Rio Properties Inc v Amer Mouaffac Al-Midani

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
2 August 2002

151/2001

Manchester County Court

2002 WL 31962128

Before: His Honour Judge Maddocks

Friday 2nd August 2002

Representation

Mr. Victor Joffé QC appeared on behalf of the Claimant.
Mr. Louis Doyle appeared on behalf of the Defendant.

Judgment

Friday 2nd August 2002

Judge Maddocks:

This is the hearing from a bankruptcy petition based upon a somewhat unusual debt. The petitioning creditor, Rio Properties Incorporated ("Rio") a company incorporated in the state of Nevada in the United States of America. Rio carries on the business of a hotel and gaming casino at Las Vegas called the Rio All-Suite Hotel and Casino. The debtor, Mr. Al-Midani, was a patron in the casino and engaged in gaming, principally at the roulette tables on occasions between December 1999 and August 2000.

The debt upon which the petition is based is a sum of $1.8 million, being the balance of sums advanced to Mr. Al-Midani and applied by him largely, if not entirely, in gaming at the tables. The figure as such, which is equivalent to just over £1.2 million Sterling, is not disputed. The petition is opposed on the grounds that the loan is irrecoverable by virtue of section 1 of the Gaming Act 1892 , to which I shall turn shortly.

It is the case that under Nevada State law, the gaming was lawful and the loan recoverable. That being so, the loan was, or, as the debtor concedes on the authorities, would have been, recoverable under English law in the English courts. The debtor's case is based upon two subsequent deeds of compromise which Mr. Doyle for the debtor maintains created a new debt which fell within the mischief of the 1892 Act and was rendered irrecoverable accordingly. That, shortly, is the issue. To resolve it I must look at the facts and the law in a little more detail.

The debtor's five visits to the casino were between the following dates, 26th December 1999 to the 1st January 2000; 4th January to 16th January 2000; 7th July to 10th July 2000; 15th July to 24th July 2000 and 30th July to 3rd August 2000. The first four of these visits are really a matter of background but it is right to note that his overall winnings amounted to

$3,880,500 all of which was duly paid to him by Rio, partly in cash but mainly by transfers to his bank account with the Arab Bank in Switzerland. His fifth and final visit went the other way. He lost a net amount of $3 million of the amount drawn.

At this point it is convenient to look at the full account which includes later payments in respect of the loans as set out in the schedule to the final statutory demand. I will take these in four columns.

Date	Debit	Credit	Balance
31st July 2000	$2,250,000		$2,250,000
1st August 2000	$1,000,000		$3,250,000
2ndAugust2000	Chips Deposited	$1,280,000	$1,970,000
2nd August 2000	$850,000,		$2,620,000
3rd August 2000	$380,000		$3,000,000
That is the starting figure.			
3rd December 2000	Wire Transfer	$200,000	$2,800,000
15th February 2001	Wire Transfer	$200,000	$2,600,000
20th April 2001	Cash Payment	$50,000	$2,550,000
25th April 2001	Wire Transfer	$150,000	$2,400,000
18th May 2001,	Wire Transfer	$200,000	$2,200,000
19th June 2001	Wire Transfer	$200,000	$2,000,000
28th September 2001	Wire Transfer	$200,000	$1,800,000

being the subject matter of the present petition.

The procedures at the casino were, briefly, as follows. Having arrived and been introduced, the guest would be offered terms for gaming. The material terms for Mr. Al-Midani on the last visit were set out in a letter signed by Mr. Al-Midani himself and also signed on behalf of Rio:

> "Dear Mr. Al-Midani, The following terms and conditions must be met in order to qualify for discount and airfare reimbursements at the Rio Suite Hotel and Casino."

It then sets out a credit limit of $3,000,000 and I think I need only read terms 4 and 5:

> "4. Discount 10% on all losses over $100,000 and 12% on all losses over $500,000. Discount of 15% on all losses over $1,000,000. Discount of 18% on losses over $2,000,000
>
> 5. Payment in full 120 days."

