IN THE COURT OF APPEAL [1994] QCA 279

SUPREME COURT OF QUEENSLAND

Appeal No. 255 of 1993

Before Fitzgerald P.
Davies JA.
Williams J.

[Quirey v. The Queensland Principal Club]

BETWEEN:

MICHAEL MERVYN QUIREY Appellant

AND:

THE QUEENSLAND PRINCIPAL CLUB Respondent

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 09/08/94

This is an appeal from an order made in the Trial Division on 30 November 1993 dismissing an application by the appellant under the *Judicial Review Act, 1991,* for the review of decisions of the respondent made on 14 December 1992 and notified to the appellant by letter dated 17 December 1992. Although additional relief was claimed in the application, the appellant seems presently to seek only an order setting aside the respondent's decisions, which were that the appellant is "a defaulter in bets within Australian Rules of Racing Rule 192" and that he "be disqualified pursuant to Australian Rules of Racing Rule 192 until the default is cleared." The respondent did not contend that these decisions were not reviewable under the *Judicial Review Act*.

By subsection 130(2) of the *Racing and Betting Act 1980*, the Rules of Racing, as defined in section 5 of that Act, "shall apply subject to this Act and clubs shall make all necessary adaptions to those rules for the purpose of the application of this Act." Further, by subsection 11A(2), the Rules of Racing are to be read subject to that section to the extent necessary

to give it operation and effect. The other subsection in section 11A provides:

> "(1) The functions of the Queensland Principal Club are -
>
> (a) to control, supervise, regulate and promote racing; and
> (b) to initiate, develop and implement policies it considers conducive to the development and welfare of the racing industry and the protection of the public interest, in relation to the public industry."

No other part of the Act was referred to except the definition of "Rules of Racing" which, by section 5, "means the rules for the time being governing and relating to horse racing under the control of the Queensland Principal Club, being with respect to the Queensland Principal Club, an amalgamation of the Australian Rules of Racing as adopted by the club and the local rules of racing of the club together with the regulations made hereunder ...".

Although Counsel for the respondent referred to a general provision in the Rules of Racing giving those rules effect, no rule was suggested to be presently material other than rules 182 and 192. The former speaks of the consequences of disqualification by the respondent, which include exclusion from racecourses and the racing industry. Rule 192 provides:

> "192. Any person found by the Committee of the Principal Club to be a defaulter in bets ... may be disqualified until his default is cleared ... ."

The appellant defaulted in his obligation to pay three registered bookmakers the amounts of credit bets, totalling in each case some thousands of dollars. All of these bets had been lost prior to 12 November 1991, and the appellant was then indebted to the bookmakers, when he presented a debtor's petition pursuant to section 55 of the *Bankruptcy Act 1966 (Commonwealth)*, as a result of which he then became bankrupt. On 23 November 1992, the appellant signed a proposal for composition requesting his trustee in bankruptcy to call a

special meeting of creditors to consider and vote on the proposal for composition, and the trustee in bankruptcy by notice in writing to all creditors, including the three bookmakers, formally convened a meeting of creditors which was held on 9 December 1992. At that meeting, the creditors by special resolution accepted the composition, and the appellant's bankruptcy was consequently annulled by the operation of subsection 74(5) of the *Bankruptcy Act*. That composition became and continues to be binding on all the creditors of the appellant, including the bookmakers: *Bankruptcy Act,* subsection 75(1). Under the composition, the appellant is required to make a number of payments to his trustee, the latest to be made in December 1995, which his trustee is to "apply ... in accordance with the provisions of Division 1 of Part VI and sections 108, 109, 140 and 145 of the Bankruptcy Act 1966 and the Bankruptcy Rules relevant to such Sections (which said provisions are hereby applied to the administration of this composition mutatis mutandis)." Further, provision was made in clause 8 of the composition for it to "operate as a release" of all "provable debts".

There are two approaches available in relation to a decision as to whether or not the appellant was in default when the respondent made its decisions, as the respondent and the primary judge held. One approach looks at the appellant's non-payment of what he owed the bookmakers, which continued as at the date of the respondent's decisions. The other approach directs attention to the relationship between the appellant and the bookmakers at the time of the respondent's decisions, and says that there was then no continuing failure by the appellant to pay the bookmakers because of the events which had intervened and their legal consequences. While the appellant concedes that he was previously "a defaulter in bets", he contends that he had ceased to be so before the respondent's decisions were made. The respondent accepts that the appellant was under no legal obligation to pay the bookmakers when it made its decisions, but

asserts that he was under a moral obligation to do so.

