

Neutral Citation Number: [2008] EWHC 2101 (Comm)

Case No: 2006 FOLIO NO.169

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/09/2008

Before :

MR. JUSTICE TEARE

Between :

ASPINALL'S CLUB LIMITED

Claimant

- and -

FOUAD AL-ZAYAT

Defendant

Christopher Moger QC and Patrick Goodall (instructed by **Beachcroft LLP**) for the
Claimant

David Lord (instructed by **Quastel Midgen LLP**) for the **Defendant**

Hearing dates: 22-23 July 2008

Judgment

As Approved by the Court

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MR.JUSTICE TEARE

Mr. Justice Teare :

1. On 10 March 2000 the Defendant, Fouad Al-Zayat, a businessman resident in Nicosia, Cyprus visited the Claimant's gaming club, Aspinall's, in Mayfair. He had visited the Club on an irregular but frequent basis since 10 October 1994. He continued to do so until 11 April 2006. During that period he gambled £91,538,077 and lost £23,225,041.89. In the early years he gambled tens and hundreds of thousands of pounds in a single night. In 1999 and 2000 he began to gamble sums in excess of one million pounds in a single night. His appetite for gambling was such that he was known to some as a "whale". Not surprisingly he was regarded by the Club as an important client who demanded and was shown respect.
2. On the night of 10 March 2000 he gambled £2m. and lost every penny. He had paid for his chips by cheque but when the cheque was presented on 14 March 2000 it was dishonoured on his instructions. Thereafter he continued to visit the club, paying for his chips by debit card payments or third party cheques, but the scale of his betting subsided to tens and hundreds of thousands of pounds per night. Nevertheless, between March 2000 and April 2006 (shortly after the Club had issued a Claim Form for the unpaid debt of £2m. a few days before the expiry of the 6 year limitation period) he had gambled £40,884,565 and lost £10,547,030.
3. The Claimant's claim for the debt of £2m. has already been before the Commercial Court and Court of Appeal. The Commercial Court gave the Claimant summary judgment upon its claim (see 2007 EWHC 362 (Comm.) per David Steel J.) but the Court of Appeal set that judgment aside having concluded that the Defendant had a real prospect of successfully defending the claim (see 2007 EWCA Civ 1001 per Sir Anthony Clarke MR, Sedley LJ and Lloyd LJ.)
4. The Defendant chose not to give evidence at the trial of the action. This meant that one of his pleaded defences could not be advanced and was therefore not pursued. His remaining defence was that after his cheque for £2m. had been dishonoured on his instructions the Claimant had, within the meaning of section 16(1)(b) of the Gaming Act 1968, provided or allowed him credit in respect of his losses of £2m. Such credit was unlawful. For the reasons given by Lloyd LJ in the Court of Appeal at paragraphs 41–44 of his judgment that would render the Club's claim in respect of the debt of £2m. unenforceable. This conclusion of law (upon the assumption that unlawful credit was provided or allowed) was not challenged before me but the Claimant reserved the right to challenge it at a later stage in these proceedings.
5. If unlawful credit was provided as alleged by the Defendant that would amount to the commission of a criminal offence; see section 23 of the Gaming Act 1968. I have therefore reminded myself that although this is a civil case and the Defendant must prove its allegation on the balance of probabilities, cogent evidence, commensurate with the gravity of the allegation made against the Claimant, is required to prove the allegation on the balance of probabilities; see *Re. H* [1996] AC 563.

6. Emboldened by certain remarks of the Court of Appeal the Defendant has not only defended the claim but has advanced a counterclaim for the return of the £10m. that he lost between March 2000 and April 2006.
7. The counterclaim is made on the basis that unlawful credit was provided or allowed by the Claimant "for enabling [the Defendant] to take part in the gaming" within the meaning of s.16(1)(a) of the Gaming Act 1968. That was said to give rise to a claim in restitution for the return of the losses incurred in the gaming in which he was enabled to take part.
8. I note that in the Court of Appeal Sedley LJ remarked (at paragraph 55 of his judgment) that "this is one of those cases which have everything to do with law and nothing to do with justice."

