CA on appeal from QBD (Mr Justice Toulson) before Hirst LJ; May LJ; Sir Christopher Slade. 19th November 1998.

JUDGMENT : HIRST L.J.

1. This case relates to a dispute between Coral Racing Ltd. (Coral), the very well known firm of bookmakers, and one of its regular customers, the appellant Mr Terence Matthew O'Callaghan, who is a professional gambler.

2. On 10 September 1996 the appellant placed two bets Numbers 4389 and 4390 at Coral's shop in Cardiff while the shop was still open but after it had gone through its closing down procedures. The second betting slip, which is the one presently in issue, was processed at 5.59 p.m., one minute before closing time, but (like the other one), was not photographed, despite the procedures laid down by Coral which require all betting slips to be photographed in order that there can be no dispute about verification. By this betting slip the appellant placed a £50 "correct score" accumulation bet on four football matches, predicting correctly, as it turned out, the actual score of all four. If the bet was valid, he would have garnered no less than £259,200, i.e. a win at odds of more than 5000 to 1. Coral's rules, which are on prominent display in all their betting shops including Cardiff, include the following two rules which are critical to the present case:-

   "1. Conditions of acceptance ...

   We reserve the right to refuse the whole or any part of any bet offered to us and to declare void any betting slip with whose bona fides we are not satisfied. In addition, we reserve the right to refuse payment on any lost or stolen bet that cannot be substantiated by reference to our photographic records; on any bet where the validity of the bet cannot be substantiated for reasons beyond our reasonable control; and on any bet for which no claim has been received within two months of the date of the event...

   21. Disputes

   In the event of a bet giving rise to a dispute which cannot be resolved by Coral personnel, it will be submitted for arbitration to the Editor of The Sporting Life. The editor's decision will be considered final, save that in the case of Horseracing bets, they can, at the customer's wish, be subsequently referred to the Tattersalls Committee for a final decision."

3. Shortly afterwards Coral expressed concern about the bona fides of the bet and by a letter dated 25 September 1996 they informed the appellant that in view of the lack of photographic evidence, they were relying on rule 1; they enclosed a cheque returning the £50 stake.

4. This decision on Coral's part to declare the bet void for lack of photographic evidence was submitted by the parties to the Editor of The Sporting Life pursuant to rule 21, and both sides made submissions, the appellant citing, in particular, the unfairness of declaring the bet void when the lack of photographic evidence stemmed from the negligence of the respondent's own staff, who were on duty in the shop at the time, and who failed to photograph the bet contrary to Coral's well established system of work.

5. Coral also made submissions, but their content was not disclosed to the appellant during the course of the proceedings. Those submissions were, nonetheless, taken into account by the panel appointed by the editor to fulfil his functions under rule 21, and in the upshot, by a letter dated 12 November 1996, the editor's representative communicated the panel's decision as follows:- *"As the coupon in question did not undergo validation procedures before the nominated events took place, the panel upholds the right of Coral, in accordance with its rules, to declare the bet void.*

   The failure of a member of staff to pass the coupon through the security camera and to notify the bet to the monitoring shop were breaches of company procedures which the company could not have foreseen or prevented. It is therefore the panel's view that Coral did not contribute to the omissions and cannot reasonably be held responsible for them.

   It is a basic requirement of betting, in the interests of both parties, that a slip or coupon can be independently verified by reference to a photographic record of the transaction obtained prior to the event or events named in the bet."

6. This decision reflects the submissions of Coral (now available in the papers) in a letter to the Editor dated 16 October 1996 as follows: *"Mr O'Callaghan placed 2 bets after the proper closing time of our shop at the Hayes in Cardiff on 10 September 1996.*

Bet number 4389 was registered by the manager, who was alone in the shop, and because of its value was telephoned through to our racing room for authority to accept. Such authority was given.

We also have a process whereby information concerning the betting patterns of regular customers who customarily bet high stakes is collated by a particular shop closely connected with him or her. These shops are known as ´monitoring shops'. Bet number 4389 was also telephoned through to the monitoring shop.

Either whilst the manager was on the telephone to the monitoring shop or immediately afterwards (something which we are still investigating) the manager accepted bet 4390, because of its value it did not need to be separately authorised. It should have been notified to the monitoring shop but was not. Crucially neither bet was photographed, and bets 4389 and 4390 were the only bets not photographed on the day in question.