To draw down on the credit, the guest would sign a document known as a marker being, in effect, a cheque for the sum required and otherwise left blank but containing the following declaration.

> "I hereby acknowledge that I have received cash without restriction to its use in the full principal amount. I authorise completion, if necessary, of the payee any missing amount; my bank account number, the name, address and branch of my bank and the date as to whatever date this cheque is processed for payment. I waive any rights, statutory or otherwise, to stop payment and I guarantee payment with exchange and costs in collecting.
>
> I further authorise the bank which maintains the account, against which I have issued this cheque, to release any and all information concerning my account should this cheque be returned unpaid, for any reason, by my bank. This information can be for any account from which I may in the future have the right to withdraw funds regardless of whether that account now exists, or whether I provided the information on the account to the payee. I acknowledge that said debt is incurred in Nevada and agree to submit to the jurisdiction of any Nevada court."

The cheque would be signed either at the central office, I think described as "the cage", or when the guest was sitting at one of the tables. He would be issued with chips to the amount required which he could use for gaming or, doubtless, incidental purchases, or, could cash in, unused, with any winnings.

As appears from the account, Mr. Al-Midani's total drawings were $4,480,000 and net, after credits, $3,000,000. He was then entitled to discounts if settlement was made according to the terms agreed, that is to say, within 120 days. In fact, Rio went a little further by reducing the $3,000,000 to $2,939,200, that being Mr. Al-Midani's observed loss.

The discounts were then applied resulting in a figure of $2,396,000 for which, on 5th August 2000, he signed a cheque drawn on his account at the Arab Bank, Switzerland, to be held by Rio until 5th December 2000, before presentation; that is the 120 days. Had it been presented, that would have been an end to the matter. However, Mr. Al-Midani requested further time.

He did make two payments of $200,000 each noted above, but other promises were not met and on 30th March 2001, the first statutory demand was issued for the full balance of $2.6 million. There followed further negotiations which resulted in a Deed of Compromise dated 3rd May 2001. It recited the background facts and continued

> "4. The Rio has now agreed to accept from Mr. Al-Midani payment of the sum of $2.2 million in full and final satisfaction of the debt of $2.6 million upon the following terms and conditions."

The instalments then followed and were to continue to 23rd February 2002. It continues at 4.5:—

> "By signing this deed Mr. Al-Midani agrees that he shall make no application to set aside the statutory demand referred to above. By signing this deed the Rio agrees that it shall not present a petition in bankruptcy against Mr. Al-Midani based upon such statutory demand so long as the payment stipulated by this deed are paid in accordance with the terms hereof."

And then moving on, I come to clause 9 which is material,

> "Should Mr. Al-Midani, for whatever reason, delay or default in payment to the second upfront payment, or any monthly payment by the due date, or the respective due dates where applicable, in accordance with sub-clauses 4.1 and 4.3 above then subject to a seven day period of grace, the balance of the sum due to the Rio, in accordance with the statutory demand referred to in sub-clause 3.2.5 above, shall become immediately due and payable without notice and the Rio shall be absolutely entitled to enforce such debt against Mr. Al-Midani for the amount then outstanding and shall be entitled to exercise all such other rights and remedies that the Rio would have been entitled to so exercise against Mr. Al-Midani as if this deed had never been executed."

Than I shall read clause 12 which states amongst other things,

> "This deed constitutes the entire agreement and understanding between the parties hereto with respect to its subject matter and supersedes any prior agreement or understanding."

And finally, clause 18,

> "This deed shall be governed by and construed in all respects in accordance with the laws of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales."

Some payments were made as recorded but Mr. Al-Midani again failed to keep up the instalments. This led to a second statutory demand dated 31st August 2001 for the full balance due then of $2,000,000. This was served on 3rd September 2001. That, in turn, resulted in a further deed dated 27th September 2001 expressed as being 'Amended and Re-stated Deed of Compromise.' It recited the facts up to that date and continued at clause 22.