The facts

9. Mr. James Osborne, who was the Managing Director of the Claimant between October 1992 and August 2007, gave oral evidence on behalf of the Claimant. Certain records of the Claimant were also in evidence. In the absence of evidence from the Defendant there was and could be no challenge to Mr. Osborne's account of events.
10. On 10 March 2000 at about 5.20 pm the Defendant paid £1000 by way of a debit card in return for gaming tokens to play roulette or blackjack. He lost them all. Between 5.31 pm and 3.18 am the following morning he drew four separate script (or house) cheques. Each was for the sum of £500,000. They were exchanged for playing tokens. He lost them all. (After the first script cheque had been drawn he cashed £350,000 worth of tokens and visited the Colony Club with the Claimant's cheque for £350,000. He later returned with a cheque from the Colony Club for £350,000 which was exchanged for tokens. This excursion to the Colony is mentioned for the sake of completeness. It does not appear to have any relevance to the issues which the Court must decide.) Towards the end of the playing session he requested the Club to redeem the script cheques in exchange for a cheque in the sum of £2m. The Club redeemed the cheques and accepted the single cheque for £2m. This was permitted by section 16(2A) of the Gaming Act 1968.
11. On 11 March 2000 the Defendant wrote to the Club complaining of a problem he had had with the croupier and saying that there had not been a "fair game". He requested the Club not to present his cheque.
12. After the Club received that letter the Defendant and Mr. Osborne spoke but the complaint was not discussed in detail.

13. On 14 March 2000 the Club presented the substitute cheque for payment (as it was required to do by section 16 of the Gaming Act 1968) but it was dishonoured on the Defendant's instructions. It appears that the Club learnt of this on 17 March 2000.
14. Shortly afterwards the Defendant attempted to negotiate payment of a lower sum. He offered to pay £1m. in settlement. Mr. Osborne told him that he had no grounds for non-payment and that the Club was not permitted by the Act to accept anything less than the full amount of the cheque.
15. At a later date the Defendant suggested that he pay £2m. on the basis that the Club instructed a debt collection agency of his choice to collect the debt. Their fee would be £1m. which would find its way back to the Defendant. This was, he said, in order to get round the difficulty that the Club could not accept anything less than the full amount of the cheque. This suggestion was also declined.
16. The Club's records show that the Defendant returned to the Club to gamble on 30 March, on dates between April and June and between August and December 2000. He also did so in January and February 2001.
17. From time to time there were discussions about the debt. They were restricted to when the Defendant would pay the £2m.
18. In February 2001 the Defendant informed Mr. Osborne that he was going through "a financial low". He asked the Club to allow him one year to pay, during which time he would continue to play at the Club. He said he would make repayments from the winnings.
19. Mr. Osborne said in his statement dated June 2008 that he replied saying that the Club was prepared to allow the Defendant to repay the £2m. out of his winnings over the next 12 months. Mr. Osborne explained in his statement that he took the view that it was in the Club's interests to seek to maintain contact with the Defendant and to allow him to continue gambling at the Club on the basis that he would repay the outstanding debt.
20. In his oral evidence Mr. Osborne said that

"it was one of those offers that we really have not got much choice. He said that he was unable to pay up, that he needed a year to payxxx.but he would continue to gamble, and if he won he would pay off with his winnings. It was sort of one of those questions that we were not being really asked, we were being told."
21. He said that the Defendant (whom he said was not a "knocker" but a "payer") had asked for

"an extension of time because he had cash flow problems or something, which we naturally granted."

22. The Club's records show that the Defendant continued to gamble at the Club from February to July 2001. On some nights he won. For example on 22 April 2001 he bet £75,350 and won £374,650. On 29 April 2001 he bet £2,500 and won £128,500. On 24 May 2001 he bet £50,000 and won £100,000. However, although it is likely that the gambling manager, Mr. Angelo Baglioni, approached the Defendant when he had had significant wins to remind him that he said he would repay his debt out of his winnings, no repayments were made to the Claimant. After July he did not gamble at the Club again in 2001, save for one night in November 2001.

23. On 13 February 2002 Mr. Osborne wrote as follows to the Defendant:

"It is now one year since we discussed the matter of your indebtedness to the club of £2 million.

