IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No.18 of 2012

MA ZHING YING — Plaintiff

v

CAO WEN BO — Defendant

JUDGE:	Eames, C.J.
DATE OF HEARING:	19 August 2013
DATE OF JUDGMENT:	21 August 2013
CASE MAY BE CITED AS:	Ma Zhing Ying v Cao Wen Bo
MEDIUM NEUTRAL CITATION:	[2013] NRSC 15

CATCHWORDS:

Action for debt - Plaintiff claims $7,500 was lent to defendant in cash - Defendant claims sum was $3,500 and was not lent in cash but by way of credit for gambling in gambling house which he claimed was conducted by plaintiff's father.

Illegality - *Gaming Act* 2011 - Loan was for purpose of illegal gambling - Whether Court should allow enforcement of a debt arising from illegal conduct - Policy considerations.

Counterclaim for assault and/or trespass to person - Defendant claims he was assaulted by plaintiff and persons acting on his behalf, in order to extort repayment of the debt inflated to $10,000.

Evidence - Use of witness statements - *Civil Procedure Rules* 1972, Order 32 - *Civil Evidence Act* 1972, section 4.

APPEARANCES:

For the Plaintiff	Ms M. Depaune (Pleader)
For the Defendant	Mr V. Clodumar (Pleader)

CHIEF JUSTICE:

1. The plaintiff brings an action to recover what he claims is a debt, owing by the defendant. The only proceedings before the Court had been an application by originating summons issued on 22nd May 2012, whereby the plaintiff sought a restraining order to prevent the defendant leaving Nauru until after the hearing of the action for debt brought by the plaintiff. Given that, in the more than fifteen months since that summons was issued, the defendant has not departed Nauru, that application seems to have been put to one side. Instead, the plaintiff issued a writ on the day listed for hearing. Mr Clodumar, pleader for the defendant, did not complain about the lateness of that proceeding, and was content to rely on a defence and counterclaim which he had pleaded in response to the restraining order proceedings. Ms Depaune had no objection to the counterclaim being dealt with in the debt proceeding.

The alleged debt

2. The plaintiff gave evidence that about a year ago he lent the defendant $7,500, in two instalments. He first lent $4,500 without knowing what the defendant, who was his friend, needed the money for. The defendant, the plaintiff says, promised to repay the $4,500 within a week. Three days after the first loan, the defendant borrowed a further $3,000. This time, the defendant said that the money was for gambling. On the second occasion the money was given to the defendant at, or near, the "casino", a gambling place used by Chinese gamblers.

3. The plaintiff contends that no portion of the $7,500 has been repaid. The plaintiff said in his evidence that interest on the debt had not been discussed.

4. Under cross-examination, the plaintiff denied that rather than pay the defendant cash, the defendant was given gambling credit. The defendant said that the debt he incurred (which he said was $3,500) was not handed to him in cash but was incurred by virtue of him being credited with chips so that he could keep playing, and eventually he had run up the sum of $3,500 in losses. The plaintiff said that he was not himself a gambler, and he did not know if chips were used in the gambling place. He denied that the gambling establishment was run by his father. He denied, too, the suggestion that the debt had been reduced from $3,500 to $1,000 by repayments from the defendant. The plaintiff denied that he and his father had made a demand for $10,000.

Alleged assaults

5. The plaintiff denied the defendant's allegation that the defendant had been twice assaulted and intimidated in an attempt to force him to pay $10,000. The defendant claimed that on the first occasion, in July 2012, a number of Nauruan men collected him at his shop and forced him into a car. He was then driven to the police station, taken into a room, and threatened. One of the men then assaulted the defendant, punching him to the chest, jaw and back of the neck. The plaintiff and his father were present, the defendant said.

6. The defendant said that he had reported this incident to police, who had that day taken him to the hospital for examination. He claimed to have had pain and bruises (which had been photographed, but which photos were not produced). He said that criminal proceedings had been commenced against the plaintiff's father and three Nauruan men.

7. The plaintiff and defendant both gave evidence through an interpreter, who was not formally trained. I make allowance for the possibility that there were mistakes in the translation. Having regard to that possibility, I am uncertain whether the defendant said that the plaintiff himself was also charged as a result of the alleged incident in the police station, or was merely present with his father, encouraging the behaviour of the other men.

8. The plaintiff denied having been present at such an incident. He said he had never been with the defendant at the police station. He denied that his father and three Nauruan men had been charged with criminal offences arising from such incident. He said he did not know if there had been such charges laid.

