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ENFORCEMENT OF GAMING DEBTS IN BRITAIN

NEIL FAGAN*

History of Gaming Legislation

Gaming has popular appeal to all sections of British society, and thus it would be difficult to undertake a full study of gaming legislation without some examination of its historical background. However, it is important for those whose law is codified to distinguish common law systems, where only part of the law is codified in statute and part is judicially created.

Gaming, though not unlawful at common law,¹ has been regulated by statute for more than 400 years. Games in general have been regulated for an even longer period, commencing with a proclamation by Richard II in 1388 prohibiting the exercise of certain games such as tennis, football and the “casting of stonekaileg.”² Other enactments in a similar vein followed.³ The purpose of this early legislation was practical in that it sought to prevent games or gaming activity that would compete with the practice of archery, which was necessary for the defense of the realm.

The Unlawful Games Act of 1541⁴ sought to ban games which apparently involved the use of money. However, that statute, did include a provision allowing various games to be played by certain noblemen⁵ and it was lawful for every “master” to license his servants to play certain games with him or guests in his house.⁶

It was not until 1665 that legislation was introduced having regard to public morals.⁷ In the context of gaming, this legislation was against

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2. 12 Rich. 2, ch. 6 (1388).
3. See 11 Hen. 4, ch. 4 (1409), 17 Edw. 4, ch. 3 (1477), 11 Hen. 7, ch. 2 (1494), 19 Hen. 7, ch. 12 (1503), 3 Hen. 8, ch. 3 (1511), 6 Hen. 8, ch. (1514), 27 Hen. 8, ch. 25 (1535), 33 Hen. 8, ch. 9 (1541).
4. 33 Hen. 8, ch. 9 (1541).
5. Id. at § XXII (provided they owned land with a value of a least £100).
6. Id. at § XXIII.
7. In 1649, the Puritans, under Oliver Cromwell, gained control of England. Although not adverse to gaming, they felt that gaming was too time-consuming. They passed a statute in 1657 which provided that a gaming debtor could sue the creditor for the loss and recover twice that amount. Act of June 26, 1657, 2 Acts & Orders Interregnum
those games which involved hazarding money. The moralistic approach
typified by this and subsequent legislation as well as various other at-
ttempts at regulation were, until the nineteenth century, largely
ineffectual.

The Gaming Act of 1710\(^8\) attempted to deal with the question of
security, a common theme running through gaming legislation. Section
1 of that Act provided that any security taken, given for money or any
other "valuable thing" won by gaming, or any security for the repay-
ment of money lent for gaming, was void.\(^9\) Furthermore, the Gaming
Act of 1835\(^10\) provided that the consideration (i.e. the money or other
"valuable thing") which arose out of the gaming was deemed to have
been given for an illegal consideration.\(^11\) Thus an action could not be
brought in the courts to enforce the security because it arose out of an
illegal contract.

Under the Gaming Act of 1845,\(^12\) all contracts or agreements by
way of gaming or wagering were deemed null and void.\(^13\) Thus, actions
could not be brought to recover any sum or valuable thing from any
wager. The Gaming Act of 1892\(^14\) stated that a promise to repay any
sum of money paid under a contract rendered null and void by the
Gaming Act of 1845 was null and void, and no action could be brought
to recover such a sum of money or valuable thing.\(^15\) It is important to
note these historical developments for two reasons; first because it
demonstrates the consistently hostile social attitude toward gaming as
expressed by Parliament, and second, because it indicates that the leg-
islators have faced the reality that gaming has always existed and will
continue to do so.

Gaming in the United Kingdom is now regulated by the Gaming

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1249 (reprint 1972). This statute, like all Puritan legislation was abolished upon Charles
II accession to the throne in the Restoration. See 6 W. HOLDSWORTH, A HISTORY OF EN-
GLISH LAW 148 (2d ed. 1927).
8. 5 & 6 Will. 4, ch. 41 (1710).
9. Id. at § 1.
10. 9 Anne, ch. 19 (1835).
11. Section 1 of the Gaming Act of 1710 voided securities given for such loans with-
out expressly voiding the consideration for them; that is the loan. 5 & 6 Will. 4, ch. 41 §
I. Section 1 of the Gaming Act of 1835 states that all such securities are deemed to have
been given for an illegal consideration. 9 Anne, ch. 19 § I. It has been held that the
combined effect of those sections voids not only the security, but the loan as well. See
Carlton Hall Club v. Laurence [1929] 2 K.B. 153, 3 All E.R. Rep. 605, (D.C.); but see
Appeal doubted the validity of that decision.
12. 8 & 9 Vict., ch. 109 (1845).
13. Id. at § 18.
14. 55 & 56 Vict., ch. 9 (1892).
15. Id. at § 1.
Act of 1968,\textsuperscript{16} which came into force in stages between 1969 and 1971 and represents the cumulation of a series of reforming acts passed during the twentieth century. This act made it unlawful to play any game which either involved playing or staking against a bank where the premises are not actually licensed or registered for the purpose of gaming.\textsuperscript{17} This holds true regardless of who holds the bank, and where the chances in the game are not equally favorable to all players.\textsuperscript{18} There are exemptions from this act for gaming which takes place on domestic occasions or in private dwellings, and gaming in hotels, residence halls, or similar establishments where gaming is not carried on by way of trade or business.\textsuperscript{19} Though the private party where a game of roulette as an after dinner adjunct to the entertainment is acceptable and lawful, the public cannot be invited; the public essentially being those persons not invited.

\textit{Attempts to Reform Gaming Legislation}

Under the Gaming Act of 1541,\textsuperscript{20} certain games were barred, and the common gaming house was prohibited.\textsuperscript{21} These provisions were the basis for all future gaming legislation until the sweeping reforms of the Betting and Gaming Act of 1960.\textsuperscript{22} The Betting and Gaming Act of 1960 was principally concerned with denying a right of action on gaming contracts and restricting the recoverability of securities in the hands of third parties given during the course of gaming transactions. The security provisions of earlier acts survived the 1960 reforms, and are now specified in and affected by Section 16(4) of the 1968 Act.\textsuperscript{23} Significantly, this section refers to checks as securities,\textsuperscript{24} and the fact that the 1968 Act deals with enforceability of securities and actions on such checks indicates that at least the legislators have been consistent in their belief that regulating gaming debts is only practicable through regulation of the right to realize security for gaming debts.