At this meeting you asked us to allow you one year, during which time you would continue to play here and would make repayments from winnings. This has not happened and the debt remains unaltered. Apart from there having been no payments, there have been few visits with none at all in the past few months.

I am pressured by my Board of Directors, our shareholders and our auditors to pursue this debt and we are ever mindful of the Gaming Board who could construe a 'credit giving' argument.

As you know Angelo and I hold you in the highest regard and we ask you to give us a repayment schedule so that we can put this matter behind us."

24. It was submitted on behalf of the Defendant that he and Mr. Osborne had plainly come to an agreement, understanding or arrangement in February 2001 that in return for the Defendant repaying his debt out of winnings, the Claimant would not pursue him for the debt for 12 months. On behalf of the Claimant it was said that the Claimant merely went along with the Defendant's request because it had no option but to do so. The difference between the two submissions, as it appears to me, is that in the first submission the Claimant's decision not to pursue the Defendant for 12 months is communicated to him whereas in the second submission the Claimant takes the same decision but does not communicate it to the Defendant.

25. My finding is that in February 2001, in the course of the meeting between the Defendant and Mr. Osborne, the Defendant requested the Claimant to allow him one year to pay his debt out of his winnings at the Club and Mr. Osborne on behalf of the Claimant assented to that request. The meeting and request are plainly evidenced by Mr. Osborne's letter dated 13 February 2002. The assent is not so evidenced but is evidenced by Mr. Osborne's written and oral evidence.

26. The Defendant did not attend the trial to give evidence that the Claimant's assent to his request for time to pay was communicated to him. Not surprisingly this failure to give evidence was heavily relied upon by the Claimant. But it seems to me to be an inevitable conclusion to draw from the evidence of Mr. Osborne that he communicated his assent to the request to the Defendant. If Mr. Osborne had merely "gone along" with the request without signifying to the Defendant whether he agreed or disagreed with the request it would have been possible to argue that there was no evidence that the Claimant's decision to give twelve months to pay had been communicated to the Defendant. But the request was made in the course of a meeting between the Defendant and Mr. Osborne. In his written evidence Mr. Osborne stated that, when informed by the Defendant that he was going through a financial low, he "*said* [emphasis added] that the Club was therefore prepared to allow [the Defendant] to repay the £2 million out of his winnings from gambling at the Club over the next twelve months." In his oral evidence he said that he *granted* the Defendant's request. He did not say that he kept his decision secret from the Defendant. Mr. Osborne had responded to the Defendant's earlier requests to accept £1m. in settlement and to instruct a debt collection agency at a fee of £1m. by rejecting them. It is most improbable that Mr. Osborne did not respond to a request from a valuable client whom he wished to treat with respect. My finding that Mr. Osborne assented to the request is therefore supported by the written and oral evidence of Mr. Osborne and is consistent with the probabilities.
27. The following points may also be noted. The timing of the letter dated 13 February 2002 is consistent with the Club having allowed the 12 month period to pass. In that letter Mr. Osborne pointed out that there had been no payments and that the Defendant had paid few visits to the Club in recent months. The 12 month period having passed with no payments, Mr. Osborne then requested a "repayment schedule". That had not been requested in writing before, presumably because of the arrangement made in February 2001. My finding is also consistent with paragraph 3 of the Claim Form which pleaded that "in or about early 2001 the Claimant entered into an agreement with the Defendant ("the Repayment Agreement") whereby it was agreed that the Defendant would take part in further gaming at the Club and the sum of £2 million would be repaid to the Claimant out of his future winnings", though I note that this claim was not pursued in the Particulars of Claim.
28. On 15 February 2002 the Club instructed its solicitors to issue a claim form against the Defendant for recovery of the £2m. debt. Mr. Osborne gave evidence that this action was prompted by the receipt of "intelligence" that the Defendant was due to fly into the UK in his private aeroplane. The claim form was issued on 18 February 2002. An application for a freezing order was also prepared. However, the proceedings were not served because the Ritz also issued proceedings and obtained a freezing order over the Defendant's Boeing 747 and Rolls Royce. Mr. Osborne decided not to proceed with his action apparently because he took the view that any freezing order he obtained would not freeze any assets of the Defendant because the Ritz had got there first. He therefore decided to maintain his "amicable discussions" with the Defendant and instructed the Club's solicitors not to serve the Claim Form.

