ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

JUDGMENT

CITATION: Andre Garcia v. Barry Ballantyne

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 437 of 2011

DELIVERED ON: 24th July 2012

CORAM: Her Worship Magistrate Nalini Singh
St. George West County
Port of Spain Petty Civil Court Judge

REPRESENTATION:

Ms. Alice Daniel for Andre Garcia

Ms. Shoba Nandalal for Barry Ballantyne

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1. INTRODUCTION

1.1 By ordinary summons dated and filed on the 24th November 2011, the claimant, Andre Garcia, claimed the sum of $9000.00 from the defendant, Barry Ballantyne, as reimbursement for labor costs and material costs under an incomplete contract between the parties.

1.2 The appropriate place to start, on an examination of the pertinent facts, is with the particulars of claim filed, which I turn to now.

2. THE PARTICULARS OF CLAIM

2.1 The claimant set out in his particulars of claim dated and filed on the 24th November 2011, his version of the events. According to the claimant, in or about the 20th January 2008, he entered into an oral contract with the defendant whereby the defendant agreed to install a three phase electrical supply at the claimant's residence located at #1 De Nobriga Street, Morvant (pleaded at paragraph 3 of the particulars of claim).

2.2 It was agreed in particular that the defendant would file an application with the Trinidad and Tobago Electricity Commission (T&TEC) in order to obtain the necessary approvals before any work could commence (pleaded at paragraph 6 of the particulars of claim).

2.3 In consideration of the said work being done, the claimant advanced to the defendant the sum of $2000.00 on the 20th January 2011 and, on the 20th February 2011, he advanced to the defendant a further sum of $7000.00 (pleaded at paragraph 5 of the particulars of claim).

2.4 It was agreed that the defendant would use this money to purchase a 220/3 phase, splitter, cable and all other electrical items which were needed to carry out the said works. These items were purchased and kept by the defendant pending the T&TEC approvals being secured but same was never obtained by the defendant (pleaded at paragraphs 7 and 9 of the particulars of claim).

2.5 The claimant eventually secured the approvals himself and some two weeks after this, he was finally able to contact the defendant to apprise his of this fact (pleaded at paragraphs 10 and 11 of the particulars of claim).

2.6 Thereafter, the claimant and the defendant agreed that the defendant would disconnect the existing electrical supply to an old house on the site which was carded for demolition. This was done in or about March or April 2008 and the demolition work ensued. Thereafter, construction of the house the defendant was employed to wire, commenced. The defendant was contacted to commence the contracted works but he failed to respond to the claimant's request (pleaded at paragraphs 12 and 13 of the particulars of claim).

2.7 The contracted works were never done by the defendant and he retained the items purchased (pleaded at paragraph 18 of the particulars of claim).

2.8 It is against this backdrop that the claimant claims the sum of $9000.00 from the defendant as monies had and received by the defendant for work which was never done (pleaded at paragraph 22 of the particulars of claim).

2.9 I turn now to an examination of the defence filed.

3. THE DEFENCE

3.1 The defendant agreed that he was contracted to carry out electrical works at the claimant's residence located at #1 De Nobriga Street, Morvant but stated that the agreement was that payment for material and labour would be made as the job progressed (pleaded at paragraph 2 of the defence).

3.2 The defendant went on to acknowledge receipt of money from the claimant but stated that the total amount which was advanced to him by the claimant was $7000.00. According to him, he received an initial payment of $2000.00 and this was followed by another payment on the 20th February 2008 of $5000.00 (pleaded at paragraph 4 of the defence).

3.3 The defendant also stated that he was the one who made the application to T&TEC and thereafter, kept the claimant apprised of all developments regarding the status of the application (pleaded at paragraph 7 of the defence).

3.4 The defendant then contended that he was informed by the claimant that the services of another electrician had been retained and in the circumstances he would only be required to run the three phase supply of electricity to the machine shop at the claimant's residence located at #1 De Nobriga Street, Morvant (pleaded at paragraph 8 of the defence).

3.5 The defendant went on to assert that he was asked and did in fact disconnect the electrical supply to the old house. He stated further that "a supply of electricity was made available by the Defendant connecting the lines to a temporary pole. This saved the Claimant from having to purchase a private pole and temporary kit which would have cost $5000.00 and a payment of $800.00 payable to T&TEC for a three month period" (pleaded at paragraph 9 of the defence).

3.6 The defendant denied that he was ever contacted by the claimant to commence the contracted works. He also stated that he never handed over to the claimant the items he purchased and prepared for the job because according to him, when the claimant came to collect the said items, "the claimant was not ready to make the required payment to the Defendant for having the items prepared for installation" (pleaded at paragraph 13 of the defence).