The Act of 1960 was based on the recommendations of the Royal Commission on Betting, Lotteries and Gaming, which sat from 1949 to 1951. The aim of the legislation was summed up as follows:

\begin{itemize}
  \item The Gaming Act, 1968, 16 & 17 Eliz. 2, ch. 65 [hereinafter the Act].
  \item \textit{Id.} at §2(1).
  \item \textit{Id}.
  \item \textit{Id.} at §2 (2).
  \item 33 Hen. 8, ch. 9 (1541).
  \item \textit{Id.} at §11.
  \item 8 & 9 Eliz. 2, ch. 60 (1960).
  \item 16 & 17 Eliz. 2, ch. 65, §16(4).
  \item \textit{Id}.
\end{itemize}
We are led by all the evidence we have heard to the conclusion that gambling is a factor in the economic life of the country, or as a cause of crime, is of little significance, and that its effects on social behaviour, insofar as these are a suitable object for legislation are in the great majority of cases less important than has been suggested to us by some witnesses. We therefore consider that the object of gambling legislation should be to interfere as little as possible with the individual liberty to take part in the various forms of gambling, but to impose such restrictions as are desirable and practicable or prevent excess.26

The Act of 1960 was not concerned with any particular game, but rather with the type of gaming, and the conditions under which it took place. The Commission recommended that it should be illegal to provide facilities for any type of gaming in which:

1. By reason of the nature of the game the chances of all the players are not equal;
2. A toll is levied on the stakes or winning by the promoter as the game is played;
3. Charges are made which vary in accordance with the stakes for which the game is played.26

The object of these prohibitions was to prevent the exploitation of gaming by commercial interests and to provide standards by which gaming was to be considered "lawful gaming." Not surprisingly, the "conditions of lawful gaming" mirrored those prohibitions and were:

1. The chances must be equally favorable to all players;
2. No toll on stakes or winnings to be taken by the promoter;
3. No charges for taking part in gaming.27

The Failure of the 1960 Act

The Betting, Gaming and Lotteries Act of 196328 was a consolidating act, with Sections 32 through 47 referring to gaming. Under the Acts of 1960 and 1963, the conditions for lawful gaming were framed in clear language and may have succeeded in preventing the exploitation of gaming by commercial interests had there been no qualifications to the concept of "lawful gaming." Unfortunately, the legislature made

26. Id.
two qualifications to the general principles in the hopes of making the law more flexible. These qualifications, however, opened the floodgates to a large number of small quasi-illegal casinos and unsatisfactory practices.

The first qualification referred to the “conduct of the gaming” and required that the game be played in a manner which gave the players an equal chance.\(^2^9\) This held true even where the banker had a “built-in advantage.” It was a simple enough matter to decide whether or not the chances were equal, but it was left to the courts to decide whether the advantage built into the game in favor of the banker could be balanced out by the “conduct of the gaming.” Generally this was done by offering the bank to other players and would vary in each particular case. In many cases where the “conduct of the gaming” was held to be unlawful, promoters would simply devise alternative means to take its place. For example in *Kursaal Casino Ltd. v. Crickitt*,\(^3^0\) although the bank was offered to the other players, a “means test” had to be met before the player could accept.\(^3^1\) That was held to be unlawful, and as a result, the promoter altered the rules so that the player could set the ceiling on his liability as banker, although he had to show that he had the financial resources to cover his possible liability. This was held to be unlawful by the Magistrate’s Court, lawful by the Divisional Court\(^3^2\) and finally, unlawful by the House of Lords.\(^3^3\) The vagueries of these decisions discouraged prosecutions, demonstrating that the “conduct of the gaming” could not be subject to efficient regulation.

The second qualification was a concession to the age old custom of clubs charging for gaming. To accommodate this, the 1960 Act allowed genuine social clubs to retain the custom of charging “card money.”\(^3^4\) Subsequently there was a proliferation of “bingo clubs” which possessed those club characteristics required by the act. The result was a substantial bingo industry and the growth of petty gambling; something the 1960 Act had in fact sought to prevent.

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31. Id. The means test was passed if any member of the assembled players could show that he was able to meet the financial commitments involved if the Bank should lose while he was in possession of it.
33. Crickett v. Kursaal Casino Ltd. (No. 2) [1968] 1 All E.R. 139 (H.L.). An appeal from the Magistrates Court which is essentially a criminal court is to the Divisional Court of the Queen’s Bench Division. In usual circumstances, an appeal from the Divisional Court is to the Court of Appeal, but in instances where there are important matters of law the matter can “leap-frog” to the House of Lords.
34. Betting and Gaming Act, 1960, 8 & 9 Eliz. 2, ch. 60, § 16(7).
Present Legislation

The two qualifications of the 1960 Act enabled commercial interests to exploit gaming. The Gaming Act of 1968 attempted to remedy the deficiencies of the 1960 and 1963 Acts, by discarding the "conditions of lawful gaming," and replacing them with a regulatory system. Several administrative bodies were also created, and Sections 32 through 39 of the 1963 Act were repealed.

Under the 1968 Act, gaming is regulated in relation to the premises being used, with permissible types of gaming being determined by these classifications. Premises will either fall within Part I or Part II of the Act, and gaming is only unlawful if it is carried on in premises or under conditions other than those laid out.

The distinction between premises falling within Part I and Part II of the Act is the extent of control exercised over them, with licensing and registration serving as the instruments of control. Licensing is required for those premises occupied by proprietary clubs while members clubs are subject to registration. There is nothing to prevent a member's club from being granted a license if a member is prepared to assume the responsibilities attached to the license and the constitution of the club permitted it. Generally, only established clubs such as working mens' clubs, miners' welfare institutes, etc. are registered, while all gaming clubs or casinos are in fact proprietary clubs.