29. On 20 August 2002 the Claimant was informed that the freezing order obtained by the Ritz had been discharged. This did not, however, lead to any change in Mr. Osborne's strategy of maintaining amicable discussions with the Defendant. The Defendant resumed gambling at the Club on 3 September 2002 and continued to gamble at the Club almost every month.
30. Mr. Osborne wrote to the Defendant by letter dated 6 October 2003. He said that he was being pressed by his board and shareholders with regard to the outstanding debt of £2m. He continued as follows:
- "I do not, of course, plan to take the very ill advised route of my colleagues at the Ritz as I am sure that, in view of our warm friendship, we can settle this in a manner that will keep us happy whilst not over burdening you.
- When you are next in London please could you call me to arrange a meeting to discuss thisxxx."
31. There was no evidence that any such meeting was arranged. The Defendant continued to gamble at the Club and a little over a year later, on 11 November 2004, Mr. Osborne wrote to the Defendant saying that:
- "the rumour around town is that you have paid off all your casino debts (except us). This causes us some difficulty with the Gaming Board. Damian [Aspinall] and I would like to come and see you to discuss this."
32. The Defendant replied the same day expressing his shock that Mr. Osborne paid attention to rumours and his belief that he thought his relationship with Mr. Osborne was "far above rumours and innuendo". He suggested lunch the next week.
33. On 12 November 2004 Mr. Osborne replied saying that he would like to see the Defendant the next week. In the event it does not appear that any further specific meeting took place.
34. The Defendant continued to gamble until July 2005. There was then a pause until December 2005. He last gambled at the Club in January 2006 though he visited it in March and April 2006.
35. The Claim Form in this action was issued on 7 March 2006, just a few days before the expiry of the six year limitation period.

The Claim

36. There is no dispute that, subject to the defence based upon the alleged provision of unlawful credit, the Claimant has a good claim against the Defendant based upon the dishonoured cheque and the underlying loan.
37. The defence is based upon the provisions of section 16 of the Gaming Act 1968, as amended, which provided as follows:

"16 Provision of credit for gaming

(1) Subject to subsections (2) to (2A) of this section, where gaming to which this Part of this Act applies takes place on premises in respect of which a licence under this Act is for the time being in force, neither the holder of the licence nor any person acting on his behalf or under any arrangement with him shall make any loan or otherwise provide or allow to any person any credit, or release, or discharge on another person's behalf, the whole or part of any debt,—

(a) for enabling any person to take part in the gaming,
or

(b) in respect of any losses incurred by any person in the gaming.

(2) Neither the holder of the licence nor any person acting on his behalf or under any arrangement with him shall accept a cheque and give in exchange for it cash or tokens for enabling any person to take part in the gaming unless the following conditions are fulfilled, that is to say—

(a) the cheque is not a post-dated cheque, and

(b) it is exchanged for cash to an amount equal to the amount for which it is drawn, or is exchanged for tokens at the same rate as would apply if cash, to the amount for which the cheque is drawn, were given in exchange for them;

but, where those conditions are fulfilled, the giving of cash or tokens in exchange for a cheque shall not be taken to contravene subsection (1) of this section.

(2ZA) Neither the holder of the licence nor any person acting on his behalf or under any arrangement with him shall accept a debit card payment and give in exchange for it cash or tokens for enabling any person to take part in the gaming unless the following conditions are fulfilled, that is to say—

(a) the payment is exchanged for cash to an amount equal to the amount of the payment, or is exchanged for tokens at the

same rate as would apply if cash, to the amount of the payment, were given in exchange for them, and

(b) the payment has been authorised by the holder of the card and by or on behalf of the issuer of the card;

but where those conditions are fulfilled, the giving of cash or tokens in exchange for a debit card payment shall not be taken to contravene subsection (1) above.