> "The Rio has now agreed to amend and re-state the Deed of Compromise dated 3rd May 2001 and to accept from Mr. Al-Midani payment of the further sum of $1,660,000 in full and final satisfaction of the debt of $2,000,000 upon the following terms and conditions"

and provision was made, again, for payment by instalments in this deed over a period up to 29th November 2002.

Clauses 24 and 25 were in the same terms as clauses 4.5 and 5 of the first deed and clause 28 was in the same terms as clause 9 of the first deed. Clause 31 contained an entire agreement clause, as in clause 12 of the first deed and clause 37 followed the terms of clause 18. However, there was, again, a default which gave rise to the third statutory demand dated and served on 5th December 2001. It claimed the full balance of $1.8 million, equivalent to £1,265,831.73. There was no application to set aside the statutory demand. The petition was issued on 27th December 2001 and served on 10th January 2002. It was originally opposed on three grounds of a legal nature and also under section 271(3) Insolvency Act 1986 in reliance upon two offers which had been made to the creditor. Pursuant to directions, the hearing was listed for five days, commencing on Monday 29th July, which was last Monday.

At this hearing, Mr. Al-Midani by his counsel, Mr. Doyle, has not pursued the ground of opposition under section 271 nor the second and third of the legal grounds. His case has been on the first, being that the debt was irrecoverable by section 1 Gaming Act 1892 . In order to understand the case, it is necessary to look first at the legislation and certain of the decisions upon it.

Under the Statute of Queen Anne, the Gaming Act of 1710 , it was provided as follows,

> "From and after 1st May 1711, all notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever given, granted, drawn entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or by playing with cards, dice, tables, tennis, bowls or other game or games whatsoever or by betting on the sides or hands of such as do game at any of the games aforesaid or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as fore said, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play so play or bett shall be utterly void, frustrate and of none effect to all intents and purposes whatsoever any statute law or usage to the contrary thereof in any wise notwithstanding."

I just note the following points.

1. The statute does not in terms apply to the loan to meet a gaming debt but only to a security for the loan. Later decisions held that it must cover the loan itself.
2. It refers not only to a loan for gaming but also to a loan made at the time of play to a player.
3. The security was rendered void so as to be of no value even to a person to whom it was transferred for value without notice. That was modified by the Gaming Act 1835 which instead treated the security as being given for an illegal consideration.

Next, and more material to the present case, is section 18, Gaming Act 1845 .

> "All contracts or agreements whether made by parole or in writing by way of gaming or wagering shall be null and void and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager or shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

That strikes at the gaming contract and the gaming debt itself. However, if an agent paid the gaming debt, the section did not prevent him from recovering it from his principal. That omission led to section 1 of the Gaming Act 1896 , which, so far as material reads,

> "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act 1845 … shall be null and void and no action shall be brought or maintained to recover any such sum of money."

The following points can be noted here.

1. In relation to a loan, the section has been confined to a loan which, by its terms, required the money to be applied in payment under a gaming contract. A loan which was so applied but could have been used for other purposes was not affected (*Re: O'Shea (1911) 2KB 981* as explained in *Macdonald -v- Crean (1951) 1KB 594* , page 601).
2. Money lent for gaming in a country where the gaming law was lawful, has been held recoverable as being outside the Statute of Queen Anne in Quarry -v- Colston (1842) 1 Ph. 146 and the decision was followed and applied in relation to the 1892 Act in *Saxby -v- Fulton (1909) 2KB 208* .
3. The second limb of section 1 is wider than the first in that it extends to an agreement made for payment of a gaming debt after it has been incurred. See Hill -v- William Hill [1949] A.C. in particular the judgment of Lord Greene, MR, at page 552, where he says here,

> "The language of the first branch is entirely different from the language of the second branch. Under the first branch, the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost."

I turn, then, to submissions of Mr. Doyle as to the application of section 1 to the facts in the present case.

