JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 27 of 1969

BEFORE: The Hon. Mr. Justice Luckhoo, (P. Ag.).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

B E T W E E N OFF-COURSE BETTING (1955) LTD. - DEFENDANT/APPELLANT

A N D JAMES CHEN - PLAINTIFF/RESPONDENT

H.G. Edwards Q.C., and Dr. L.G. Barnett for the Appellant.

H. DaCosta Q.C., and R.N.A. Henriques for the Respondent.

6th, 7th, 8th December 1971
March 24, 1972

EDUN, J.A.

At the trial of this case now under appeal, the plaintiff/respondent (hereinafter referred to as the "respondent") claimed from the defendant/appellant company (hereinafter referred to as the "appellant co.") the sum of £4,206.19.2 as the amount due by the appellant co. on a wager made by the respondent with the appellant co., on the results of horse-racing in England on July 2nd, 1966. On the pleadings, the appellant co. admitted that it carried on business of bookmaking, had a "bookmaker's permit" in accordance with the provisions of The Betting, Gaming and Lotteries Act, No.34 of 1965 (hereinafter referred to as the "Act No.34 of 1965"), at all material times had a licensed betting office at Main Street, Lionel Town in the Parish of Clarendon, and that Gloria Chen, wife of the respondent, was manager of that office.

The case for the respondent was that programme voucher books and "clock" bags came from the head office of the appellant co., for Gloria Chen and he had many times placed bets with her, acting as agent of the appellant co. The respondent carried on business of a grocer on premises separate from the betting shop but he was in the habit of keeping books of betting vouchers at his grocery and writing them up with bets for himself and for other persons, at his grocery. Gloria Chen said she thought she could write bets anywhere. The collector from the appellant co., sometimes saw

books of betting vouchers at the grocery. The respondent had a telephone at his grocery, there was none at the licensed betting shop and persons were in the habit of placing bets by telephone with the appellant co., through the respondent or his wife.

A bet evidenced by betting voucher No. 3119 which the respondent placed with appellant co., and won the amount claimed, was written up by Gloria Chen on Friday night, July 1st, 1966 at the grocery. Duplicates of that voucher with others, some of which resulted in losses, were placed in the appellant co.'s "clock" bag and "closed off" on Saturday July 2, 5 or 7 minutes before the scheduled time. The clock mechanism on the bag ensured that no bets could be placed in the bags after the results of the races were known. A collector from the appellant co., later collected the bags, took in all sums due on the original vouchers and was expected to pay winning bets as soon as the results were known and stated by the appellant co.. On Tuesday, July 5, however, the respondent was told by a director of the appellant co., that his bet was a bogus one; the police were called in and they had the respondent "twisted around" for over 4 hours. Conspiracy to defraud between the respondent and Gloria Chen was alleged but no prosecution resulted, nor was the respondent paid his winnings.

At the close of the case for the respondent, the allegation regarding conspiracy and fraud was withdrawn by counsel for the appellant co., and the learned trial judge accordingly struck it out from the pleadings. The appellant co., led no evidence on its behalf but maintained that the wagering transaction was illegal and so void because the formation of the contract was expressly or by necessary implication prohibited by the provisions of Act No.34 of 1965 and the Regulations thereunder, in that

(a) the betting transaction was pool betting, contrary to s.4 (1)(a), and

(b) if the betting transaction was not pool betting that the bet was received or negotiated in unlicensed premises, to wit, the grocery, contrary to ss.4(1)(b) and 8 of the Act No.34 of 1965.

The learned trial judge rejected the submissions on the point of illegality and there being no other issue and no evidence on behalf of the appellant co., to consider, gave judgment for the respondent in the sum of £4,206.19.2 as claimed with Costs to be taxed or agreed upon. Against that

judgment, the appellant co., has appealed.

Pool Betting. In this case, the transaction does not form any part of a pool betting operation because an essential feature of a wager is that there must be two parties, either of whom is capable of winning or losing; it follows that there must be no more than two parties or two groups of parties to the contract: Ellesmere v. Wallace (1929) 2 Ch 1. By s.3 of the Act No.34 of 1965 bets shall be held to be pool betting where a number of persons make bets and the winner's share was

(a) dependent upon the stake money agreed to be paid by all those persons engaged in the transaction, or
(b) determined by the proportion of winners among all those persons, or
(c) dependent upon the discretion of the operator.