(2A) Neither the holder of a licence under this Act nor any person acting on his behalf or under any arrangement with him shall permit to be redeemed any cheque (not being a cheque which has been dishonoured) accepted in exchange for cash or tokens for enabling any person to take part in gaming to which this Part of this Act applies unless the following conditions are fulfilled, that is to say—

(a) the cheque is redeemed by the person from whom it was accepted giving in exchange for it cash, or tokens, or a substitute cheque or a debit card payment, or any combination of these, to an amount equal to the amount of the redeemed cheque or (where two or more cheques are redeemed) the aggregate amount of the redeemed cheques;

(b) it is redeemed during the playing session in which it was accepted, or within thirty minutes after the end of the session;

(c) where a substitute cheque is given in whole or in part exchange for the redeemed cheque the substitute cheque is not a post-dated cheque;×

(d) where tokens are given in whole or in part exchange for the redeemed cheque, the value of each token is equal to the amount originally given in exchange for it or, if the token was won in the gaming, the value it represented when won; and

(e) where a debit card payment is given in whole or in part exchange for the redeemed cheque, the payment has been authorised by the holder of the card and by or on behalf of the issuer of the card;

but, where those conditions are fulfilled, the return of a redeemed cheque in exchange for cash, or tokens, or a substitute cheque or a debit card payment, or any combination of these, shall not be taken to contravene subsection (1) of this section.

(3) Where the holder of a licence under this Act, or a person acting on behalf of or under any arrangement with the holder of such a licence, accepts a cheque in exchange for cash or tokens to be used by a player in gaming to which this Part of this Act

applies, or a substitute cheque he shall not more than two banking days later cause the cheque to be delivered to a bank for payment or collection.

(3A) Subsection (3) of this section shall not apply to a redeemed cheque.

(3B) Where the holder of a licence under this Act, or a person acting on behalf of or under any arrangement with the holder of such a licence, accepts a debit card payment in exchange for cash or tokens to be used by a player in gaming to which this Part of this Act applies, or a substitute debit card payment, he shall not more than two banking days later do whatever is required under his arrangements with the issuer of the card to secure that he is credited with the amount of the payment.

(4) Nothing in the Gaming Act 1710, the Gaming Act 1835, the Gaming Act 1845 or the Gaming Act 1892 shall affect the validity of, or any remedy in respect of, any cheque or debit card payment which is accepted in exchange for cash or tokens to be used by a player in gaming to which this Part of this Act applies or any substitute cheque or substitute debit card payment."

38. Counsel for the Defendant submitted that from 18 March 2000, the day after receiving notification that the Defendant's cheque had been dishonoured, the Claimant provided or allowed credit to the Defendant in respect of his losses incurred in the gaming. The relevant "losses" were the £2m. lost on 10 March 2000.
39. Counsel for the Claimant submitted that all that the Claimant had done from that date was to forbear from suing the Defendant and that such forbearance cannot amount to providing or allowing the Defendant credit.
40. It is first necessary to consider what is meant by providing or allowing credit in section 16 of the Gaming Act 1968. The legislative purpose of section 16 was to discourage gaming on credit; see *Crockford's Club Ltd. v Mehta* [1992] 1 WLR 355 at p.365E and *R v Knightsbridge Crown Court ex p. Marcrest Properties Ltd.* [1983] 1 WLR 300 at p.308B. In the latter case Ackner LJ described the purpose as follows:

"The clear purpose of section 16 is to protect the punters against themselves. They are not to be given by the casinos so much rope that they eventually hang themselves, figuratively or otherwise."
41. It is to be noted, however, that whilst Ackner LJ's statement of the legislative purpose of section 16 is particularly apt in relation to section 16(1)(a) – forbidding the provision or allowance of credit for "enabling any person to take part in the gaming"

– it is perhaps less apt in the context of section 16(1)(b) – forbidding the provision or allowance of credit "in respect of any losses incurred by any person in the gaming." For in the latter case the punter has already gambled and lost. The provision or allowance of credit in respect of his losses does not have the effect of extending sufficient rope to the punter to hang himself because he has already gambled and lost. Nevertheless, the provision of such credit is in a more general sense contrary to the policy of the Act. Further, counsel for the Claimant did not argue that the Defendant's liability on the cheque for £2m. (or on the underlying loan) was not a debt in respect of losses incurred by the Defendant in the gaming. This was no doubt because, when this very case was before the Court of Appeal on appeal from the judgment of David Steel J., Lloyd LJ had decided that it was; see paragraphs 36–39 of the judgment of the Court of Appeal.