Licensed premises are subject to greater control and a license is granted only after a thorough investigation as to the fitness of the person or body of persons applying for it. It may be terminated or varied at any time at the request of the controlling authority, if it's standards fall short of those expected. Although the regulation of registered clubs may extend to the submission of the books of accounts or limits on the amount of charges or stakes, generally there is less control.

The Control Machinery

The apparatus of control includes the use of established authorities such as the judiciary, the police and a central authority - the Gaming Board. The 1963 Act gives the Gaming Board considerable powers (by advice and rights of appeal) to influence decisions of the local Licensing Authority created by the Act. The Gaming Board grants certificates of consent, which are conditions precedent to application for li-

36. Id. at § 43 (the Gaming Board, with the assistance of the local police, conducts the investigations).
37. Id. at sch. 2. (this section deals with the grant, renewal, cancellation and transfer of licenses).
licenses, and is extremely concerned with fitness and propriety, as evidenced by its paranoia about "organized crime." The Board works alongside the Licensing Authority which has the power to grant, refuse or modify a license, and in exercising its powers, the Licensing Authority must consider the advice of the Board, in addition to the prescribed regulations. The Secretary of State also has power to modify such regulations, but must consult with the Board before doing so. This system provides for the interaction of all controlling authorities and gives the Board almost absolute powers of regulation. It has been stated that the local licensing authority is the "king pin" of the licensing machinery. Clearly, this is true, and in London the differing views and attitudes of the various licensing authorities is vitally important to prospective licencees. Although the Licensing Authority looks to the Board to advise them on technical or specialist matters arising from the nature of gaming, the Board itself can be a party to the hearing of the license application and thus is careful not to urge any views upon the licensing authorities (out of court) which might be prejudicial to any particular application. The role of the courts is also relevant in that they have the power to disqualify a licensee from holding a licence and impose criminal sanctions such as fines and imprisonment.

**Particular Problems**

1. The Granting of Credit

   The intention of the 1968 Act was to prevent or restrain the practice of gambling on credit. Originally, the Gaming Houses Act of 1854 made it an offense for any person to "advance or furnish money" for the purposes of gaming, but since the repeal of that Act during the 1960 reforms there had been no restriction on lending. This situation was remedied by Section 16 of the 1968 Act which prohibits licensed clubs from allowing credit for gaming in any form whether by loan, redeeming debts to other players, or allowing losses to stand on account. Section 16 (1) provides that it is an offense for the licensee or anyone acting on his behalf to make any loan or to allow any credit or

38. *Id.* at §51 (the Licensing Authority does not have to accept the recommendation of the Board; the Board only has a power of veto in refusing to grant a certificate of consent to an applicant for a grant of a license).
40. 17 & 18 Vict., ch. 38 (1854).
41. *Id.* at §18.
42. Betting and Gaming Act, 1960, 8 & 9 Eliz. 2, ch. 60, §15.
43. This provision covers all clubs licensed under Part II of the Act.
to release or discharge on another person's behalf the whole or any 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.

These prohibitions do not apply to checks, since Section 16 (4) specifically provides that nothing in the Gaming Act of 1710, the Gaming Act of 1835, the Gaming Act of 1845 or the Gaming Act of 1892 shall affect the validity of, or the remedy for, such a check. This effectively removes “checks” from the general prohibition on the enforcement of securities. The importance of this cannot be overstated, as it is the cornerstone of British law with respect to the enforceability of gaming debts. Today, gaming in the United Kingdom has become a billion dollar industry, due in part to this exception.

A recurrent problem in the area of credit involves the repeated acceptance of checks from persons whose previous checks may have been dishonored. Such transactions could be seen as a granting of unlawful credit since it could be inferred that the recipient of the check knew that it would not be honored on a first presentation. This amounts to a “sham”—a transaction which allows the licensee to extend the customer credit. In attempting to deal with this problem, the British Casino Association has issued guidelines which state that a casino cannot accept a check from a player in exchange for tokens if that player has dishonored a previous check from which the debt, or any part of it remains outstanding. However under certain circumstances, the management of a casino may accept a check where, despite the previously dishonored check, both the casino and the player genuinely expect that the new check will be honored on presentation as required by Section 16 of the 1968 Act. The management, for example, may accept the check if it is aware of an influx of funds into the customers account. Of course the casino must prove that this expectation was jus-
tified, as in the situation where the customer is a long standing member of the casino and it is familiar enough with the customer’s affairs to have a reasonable assurance of repayment. It may be inferred from this example that if a player has an existing indebtedness to a casino which he has yet to repay, the only situation where a casino can reasonably expect the check to be met on presentation is if the value of the check is considerably less than the outstanding indebtedness, otherwise there is no reason why the customer cannot pay off his indebtedness as a whole.

Where a casino chooses to accept a check in these circumstances a procedure prescribed by the British Casino Association must be followed whereby the transaction must be approved and authorized by the casino “at director level or, in rare circumstances, by a manager holding the gaming board’s grey license.” In addition, a record of the authorization must be kept showing:

(a) Reasons for the approval;
(b) Name and title of person who authorized it and his/her signature confirming the decision;
(c) The outcome (e.g.) whether the check cleared.47

A “dishonored” check is defined as any check returned unpaid, whether marked for re-presentation or not.48 Where the casino has limited the amount for which a customer may cash a check, no check facility which would cause the player’s liability to exceed that limit may be permitted by the casino except in the special circumstances outlined above governing the acceptance of the player’s check after a previous dishonor. There is a prescribed procedure for increasing check cashing facilities,49 which is the same as that for the acceptance of checks from defaulting players.50

2. Settling Claims on Dishonored Checks

Section 16 of the 1968 Act, notwithstanding what has previously been said, is fraught with problems concerning the recovery of debts arising from dishonored checks given in return for gaming tokens. Section 16(4) in relation to checks is vital but note that any release outside Section 16(1)(a) and (b), remains unaffected by the prohibition under the Act. The question remains: Is a debt arising from a dishon-
ored check a Section 16(1) debt in respect of losses incurred in the gaming? If this is the case, the Act prevents releases under agreements whereby a lesser sum is accepted in discharge of a larger debt. Thus, it would appear that a plaintiff can sue for the actual sum written on a dishonored check, but cannot legally settle for anything less. Clearly, this would create insurmountable difficulties for litigators where, for example, other defenses raised by the payer of a dishonored check render it necessary to settle for less that the full sum claimed.