Illegality of the transaction. Counsel for the appellant co., among other arguments and citations relied upon the decision of the Court of Appeal in Paramount Betting Ltd. v. Bertram Brown, Res. Mag. Courts Civil Appeal No.34 of 1969 delivered on March 12, 1971. On the question of the scope and purpose of the Act No.34 of 1965, it is there stated:

> "The Licensed Betting Office Rules, 1965 .... clearly indicate the concern of the legislature for the protection of persons attending licensed betting offices from being importuned by the bookmakers directly or indirectly into enterin_ into betting transactions .... While it is true that advantage is taken in the Act to enact revenue producing provisions it is at least equally the case that the protection of the betting public is specifically sought to be ensured and not only incidentally so. The Law indeed is similar in its scope and purpose to the law relating to moneylending both in England and locally .... Section 2(2) of the 1900 Act provided that breach of s.2(1)(b) of that Act rendered the offending money-lender liable to a penalty on summary conviction thereof ...."

The judgment in Paramount Betting Ltd. proceeded to follow and apply the decision of Cornelius v. Phillips (1918) A.C.205 where the Law Lords were of unanimous opinion in dealing with the provisions of s.2(1)(b) of the Moneylenders Act 1900 clearly indicated that as a general rule breach of a statutory provision which relates to the effecting of a transaction renders the transaction itself void and incapable of conferring any rights.

On the other hand, counsel for the respondent submitted that the positions in the United Kingdom and in Jamaica concerning wagers are different

and questions as to public policy must be regarded in an entirely different light. Betting transactions are legal in Jamaica and the decisions of Parchment v. Reynolds (1917) Clark's Reps. p.15 and Watson v. Sigarny (1946-1950) 5 J.L.R., 148 establish clearly that a contract of wager on a horse race is not voidable on the grounds of public policy and the Courts were not disposed to create "a new head of law founded on a new policy."

First of all, is it correct to approach the problems in the instant case by following the decision in Cornelius v. Phillips (supra)? Assuming it is, section 2 (1)(b) of the Moneylenders Act 1900 provides:

> "A moneylender ... shall carry on the moneylending business ... at his registered address or addresses, and at no other address."

And by s.2(2)

> "If a moneylender ... carries on business ... elsewhere than at his registered address, or fails to comply with any other requirement of this section" ... shall be liable to a fine or imprisonment.

These sections were considered by a strong court of five Law Lords in the House of Lords in Kirkwood v. Gadd (1910) A.C. 422. In that case, Dobson wrote to the appellant Kirkwood stating that Gadd required a loan of £100 and giving his furniture as security. In due course, Kirkwood's agent Sandoe, called upon the respondent at Ilford, terms of the proposed loan were arranged, Sandoe drew up a bill of sale and there advanced and paid to the respondent Gadd the sum of £100 being the consideration for the bill of sale. Default was made in fulfilling the terms of the bill of sale, whereupon Kirkwood took possession of the goods assigned by it. Gadd then applied to a judge to restrain the appellant's proceedings, on the ground that he had carried on business at an address other than the registered address. The judge refused the application but a court of appeal granted the application. On appeal to the House of Lords it was held that in the circumstances of the case, there was no contravention by the moneylender of s.2(1)(b) of the Act of 1900.

Lord Loreburn L.C. said at pp. 423 and 424

> "This enactment contains a positive direction, in that the man shall carry on the business at the registered address. It also contains a negative one, that he shall not carry on business elsewhere ..... If, however, the moneylender employs an agent to frequent markets, or call upon individuals in order to procure borrowers, and thereupon a moneylending transaction, even a single transaction, goes through without the borrower

> being brought into communication with the registered address till after the transaction is completed, it might amount to carrying on business elsewhere than at his registered address. There may be many cases betwixt and between. It is always a question of fact, the answer to which depends on the circumstances of the case. I can see that nice points may arise in applying this section of the Act. It must be so inevitably when general language of this kind is used in the Act. But such points are not matter of law if there is evidence to support the conclusion. They are points of fact and should be so regarded."