42. The ordinary and natural meaning of "credit" in the context of section 16 of the Act is "time to pay", in the sense of deferring or postponing the punter's obligation to pay for the chips he is about to use (section 16(1)(a)) or has used (section 16(1)(b)) in gambling at the casino. Often, the providing or allowing of credit will be by way of agreement. But it need not be. The words "providing" or "allowing" credit do not, in my judgment, require an agreement. Credit may be provided or allowed unilaterally in the sense that the bank may state that it will defer or postpone the obligation to pay. Whilst the Court of Appeal only decided that the suggested defence had a real prospect of success it appears to have been the view of Sedley LJ that credit could be provided unilaterally; see paragraph 54. I respectfully agree with that view. However, having regard to the purpose of section 16, I consider that any such unilateral provision of credit must at least be communicated to the punter. A provision of credit of which the punter is unaware is not going to cause him to hang himself. Whilst, as already noted, this comment is less apt in the context of section 16(1)(b), nevertheless, if communication is necessary in relation to section 16(1)(a), it must also be necessary in relation to section 16(1)(b). The concept of providing or allowing credit necessarily involves communication of the provision or allowance of credit. In the absence of such communication the debtor would be unaware of the credit and would consider himself obliged to pay on the due date for payment. That is, in my judgment, inconsistent with the notion of providing or allowing credit.
43. Counsel for the Defendant submitted that the Claimant provided or allowed credit from 18 March 2000 and continued to do so until proceedings were issued in March 2006. The basis of this submission is that from 18 March 2000 the Claimant adopted the strategy of allowing the Defendant to continue to gamble at the Club in the hope or expectation that he would repay his debt at some stage, perhaps out of his winnings.
44. Counsel for the Claimant submitted that mere forbearance to sue cannot amount to the giving or allowing of credit and that was all the Claimant did.
45. I am unable to accept the submission that the Claimant provided or allowed credit from 18 March 2000. It seems to me that a fair description of the Club's conduct from 18 March 2000 until February 2001 is that, from time to time, the Claimant had

discussions with the Defendant about the £2m debt. Suggestions were made by the Defendant as to payment of the debt but none was acceptable to the Claimant. Throughout this time the Claimant forbore from suing whilst awaiting the Defendant's proposals as to how he would pay the outstanding debt. Whilst the Claimant in fact permitted the Defendant to continue gambling there is no evidence that the Claimant decided to defer or postpone the time for payment of the debt in return for future payment of the debt from winnings or that the Claimant communicated any such election to the Defendant. Had any such decision been made and communicated to the Defendant the discussions which Mr. Osborne had with the Defendant concerning payment of £1m. or the engagement of a debt collection agency for a fee of £1m. would have been, at best, premature.

46. However, matters changed in February 2001. In that month the Defendant requested the Claimant at a meeting to allow him one year to pay his debt out of his winnings at the Club and Mr. Osborne on behalf of the Claimant assented to that request. It seems to me that in assenting to that request the Claimant deferred or postponed for one year the Defendant's liability to repay the £2m. of losses he had incurred in gaming on 10 March 2000. That decision was communicated to the Defendant at the meeting.
47. That the Claimant had provided credit by deferring or postponing the Defendant's liability to pay can be shown by considering what would have happened had the Claimant issued proceedings against the Defendant in April 2001. The Defendant would have been able to resist the claim (subject to any arguments stemming from the unlawfulness of the credit) by giving evidence that, although the debt had fallen due in March 2000, the Claimant had represented that it would not seek to enforce payment until February 2002 and that he had relied upon that representation by continuing to gamble.
48. I have therefore reached the conclusion that in February 2001 the Claimant provided or allowed the Defendant 12 months credit in respect of his losses of £2m. incurred in the gaming on 10 March 2000.
49. In reaching that conclusion I have not ignored the submission made on behalf of the Claimant that in permitting the Defendant, a defaulting member, to continue to gamble, purchasing his chips by using third party cheques or debit card payments, the Claimant was acting in accordance with section 16 of the Gaming Act 1968 and with the Gaming Board Guidelines. However, the relevant question is whether the exchange between Mr. Osborne and the Defendant at the meeting in February 2001 amounted to providing or allowing credit in respect of the Defendant's losses incurred on 10 March 2000. I consider that it did, notwithstanding that defaulting members may continue to game so long as they purchase their chips using cash or its equivalent. Nor have I overlooked the submission, based upon the evidence of Mr. Osborne and upon the evidence of agreements reached between the Defendant and other casinos, that Mr. Osborne acted in a manner in which other casinos have acted in the past. He said it was very much the standard practice for casinos to make arrangements for defaulting players to pay off instalments of debt whilst continuing to game. However, for the reasons that I have expressed, the exchange between Mr.