"Default" is not an event which can be identified in the abstract. It must be related to a particular obligation. Default occurs only when there is a failure to do an act which ought to be done. In *Woolworths Ltd. v. Crotty (1942) 66 CLR 603*, Rich J. said at p.620:

> "'Default' means not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction",

and he cited in support of that proposition *In re Bayley-Worthington and Cohen's Contract (1909) 1 Ch.648 at p.658.*

The issue for determination in this appeal, therefore, is whether, at the time when the respondent made its decisions, the relationship between the appellant and the bookmakers was such that he ought to pay them the lost bets. Only if that question could, on some basis, be answered in the affirmative, could there be a foundation for an argument that he was then a "defaulter"

The composition accepted by the appellant's creditors, which is binding on all of his creditors, including the bookmakers, requires the opposite conclusion.

Except perhaps for the purpose of criminal offences which may have been committed, (*Re Hayes ex parte Hayes (1984) 59 ALR 219*), at least unless and until the composition is set aside (*Slater v. Jones (1873) LR 8 Ex 186*), the debts previously owned by the appellant to the bookmakers have not only become unenforceable but, in the language of the composition, have been released. Further, the bookmakers have received, in lieu, entitlements which they did not previously possess; i.e., to participate in distributions of the composition fund by the composition trustee: cf *McDonald v. Dennys Lascelles Ltd. (1933) 48 CLR 457, 467, per Rich J.*; cited *Hill v. Anderson Meat Industries Ltd. (1971) 1 NSWLR 868, 875-876 per Street J.; approved (1972) 2 NSWLR 704; Gilbey v. Jeffries (1883) 11 QBD 559.*

In my opinion, there was no obligation on the appellant in relation to the bookmakers which he was failing to perform when the respondent made its decisions. Accordingly, he was not then a defaulter.

It follows that the appeal should be allowed with costs to be taxed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 255 of 1993

Brisbane

[Quirey v. The Queensland Principal Club]

BETWEEN:

MICHAEL MERVYN QUIREY — Appellant

AND:

THE QUEENSLAND PRINCIPAL CLUB — Respondent

Fitzgerald P.
Davies JA.
Williams J.

Judgment delivered 09/08/94

Separate reasons for judgment of Fitzgerald P., Davies J.A. and Williams J. Davies J.A. and Williams J. concurring as to the orders to be made. Fitzgerald P. dissenting.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS: **CONSTRUCTION** - *Racing and Betting Act* - appellant owed bets to licensed bookmakers - appellant declared bankrupt - creditors, including the bookmakers, accepted a composition and annulment of the bankruptcy - respondent still declared appellant a "defaulter" under the Rules of Racing - whether appellant's release from bankruptcy meant he was no longer a defaulter under the Rules of Racing.

Counsel: Mr. G. Egan for the Appellant
Mr. J. Douglas Q.C. for the Respondent

Solicitors: Minter Ellison Morris Fletcher for the Appellant
Peter Channel and Associates for the Respondent

Hearing Date: 21/07/94

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND Appeal No.255 of 1993

Brisbane

Before Fitzgerald P.
Davies J.A.
Williams J.

[Quirey v. The Queensland Principal Club]

BETWEEN:

MALCOLM MERVYN QUIREY
(Applicant) Appellant

AND:

THE QUEENSLAND PRINCIPAL CLUB
(Respondent) Respondent

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 09/08/1994

I have had the advantage of reading in draft the reasons of the President and Williams J. Each has set out the relevant facts and some statutory provisions which I adopt for the purpose of these reasons.

It is not necessary to cite authority or a dictionary to establish that the word "defaulter" is a word of wide meaning and consequently that the context in which it is used will dictate the meaning which it has on any occasion. Whether on 14

December 1992 the appellant was a defaulter within the meaning of r. 192 of the Rules of Racing does not, in my view, depend merely on whether, on that day, he remained legally liable to pay the amounts on which he had defaulted in payment to registered bookmakers for legal bets placed with them. If it did depend on that alone, it was common ground that the appeal must succeed.

It is necessary, in my view, to examine the context in which that word is used in r. 192. Part 4 of the Racing and Betting Act 1980 provides for the detailed control of the business of bookmaking and the acceptance of bets by bookmakers. It envisages that the taking of bets by bookmakers at race meetings and the payment of those bets is an essential part of the conduct of race meetings. One aspect of this, the payment of winning bets, is secured by s. 143 which requires a bookmaker to obtain and maintain a policy of insurance or bond indemnifying bettors in respect of winning bets, thereby ensuring that irrespective of his bankruptcy those bets are paid.

It is likely, in my view, that r. 192 is intended to complement s. 143 by requiring that those who bet with bookmakers should be permitted to continue to be involved in the sport of racing only on condition that they pay losing bets in full; that is, that a defaulter's default is not "cleared" until payment is made in full. The consequences of disqualification under s. 192 are

provided in r. 182. They include disqualification from entering upon a racecourse or training track of the Club and racing or training a racehorse.