Our rules of racing which are clearly visible in all of our shops allow us to reserve the right to refuse the whole or an part of any bet offered to us and to declare void any betting slip with whose bona-fides we are not satisfied and/or whose validity cannot be substantiated for reasons beyond our reasonable control.

In the absence of photographic evidence we were not able to validate the bet. In addition no separate authorisation was sought from our Racing Room.

I know that Mr O'Callaghan feels aggrieved and argues that the fact that the bet was not photographed is not his fault. Without in any way wishing to impugn the credibility or reputation of Mr O'Callaghan I am sure that you can understand why security precautions such as the photographing of bets are so crucial in the bookmaking industry. In some cases were bets are not photographed and the circumstances seem to us to warrant it we will exercise our discretion to pay out bets, for example in a previous case of which Mr O'Callaghan is aware, where a bet was paid out without it having been photographed, but the reason for the absence of photographic evidence could clearly be established as being entirely accidental, (in that case an incorrectly loaded film), and the bet had been separately authorised by telephone call to our Racing Room prior to the event taking place. In this particular case, whilst we do not doubt that Mr O'Callaghan feels strongly, there are no circumstances that suggest to us that this is a case where we ought to exercise our discretion to pay out."

7. This decision was published in The Sporting Life the following day, and attracted widespread national publicity; we are, however, not concerned with the rights and wrongs of the underlying dispute.

8. Following the decision, the appellant sought in vain to persuade the editor to reconsider the matter on a number of grounds, including a breach of natural justice in refusing to disclose to him Coral's evidence and to give him an opportunity to comment on it, and also a complaint as to the panel's conclusion that Coral were not vicariously responsible for the negligence of their employees at the Cardiff shop.

9. This request was refused, and as a result the appellant sought for an order for remission of the award pursuant to section 22(1) of the Arbitration Act 1950 and leave to appeal under section 1(3)(b) of the Arbitration Act 1979.

10. Both these applications were refused by Toulson J on 14 May 1997, and it is against his decision that the appellant presently appeals.

11. The judge's decision fell into two main sections:-
    1. That the arbitration clause was void because it formed an integral part of a wagering contract which was void by reason of section 18 of the Gaming Act 1845. The matter submitted to the editor was no more and no less than the applicant's claim to the payment of the bet. Such a claim, if submitted to arbitration within the meaning of the Arbitration Acts, would have been bound to fail because the arbitrator would have to take notice of the illegality of the contract. Moreover the enforcement of an award on a wagering contract would have contravened the second part of section 18.

2. That Clause 21 does not qualify as an arbitration agreement within the meaning of the Arbitration Act.

The Gaming Act Issues .

12. Section 18 of the Gaming Act 1845 provides as follows:- *"... All contracts or agreements, whether 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 which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: ..."*

Both limbs are of great importance in the present case.

13. The judge relied strongly on a decision of Eve J. in **Joe Lee Ltd. v. Lord Dalmeney** [1927] 1 Ch 300. This was a case concerning disputed bets, and the question immediately in issue was as to the status of a clause in the bookmaker's book of rules which provided:- *"Should unfortunately any dispute arise we stipulate that the matter be referred within 30 days to the editor of any paper in which we advertise or another responsible arbitrator by mutual agreement."*

Eve J. stated as follows:- *"That the rules in this book, if accepted, expressly or by conduct, would constitute a contract or agreement by way of gaming or wagering would not be disputed, but it has been argued that the paragraph I have read is not included under the heading ´Rules', and ought to be treated as a separate agreement, and as one not tainted with the illegality attaching to rules regulating betting transactions. I cannot take that view. The paragraph is, in my opinion, an integral part of the terms upon which alone the plaintiffs were willing to do business with the persons to whom this book was sent.... I cannot separate that part of the document from the rules and treat the agreement to refer as one distinct and apart from the other contents of this book. There is only one contract and that a contract or agreement by way of gaming or wagering, a contract therefore which is void and cannot be made the foundation of any successful application in these Courts."*

14. Mr Englehart QC on behalf of the appellant submitted that this decision has been overtaken by later authorities which recognise that an arbitration clause may be severable from the remainder of an agreement, and therefore remain in force notwithstanding the illegality of the primary obligation in the contract (**Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Company Ltd. [**1993] 1 Lloyds Rep. 455 (CA) **Soleimany v. Soleimany [**1998] 3 WLR 811. He also drew attention to the leading case of **Heyman v. Darwins Ltd. [**1942] AC 356, where the House of Lords held that an arbitration clause contained in an originally valid contract still held good notwithstanding the acceptance by one party of the other's repudiation. Mr Englehart stressed that all the appellant seeks here is a declaration that Coral's refusal to pay was contrary to their rules, and he submitted that this is not to be equated with a claim for payment which he recognises the tribunal could not award.