1. He does not dispute that as the original debt, the Rio debt, was for gaming which was lawful by the law of Nevada, it was not rendered illegal by the English legislation and could have been recovered if nothing further had taken place.
2. The effect of the first deed, both initially and as amended by the second deed, was to extinguish the original debt and replace it with a contractual debt, governed exclusively by the law of England.
3. That left no room for the application of law of the State of Nevada.
4. Nevertheless, the nature and characteristics of the original debt remained as being a gaming debt within section 18 of the 1845 Act so that section 1 of the 1892 Act applied to the new contractual debt to make payment (as in Hill -v- William Hill).
5. Section 1 is, if necessary, to be read as referring to a contract which has the characteristics of a contract rendered void by section 18 .

I hope that rather brief summary does justice to the submissions which were helpfully advanced by Mr. Doyle. In my judgment, the submissions fail at every stage and for these reasons.

1. The first deed in its original form and, equally, as amended by the second deed, does not extinguish the original debt unless and until there has been payment in full of the stipulated instalments. The substance and purpose of the deeds is to provide an agreed method of satisfaction of the original debt but only upon the "next following terms and conditions." So long as there is compliance with those terms and conditions the original debt is, no doubt, suspended. If there is default then by clause 9, the debt becomes immediately due and payable "as if this deed had never been executed." The debt cannot therefore have been extinguished. To hold otherwise would be to fly in the face of the wording of the deed.
2. As the gaming and the original debt were lawful by the law of Nevada, the debt is recoverable under the principle in Saxby -v- Fulton .
3. Even if the law of Nevada was not applicable, the terms of the loan were "without restriction to its use" it cannot be said to have been a loan in respect of a subsequent gaming contract. It is fair to add that this point may seem somewhat artificial in relation to the circumstances in which the loan was made. Nevertheless, the authorities do appear to allow recovery where there is no term requiring money to be applied for gaming or for payment of a gaming debt.
4. I do not see any basis for reading section 1 in any way different from its wording and natural meaning. It refers only to a contract rendered null and void by section 18 . The loan and gaming contract in Nevada were not rendered void by section 18 , they were valid according to the local law of the contract and section 18 , accordingly, has no application.
5. I should finally add that the application of English law to the two deeds does not exclude the recognition given by English law to the local law of the contract as governing the original debt.

For these reasons I am satisfied that the challenge to the debt cannot be sustained and there is no other ground before me for refusing a bankruptcy order. However, I will hear counsel at the end of the next judgment as to the course now to be taken.

JUDGE MADDOCKS: This judgment sets out more fully the reasons for my decision given at a hearing by telephone conference on Friday 26th July when I refused the debtor's application for a validation order for legal expenses under section 284 Insolvency Act 1986 .

The background to the petition is set out in the judgment upon the petition which I have just delivered. The salient facts for the present purposes are these.

The petition was issued on 27th December 2001 and served on the debtor on 10th January 2002. The petition was based on a debt of $1.8, just over £1,265,000 for which a statutory demand had been served on the 5th December 2001. One of the grounds of opposition, although it was not pursued at the trial, was that the petitioning creditor had unreasonably refused offers to compound the debt.

In relation to his legal costs, I was told that £35,000 had been paid by the debtor to his solicitors from the date of the petition to 26th July 2002. Further costs of £15,389.18 and disbursements of £112.90 for disbursements were outstanding. The firm's estimated total costs of the trial came to £68,000.

On 11th July 2002 the debtor made an application to vacate the trial date on grounds of ill-health. That came before me on Thursday 18th July and was refused. Directions were given for a revised timetable as to outstanding steps before the trial.

On Tuesday 23rd July, Mr. Al-Midani's solicitors, Steinart, Levy & Co. applied to District Judge Jones for permission to be removed from the record on evidence that they had not been able to obtain proper or clear instructions from their client, in

particular, as to his assets and liabilities and they had not been placed in funds. That event and evidence of dissipation of assets led to an application by the petitioning creditor for the appointment of an interim receiver and manager. I heard the application and made the appointment late on the same day, giving leave to the debtor to vary or discharge the terms of the order.