Alternatively, it could be said that where a check has been accepted in return for tokens prior to gaming, the debt arises and remains so whether the player wins or loses when playing with the tokens. In this case, the debt cannot then be said to be "in respect of losses incurred in gaming."

Section 16(3) prohibits the return of the check to a player before presentation for redemption and payment of the amount for which it is drawn, whether out of winnings or anything else. This also holds true when a check is accepted in return for cash which may in turn be exchanged for tokens. The check is not "in respect of losses," but is in respect of cash paid over to the player.

Common sense would dictate that as a matter of policy a licensee should be able to settle a debt if:

1. There is a genuine dispute as to the legality of it, for example, whether or not a relevant contravention of the Act has occurred;
2. Where it is plain that the full debt is not recoverable;
3. Where part of the debt will not be recoverable if a release of part of the debt is not conceded, for example, where a debtor has limited means or resides abroad.

These arguments were tested in the Court of Appeal in Regina v. Knightsbridge Crown Court, ex parte Marcrest Properties Ltd. and were rejected. In that case, the appellants contended that where a sum less than the face value of the dishonored check was accepted, it did not amount to the release of part "of any debt in respect of any losses incurred by any person in the gaming." It was also contended that when a casino issues tokens against a check, the player did not incur a debt at that moment. A customer might decide against gambling at that time and leave the casino, or cash his tokens in. Alternatively, he may win money on that day and cash in his tokens. It did not follow, therefore, that when a check was dishonored a debt in respect of any losses was incurred by the customer in the gaming. As Lord Justice

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Ackner stated:

In our judgment when a cheque is given by the customer to enable him to take part in the gaming, and is subsequently dishonored, then prima facie a debt has been incurred in respect of losses in the gaming. Of course, if the customer can establish that he never used the cash or tokens purchased by means of his cheque, or that he in fact made no loss as a result of being enabled through the acceptance by the casino of his cheque to take part in gambling on their premises, then he would have destroyed the prima facie case that the cheque which was dishonored had created a debt in respect of a loss incurred by him on the occasion of their cashing his check.”

The only problem here is that if a casino is pressing a customer for payment on one of his checks, it might not always have the cooperation of the customer in establishing the chronology of events after the check was exchanged for tokens. It was argued that if compromising a dishonored check was unlawful, casinos would sustain serious losses which might otherwise have been mitigated. Although their Lordships were sympathetic, their position was clear, writing: “It seems to us to be fully consistent with the policy of the legislation, which is to ensure that licensees do impose realistic limits on the credit which they accord to their customers.”

It could be argued that the narrower construction furthers statutory policy, by encouraging casinos to press for repayment. However, in view of the Marcrest decision, it is now settled law that a check cannot be compromised for a lesser sum than that claimed, and a settlement for a lesser sum can only be accepted after judgment has been entered. This raises difficulties because there are many situations in which a customer would not wish to have a consent judgment entered against him, when, for example, the judgment affects his credit worthiness. There are also those cases where a casino may be discouraged from pursuing a debtor to judgment if the transaction is in some way, tainted.

The British Casino Association responded to court decisions on this subject by issuing guidelines which state that “[n]o casino shall agree to the compromise of the dishonored gaming cheque or enter into any arrangement to make settlement for players debts arising from such a cheque for less than the full amount in which that cheque was

52. Id. at 309.
53. Id. at 310.
There may be some circumstances where the licensee is not the plaintiff as, for example, where a receiver has been appointed over the assets of a casino. If the casino license remains in existence, the receiver is bound by its limitations, but if the license is withdrawn, it is arguable that the restrictions no longer apply and the receiver is in the position of any other plaintiff and is not bound by Section 16(1).

There has been some recent relaxation of the stringency of Section 16 insofar as it relates to checks which have not been dishonored. The Gaming (Amendment) Act of 1986 which came into effect on 1 August 1987 permitted "consolidation" of checks for the first time. The main purpose of this act is to permit redemption of a check which has previously been accepted in exchange for cash or tokens if the check has not been dishonored and provided that it is redeemed by the person for whom it was accepted by giving cash or tokens or a substitute check (or a combination) to an amount equal to the redeemed check or checks.

Foreign Gaming and the Operation of the Gaming Acts

The Gaming Act of 1845 and the Gaming Act of 1892 do not render a gaming contract which is lawful abroad, void and unenforceable in England. Money lent abroad for the purposes of gaming abroad, is recoverable in English courts, provided that the debt is recoverable both in English courts, and in the foreign jurisdiction. It must be remembered, however, that any security given for a gaming loan or won by gaming is not enforceable in England. This is because by Section 1 of the Gaming Act of 1710 and the Gaming Act of 1835, which state that such security is deemed to have been given for an illegal consideration. A check is such security, and despite the fact that the security may be enforceable in the foreign jurisdiction, it is not enforceable in England and Wales. There is contrary opinion that such a foreign gaming loan is not actionable because the check used as security is given in return for illegal consideration, therefore the loan itself cannot be enforced. It is submitted that this opinion is in error. The matter was considered in Societe Anonyme des Grand Etablissements du Touquet Paris-Plage v. Baumgart which followed the existing precedents.

If a foreign gambling debt is enforceable in the foreign jurisdic-

54. GUIDELINES FOR ACCEPTED PRACTICE supra note 43 at para. 1.
57. [1927] 1 All E.R. 280.
tion, it will also be enforceable in England. The operation of the 1845 and 1892 acts apply only to gaming which is unlawful in England.\textsuperscript{58} Loans for gaming overseas, are not void under English law, provided the loan is lawful in the foreign jurisdiction. With respect to 'lawful' foreign gaming debts, the relevant English law accommodates the operation of foreign law in that it takes note of how the foreign law treats the gambling debt.