9. The defendant claimed that he had also been assaulted on a second occasion. This occurred in July 2012. The plaintiff had come to his store, asked him to go outside, and demanded $10,000. He then assaulted the defendant by punching him in the chest and elbowing the defendant in the neck when he bent forward, after receiving the first blows. The plaintiff said he had gone to the store, but had only talked to the defendant. The plaintiff denied having assaulted the defendant.

10. The defendant claimed that when he was assaulted outside his store in July 2012, there were both Chinese and Nauruan witnesses. No witness to that assault was called to give evidence.

Findings as to the sum due

11. I am satisfied that a debt, by way of credit for gambling chips, was advanced to the defendant by the plaintiff. I reject the plaintiff's claim that he handed over cash to the defendant. I also reject the suggestion that he did not know (until the second loan) that the defendant was using the advance to continue gambling.

12. As to the sum advanced, the only evidence to support the plaintiff's contention is to be found in an affidavit of Wong Sheng Lng, sworn 24 July 2012. That witness was not called by the plaintiff's pleader. An affidavit might be tendered in evidence notwithstanding that the deponent was not called to give oral evidence. Order 32 (2) of the *Civil Procedure Rules* 1972 provides:

> "2. (1) A Court may, at or before the trial by it of a suit, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.
>
> (2) An order under the last preceding paragraph may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks

fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose."

13. The affidavit might also have been a "statement" for the purposes of section 4(1) of the *Civil Evidence Act* 1972, which reads:.

> "ADMISSIBILITY OF OUT-OF-COURT STATEMENTS AS EVIDENCE OF FACTS STATED
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> 4. (1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

14. Ms Depaune did not tender the affidavit, but I accept that I may have discouraged her from doing so when I first responded to her attempt to use it. I subsequently referred her to section 4(1), but I overlooked Order 32. Ms Depaune did not then apply to tender the affidavit. I think that was just an oversight.

15. I note that the defendant himself swore an affidavit dated 12 July 2012. That affidavit was not tendered, nor was the defendant led in evidence to address much of the detailed information contained in the affidavit. Assuming that an affidavit qualifies as being a "statement" for the purpose of section 4, the procedural principles governing the defendant's affidavit are different to those of the witness Wong Shen Lng. That situation is governed by the other provisions under section 4(2). The relevant provisions are:

> "4. (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement:
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> (a)shall not be given in evidence by virtue of this section on behalf of that party without the leave of the Court; and
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> (b) without prejudice to paragraph (a), shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination in-chief of the person by whom it was made, except:
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> (i) where, before that person is called, the Court allows evidence of the making of the statement to be given on behalf of that party by some other person; or
>
> (ii) in so far as the Court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.
>
> (3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other

than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it: Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings, whether civil or criminal, it may be proved in any manner authorised by the Court."

16. The purpose of section 4(2) is to prevent a witness simply adopting a written document as his evidence in chief. In deciding whether to allow the witness to make use of his statement during his evidence in chief, the Judge would only do so where, if he refused to allow that course, it would "affect the intelligibility of his evidence": see section 4(2)(b)(ii). I have had no regard to the defendant's affidavit.

17. It is not necessary that I resolve whether use of an affidavit is governed solely by Order 32, or might also have been governed by section 4 of the *Civil Evidence Act*, because even if I have regard to the affidavit in question, to which Ms Depaune referred, it takes the plaintiff's case no further.

18. In the affidavit of Wong Shen Lng he said that he knows that the defendant owed $7,500, "because I was there". He said he saw the defendant "loaned a substantial amount of cash for gambling".

19. That account of a single instance of a loan, rather than two occasions separated by three days, conflicts with the plaintiff's account. It also conflicts with the plaintiff's suggestion that, when he first lent money, he did not know it was funding a gambling spree.

20. Without the witness being called to give evidence and be cross-examined, I regard his affidavit as having little weight. He does not say he saw $7,500, but merely asserts that "he owes a lot of money at $7,500", which suggests he was told that by the plaintiff. The onus is on the plaintiff to establish that the debt was $7,500. I am not persuaded as to that sum, but I will accept that $3,500 was advanced and that the defendant repaid only $2,500.

21. The plaintiff's writ claims $19,080 interest on the sum claimed of $7,500. That is a fantastic and absurd claim for interest: the very fact of it having been claimed undermines the credibility of the rest of the plaintiff's claim. In any event, the plaintiff said interest had not been discussed. The deponent Wong Sheng Lng did not refer to interest, but said repayment had been agreed at "$40 per $1,000 and $20 per $500 ", whatever that might mean.