3.7 In view of the aforementioned matters the defendant claimed that it was the claimant who breached the contract when he hired someone else to install the single phase electrical supply throughout the entire premises and failed to reimburse him for the materials he had purchased and prepared for the contracted works. On this basis the defendant made a counterclaim of $9000.00 which represented a claim for reimbursement for labour costs for preparing the said purchased items for installation and, loss of income for time spent making the application and checks to T&TEC for securing the T&TEC approval (pleaded at paragraphs 25 and 26 of the defence).

3.8 I come now to set out the evidence in so far as it was material.

4. THE EVIDENCE

4.1 Two witnesses testified in the matter: the claimant and the defendant. Their evidence was for the most part, consistent with that which was pleaded. This is the essence of their evidence.

4.2 According to the claimant, the defendant was hired by him to do a three phase wiring of the house he expected to construct. They met in January 2008 and following this meeting, the claimant gave to the defendant the sum of $2000.00 as a down payment for the three phase wiring job. The claimant testified to receiving a receipt from the defendant which acknowledged the payment of this "(t)wo thousand Dollars for Electrical Wiring to house 3 phase supply and splitter". This document was objected to on by the defendant on the basis that he never gave the claimant that document. Indeed he stated that the signature on the document was not his. The Court came to the conclusion that it would ultimately be a question of fact as to whether or not this receipt was in fact handed over to the plaintiff by the claimant –which was not something that went to admissibility and the receipt was accordingly tendered into evidence and marked "AG1".

4.3 The claimant then told the Court that he went on to pay to the defendant a further sum of $7000.00 for which he was given a receipt by the defendant. This receipt stated that the claimant had paid to the defendant the sum of "$7000 seven thousand for Electrical Work and Materials (Inspections)". It was tendered into evidence as "AG2" without objection from the defendant.

4.4 According the claimant, he gave the defendant the money and expected in return that he would purchase the materials which were necessary to get the job done and obtain the T&TEC approval for the contracted work.

4.5 The claimant went on to testify that he called the defendant to disconnect current from the house which was to be broken down. According to the claimant this was not part of the job he had originally contracted the defendant to do. Indeed it was a favour which the defendant agreed to perform.

4.6 The Court heard that the contracted work was expected to take place within two to three months of finalizing the agreement but the defendant did not commence nor conclude the wiring of the new structure within this time frame. Additionally the defendant never handed over to the claimant any materials he had been paid to purchase, and he failed to secure the T&TEC approval for the claimant.

4.7 In the event the claimant had to secure the T&TEC approvals on his own and the Court heard that to date, there is no three phase supply of electricity on the claimant's property at #1 De Nobriga Street, Morvant. According to the claimant, he paid to the defendant the sum of $9000.00 and received nothing for it.

4.8 The defendant testified that he was hired by the claimant to wire the entire premises which included the installation of not just a three phase electrical supply but a single phase electrical supply as well. According to the defendant it was an oral agreement according to

which the claimant would supply the materials and he would supply the labour. The defendant testified to receiving a $2000.00 payment and then a $5000.00 payment from the claimant.

4.9 The defendant also told the Court that at some point after the agreement was made, the claimant called the defendant and told him that they were demolishing an old building and he enquired whether the defendant would be able to remove the meter from that building and he agreed to disconnect the existing power supply to the building and reconnect it onto a temporary pole.

4.10 He also told the Court that he went into T&TEC and made the application for the installation of the three phase supply of electricity and in September 2008 he was finally able to obtain same. He stated further that when he communicated with the claimant he was notified that another contractor had been retained by the claimant to do the installation of the single phase supply of electricity and, in the circumstances he would only be required to perform the remaining works under the original agreement. The defendant stated that he did not consent to this as it was a variation of the previous agreement.

4.11 This has given rise to the following issues:

5. THE ISSUES

5.1 The following issues arise for determination. They are:

1. Whether the second contract to disconnect the existing power supply and reconnect a temporary one was a collateral contract in relation to the first contract to wire the new structure at #1 De Nobriga Street, Morvant.
2. Whether the second contract is tainted by illegality.
3. Whether the fact that the second contract is tainted by illegality affects the first contract under which the claim is made.

1. Whether the second contract to disconnect the existing power supply and reconnect a temporary one was a collateral contract in relation to the first contract to wire the new structure at #1 De Nobriga Street Morvant.

Submissions of Counsel

5.2 Counsel for the claimant submitted that there was just one agreement between the claimant and the defendant. According to her the act of the defendant in disconnecting the existing power supply and then reconnecting it onto a temporary pole was part of the process of giving effect to one agreement which in this case was the agreement to wire the new structure at #1 De Nobriga Street, Morvant. According to her, the wiring of the new structure could not take place unless the power supply from the old structure had been disconnected so that that old structure could be demolished and a new one erected in its place. In these circumstances therefore the parties really made one agreement.