Rules 73 and 75 have similar consequences. Rule 73 precludes a horse from starting in a race where moneys are owing in respect of the race or of any arrears. And r. 75 provides for a "Forfeit List" in which is recorded all due and unpaid subscriptions, fines, fees, stakes, forfeits and prize money recoverable and unpaid and the names of the persons from whom they are due. Until they are "paid", the names of the persons from whom they are due remain on the forfeit list with the same consequences as default under r. 192: r. 76(a). Bankruptcy, or discharge therefrom, of a person whose name appears on the forfeit list could not have the consequence that money unpaid by him or her would become "paid" within the meaning of r. 75.

Construed in the context of those provisions, "defaulter" in r. 192, in my view, means a person who has not paid his losing bets in full. Consequently, although the effect of the Bankruptcy Act in the present case was to release the appellant from liability for his debts, it did not have the consequence, upon his release from bankruptcy, that his default was cleared within the meaning of r. 192.

I would therefore dismiss the appeal.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

No. 255 of 1993

Brisbane

Before The President

Davies JA

Williams J

[Quirey v. Queensland Principal Club]

BETWEEN:

MALCOLM MERVYN QUIREY
(Applicant) Appellant

AND:

THE QUEENSLAND PRINCIPAL CLUB
(Respondent) Respondent

JUDGMENT - G N WILLIAMS J

Judgment delivered 09/08/1994

The appellant, Malcolm Mervyn Quirey, is a welsher as that term is defined in the Macquarie Dictionary; he did not pay a number of bets lawfully entered into with licensed bookmakers on licensed racing tracks. In order to avoid the ordinary consequence of breaching R. 192 of the Rules of Racing, namely disqualification until the default is cleared, he seeks to rely on the fact that on 12 November 1991 he became bankrupt upon presenting his own petition and subsequently that bankruptcy was annulled pursuant to s. 74(5) of the Bankruptcy Act 1966 on

9 December 1992 when a composition was accepted by creditors.

The betting debts in question were incurred with three bookmakers at various race meetings in April 1990. Each of the bets was enforceable in accordance with s. 249 of the Racing and Betting Act 1980.

Rule 192 of the Rules of Racing is in the following terms:

> "Any person found by the Committee of the Principal Club to be a defaulter in bets or any person posted as a defaulter in bets by any Club recognised by the Committee of a Principal Club for the purpose of this Rule, may be disqualified until his default is cleared or his posting removed."

One finds the Rules of Racing defined in s. 5 of the Racing and Betting Act, and express reference is made to them in provisions of that statute such as s. 11A, s. 11B(2), and s. 130(2). Section 11A provides:

> "(1) The functions of the Queensland Principal Club are -
>
> a) to control, supervise, regulate and promote racing; and
>
> b) to initiate, develop and implement policies it considers conducive in the development and welfare of the racing industry and the protection of the public interest, in relation to the racing industry.
>
> (2) The Rules of Racing, to the extent necessary to give operation and effect to this section, are to be read subject to this section."

By notice dated 23 October 1992, the respondent called upon the applicant to show cause why he should not be found to be a defaulter in bets and disqualified pursuant to R. 192. The show cause hearing took place on 14 December 1992, and the appellant appeared on that occasion and personally sought to

show cause. His submissions were summarised in writing, and a perusal of all that was before the respondent establishes that the only basis on which the appellant sought to show cause related to the bankruptcy issue referred to above. On 17 December 1992, the appellant was notified that the respondent had concluded that he had not shown cause and had decided to disqualify him until the default was cleared. Pursuant to the provisions of the Judicial Review Act 1991, the appellant asked for a statement of reasons in writing and they were provided on 1 February 1993.

From that decision the appellant applied for a statutory order of review pursuant to the Judicial Review Act. It would appear that the appellant asserts that the decision of the respondent was a decision "made . . . under an enactment" and therefore within the definition of the phrase "decision to which this Act applies" found in s. 5. The term "enactment" is defined so as to include any Act or statutory instrument. The respondent is established and incorporated by s. 11 of the Racing and Betting Act, and s. 11B(2)(j) confers express power on it to "prohibit a person from attending at or taking part in a race meeting". The question of jurisdiction was not argued before the Chamber Judge, and it was only lightly touched upon in this Court; it seems to me that the decision in question is reviewable under the Judicial Review Act, though perhaps not all decisions of the respondent would be so reviewable. The question may need further consideration in the future.

Pursuant to the provisions of the Bankruptcy Act (ss. 73, 74 and 75), the effect of the Court and creditors approving a composition and the consequent annulment of the bankruptcy is essentially the same as if there was an order for discharge (ss. 150 and 153); in either event debts provable in the bankruptcy are "released". In those circumstances, no action is maintainable with respect to any debt provable under the bankruptcy (Gilbey v. Jeffries [1883] 1 Q.B.D. 559). That was the conclusion reached by the Chamber Judge in this case.