On Thursday afternoon the debtor's solicitors applied to come back for the limited purpose only of making an application to vary the order and to have a validation order for legal costs. The evidence at this stage was that Mr. Al-Midani had made contact with his solicitors again and disclosed funds of $109,000 in his account at the Arab Bank, Switzerland, which he said had been intended to meet his legal costs. The application was that the receiver be authorised to release the funds to the solicitors for the purpose of meeting the legal costs and that an order be made validating the transaction. I allowed the transfer to be made to the limited extent that the funds were to be held to the order of the receiver so that they might be viewed as available to the solicitors if the petition were to be dismissed and the receiver discharged but I did not see grounds for a validation order and accordingly, refused to authorise the transfer to be made to meet the legal costs.

On the following afternoon, Mr. Doyle, counsel for Mr. Al-Midani returned to renew the application, or perhaps to invite me to review it under section 375 , on the basis of further authority. Having regard to the limited time which had been available for the previous application, I was prepared to entertain this renewed application and counsel, Mr. Joffé QC for the petitioning creditor was able to attend again on this further telephone hearing. The basis for Mr. Doyle's case was that under the previous bankruptcy regime, the court had as a matter of practice, allowed payments to be made by the debtor to meet his legal costs of opposing a petition. The basis of that practice was the decision of Cave J. in the case of Re: Sinclair 1885 15 QBD at 616 and the judgment is short and helpful. It reads,

> “There appears to be no precedent for this application. On the 23rd March, an application on behalf of the bankrupt to set aside a receiving order was dismissed. Before making the application, the solicitor told his client that he should require a sum of £25 to be paid to him on account of the costs in the motion and the debtor paid him the money. No case has been referred to where the court has interfered to make a solicitor refund money paid to him for services rendered and if an order were to be made on such an application as this, it would be a great injustice. It is right that a man should have legal advice and assistance against a bankruptcy petition, but if a solicitor has to refund money paid to him for such a purpose, a man would be left defenceless because nobody would act for him. It seems to me impossible to hold that whenever a solicitor has received instructions to oppose proceedings in bankruptcy, does his work and is paid for his services, if the petition is ultimately successful, the money that has been paid to him by the bankrupt may be recovered from him by the trustee in bankruptcy. It might just as well be said that if a bankrupt goes into a baker's shop who knows that he has committed an act of bankruptcy, pays for a loaf of bread, the trustee can recover the money from the baker. In my opinion, this application must be dismissed with costs.”

In Re: A Debtor (1937), Ch.D at page 92, Clauson J. was unwilling to extend the practice to the costs of an appeal but he did make this observation.

> “It is not easy on the Act as it stands to appreciate the justification for the practice but the practice is well-settled and it has been accounted for by Lord Esher, MR. when presiding in the Court of Appeal in the case of Re: Pollitt 15 QBD, 616 as being due to the court's consideration to the dictates of humanity. The question I have to determine is whether this practice (which I do not for one moment suggest should be departed from) is to be extended so as to apply to the costs of supporting an appeal which, *ex-hypothesi* , is unsuccessful. I do not see my way to extend the practice.”

The practice was referred to in Williams & Muir Hunter on Bankruptcy 19th Edition of 1979 to which Mr. Doyle referred me with the added comment

> “The availability of legal aid in bankruptcy might be thought, at least in theory, to have reduced the necessity for this exception to the universality of the trustee's title.”

The 1986 Act introduced a new regime and section 284 , which I will read,

> "Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court or is or was subsequently ratified by the court.
>
> 3. This section applies to the period beginning with the day of presentation of the petition for the bankruptcy order and ending with the vesting under chapter iv of this part, of the bankrupt's estate in a trustee."

That corresponds to the legislation in relation to a company winding-up petition, now contained in section 127 . I should perhaps just read that.

> "In a winding-up by the court, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after commencement of the winding-up is, unless the court otherwise orders, void."