22. I do not believe that any claim for interest has been made out. Accordingly, the plaintiff has established a remaining debt of only $1,000.

23. That leads to the next issue – should the Court refuse to uphold the claim, at all? Should the Court refuse to give judgment when the debt arose out of illegal gambling?

Illegality

24. In his statement of defence, the defendant pleads that the debt arose not by a loan but from "gambling". He pleaded that no money had been paid by the plaintiff, but instead, the defendant had been given credit by way of gambling chips used by the defendant in a gambling game.

25. The defence of illegality raised on the pleadings requires consideration, first, of the *Gaming Act* 2011. This Act came into force on 4 December 2011 and was therefore operative when the alleged debt arose.

26. In that Act "unlawful game" is defined in section 3:

> "***'unlawful game'*** means a game:
> (a) of chance, or of mixed chance and skill, in which money or any other valuable thing is offered as a prize or is staked or risked (by a participant or someone else) on an event or contingency; and
> (b) that is not an exempt game."

27. An exempt game is defined to be one which is being conducted pursuant to a gaming licence or was authorized by a law or was an exempt private game or raffle. An exempt private game is defined as one that is conducted otherwise than for a commercial purpose and also one where a participant can only profit by winning a bet in the game and that the rules of the game give all parties the same chance of winning. A game is conducted for a commercial purpose if a charge or commission fee was deducted from any amount by a participant in the game.

28. Section 17 makes it an offence, punishable by a fine of $50,000, or 2 years imprisonment, for a person to arrange an unlawful game or unlawful betting. Section 18 likewise makes it an offence for conducting an unlawful game or unlawful betting and by section 19, a person commits an offence if that person is in charge of a place being used for the conduct of an unlawful game and knows that the place is being used for that purpose.

29. Section 21 makes it an offence for a person to participate in an unlawful game when he knows it's unlawful. That carries a maximum fine of $10,000 and 6 months imprisonment.

30. I accept the defendant's evidence that the debt arose to fund illegal gambling. The gambling took place at a site called the "casino". The defendant's evidence is that the gaming place was run by the father of the plaintiff, Mai You Xin. The plaintiff denied that his father ran the gambling place; he said it was owned by You Wan Ming. I have no doubt that the plaintiff's father was in some way associated with the casino, but the precise involvement is uncertain. I do not accept the plaintiff's protestations that he knew next to nothing about the gambling operation.

31. In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[1] the High Court considered the circumstances in which a Court might refuse to enforce a debt where it upholds a defence of illegality. Gibbs ACJ[2], held that there were four main ways in which the enforceability of a contract might be affected by a statutory provision which rendered conduct unlawful. Those were as follows:

1. The contract may be to do something which the statute forbids;
2. The contract may be one which the statute expressly or impliedly prohibits;
3. The contract although lawful on its face may be made in order to affect the purpose which the statute renders unlawful;
4. The contract although lawful according to its own terms may be performed in a manner which the statute prohibits.

32. Gibbs ACJ held that the question in that case was whether the relevant provision on its proper construction prohibited the making or performance of the contract. The question, he held, was whether the statute on its proper construction intended to vitiate a contract made in breach of its provision. In that case his Honour held[3] that there was "no suggestion that the money was borrowed for an illegal purpose".

33. Gibbs ACJ quoted Lord Tenterden CJ in *Wetherell v Jones*[4] where his Lordship held that where a plaintiff sought to enforce a contract which was expressly or by implication forbidden by a statute, "no court will lend its assistance to give it effect". On the other hand, "where the consideration and the matter to be performed are both legal we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract in the performance of something to be done on his part".

34. Applying those principles on the present case, it seems reasonably clear that if I accept the evidence of the defendant, the entire transaction, including the provision of credit to the defendant, arose out of and was for the purpose of effecting an illegal game.

35. In *Yango* Mason CJ held[5], citing Lord Atkin in *Beresford v Royal Insurance Co Ltd*[6]:

> "The principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime, and that its effect is to act as deterrent to crime. But apart from these considerations, the absolute rule is that the court will not recognize a benefit accruing to a criminal from his crime."

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[1] [1978] HCA 42; (1978) 139 CLR 410.
[2] At [3], page 413.
[3] At [12].
[4] (1832) 3 B & Ad 221 at [225-6].
[5] At [428].
[6] (1938) AC 586 at [598-599].