\textit{Jurisdiction in the English Court for Claims Outside the EEC}

The English courts clearly have jurisdiction over gaming debts incurred in the United Kingdom. With regard to foreign gaming debts, English courts will have the necessary jurisdiction if:

1. The debtor is present in the United Kingdom and has been served with legal process there. The debtor only has to be "present" for a short period; or
2. The debtor is domiciled or ordinarily resident in the United Kingdom. "Domiciled" means that the United Kingdom is the debtor's permanent home, and "ordinarily resident" means that the debtor has more than a "temporary presence" in the United Kingdom; or
3. A breach of contract has been committed by the debtor in the jurisdiction of the English courts. The contract may have been made overseas and out of the jurisdiction; or
4. The debtor submits to the jurisdiction of the English courts, or the gambling transactions provides that the obligations under it are to be enforced by English courts.

The second and third basis for jurisdiction are probably the most common grounds on which gaming debtors in England are pursued. If the debtor is domiciled or ordinarily resident in England, he is likely to have assets in the country, therefore it would be advantageous to proceed against him in the English courts. Often a gaming debtor has provided a 'marker' in the form of a check drawn on a bank in England. If this check is not honored on presentation for payment in England, then a breach of obligation occurs and this itself, gives the English courts jurisdiction to hear claims against the debtor. Under the rule of \textit{Saxby v. Fulton},\textsuperscript{59} although the check itself cannot be the basis of an action, the loan for which it was given as security gives rise to a cause of action.

Once the question of enforceability and jurisdiction have been re-

\textsuperscript{59} [1909] 2 K.B. 208.
solved, in essence, the collection of the overseas gambling debt follows the normal course of litigation. The only material difference is that at trial of the action, the relevant foreign law will be applied by the courts.

**Procedural Points for Service Outside the EEC**

Service of process on an individual can either be by personal service or by postal service pursuant to Rules of the Supreme Court, Order 10 - Rule 1. If service is by post, then service is deemed to be effective seven days after posting of the proceedings to the debtor.

If the debtor evades personal service or causes the posted service to be returned by the post office dead letter service, steps can be taken to effect substituted service on the debtor under Rules of Supreme Court, Order 65 - Rule 4. On an application, the court will consider alternative methods of service, including service by post to an address where it is deemed that the writ will come to the knowledge of the debtor, or by service on a person or body likely to be in contact with the debtor, such as the debtor's lawyer, accountant or bank. In rare circumstances the court may permit an advertisement to be placed in a newspaper or journal. This method of service is used where the defendant's residence is not known, or in cases where there is reason to believe that he is keeping out of the way to evade service and it is not possible to name any person who will be effective in reaching the defendant, upon whom service could therefore be effected in substitution. In practice, such an order will only be made where there is good reason to believe that the advertisement will be seen by the defendant.

Particular problems arise if a debtor is overseas or if service of English proceedings is to be effected on him. To serve a debtor outside the jurisdiction, leave of the court must be obtained under Rules of Supreme Court, Order 11. The court will only grant leave if it can be shown: that the creditor has a good arguable claim against the gambling debtor, that English courts have jurisdiction to adjudicate the claim and that the English courts are the most convenient forum in which the action should proceed. It is difficult to persuade the court to grant leave to serve out of the jurisdiction if a debtor is not domiciled

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60. This method of service is used when the defendant's residence is not known, and in cases where there is reason to believe that he is keeping out of the way to evade service, and it is not possible to name any person who will be effective in reaching the defendant and upon whom service could therefore be effected in substitution. In practice, such an order will only be made where there is good reason to believe that the advertisement will be seen by the defendant.
or ordinarily resident in the United Kingdom. 61

Jurisdiction in the English Court for Claims Within the EEC

The Civil Jurisdiction and Judgment Act, 1982 62 requires that a defendant must be sued in the courts of the state in which he is domiciled, 63 if that State has adhered to the Brussels Convention. 64 The domicile of the defendant is interpreted as the genuine residence and is slightly different from the interpretation generally attributed in English law. It is now no longer possible to serve a defendant domiciled in one of the member states while on a short visit to another member state. 65 Special jurisdiction is conferred where a person domiciled in a convention territory may be sued in matters relating to a contract in the court of the place of performance of the obligation in question, that is the payment of the debt. 66 A gaming debtor in the EEC may therefore be sued in the English courts if he is domiciled in England or if the gaming debt was incurred there. On the issue of the writ the plaintiff simply has to endorse that the English court has jurisdiction.

Security for Costs

A plaintiff "ordinarily resident abroad" may be ordered by the court to give security for the defendants' costs. Although the court's power is discretionary, it is usually exercised in favor of the defendant. If a plaintiff is a foreign gaming establishment, there is a strong possibility that the debtor will apply to the court for an order for security for costs. However, if the plaintiff can show that he has substantial property within the jurisdiction of a "fixed and permanent nature and available for cost," or if the defendant himself is not ordinarily resident in the United Kingdom, no order for costs will be made.

The jurisdictional provisions of the Brussels Convention do not deal with the security for costs with respect to litigation within the EEC, but the Convention is important since one of its objectives is to facilitate the enforcement of procedural rights across the frontiers of contracting states. A recent decision of the Chancery Division 67 held

61. It must be remembered that the debtor is always entitled to challenge the jurisdiction of the English courts.
62. The Civil Jurisdiction and Judgements Act, 1982 11 Eliz. ch. 27.
63. Id. art 2, sched. 1.
65. Id. art. 3, sched. 1.
66. Id. art. 5, sched. 1.
that in exercising its discretion to order security for costs where the plaintiff was ordinarily resident out of the jurisdiction, the court would take into account, as an important but not a decisive factor, the substantial and improved rights of enforcement available to a defendant under the Civil Jurisdiction and Judgements Act. Relevant factors may include, for example, whether the enforcement of an order for costs would be difficult in practice whether because of the nature of the plaintiff’s assets or other matters.