It has, of course, been the common practice before and after the 1986 Act for applications to be made for validation orders. The basis of such orders has always been either that the company was solvent or that the order would be for the benefit of creditors by improving the company's financial position. The leading case latterly was *Re: Gray's Inn Construction 1980 1 W.L.R. 711* . I can just take part of the headnote,

> "The court's discretion under section 227 should be exercised in the context of the liquidation provisions of the 1948 Act and the court should not in exercising that discretion, validate any transaction which would result in a pre-liquidation creditor being paid in full at the expense of other creditors who would only receive their dividends unless to do so would benefit the unsecured creditors as a whole."

And at page 717, Buckley LJ., said this,

> "It is a basic concept of our law governing the liquidation of insolvent estates, whether in bankruptcy or under the Companies' Act that the free assets of the insolvent at the commencement of the liquidation, shall be distributed rateably under the insolvent's unsecured creditors as at that date. In bankruptcy this is achieved by the relation of the trustee's title to the bankrupt's assets back to the commencement of the bankruptcy. In a company's compulsory winding-up it is achieved by section 227."

Now, of course, there are many authorities to the same effect. In *Re: McGuinness Bros. UK. 1987 3 BCC, 571* at page 574, Harman J. said this,

> "Unless I am satisfied there is no serious risk to the creditors because the company is likely to be solvent, or I am satisfied the company is likely to improve the position of creditors by trading at a profit during the period before the hearing of the winding-up petition, I rarely make such an order. If any such order were made in other circumstances it would be made subject to the safeguards of the sort that are well-known …"

and he goes on to deal with the opening of the specific wages, account and so forth. Then, again, in *Re: Fairway Graphics 1991 BCLC 468* , Harman J. said this,

> "It is, in my judgment, a clear and well-settled point of practice in the Companies' Court that validation orders as they are called, are only made in respect of companies where the court is satisfied by credible evidence as to one or other of two factual conclusions: Either the court must be satisfied … that the company is solvent and able to pay its debts as they fall due. Alternatively, the court must be satisfied that a particular transaction, usually a sale of a substantial asset, is beneficial to creditors or it produces an advantageous price or some such benefit or that a series of transactions, usually the carrying-on of the company's trade, are likely to be profitable and therefore will increase the company's assets so as to be beneficial to creditors. The court looks to see that the validation order is likely to benefit the creditors as a class."

Mr. Joffé, for the petitioning creditor submitted that the principle applicable to a company application was no less applicable to a bankruptcy application under section 284 . That submission can be supported by the passage in the judgment of Buckley LJ. in Gray's Inn to which I have referred. However, that equal approach prior to 1986 still did not exclude the practice whereby legal costs of the debtor were allowed. The question is whether the practice is one which can and ought to be continued under the new regime. In the first place, a legal challenge by the debtor would, in many cases, be made by an application to set aside the statutory demand, thus at a time when legal costs could properly be paid. Secondly, section 284 allows for an application to be made for a validation order. Mr. Joffé submitted that such an application could still not succeed, as it did not and could not meet the criteria in Re: Gray's Inn . The payment of the legal costs could only reduce the estate available to creditors. Only by the most tortuous reasoning could one say that the payment of the legal costs were of any benefit to creditors. None of this displaces the points made by Cave J.

The conclusion I have reached is that under the 1986 regime, the court's discretion under section 284 could be exercised to allow payment of the debtor's legal costs in opposing the petition and that is the way by which effect could be given to the principle in Re: Sinclair . However, it would remain as a discretion. The court would expect to have some evidence as to the financial position of the debtor and of the grounds for possession. In the present case it did not appear to me that the application had merit, certainly in relation to the proposed release of further funds. On the one hand the debtor had set out to oppose the petition under section 271 which itself required a full and frank disclosure to the petitioning creditor and to the court of his financial position but no such disclosure, certainly no adequate disclosure, was made. That is still the situation. In the circumstances and at this rather late stage, it did not appear to be appropriate to make any order validating any further payments, I would not, at this stage, make any comment in relation to sums which had already been paid. For the reasons given, I dismiss the application.