance on s 15C.

As is apparent from s 15C(1)(b), it is only an offence to provide a regulated interactive gambling service to a customer who is physically present in Australia, and even then, having regard to s 15C(5), it would only be an offence if the plaintiff did not know and could not with reasonable diligence have ascertained that the defendant was physically present in Australia.

Not only did the defendant not adduce any evidence to establish that he was physically present in Australia when provided with credit in connection with the service, the defendant pleaded that at all material times during the relevant period, he engaged the services of the plaintiff when he was physically located in London, elsewhere in the United Kingdom, or in Queensland (pleaded to be outside New South Wales).

It is difficult to understand how the defendant could have asserted that the plaintiff was guilty of conduct which would constitute an offence under s 15C of the Interactive Gambling Act whilst pleading in his further amended defence facts which would mean that the plaintiff was not so guilty of such conduct.

The defendant's answer to this problem, as identified in closing submissions, was as follows:

To submit that the plaintiff must prove that he falls within an exception, otherwise he is deemed to be guilty of an offence contrary to s 15C. This is evident from the following exchange:

"NOLAN: He must prove that he falls within the exceptions to the offences.

HIS HONOUR: Otherwise, he's deemed to be guilty of the offences?

NOLAN: That's right.

HIS HONOUR: In effect, he has to prove that he's not guilty of a criminal offence, by establishing that he falls within an exception?

NOLAN: Yes.

HIS HONOUR: Otherwise, is there some deeming provision that says that a person is guilty of a criminal offence if he doesn't prove he's otherwise excluded from the criminal offence?

NOLAN: It works the other way. He is guilty of a criminal offence if he does it."

To submit that it is incumbent upon the plaintiff to prove the exception in order to be able to enforce the debt, as follows:

“NOLAN: So, the party is guilty of a criminal offence unless they fall within the exception. My submission is that it’s incumbent upon them to prove the exception in order to be able to enforce the debt.”

To fall back on the primary submission that Tarpin was guilty of a criminal offence and the plaintiff must prove that Tarpin was not guilty of a criminal offence, as follows:

“HIS HONOUR: Are you asserting that Tarpin was guilty of [a] certain criminal offence?”

NOLAN: I don’t have to assert that. I said the plaintiff has to prove that Tarpin -

HIS HONOUR: Was not?

NOLAN: Correct.

HIS HONOUR: So, just to repeat that for everyone. The plaintiff has to prove that Tarpin was not guilty of a criminal offence.

NOLAN: I’m not putting it in this language, with respect, your Honour. I’m using -

HIS HONOUR: You said you were.

NOLAN: No, I am not. I keep trying to redirect the way - your Honour is putting to me a premise which I reject.

HIS HONOUR: Because most of your submissions have been focussed on who bears the onus of proof because you have not called any evidence -

NOLAN: Precisely.”

To assert that the plaintiff accepted that s 15C of the Interactive Gambling Act is engaged in their reply, as if to operate as an admission by the plaintiff that the defendant was physically present in Australia, as follows:

“NOLAN: I say that 15C is engaged by virtue of the fact that he was that there was a knowledge and acceptance that he was an Australian.”

HIS HONOUR: Who accepted that?

NOLAN: The plaintiff.

HIS HONOUR: When?

NOLAN: They accept that 15C is engaged in their reply. They accept that so we’re not - we’ve joined issue on it all.

HIS HONOUR: I don’t think they do, Ms Nolan.

NOLAN: Pardon?

HIS HONOUR: I don't think they do. Don't worry what they accept. I'm asking what you're asserting. Are you asserting that -

NOLAN: That he was present in Australia.

HIS HONOUR: You assert that at all times the defendant placed bets he was in Australia?

NOLAN: Yes.

HIS HONOUR: Have you adduced evidence to that effect?

NOLAN: Pardon?"

HIS HONOUR: Have you adduced -

NOLAN: Have I adduced evidence -

HIS HONOUR: - to the effect that at all times -

NOLAN: No, I haven't because it is accepted that 15C is engaged.

HIS HONOUR: You haven't adduced any evidence to the effect that your client was even once physically in Australia when placing bets but you say that you're not required to do that? Who's required to do it, then?

NOLAN: It has been accepted that 15C is engaged.

HIS HONOUR: Where is that?

NOLAN: He was physical[ly] present in Australia."

To assert that the words "physically present in Australia" operate as some form of carve-out, similar to s 15D, as follows:

"NOLAN: Thank you, your Honour. I'm grateful for the time because it allowed me to collect my thoughts and remember what my argument was and, your Honour is again astute to pick this point up. It's probably something I should fairly address. I did have an argument for it, and that's this. It falls actually within the same architecture of my original point which is it's in the language of an exception. So it is also a carve out similar to s 15D from the operation of the section. It provides a basis upon which the carve out works. So why it matters is because my client put in issue his location and, so therefore, if the exception were to apply to exclude some of the wagers, it fell on my burden of proof argument on the plaintiff. That's how I say the architecture of the Act works."