Preservation of the Defendant’s Assets Within the Jurisdiction

Under Section 37(3) of the Supreme Court Act of 1981, the High Court has the power to grant an interlocutory injunction restraining a debtor from removing his assets from the jurisdiction of the court, or otherwise dealing with his assets located within the jurisdiction, whether or not the debtor is domiciled, resident or present within the jurisdiction. Known as a *Mareva* 68 injunction, this relief will be granted where the plaintiff can show that he is likely to obtain a judgment against the debtor for a certain or approximate sum. The plaintiff must also show that he has reason to believe that the debtor has assets within the jurisdiction to meet the judgment and that the debtor might remove these assets from the jurisdiction or dispose of them within the jurisdiction so that they are not available or traceable when a judgment is obtained.

The law in relation to the granting of injunctive relief for the protection of a litigant’s rights pending the hearing of an action has been transformed over the past ten years by the Anton Pillar 69 and *Mareva* relief, two developments which have greatly expanded the law in this area.

Procedure on Obtaining a Mareva Injunction

A *Mareva* injunction is sought where the plaintiff fears the consequences of not restraining a defendant’s assets. This may be particularly necessary where the debtor does not reside in the jurisdiction.


69. This is a mandatory injunction allowing the plaintiff’s solicitor to inspect documents of chattels on the defendant’s premises, and to take photographs or copies of them. It is used in cases where it is vital for a plaintiff to prevent a defendant destroying or disposing evidence, thereby making it difficult for the plaintiff to prove his case. The basis of the Anton Pillar order is in Rules of Supreme Court, Order 29-Rule 2(1). See *A v. C* [1980] 2 All E.R. 347 (Q.B.).
The application for a *Mareva* injunction is usually ex parte on affidavit and in urgent cases can be before the issue of the writ or originating summons as long as the order contains an undertaking to issue forthwith.\(^7\)

Although most *Mareva* applications are in the Commercial Court,\(^7\) the principles are the same wherever the order is granted. The applicant must put the writ or a draft before the court, together with an affidavit, in draft if absolutely unavoidable, setting out the claim, the amount, and the point, if any, made against the defendant.

The affidavit in support must show that it is reasonable to believe that there are assets of the defendant within the jurisdiction, and that there is a risk that the defendant will remove his assets unless restrained. Full and frank disclosure of all material matters must be made and therefore, the affidavit should contain as much information as possible.\(^2\) Notice can be given to the defendant and third parties in control of assets, by telephone if necessary, and the written order will be sent afterwards. A penal notice warning of the consequences of a breach of the injunction should also be included.

The plaintiff need not have a strong prima facie case, nor one which will succeed under an application for summary judgment. The test is whether he has a "good arguable claim." The court has broad discretion in these cases, and while the plaintiff must present a good arguable claim for the exercise of the *Mareva* jurisdiction, ultimately the court must consider the evidence as a whole in deciding whether or not to exercise the statutory jurisdictions.\(^7\)

The injunction applies to all assets tangible and intangible within the jurisdiction. All assets are potentially within the scope of the injunction as long as they are within the jurisdiction and in the legal or beneficial ownership of the defendant, and are not subject to legal or equitable interests of third parties. The injunction is inapplicable as assets outside of the jurisdiction.\(^7\)

An injunction may be granted in the aid of executing a judgment, (although it cannot be used to enforce a judgment) on the same basis

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\(^7\) *In re N* (infants), [1967] 1 All E.R. 161 (Ch. D.).

\(^7\) The Commercial Court is part of the Queen's Bench Division of the High Court of Justice. Proceedings involving insurance, banking or other mercantile matters are suitable for the Commercial Court. See *Administration of Justice Act*, 1970 ch. 31, § 3.


as in an application before judgment, except that the existence of the judgment itself serves as the basis of the claim.\textsuperscript{79} However, the risk that the defendant will remove his assets must still be proven. This power is exercisable despite the existence of other methods for enforcing execution, since it is up to the judgment creditor to select his remedies. It should also be noted that the injunction does not give the judgment creditor any right in the property, unlike other methods in the execution process.

\textit{Mareva Injunctions in Relation to Bank Accounts}

Generally, the assets of a foreign debtor will consist of bank accounts within the jurisdiction, and particular problems arise with respect to banks and \textit{Mareva} injunctions. The plaintiff will usually be in possession of a dishonored check and will therefore have some details of the debtor's banking arrangements, yet compliance with an injunction by a bank is still time consuming and expensive.\textsuperscript{76} Thus, the order as it relates to the bank should clearly identify what assets are covered and to what extent.

The plaintiff should be able to identify the funds within the jurisdiction by naming the bank and if possible the branch where the funds are deposited. If the branch is not known the bank could be requested to "trawl" its branches.\textsuperscript{77} Such an exercise would cost approximately £2,000, and in some cases may even be higher.

An additional problem is the application of the \textit{Mareva} injunction to assets other than money held by the bank. It was suggested by Lord Justice Kerr that shares, title deeds, or articles held in the safe custody by the bank are either not covered unless specifically referred to in the order, or perhaps, should be expressly excluded.\textsuperscript{78}

\textit{The Contempt Rules in Relation to Third Parties}

Generally, plaintiffs suing on dishonored checks will be seeking to freeze bank accounts of various debtors. The leading case on this issue

\textsuperscript{75} Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd., [1985] 3 All E.R. 747 (Q.B. 1984); Stewart Chartering Ltd. v. C & O Managements S.A. and Others, [1980] 1 All E.R. 718 (Q.B. 1979), (\textit{Mareva} injunction was continued after judgment).


\textsuperscript{77} "Trawl" is a term used by banks and involves making inquiries of every branch as to the existence of an account. \textit{See} Z Ltd. v. A-Z and AA-LL at 586.

\textsuperscript{78} \textit{Id.} at 590. This part of the decision is obiter dictum and does not have the burdening effect of precedent.
Z Ltd. v. A-Z and AA-LL,79 considered the contempt aspect of Mareva injunctions as it affected banks and third parties. That case held that a third party is liable if he knowingly assists in the breach of the injunction, or if he knows of the terms of the injunction, but nevertheless wilfully assists in a breach by the person to whom it was addressed. It is clear that a third party can be in contempt even if a defendant himself has not yet received notice of the injunction, because the third party is interfering with the administration of justice.