5.3 It was further submitted by counsel for the claimant that her submission on this point was buttressed by the fact that the act of disconnecting the existing power supply and then

reconnecting it onto a temporary pole was a "favor" that was done and as such, no consideration passed to make it a separate agreement with all the ingredients of a legally enforceable contract.

5.4 Attorney for the defendant argued in response that there was evidence of two separate and distinct agreements which were made between the claimant and the defendant. One concerned the wiring of the structure at #1 De Nobriga Street, Morvant and, the other involved the disconnection of the existing power supply and the reconnection of it onto a temporary pole. Further, the second agreement did have consideration flowing from both parties. According to her, the consideration which moved from the claimant was that he was saved a considerable sum of money as he was not required to purchase the temporary installation kit from T&TEC whereas the defendant in turn secured the benefit of ensuring that he would be given the contract to wire the new structure at #1 De Nobriga Street, Morvant.

The Law

5.5 The meaning of the term "collateral contract" was discussed in the case of **David Securities Pty Ltd. v. Commonwealth Bank of Australia (1992) 175 CLR 353** in the context of section 261(5) of the Income Tax Assessment Act 1936 which defined the term mortgage to include "any charge, lien or encumbrance to secure the repayment of money, and any collateral or supplementary agreement ...". The case involved loan agreements and securities by way of mortgage, and it was necessary to determine whether the concept of a collateral agreement involved the notion of primacy and, if so, which agreement was primary and which subordinate. In the course of rejecting the notion of primacy, this is what was stated at pages 364-365 by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ:

“But the prefix “co-” imports a sense of “with” or “in addition to”, without any necessary concept of primacy or subordination. The Shorter Oxford English Dictionary definition, “[s]ituated or running side by side, parallel”, which was quoted with disapproval by counsel for the Bank in this Court, may well be inapplicable to contractual agreements when interpreted in a spatial sense, but is quite apposite if construed as meaning “related to” or “contributory”. In the case In re Athill, Athill v Athill, which concerned the relation between different securities, Sir George Jessel M.R. stated(31):

> ‘Then why should we attribute to this word “collateral”, which does not by itself necessarily mean “secondary”, that meaning, when it is not so expressed in the contract itself? Where the word, as is admitted by the counsel for the Appellants, is at all events susceptible of the strict meaning of “parallel” or “additional”, why should it have one meaning rather than the other if the nature of the transaction does not require us to depart from its literal meaning? It appears to me there is nothing whatever in these securities to compel us to say that the word “collateral” means in this case “secondary”.’

Collateral contracts are so-called not because they are subordinate or of lessor importance (although they may well be, depending on the facts of the case), but because they impinge upon and are related to another contract. ... Once the notion

of primacy is jettisoned, "collateral" must be understood in the sense of "related to" or even "in addition to". *(emphasis mine)*.

5.6 It seems that a collateral contract is therefore any contract which is related to another contract.

Findings

5.7 I am inclined to agree with submissions of counsel for the defendant and I find as a fact that the claimant and the defendant made two contracts. One provided that the defendant would wire the newly constructed dwelling house located at #1 De Nobriga Street, Morvant (the first contract). The other provided for the defendant to disconnect the existing power supply from a house which was to be demolished in order that construction of the new dwelling house could commence at the location. Additionally the second contract envisaged that the defendant would reconnect the disconnected power supply onto a temporary pole thereby providing a power supply to aid in the construction of the new dwelling house (the second contract).

5.8 Bearing in mind the following:

1. The existing power supply had to be disconnected before the old structure could be demolished,
2. The old structure had to be demolished so that the new dwelling house could be constructed on the site,
3. The defendant could only wire the new dwelling house after its construction commenced,

4. Both agreements were not made contemporaneously but were separate in point of time and,
5. The claimant himself admitted that the second contract was not part of the original job he had hired the defendant to perform,

I find that the agreement to disconnect and reconnect a supply of electricity onto a temporary pole was "related to" or "in addition to" the contract between the claimant and the defendant whereby the defendant was to wire the new dwelling house at #1 De Nobriga Street, Morvant. As such the second contract was a collateral contract in relation to the first contract.

2. Whether the second contract is tainted by illegality.

Submissions of Counsel

5.8 The submission of counsel for the claimant on this issue is that the act of disconnecting and reconnecting the existing electrical power supply without prior approval from T&TEC is not an illegal act. The attorney for the defendant on the other hand submits that the act contravenes **The Trinidad and Tobago Electricity Commission Act Chap. 54:70.**

The Law

5.10 It is not in dispute that the defendant disconnected the existing electrical supply which was directed to an old structure at #1 De Nobriga Street, Morvant and then reconnected that supply onto a temporary pole at that location.

5.11 The effect of **sections 52, 55, 57 66 and 80** of the **Trinidad and Tobago Electricity Commission Act Chap. 54:70** appears to be this.