To assert that the plaintiff bore the onus of proving that the defendant was physically in Australia each time he placed a bet, as follows:

"HIS HONOUR: ... So when it says, 'Who is physically present in Australia' that's a condition to the operation of s 15C. Are you asserting that the plaintiff must prove that the defendant was physically in Australia?"

NOLAN: Yes, I'm submitting that by virtue of the fact that it also provides a statutory carve out to the -

HIS HONOUR: No, don't worry about the exception. I'm not asking you about s 15D.

NOLAN: No, I'm saying s 15C(5) is a statutory carve out. So it does the same. So within the statutory architecture, it does the same work. My client, having put on his sworn defence that he was in various places, to the extent to which the carve out were to apply, it forms part of the burden of proof."

In the end, the position got to the following in closing submissions:

"HIS HONOUR: Just to finish it off once and for all, who is, on your case, required to produce evidence about where the defendant was when he was placing bets?"

NOLAN: The plaintiff.

HIS HONOUR: Thank you.

NOLAN: Because I reject the plaintiff's characterisation of this case as an affirmative illegality case, with the result that the defendant bears the burden of proving that the wagers were illegal. That's not how we put the case. The characterisation should be rejected because it's wrong, because these aren't criminal proceedings. These are proceedings in debt, and the enforceability of that debt depends on certain matters, so prima facie this case is within 15C."

I am unable to read the defendant's pleading that the plaintiff failed to comply with s 15C of the Interactive Gambling Act other than as a positive assertion that the plaintiff was engaged in conduct contrary to s 15C. The suggestion during closing submissions that the defendant was not running an unlawfulness case, but rather was running an enforceability case, made no sense. The only basis on which it was asserted that the contract was unenforceable was because of a failure to comply with the offence provisions in the legislation whilst providing the services.

Nor do I accept that the requirement that the defendant be physically present in Australia operates as "a carve-out" or exception to s 15C and that the plaintiff bears the onus of establishing that he was not physically in Australia. Again, this would be absurd. It would require the plaintiff to adduce evidence of where the defendant was every time he placed a bet with the plaintiff.

The defendant did not adduce any evidence to support his reliance on s 15C. Indeed, as I have already indicated, the defendant's pleading is inconsistent with any failure on the part of the plaintiff to comply with the requirements of s 15C. I reject the submission that the defendant, having raised the issue in his further amended defence and opening submissions, then bore no onus to adduce evidence to support his contention and that it was incumbent upon the plaintiff to adduce evidence to establish that he satisfied s 15C whilst providing services to the defendant.

The defendant has not established that at any time when the plaintiff was providing wagering services to the defendant he was acting in breach of s 15C.

This finding rather renders unnecessary to consider the defendant's further two arguments, being that:

Non-compliance with s 15C renders the agreement unenforceable and the plaintiff liable to repay sums already paid; and

The plaintiff has not established the entitlement to rely on the exemptions set out in s 15C.

However, I will deal with the second matter, being reliance on s 15D.

The plaintiff submits that he was exempt from the operation of s 15C because his wagering turnover for each financial year for the relevant period was less than \$30 million. In support of that contention, the plaintiff relied on:

The plaintiff's own evidence, being a calculation based on the total bets placed by all of his customers during each financial year;

All of the betting account statements issued by the plaintiff to his customers during the relevant period (redacted to anonymise the customers); and

The expert report of Mr Stewart, who undertook the analysis in some detail (coming to slightly different amounts to those of the plaintiff).

As I have indicated, the defendant objected to all of this evidence, but I admitted it. Despite that, the defendant still submitted that the plaintiff had not proved that which he needed to prove.

The basis of that submission was that, as set out in s 26GC of the Betting and Racing Act, the plaintiff was required to keep certain records. The defendant submitted that being required to keep certain records meant that the plaintiff must rely on those records for the purposes of proving the debt. As the plaintiff had not tendered documents such as audited financial statements, then having regard to the highly regulated nature of the industry in which the plaintiff operates his business, the debt had not been proved.

No authority was cited for the proposition that in circumstances in which a business is required to keep certain records (styled "the statutory records"), it could only prove its loss in civil litigation through those statutory records. There is nothing in any of the legislation which would support such a requirement. Further, the defendant did not plead that the plaintiff was so required. This is surely a matter which would catch the plaintiff by surprise if it was not pleaded (as it did). That is, to the extent that it was necessary for the plaintiff to tender the so-called statutory records to prove the loss, I would infer that those records would have been available and could have been tendered. However, the plaintiff complained that it was not pleaded and he was not on notice of any suggestion that he should be doing so. If the establishment of the debt depended upon this point raised by the defendant, I would have:

Precluded the defendant from taking the point, as it was not pleaded; and

Rejected the submission in any event.