The knowledge of the bank's employees is very important when the injunction affects a financial institution. An employer is responsible for the employee if he knowingly assists in the breach of a court order, but what if an employee unintentionally disobeys a court order of which he has no knowledge, even though another employee has had notice of it? This issue was resolved by Lord Justice Eveleigh when he wrote: "I do not think that it should be possible to add together the innocent state of mind of two or more servants of the corporation in order to produce guilty knowledge on the part of the corporation.80

The applicant for a Mareva injunction must make certain, for the bank's purposes, that the order is clear as to its scope and involvement. The order usually refers to numbered accounts and it is better to be as specific as possible in all respects, especially when the order indicates a maximum sum, since the bank has freedom to allow withdrawals if the assets exceed the figure in the order. The more information the judge possesses, the more specific he can be, thus the plaintiff, if possible, should designate the particular account which is the subject of the order.

Courts will only find a bank in contempt in the clearest of cases, and the greater the difficulty in discovering the account and consequently controlling it, the less likely the risk of contempt of court,81 for as Lord Justice Eveleigh noted:

Carelessness or even recklessness on the part of the banks ought not in my opinion to make them liable for contempt unless it can be shown that there was indifference to such a degree that it was contumacious. A Mareva injunction is granted for the benefit of an individual litigant and it seems to me to be undesireable that those who are not immediate parties should be in danger of being held in contempt of court unless they can be shown to have been contumacious.82

80. Id. at 581.
81. Id. at 582.
82. Id. at 583.
Orders for Disclosure of the Debtor's Assets

The Mareva injunction may state a specific sum to be frozen, or it may simply be a general order covering all the defendant's assets, in which case, an application to discharge or vary may follow. Since the plaintiff has to specify his damages, it has become a common drafting practice to limit the order to a specific sum so as to minimize inconvenience to the defendant. The purpose here is to allow the defendant to use the balance of his assets. The application of a maximum sum to third parties who have no knowledge of what other assets are held by the defendant can cause problems, because of the danger that any release of funds or assets in the belief that other assets are frozen will probably be in violation of the order. The solution is for an order for discovery to be made, to locate and identify all the defendant's assets so that those above the claim can be released. It is submitted that the maximum sum can include not only the amount claimed, but costs, together with interest and the likely damages and costs incurred for third parties.

The courts have inherent jurisdiction to make an order in support of a Mareva injunction, for example, a defendant may be ordered to disclose his assets on an affidavit. The rationale is that without such an order, the injunction might be ineffective where a defendant has hidden his assets. In addition, a plaintiff may be deterred from seeking a Mareva injunction if he does not know the value of the defendant's assets since if his specifics as to damages is called upon, the order freezes all assets in the absence of disclosure, over and above the sum necessary. For example, if a defendant has £5,000,000 equally distributed in five bank accounts and has only been served with an injunction up to the sum of £1,000,000, each bank will protect its position as to the £1,000,000 whereas if an order for disclosure were made, the order could be amended and served upon each bank, with the £4,000,000 balance available to the defendant.

Strategy - Mareva's and Summary Judgment (R.S.C. Order 14)

Under Rules of Supreme Court Order, 11, an application, may be made for leave to serve a foreign defendant out of the jurisdiction. This application should be made at the same time as the application for a Mareva injunction since the injunction must be based on the same cause of action within the jurisdiction. One affidavit will serve for both the Mareva and the Order 11 leave, along with the appropriate draft order. Where the injunction has been granted, the plaintiff can

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serve an application for summary judgment under Rules of Supreme Court, Order 14, once the statement or points of claim have been served and a Notice of Intention to Defend the Action has been filed. If there has been no Acknowledgment of Service or Notice of Intention to Defend, the proper course is to proceed under Rules of Supreme Court, Order 13 for a judgment in default. If the defendant begins to defend the action, however, an Order 14 summons can be served. This summons is either returnable at the same time as the hearing to discharge or vary the Mareva injunction, and conveniently allows the issues to be argued at this point. The majority of Mareva cases are often disposed of at this time.

Leave to defend an Order 14 summons can be given either conditionally or unconditionally, so that payment has to be made or security provided before the defense is allowed to proceed. This is often the case where the defense is shadowy.84

In the Commercial Court, Marevas and summary judgment go hand in hand. Straightforward debt collecting applications for summary judgment are best heard in the Queen's Bench Division. The timely use of an application for summary judgment is an important ancilliary tactic in pursuing a defendant already subject to a Mareva injunction.

Ensuring the Cooperation of the Debtor - The Bayer Order

Service of process on foreign gaming debtors has proved immensely difficult and required inventive thinking and ingenious methods of service. In the course of duty, a process server posed as a call girl in an effort to obtain entry to the premises of one known debtor. On another occasion, where it proved impossible to locate a foreign debtor's London address, a process server waited four hours outside a well known London casino only eventually to be moved on by worried security staff.

More recently developed methods are available to force the debtor to be cooperative.85 A plaintiff may in certain circumstances obtain a Bayer order, first granted in Bayer A.G. v. Winter et al.86 In that case, the plaintiffs traded within the United Kingdom as Bayer (U.K.) Ltd.,


85. A debtor can, in the normal case, be ordered to file affidavit evidence as to his assets while being restrained from disposing of his assets within the jurisdiction.

and brought an action against the defendant for the sale of counterfeit insecticides. The plaintiffs were concerned that the insecticide was ineffective for the purpose for which it was intended and consequently the defendant's actions could cause great harm to their reputation and business. The counterfeit activities appeared to be of an international character and the plaintiffs feared it was only the tip of the iceberg.

The court in *Bayer* initially issued an order against the defendants requiring them to disclose to the plaintiffs the precise whereabouts of all correspondence, invoices and other papers relating to the transactions in which the counterfeit product had been supplied or offered. This order also required the defendants to disclose the value and location of their assets within the jurisdiction. In addition, it was further ordered that each defendant, after service of the order, make out a true affidavit setting forth such particulars.