Osborne and the Defendant at the meeting in February 2001 amounted to providing or allowing credit contrary to section 16(1)(b) of the Gaming Act 1968.

50. It was also submitted that since a breach of that section amounts to the commission of a criminal offence it should be possible to identify with clarity and certainty when a criminal offence had been committed. I accept that submission but consider that there is no lack of clarity or certainty in deciding whether, and if so when, the Claimant has provided or allowed credit by deferring or postponing the time for payment.
51. When the period of 12 months from February 2001 until February 2002 expired there does not appear to have been any further extension of the credit which had been given during that period. On the contrary the Claimant decided to sue but held back from doing so when the Ritz sued first.
52. When the Ritz proceedings apparently came to an end in August 2002 the Claimant decided to allow the Defendant to continue gaming. But there is no evidence of any further request for credit by the Defendant. Nor is there any evidence that the Claimant postponed the date for payment beyond February 2002 or communicated any such postponement to the Defendant. Had the Claimant sued for the debt at any time after February 2002 the Defendant would not have been able to claim that the Claimant had represented that the debt was not then payable.
53. Of course, the effect of failing to sue until March 2006 is that the Defendant was in fact provided with time to pay but the Claimant had not postponed or deferred the time when payment was due. In that strict, and in my judgment correct, sense the Claimant had not provided or allowed credit after February 2002. The conduct of the Claimant after February 2002 amounted to mere forbearance from suing, albeit in the hope or expectation that the Defendant would eventually pay. Counsel correctly described this as a commercial decision or strategy not to sue the Defendant until the Claimant had to sue him. David Steel J. held that mere forbearance from suing cannot amount to the provision or allowance of credit (see paragraph 21 of his judgment). I respectfully agree. If mere forbearance from suing did amount to the provision or allowance of credit, there would in effect be a very short limitation period of a few days. Yet the limitation period is 6 years.
54. However, since credit had been provided or allowed from February 2001 until February 2002, the claim on the cheque and on the underlying loan agreement is unenforceable for the reasons explained by Lloyd LJ and not challenged before me. It follows that the claim must be dismissed.