15. Dealing with the last point first, I am bound to say that I fully agree with Mr Norris QC's submission that Mr Englehart's distinction is lacking in reality, since what the appellant is really interested in is obtaining payment of his winnings.

16. On the main point as to severability, **Heyman v. Darwins Ltd.** is plainly distinguishable as the contract was initially valid.

17. The **Harbour Assurance** case shows that where a question arises as to the illegality of a contract, an arbitration clause therein may be severable so as empower the arbitrator to decide the illegality issue. However, the court made it clear that whether or not the particular form of illegality will, if proved, render void both the contract and the arbitration clause must depend on the nature of the illegality. Thus, Ralph Gibson LJ stated at page 461:- *"Next, as to illegality, the question whether the particular form of illegality will, if proved, render void both the contract and the arbitration clause must depend upon the nature of the illegality and, as Hoffmann LJ pointed out in the course of argument, when it is said to consist of acts prohibited by statute, upon the construction of the relevant provisions of the statute.*

For example, the decision of Eve J in ***Joe Lee Ltd. v. Lord Dalmeny*** *in which he rejected the argument that an arbitration clause in a contract for betting was collateral to the betting transaction and therefore valid, might well I think be decided in the same way if the principle of severability is upheld by this Court as far as Mr. Justice Steyn thought it should extend."*

18. Hoffmann LJ stated at page 469:- *"In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, as the House of Lords did in* ***Heyman v. Darwins Ltd. ,*** *whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties."*

19. A similar view was expressed by Waller LJ giving the judgment of the court (himself Morritt LJ and Sir Christopher Staughton) in **Soleimany v. Soleimany** [1998] 3 WLR 811 at page 821 as follows:- *"But, the fact that in a contract alleged to be illegal the arbitration clause may not itself be infected by the illegality, does not mean that it is always so, and does not mean that an arbitration agreement that is separate may not be void for illegality. There may be illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds. Ralph Gibson LJ in the* ***Harbour*** *case, at p.712, when dealing with a case concerned with betting and an arbitration provision collateral to that contract,* ***Joe Lee Ltd. v. Lord Dalmeny*** *[1927] 1 Ch. 300, recognised the possibility of an agreement containing any arbitration clause of such a nature that the arbitration clause itself was invalid. It must also follow that an arbitration agreement made separately in relation to an illegal or immoral dispute would not be recognised."*

20. This latter citation and that from Ralph Gibson LJ in the **Harbour Assurance** case are almost tantamount to approval of Eve J.'s decision in the Joe Lee case, and certainly make it clear that it is necessary to examine the particular form of illegality in issue in order to determine whether the arbitration clause survives.

21. In the present case the gaming transaction is declared null and void by section 18. Thus it is manifest that the arbitrator (if such he is) would be obliged to hold that the gaming transaction was void. He would also be obliged to acknowledge, under the second limb of section 18, that he was debarred from awarding any sum of money alleged to have been won on the bet. Consequently it seems to me that this is a case where, having regard to the terms of the statute, this clause must be treated, like the clause in the **Joe Lee** case, as an integral part of the terms on which alone Coral was willing to do business with the appellant, and consequently cannot be separated from the rules and treated as distinct and apart. In other words the clause must be treated as part and parcel of the void agreement, and so cannot survive independently.

3. The Arbitration Acts Issue.

22. The Arbitration Acts are somewhat reticent about the definition of arbitration or an arbitration agreement, confining their treatment to the provision in section 32 of the Arbitration Act 1950 as follows:- *"In this Part of this Act, unless the context otherwise requires, the expression 'arbitration agreement' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."*

23. The opening paragraph of the title on Arbitration in volume 2 of Halsbury's Laws of England (4th edition re-issue) provides as follows:- *"Definition and scope. Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law....*

24. In the footnote, the editors note that because of the judicial nature of their functions, arbitrators enjoy immunity from actions for negligence in the performance of their function, whereas a similar immunity is not enjoyed by a *'****quasi-arbitrator****'* such as an expert valuer or certifier (**Arenson v. Arenson** [1976] 1 Lloyds Rep. 179 (HL)).