Except for the usual rules as to contempt, it has been difficult to give effect to such an order if a defendant simply chooses to ignore it. The plaintiff had even fewer options if the defendant ordinarily resided out of the jurisdiction. Attempting to give effect to the court's order, the plaintiffs in *Bayer* sought an *ex parte* order, requiring the first defendant in particular to deliver up his passport to the person who shall serve the order upon him. The plaintiffs' attorneys would return it to him on the expiration date referred to in the order.

Judge Walton of the Chancery Division denied such relief *ex parte* and left the plaintiffs to apply to the Court of Appeal. The plaintiffs contended that without the protection of an order requiring the defendant deliver up his passport, they would be denied the information which the order of Judge Walton was intended to secure to them. The plaintiffs also stated that the Court had jurisdiction to grant such an order under Section 37 (1) of the Supreme Court Act of 1981, which provides that the "High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient so to do." In granting the relief sought, Lord Justice Fox wrote:

The court has to exercise that discretion according to established principles and the particular matter with which we are concerned at the moment, namely of an injunctive restraint upon a person leaving the jurisdiction, is not one on which there appears to be a previous authority... It seems to me that the courts should not shrink, if it is of the opinion that an injunction is necessary for the proper protection of party to the action, from granting relief, notwithstanding it may, in its
terms, be of a novel character.\textsuperscript{87}

Consequently, it appears that a defendant may be ordered to deliver up his passport if it will assist the plaintiff in obtaining effective relief.

\textit{Writs of Ne Exeat Regno}

It is almost impossible to obtain the above sought relief by seeking a writ of ne exeat regno. This writ, which is a form of equitable bail, can only be issued if the following requirements of Section 6 of the Debtors’ Act of 1869 are satisfied:

\begin{itemize}
  \item[(i)] The action is one in which the defendant could have been arrested at law, prior to the enactment of the Debtors’ Act of 1869;
  \item[(ii)] a good cause of action for at least £50 is established;
  \item[(iii)] there is a ‘probable cause’ for believing that the defendant is about to leave England unless he is arrested; and
  \item[(iv)] the absence of the defendant from England will materially prejudice the defendant in the prosecution of the action.\textsuperscript{88}
\end{itemize}

The application for a writ of ne exeat regno can be made at any time before final judgment, and is granted to ensure the attendance of the defendant for cross-examination on his affidavit on the hearing of a motion before the court. However, the courts have declined to extend the writ beyond the date specified upon the defendant agreeing to deposit his passport.\textsuperscript{89}

Such writs are enforced by the Court Tipstaff,\textsuperscript{90} and there is some question as to their enforceability and relevance in modern litigation. The difficulty with a writ ne exeat regno is that since the writ is only effective in the jurisdiction of England and Wales, a defendant may leave the country via Scotland. A \textit{Bayer} order on the other hand appears to be much more effective and simpler while achieving the same objective, since the surrender of a passport is an extremely effective way of ensuring that a defendant does not leave the jurisdiction.

\textsuperscript{87} \textit{Id.} at 737.

\textsuperscript{88} \textit{See} Felton and Another v. Callis, [1968] 3 All E.R. 673 (Q.B.).

\textsuperscript{89} Chalvey v. Baldwin (February 18, 1983, Chancery Division, unreported), \textit{See also} Rules of Supreme Court, Order 45, Rule 1(37).

\textsuperscript{90} The Court Tipstaff is an officer appointed by the marshall of the court.
Enforcement out of Jurisdiction of Judgments Obtained in Britain

When gaming debtors reside out of the jurisdiction and do not have assets within it, enforcement of the judgment will have to take place in the debtor's country of origin. This requires a determination as to whether an agreement for the reciprocal enforcement of judgment debts exits with that particular country.

In 1968, the European Economic Community reached a convention on jurisdiction and enforcement of civil and commercial judgments. The convention came into force in 1973 and in 1978 an Accession Convention was signed to cover the new membership of the United Kingdom, Denmark and Ireland.

The Civil Jurisdiction and Judgments Act of 1982 changed English law to correspond with the Convention. In particular, where the standard provisions of the 1968 Act are fully in force, a plaintiff suing for example, in France, can apply to the English courts to freeze the defendant's assets in England providing that the Brussels Convention applies to the original claim. Once a foreign judgment has been given in France, a plaintiff can enforce a judgment debt against the defendant's assets in the United Kingdom under the recognition and enforcement procedures of the Convention. There is complete agreement between the member states of the European Community on the principle that a party's assets may be frozen in one way or another pending the outcome of a trial.

Conclusion

The service of proceedings on debtors and in particular those debtors who reside out of the jurisdiction does create some difficulties, however, once service is effected, an application for summary judgment under Order 14 or a default judgment under Order 13 is, more often than not, obtained without difficulty. The real difficulties lie in the enforcement of the judgment, and there is no doubt that developments in the law over the past ten years have facilitated the protection of the plaintiff in situations where the defendant may ferret away his assets. It is now possible to ensure that the defendant, and his assets, remain firmly within the jurisdiction thereby making it worthwhile for any plaintiff to proceed to judgment, if necessary. It should be noted that a court will grant a Bayer order keeping the defendant personally within

92. The Civil Jurisdiction and Judgments Act, 1982, 11 Eliz. ch. 27.
the jurisdiction, only in very clear circumstances in which the defendant is likely to avoid compliance with an order.

The construction of Section 16 of the Gaming Act of 1968 as discussed in this article, makes it clear that casinos will have difficulties in obtaining repayment unless they can proceed quickly and effectively to either a summary judgment or obtain judgment in default. Although this appears to unnecessarily hamper the efficient collection of gaming debts, it must be balanced against the clear purpose of Section 16, which is to protect the players against themselves so "[t]hey are not to be given by the casinos so much rope that they may eventually hang themselves, figuratively or otherwise." 95

94. Previous attempts, as in the 1960 and 1963 Acts to allow flexibility have facilitated the development of "loopholes" in the legislation and it is clearly the intention of the legislature and the Courts to impose a firm and narrow interpretation on the 1968 Act.