The same set of facts which Lord Loreburn spoke of, that is, where a person was induced to deal with a moneylender without the identity of the moneylender or his registered address being known came up for consideration by five Law Lords in Cornelius v. Phillips (supra) in the House of Lords. In that case, the facts which were not disputed were that on Nov. 24, 1914, the appellant at the invitation of a friend, entered an hotel in Formby and met the respondent whom he had not before seen. The respondent was a moneylender, properly registered and carrying on moneylending business at his registered address at 33 Crown Street, in the city of Liverpool. At that meeting an ordinary moneylending transaction was completed. The respondent drew a cheque for £200 payable to the appellant or order, the appellant signed a promissory note promising to pay the respondent or order, the sum of £300 for value received 6 months after date. It was held that the moneylending transaction was carried on with a registered moneylender at an address other than his registered address and was unenforceable. Lord Dunedin at p.211-212, said:

> "Each case depends on its own circumstances. Kirkwood v. Gadd only decided that if a particular transaction is substantially arranged and started at the moneylender's place of business, the mere fact that certain incidental proceedings are carried through at another place does not make the moneylender carry on business at that other place. It was said that this was an isolated transaction. That fact is not conclusive one way or other, though it may in particular circumstances lead to an inference decisive of the question. Here I think the respondent only appeared at the Blundell Arms Hotel as a moneylender for the purposes of a moneylender, and in fact acted as, and so carried on the business of, a moneylender."

Lord Atkinson sat as a member of the House in both cases and in the Cornelius's Case where he agreed with the majority, at pp. 214-215 said:

"Here the very mischief against which the statute of 1900 was directed was brought about. The appellant was introduced to the respondent as a person ready to lend money. He was induced to deal with him without knowing whether he was a moneylender or not, and without knowing whether he had a registered office or not. I think that, having regard to all the circumstances of the case, the respondent, by entering into this moneylending transaction on November 24, 1914, at the Blundell Arms Hotel, Formby, did carry on moneylending business at an address other than his registered address within the meaning of s.2, sub.-s.1(b), of the Moneylenders Act of 1900. In Kirkwood v. Gadd it was contended by the persons impeaching the security (1) that every step or stage in a loan transaction must be carried through at the registered address of the lender, and (2) that as the bill of sale given in that case was executed, and the money lent to the borrower handed to him, at his own house, the moneylending business was not carried on at the lender's registered address. This House decided against that contention ...."

Both cases of Kirkwood v. Gadd and Cornelius v. Phillips have clearly decided that the question, whether or not a moneylender is "carrying on business" at his registered address is a question of fact to be decided in each particular case. But if the facts are such that a person who "pencilled" or "wrote up" a bet at a place other than at a licensed betting office, I am of the view that it does not follow as a matter of law, in considering the scope and purpose of the Act No. 34 of 1965, that the effect is to avoid the transaction.

In considering the facts of the instant case, the particular betting transaction was -

1 written up by the respondent's wife, Gloria Chen at the grocery desk on Friday, July 1, 1966.

2 There is no doubt then that Gloria Chen was the agent of the appellant co., and the respondent knew the identity of the person with whom he was contracting.

3 There is no doubt, that there was for the time being in force a licensed betting permit authorising the servant or agent of the holder thereof to use the licensed betting premises for effecting betting transactions. Can it not be said, with reason, that the betting transaction was substantially and in fact arranged and started at the licensed betting office, and that the actual "pencilling" or "writing up" of the betting voucher - was a mere incidental proceeding which took place at the grocery?

4 Unlike the facts, in Paramount Betting Ltd, (supra) there is no evidence -

(a) of fraudulent conspiracy between the respondent and Gloria Chen, or

(b) of the "clock" bag being closed in disobedience of the instructions of the appellant co., so as to lend the inference that the results were known when the bets were placed.

Let us again assume that it is helpful in considering the question now in issue to have regard to the approach taken by the courts in England in moneylending business to decide whether or not the betting transaction in the instant case is void; there is the decision of Re Seed. Ex parte King (1908-10) All E.R. Reprint 779 which also considered section 2(1)(b) of the Moneylenders Act,1900. Phillimore J. said at p. 780:

> "For the purpose of the present case we have not to consider what the moneylender generally does, but what he has done in this case. If he generally carries on business at the proper place, but the particular transaction was carried on at an improper place, it will not stand. On the other hand, if he generally carries on business at improper places, but the particular transaction was carried on at a proper place, it will stand. In other words, the section is to be construed to mean that he shall carry on his moneylending business at his registered address."