25. In Mustill and Boyd on Commercial Arbitration 2nd edition p.41 the matter is treated as follows under the heading "***Attributes which must be present*****":-**

"(i) The agreement pursuant to which the process is, or is to be, carried on (´the procedural agreement') must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement.

(ii) The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal.

(iii) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute the terms of which make it clear that the process is to be an arbitration.

(iv) The tribunal must be chosen, either by the parties, or by a method to which they have consented.

(v) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both side.

(vi) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

(vii) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed."

26. Mr Englehart submitted that clause 21 is in truth an arbitration clause because the clause applies to a dispute, and is categorized as arbitration, not mediation or conciliation, and because the third party adjudicator is identified, and his decision is final. The hallmark of the arbitration process, is, he submits, that it provides a decision of a dispute. There is moreover no reason why a declaration could not be made here as to whether Coral have complied with their own rules, even though, as he accepts, the adjudicator could not order payment. The procedure laid down by section 21 served a useful purpose to resolve disputes as to the propriety of Coral's application of their own rules, and would, as the evidence shows, result in Coral honouring any decision in the customer's favour.

27. I fully accept this last point, but in my judgment it does not provide an answer to the question as to what is the true status of the clause 21 procedure, on which I am unable to accept Mr. Englehart's arguments, substantially for the reasons advanced by Mr. Norris.

28. To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.

29. I recognise of course that in the rare instances of an ´equity clause' the arbitrator has a degree of flexibility to dispense with the strict application of the law, and to adopt a business-like attitude as opposed to the application of a literal interpretation of the contract (eg **Eagle Star Insurance Co v. Yuval Insurance Co Ltd.** [1978] 1 Lloyds Rep. 357, and see Mustill and Boyd op cit pp 74 ff). In such cases the arbitration does not fully reflect civil court procedure, though of course an award under an equity clause is binding and enforceable.

30. Clause 21 on the other hand, establishes a procedure which is devoid of any legal consequences whatsoever, and which lacks most of the key characteristics identified by the text books. Consequently to my mind it would be stretching the traditional concept of arbitration beyond breaking point to hold that clause 21 qualifies as such.

31. For this reason also I would uphold the judge's judgment and dismiss this appeal.

May L.J.

32. I agree that this appeal should be dismissed for the reasons given by Hirst L.J., whose account of the facts I gratefully adopt.

33. In my view, it is perhaps ambiguous nowadays to refer to a betting transaction as illegal. It is not unlawful to place a bet with a bookmaker in a betting shop. But the transaction is, by section 18 of the Gaming Act 1845, "null and void". This means that the transaction is not in law a contract and (if this is not tautologous) that it is not a transaction which can be enforced by proceedings in court. It is open to parties to a betting transaction to agree means whereby disputes arising from their transaction may

be settled and they may, if they wish, call such a process "arbitration" and call the person to whom they have submitted the dispute for settlement an "arbitrator". Their arbitrator may proceed to make and communicate a decision. The parties may, if they wish, abide by the decision and act in accordance with it. But, since the transaction is not in law a contract, the decision cannot make any determination of rights, obligations or incidents of the transaction which has any effect in law. There are no such rights, obligations or incidents. That extends, not only to any entitlement to payment asserted by the person placing the bet, but also to the meaning and effect of the bookmaker's terms of business. The parties' arbitrator can make a domestically interesting statement expressing his view of their meaning and effect, but in law it is no more effective than silence.

34. This means, in my judgment, that the "arbitration agreement" in this case is not one to which the Arbitration Acts have any application. It also means that the court cannot do anything for the parties beyond telling them - what they already know - that their transaction is not in law a contract. As a court of law, the court can only deal substantively with transactions

35. which have a legal effect, which the transaction in this case does not.

SIR CHRISTOPHER SLADE

36. I am in full agreement with the judgments of Hirst LJ and May LJ. For the reasons given by them, to which I cannot usefully add, I think we are bound to dismiss this appeal.

Order: Appeal dismissed; order nisi against legal aid fund with nil contribution; application for leave to appeal to House of Lords refused.

Mr R. Englehart QC and Miss J. Pollard (instructed by Messrs. Denton Hall) appeared on behalf of the Appellant.
Mr W. Norris QC and Miss L. Moorman (instructed by Messrs. Nicholson Graham & Jones, London) appeared on behalf of the Respondent.