The counterclaim

55. The Defendant counterclaims for restitution of the sums lost during the period of the unlawful credit.

56. The counterclaim is made on the basis that the credit unlawfully provided or allowed (which I have found was restricted to the period February 2001 to February 2002) not only fell within section 16(1)(b) but also within section 16(1)(a) of the Gaming Act. It appears to have been prompted by the remarks of Lloyd LJ at paragraph 45 of his judgment though it is to be noted that he expressed no view as to whether the credit provided fell foul of section 16(1)(a).
57. The question raised by the counterclaim is whether the unlawful credit was provided "for enabling [the Defendant] to take part in the gaming".
58. It is submitted on behalf of the Defendant that the grant of that credit enabled him to take part in the gaming because it made it possible for him to gamble at the Club during that period. If he had not been granted that credit but had been sued he would not have taken part in gaming at the Club.
59. It is submitted on behalf of the Claimant that the Defendant was enabled to take part in the gaming at the Club, not by the provision of credit in respect of the losses of £2m. incurred in March 2000, but by reason of the provision to him of lawful credit which enabled him to purchase gambling chips.
60. It is to be noted that the expression "for enabling any person to take part in the gaming" also appears in section 16(2), (2ZA) and (2A). Thus, in sub-sections (2) and (2ZA) references are made to cheques and debit card payments being accepted and exchanged "for cash or tokens for enabling any person to take part in the gaming". In sub-section (2A) reference is made to redeeming cheques accepted in exchange "for cash or tokens for enabling any person to take part in the gaming". It is clear from these sub-sections that the word "enabling" is used in the sense of purchasing the cash or tokens with which the person is able to gamble. There is no reason to suppose that the word "enabling" has any wider meaning in sub-section (1).
61. It follows that the meaning of sub-section (1) is that the holder of the licence shall not "provide or allow to any person any credit" for the purchase of cash or tokens with which the person is able to gamble (save for the provision of the very restricted credit permitted by section 16).
62. The credit provided or allowed to the Defendant between February 2001 and February 2002 to pay his losses of £2m. did not enable him to purchase the cash or tokens with which he was able to gamble during that period. The cash or tokens with which he was able to gamble during that period were purchased by the provision of third party cheques endorsed in favour of the Claimant or by means of debit card payments. The provision of credit to pay his losses of £2m. may have given the Defendant the opportunity to gamble at the Club during that period in the sense that had he been sued he would not have been willing to visit the Club and purchase cash or chips with which to gamble. But it does not follow, in my judgment, that the provision of credit to pay his losses of £2m. enabled him to gamble between February 2001 and February 2002. Even if the credit was extended to him in order to encourage

him to continue gaming (to adopt the phrase of Lloyd LJ in the Court of Appeal at paragraph 45) it was not "for enabling [the Defendant] to take part in the gaming" in the sense in which that phrase is used in section 16 of the Gaming Act 1968.

63. It follows that the counterclaim must be dismissed.
64. I shall therefore deal very shortly with the other objections made to the counterclaim for restitution. In support of the restitutionary counterclaim based on illegality reliance was placed upon the advice of the Privy Council in *Kiriri Cotton v Ranchhoddas Keshavji Dewani* [1960] AC 192. In that case a premium was paid in consideration of the grant of a sub-lease of property contrary to the provisions of an ordinance. It was held that the premium could be recovered as money paid under an illegal transaction. Lord Denning explained that the action was "for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff." He further said that "all the particular heads of money had and received, such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not *in pari delicto* with the defendant, are only instances where the law says the money ought to be returned."
65. The money sought to be recovered on the counterclaim was that which had been gambled and lost. However, gambling is not an illegal activity, although contracts by way of gaming are unenforceable. I was not persuaded that if, contrary to my decision, unlawful credit was provided for enabling the Defendant to take part in the gaming it followed that the gaming, otherwise lawful, had been rendered illegal. The counterclaim would therefore have failed on this ground also.
66. The restitutionary counterclaim was also based upon mistake. The alleged mistake of the Defendant was a belief that the gaming was lawful and did not involve the unlawful provision of credit. For the reason I have just given the gaming was not illegal. If, contrary to my decision, unlawful credit was provided for enabling the Defendant to take part in the gaming the question arises whether he mistakenly believed that the credit was lawful. There was no evidence from the Defendant as to what his belief was. He is therefore unable to make good the allegation that he had a mistaken belief. In any event when he paid for his tokens which he subsequently lost (and now seeks to recover by his counterclaim) he was not obliged to pay for them because gaming contracts are unenforceable. His payments were, therefore, voluntary in the sense that, even if he had the alleged belief, he was not obliged to make the payments. Thus, if he had the alleged mistaken belief, it was not a mistaken belief as to a fundamental fact; see *Morgan v Ashcroft* [1938] 1 KB 49. The counterclaim would therefore have failed on these additional grounds also.
67. The restitutionary claim was also put on the basis that the payments were *received* by the Claimant in the mistaken belief that Club could legally allow the Defendant to participate in gaming. Whether or not payments received by the payee under a mistake of fact can give rise to a restitutionary claim by the payer, such a claim would in any event fail because the gaming was not unlawful and the mistaken belief was not as to a fundamental fact.

Conclusion

68. The claim and counterclaim must therefore be dismissed for the reasons which I have endeavoured to express.