36. As Mason CJ accepted[7], however, a Court's decision not to enforce such a contract requires a weighing of considerations of public policy. In *Fitzgerald v Leonhardt Pty Ltd*[8] the Court upheld statements by McHugh J in *Nelson v Nelson*[9]. In their joint judgment, McHugh and Gummow JJ accepted that there were circumstances in which, even if the illegality had been established, the Court would nonetheless enforce the contract.

37. These exceptions or qualifications were where the claimant had acted in ignorance or on a mistake, or where the statutory scheme was one intended to benefit persons including the claimant, or else where there was fraud, oppression or unjust influence on the part of the defendant. Their Honours said that "notwithstanding the illegality, relief may still be available to the plaintiff if the plaintiff was not in equal fault with the defendant". Their Honours adopted again the statement of McHugh J in *Nelson v Nelson* in which he said, at 613:

> " . . .even if the case does not come within one of the four exceptions to the Holman dictum to which I have referred, the Court should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:
> (a) the statute discloses an intention that those rights should be unenforceable in all circumstances;
> (b) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
> (c) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies;
> (d) the statute does not disclose an intention that the sanctions and remedies contained in the statue are to be the only legal consequences of a breach of the statute or the frustration of its policies."

38. Applying those principles to the present case it is clear that the whole transaction was related to gambling and was concerned with creating a gambling debt and encouraging further gambling.

39. Were the Court not to enforce this debt however, there must be concern that the plaintiff, or a person in a similar situation to the plaintiff, would seek to enforce the debt by threats of violence and actual violence. In this case the defendant claims that is precisely what occurred, even though civil proceedings were on foot. On the balance of probabilities, I accept that the defendant was assaulted by, or on behalf of, the plaintiff.

40. Should the Court refuse to enforce this debt on the basis that it would amount to condoning illegal gambling? Each case has to be judged in its own setting and having regard to the surrounding circumstances. I have decided that in this case it should allow enforcement. The defendant himself was fully aware that he was engaging in illegal gambling; he accepts that he had a debt of $3,500 which he ought

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[7] At [429].
[8] [1997] HCA 17; (1997) 189 CLR 215.
[9] (1995) 184 CLR 538 at [613].

to have paid. He has repaid all but $1,000. The plaintiff should be able to recover that sum.

The counterclaim

41. The defendant claims that he was the victim of two assaults, instigated by the plaintiff and by his father to force repayment of an extortionate sum.

42. There were items of evidence that were apparently available but were not tendered. Among these were photographs of the defendant's injuries after he was assaulted, as he claimed, at the police station. Witnesses to the second alleged assault were also not called. Despite these omissions, I am satisfied on the balance of probabilities that he was assaulted in the police station, and again, some months later, outside his business premises. I am satisfied that the plaintiff and his father were present at the police station.

43. The defendant says that he was threatened and intimidated. He alleges that the plaintiff and his father enlisted a number of men so as to add to the threatening atmosphere. Some of those men may well have been police officers.

44. Throughout the hearing, a man later identified as the father of the plaintiff sat in Court, at times directing his gaze at the defendant when he was in the witness box. He was an intimidating presence in the Court. He could have given evidence on the question of whether he was indeed the person who ran the gambling place, and as to whether he had been present or played a part on any occasion when the plaintiff was threatened or assaulted. His absence from the witness box would allow me to draw the *Jones v Dunkell*[10] inference, that he had not been called because the plaintiff knew that his evidence would not assist the plaintiff's case.

45. Ms Depaune submitted that I should not draw that inference as to the father's failure to give evidence, and should conclude that the reason he was not called was a mistaken decision on her part that he was not relevant to the case. I cannot exclude that explanation as a possibility.

46. I consider the evidence of assault and intimidation being employed to recover debts as very serious. My findings are made not on the criminal standard of proof but the civil standard.

47. The defendant did not suffer serious injuries from the assaults. He led no medical evidence. I find that he suffered transient pain and bruising.

48. The defendant has made out his claim for damages for assault/trespass to the person. The sum of damages I will award is very modest. If such conduct from the same people were to come before the Court again in civil proceedings, and be proved, much greater damages could be expected.

49. I will award damages on the counterclaim in the sum of $1,000.

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[10] (1959) 101 CLR 298.

50. The sum awarded for the claim is offset by the sum awarded for the counterclaim. In my view, the appropriate costs order is that each side pay its own costs.

The Hon Geoffrey M Eames AM QC

Chief Justice

21 August 2013.