The debt was proved in the ordinary way through a statement of account. The plaintiff's wagering turnover (having regard to the definition of wagering turnover in s 4 of the Interactive Gambling Act) was proved both through the plaintiff and the expert accountant. Further, although contrary to the statement made in court on behalf of the defendant that there were many errors in the documents, even if those errors had been raised with the plaintiff or the expert accountant, they would have needed to be significant, bearing in mind the substantial difference between the wagering turnover each year and the \$30 million limit in s 15D (either on the plaintiff's figures or those of Mr Stewart, the expert accountant). In one year, the difference was over \$29 million. The smallest difference was nearly \$12 million.

The amount of the turnover during the relevant period was as follows:

Financial year

Plaintiff's calculation of turnover

Expert's calculation of turnover

2019-2020

\$48,083

\$48,083

2020-2021

\$18,213,033

\$18,235,100

2021-2022

\$17,356,687

\$18,149,152

2022-2023

\$3,459,931

\$2,643,399

The other issue raised by the defendant as a matter of statutory construction was that s 15D(1)(b) was not established, because it was necessary for the plaintiff to prove both subss (1)(b)(i) and (1)(b)(ii). That is, the conduct involved providing or offering to provide credit in connection with the service to a customer and "dealings" with the customer in relation to providing or offering to provide that credit wholly by one or more voice calls.

There is no evidence that the dealings between the plaintiff and the defendant in terms of making and accepting the bets were other than by voice calls. However, the defendant submitted that when the plaintiff sent emails and WhatsApp messages to the defendant about amounts

outstanding, that meant that some of the dealings were not by voice call. In other words, when the plaintiff notified the defendant that he was required to make a payment, he did so by email or WhatsApp message. The defendant submits that by doing so, that is, rather than by doing so by voice call, the plaintiff's dealings with the defendant were not all by voice call.

Again, I reject that submission. "Dealings", when referred to in s 15D(1)(b)(ii), is a reference to the making and taking of the bets as part of the wagering service. The proposition that once the licenced bookmaker corresponds with the person making the bet about payment of amounts outstanding takes the matter out of the exemption makes no sense.

In the circumstances, I would have accepted that s 15D applied such that the plaintiff was exempt from complying with s 15C in any event.

Further, even if the defendant had established that the plaintiff was acting contrary to s 15C that does not necessarily render the contract unenforceable.

Section 69A of the Interactive Gambling Act is in the following terms:

69A Regulations about unenforceability of agreements relating to illegal interactive gambling services

Agreements

- (1) The regulations may provide:
 - (a) that an agreement has no effect to the extent to which it provides for the payment of money for the supply of an illegal interactive gambling service; and
 - (b) that civil proceedings do not lie against a person to recover money alleged to have been won from, or paid in connection with, an illegal interactive gambling service.

Deadline for making regulations

- (2) The Minister must take all reasonable steps to ensure that regulations are made for the purposes of this section within 6 months after the commencement of Part 2.

Definition

- (4) In this section:

agreement means an agreement, whether made orally or in writing.

The defendant did not suggest that there was any regulation enacted consistent with s 69A(1). In circumstances in which the legislature reserved for itself the right to declare that contracts entered contrary to the Interactive Gambling Act would be unenforceable but has not done so, I would not have accepted that non-compliance with s 15C rendered the contract unenforceable.

It is unnecessary to say anything further as the issue does not arise.

Determination

In the circumstances, none of the matters raised by the defendant provide any basis for resisting the plaintiff's claim. There is no suggestion that the plaintiff did not place the bets. I am satisfied that as pleaded, there was an implied term that the defendant would pay for any losses arising from his betting activities. Indeed, this was accepted by the defendant during closing submissions.

Cross-claim

The defendant must fail on his cross-claim as he has not established that the contract was illegal or unenforceable.

Interest

The plaintiff is entitled to interest pursuant to s 100 of the Civil Procedure Act 2005 (NSW), which I calculate as follows:

Period

Days

Interest rate

Debt amount

Interest

24 October 2022 to 31 December 2022

69

4.85%

\$1,098,515.94

\$10,071.74

1 January 2023 to 30 January 2023

181

7.10%

\$1,098,515.94

\$38,676.79

1 July 2023 to 31 December 2023

184

8.10%

\$1,098,515.94

\$44,855.57

1 January 2024 to 30 June 2024

182

8.35%

\$1,098,515.94

\$45,737.39

1 July 2024 to 31 December 2024

184

8.35%

\$1,098,515.94

\$46,240.00

1 January 2025 to 30 June 2025

181

8.35%

\$1,098,515.94

\$45,846.08

1 July 2025 to 31 December 2025

184

7.85%

\$1,098,515.94

\$43,471.13

1 January 2026 to 4 September 2026

247

7.60%

\$1,098,515.94

\$56,496.83

TOTAL:

\$331,395.53

Orders

Therefore, I make the following orders:

Judgment for the plaintiff in the sum of \$1,429,911.47.

The defendant's cross-claim is dismissed.

The defendant is to pay the plaintiff's costs.

I remind the parties that should any party seek to vary these orders an application must be made within 14 days.

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Decision last updated:

04 September 2026

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Prepared on 26 October 2026 · Esheria