The submission addressed both to the Chamber Judge and this Court on behalf of the appellant was that a person could not be described as a defaulter in bets unless he was, at the time such finding was made, under a legal obligation to pay those debts. What the learned Chamber Judge in effect held was that a person could be a defaulter in bets for purposes of the Rules of Racing even though there was no legal obligation on the person to settle the bet at the time the finding was made. His Honour's reasoning is carefully worded, and it is significant to note that he did not conclude that a legal obligation to pay was necessary before such a finding could be made; in particular, he said:

> "I accept as correct a submission . . . that a person may be found to be a defaulter in debts only if he is a defaulter at the time when the decision is made by the Committee".

He then went on to consider the meaning of the word "defaulter" and referred to various dictionary definitions. In my view, dictionary definitions of the term are not all that helpful; the

meaning to be ascribed to the term depends very much upon the context in which it is used. Counsel for the appellant referred the Court to a large number of cases from various countries around the world wherein the meaning of the term "default" in a particular context had been considered. I do not find any of them to be of material assistance here. None of the cases were even remotely concerned with the use of the term in relation to the payment of bets within the framework of provisions akin to the Rules of Racing. The most helpful statement, in my view, is that of Rich J. in Woolworths Ltd v. Crotty (1942) 66 C.L.R. 603 at 620:

> "In Doe d. Dacre v. Dacre (1798) 1 B and P 250 at 258; 126 E.R. 887 at 891-2, Eyre C.J. said:
>
> > 'I do not know a larger or looser word than ' default' . . . In its largest and most general sense it seems to mean, failing.'
>
> It is a relative term and takes its colour from the context. For instance, in a case of an absolute sale of goods the failure on the part of a vendor to perform what he had to perform constitutes default (in Re Woods and Lewis' Contract (1898) 1 Ch. 433 at 435). 'Default' means not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction (in Re Bayley-Worthington and Cohen's Contract (1909) 1 Ch. 648 at 658)."

In my view, the term "defaulter" in R. 192 must be considered in the light of s. 11A of the Racing and Betting Act and the Rules of Racing. In that context, "defaulter" must have a meaning which has regard to the development and welfare of the racing industry, to the protection of the public (including punters and bookmakers) in relation to the racing industry, and

to the undesirability of permitting people who do not honour bets lawfully placed to be on or about a race track where such betting operations are conducted.

The bottom line is that, whether or not there is a continuing legal obligation to discharge the debt, the appellant has failed to pay the bets in question. That, in my view, is sufficient to bring him within the meaning of the expression "defaulter in bets" as used in R. 192. That also was the reasoning of the learned Chamber Judge.

The law recognises that though a debt may be discharged by operation of the bankruptcy laws, nevertheless the earlier debt remains identifiable as something which may be paid. The observations of Kelly C.B. in Jakeman v. Cook (1878) 4 Ex.D. 26 at 29 are instructive:

> ". . . the Act of 1869, by simple and salutary enactment, provides for the debtor who gives up all his property to his creditors and obtains their assent, whether the proceedings be in bankruptcy or in liquidation, may, under certain conditions, obtain an absolute discharge from his debts. But is there anything to prevent him from doing that which is in itself praiseworthy, and which every man ought to do if he can - entering into an entirely new contract for ample consideration to pay his old debts? I can see nothing contrary to the spirit of the bankruptcy laws in a debtor, who has given up all his property and obtained his discharge, honestly making a new engagement to do justice to his creditors if he receives an adequate benefit. A man who is just recovering from liquidation proceedings may have great difficulty in knowing what to do to obtain support for himself and his family. It is of the greatest consequence to him to get the ordinary necessaries of life, but he has no credit. He says to one of his creditors, if you will supply me with food on credit I will pay you the old debt. Is not that a good consideration? I think it is. The contract is one of great benefit not only to the creditor but to

> himself, and there is nothing in section 49 of the Bankruptcy Act of 1869 to prevent such a contract being enforced."

That case was referred to with apparent approval, but distinguished, by the Court of Appeal in Ex parte Barrow; in Re Andrews (1881) 18 Ch.D. 464. Lord Selborne L.C. was of the view that the reasoning in Jakeman v. Cook was valid after a composition had been fully and finally worked out and all instalments paid. Prior to that point of time he considered that there could not be any proper step taken which would result in a benefit for one creditor not available to all. I would also add that Atkin J. in Wild v. Tucker [1914] 3 K.B. 36 approved the reasoning in Jakeman v. Cook.

All the respondent has done here is apply R. 192 and in effect say to the appellant that if he wishes to participate in or attend at a race meeting then the condition he must satisfy in return for receiving that benefit or privilege is the payment of his outstanding indebtedness to bookmakers. Once his bets have been cleared, and he is no longer a defaulter, he may again enjoy the privilege of attending at race meetings.

In the circumstances the appeal should be dismissed with costs.