If the betting transaction as per voucher 3119 is to be regarded by itself, what reasonable cause can a constable have for believing that the respondent and his wife were committing an offence of frequenting or loitering in a public place, to wit, the grocery for the purposes of betting - where

(a) the wife had a right to be, in her husband's grocery,

(b) the books of betting vouchers were lawfully there - say for safe custody,

(c) moneys were in the grocery but even if the respondent were caught handing over the stake money to his wife, could it ever be said that both of them were frequenting or loitering in their own grocery for the purpose of betting, contrary to section 5 of the Act No.34 of 1965?

The facts and circumstances of the single transaction in the instant case, can be classified as nothing but a domestic or friendly arrangement, between Gloria Chen performing the dual role of a housewife and of an agent for the appellant co. It is extremely difficult to draw a dividing line unless

fraudulent conspiracy is disclosed. But undoubtedly, a legal transaction was concluded between the respondent and the appellant co., as soon as the bet was accepted. Those were the facts before the learned trial judge; that the particular betting transaction was dealt with, substantially directed and controlled by the agent of the appellant co. at the licensed betting premises and that the respondent dealt with the said agent in such circumstances. In my view, the learned trial judge made his findings upon evidence which reasonably supported his conclusion. His findings that the contract was valid and enforceable have not been challenged.

I proceed now to discuss the instant case on the basis that the scope and purpose of the law relating to moneylending are not helpful in deciding the issues in question. That is, to ascertain whether from the provisions of the Act No.34 of 1965, the object was not to vitiate the contract itself but only to impose a penalty As already stated the position in Jamaica is entirely different from that in England as to the law relating to betting transactions. By section 18 of the Gaming Act (U.K.) 1845, "all contracts of agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void", and "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any wager." The English, Betting, Gaming and Lotteries Act 1960 has not altered the effect of s.18 of the Gaming Act 1845: See McAffer v. Scott (1963) S.L.T. 39 and Guest v. Empire Pools (1964) 108 S.J. 98 where it was held that in accordance with the pool betting rules 1962 - 1963, a pool betting transaction gave rise to no legal relationship but binding in honour only.

In a betting transaction, there is no performance but the happening of a certain event and the question of illegality arises in connection with its formation. In the instant case, the plaintiff co., in its defence has alleged that -

(a) "the wagers were made at the grocery - an unlicensed premises, contrary to s.5 of the Act No.34 of 1965 and Rules 1965" and,

(b) "the plaintiff used, caused or knowingly permitted such premises to be used, contrary to section 4(1)(b) of the Act No.34 of 1965", thus relying on the principle

that the respondent could not therefore enforce rights which resulted to him from his own crime, or from an infringement of the law.

Devlin J. (as he then was) stated in St. John Shipping Corporation v. J. Rank Ltd. (1956) 3 A.E.R. 683 at p.685 how that principle fits in with the other principles relating to illegal contracts:-

> "There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time when the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it .... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the party is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class one has to consider not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable."

It is to be particularly noted that the important words used in s.4(1)(b) are "no person shall ... use, or cause or knowingly permit ... any premises for the purpose of effecting ... betting transactions ... and every person who contravenes any of the provisions ... shall be guilty of an offence." And in s.5 "any person frequenting or loitering ... in a public place ... for purposes of betting ... shall be guilty of an offence." There is no doubt that Act No.34 of 1965, is modelled on most of the provisions of the U.K., Act of 1960, but it must be borne in mind when construing the provisions of Act No.34 of 1965 that -

1. there is no provision similar to s.18 of the Gaming Act 1845 which prohibits a wagering contract;
2. a betting transaction in Jamaica gives rise to legal relationship between the contracting parties, and
3. though sections 4(1)(b) and 5 of Act No.34 of 1965 make it an offence for any infringements, guilty knowledge is an essential ingredient; thus recognising that an unwitting infringement of the law is an excuse.

What must happen in a case where a person unwittingly offended against any provisions of the statute, must they "forfeit all rights to justice ... and go elsewhere for it if courts of law will not give it to them?" Neither benefit to the public nor revenue measures are the only considerations upon which the courts must be guided, but ... "the nature and obligation and above all, the general purview and intendment of the Act ..." must be taken into account. As Lord Simmonds said in Cutler v. Wandsworth Stadium Ltd.(1949) 1 A.E.R. 544 at p.548 (cited in Shaw v. Groom (1970) 1 A.E.R. 702 at p.711): "The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted."

Devlin J. in the St. John Shipping Corporation's case (supra) said at p.690 and 691:

> "A Court should not hold that any contract or class of contracts is prohibited by statute, unless there is a clear implication, or 'necessary inference', as Parke B., /in Cope v. Rowlands/ put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of Contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot be expected to be aided in a Court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case - perhaps of such triviality that no authority would have felt it worthwhile to prosecute - a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality. In Vita Foods Products, Inc. v. Unus Shipping Co. Ltd. (1939) 1 A.E.R. 513, Lord Wright said (at p.523):

> 'Nor must it be forgotten that the rule by which contracts not expressly forbidden or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.'

The dicta above of both Lord Wright and Devlin J. (as he then was) have been cited with approval in Shaw v. Groom (supra). When the law and facts of the instant case are examined, we find that -

1 the learned trial judge in giving judgment for the respondent said: "The defendants contend that there have been breaches of that Law (No.34 of 1965) and the Regulations made thereunder. If there have been breaches, I do not consider that they render the contract unenforceable. I hold that the contract is valid and enforceable."

In other words, if there were no breaches of the law or regulations committed, on what basis must the respondent be denied judgment, if we have regard to the reasons for decision in Kirkwood v. Gadd and Cornelius v. Phillips?

2 The appellant co., had more or less induced or connived at, the way in which its agent, Gloria Chen conducted its business,

(a) the facility of betters using the telephone at the grocery to effect betting transactions,

(b) its books or vouchers were kept at the grocery "and that's where Collector sometimes saw them."

(c) Gloria Chen swore: "I knew my husband was writing bets in the grocery. I thought I could write bets anywhere." Here, was uncontradicted evidence which establishes that the mere "pencilling" or "writing up" of bets anywhere was not thought of as an infringement of the law, provided the law was complied with, in that, there were a valid licensed betting office and permits for the time being in force.

(d) The appellant co.'s representative or collector was in the habit for three years before July 1966, of collecting "clock bags" and duplicate betting vouchers from Gloria Chen.

But be that as it may, those aspects of the facts assisted the respondent (so found by the learned trial judge) that if ever he had committed any infringements, he had unwittingly offended.

3 From the facts and circumstances of the case, the appellant co., stood to benefit from a state of affairs it induced or connived at. Thus it stood to gain from every losing bet received or negotiated in those circumstances and hold itself ready to reject the obligation of paying winning bets if it so chose, and as it has done in this case. To deny the respondent judgment in this case, "would injure the innocent, benefit the guilty, and put a premium on deceit". Pearce L.J. (as he then was) in Archbolds Ltd. v. S. Spanglett (1961) 1 A.E.R. at p.424. No moral turpitude arises

on part of the respondent, if he has committed no infringements of the Act No.34 of 1965 or he has unwittingly offended against those provisions.

4 The respondent need only present his winning voucher for payment to the appellant co., and in a court of law, he need not prove the illegal act, that is, the place where the bet was received or negotiated.

When the plaintiff sought payment of his winnings, the appellant co., alleged it was a bogus bet. The police were called in and the plaintiff questioned for about 4 hours. The plaintiff and his wife were not charged for conspiring to defraud the appellant co., nor for any infringement of the provisions of Act No.34 of 1965 and it is now nearly 6 years from the date when the wager was effected. It cannot be too often repeated that the courts are burdened with more urgent and important matters than to be engaged with gamblers' causes. It may well be ideal for Parliament to pass legislation similar to the provisions of s.18 of the Gaming Act 1845 and so re-direct grievances against erring bookmakers to a Racing Commission which should be authorised and empowered to grant, refuse or suspend betting licences or permits for good cause shown. At least it would not take 6 years to close the file on a complaint. Of course, the courts in dealing with the law relating to crimes are ever vigilant to suppress cheats and defaulters.

In my view, though the facts in Paramount Betting Ltd v. Bertram Brown (supra) might well warrant the conclusion arrived at, in that case, yet the facts therein (as I have already indicated) are clearly distinguishable from the facts of the instant case. For the reasons given, I would dismiss this appeal, affirm the judgment of the learned trial judge and award costs of this appeal to be taxed or agreed upon, in favour of the plaintiff/ respondent.