5.12 Firstly, consumption of electricity is measured by meters which are provided by the Trinidad and Tobago Electricity Commission. So according to **section 52 of the Trinidad and Tobago Electricity Commission Act Chap. 54:70,**

> "**52.** (1) Consumption of energy shall, except as otherwise agreed between the consumer and the Commission, be determined by meter only provided by the Commission and readings of meters shall be *prima facie* evidence of the amount of energy consumed…".

5.13 Secondly, the point is made that if meters are disconnected they cease to be certified under the **Trinidad and Tobago Electricity Commission Act Chap. 54:70.** So **section 55 of the Trinidad and Tobago Electricity Commission Act Chap. 54:70** provides that:

> "… However, where any alteration is made in any certified meter, or where any such meter is unfixed or disconnected from the service lines, the meter shall cease to be a certified meter under this Act".

5.14 It is also clear that meters are not to be disconnected or reconnected without notice and **section 57 of the Trinidad and Tobago Electricity Commission Act Chap. 54:70** specifically makes it an offence to do same:

> "No consumer shall connect any meter used or to be used under this Act for ascertaining the consumption of energy with any electric line through which energy is supplied by the Commission, or disconnect any such meter from any such electric line, unless he has given to the Commission not less than fortyeight hours notice in writing of his intention to do so, and if any person acts in

contravention of this section he is liable for each offence to a fine of seventy-five dollars".

5.15 Further emphasizing the fact that members of the public are not to tamper with the power supply without authorization, are **sections 66 and 80** which provide in material part as follows:

"**66.** (1) Except as may be otherwise prescribed by law, no person shall—

(a) use, work or operate or permit to be used, worked or operated any installation; or

(b) supply to or for the use of any other person energy from any installation, except under and in accordance with the terms of a licence expressly authorising the use or supply, as the case may be…".

It is instructive that the term "installation" as used here is defined in section 70 of the **Trinidad and Tobago Electricity Commission Act Chap. 54:70** as "electrical supply lines". Further, **section 80 of the Trinidad and Tobago Electricity Commission Act Chap. 54:70 provides as follows**:

"**80.** (1) Any person who in contravention of the provisions of section 66 supplies energy from an installation to or for the use of any other person is liable to a fine of six thousand dollars, and if the contravention is continued to a fine of seven hundred and fifty dollars for every day on which the same is continued after the first day on which a conviction is had.

(2) Any licensee who without express authority from the President in that behalf supplies energy or lays down any electric supply line or constructs any electrical

works outside the area of supply specified in his licence, is liable to a fine of six thousand dollars and any such authorised line or works may, after conviction had under this subsection in respect thereof, be removed by Order of the President and the reasonable cost of the removal may be recovered from the licensee.

(3) Any person who in contravention of the provisions of section 66 uses, works or operates, or permits to be used, worked or operated any installation is liable to a fine of one thousand five hundred dollars and, if the contravention is continued, to a fine of one hundred and fifty dollars for every day on which the same is continued after the first day on which a conviction is had".

5.16 Bearing in mind the wording of the **Trinidad and Tobago Electricity Commission Act Chap. 54:70** as well as the learning in **Langton v. Hughes 1 M&S 593 at page 596,** by Ellenborough CJ to the effect that "(i)t may be taken as a received rule of law, that what is done in contravention of an Act of Parliament, cannot be made the subject-matter of an action", the Court is led to the inescapable conclusion that the any contract to tamper with existing power lines without prior T&TEC approval or notice is illegal. This being the case, it behooves this court to blatantly ignore what is clearly stated to be the law of this country. In fact, in light of the provisions set out above, it would also appear that the claimant and the defendant may have committed criminal offences.

Findings

5.17 In these circumstances I therefore find that the second contract to disconnect and then reconnect the existing supply of electricity onto a temporary pole at #12 De Nobriga Street, Morvant is ex facie illegal and void ab initio.

3. Whether the fact that the second contract is tainted by illegality affects the first contract under which the claim is made.

Submissions of Counsel

5.18 According to counsel for the claimant, there was no illegality involved in any actions of the claimant or the defendant and as such, the question of the claim at bar, being tainted by illegality and thus being unenforceable is not a live issue.

5.19 On the other hand counsel for the defendant contends that the second scheme which involved illegality taints the original contract to wire the premises at #1 De Nobriga Street, Morvant and in those circumstances the claim made to this Court should not be entertained.

5.20 Neither counsel referred the Court to authorities on this issue.

The Law

5.21 It is generally the case that contracts which are tainted by illegality are unenforceable in law. This principle can be traced back to the case of **Holman v. Johnson (1775) 98 ER 1120** where Lord Mansfield stated at page 1121 that:

> "The principle of public policy is this; *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".

This means that neither contracting party can claim monies owed, or recover monies paid, under an illegal contract if to do so, requires a contracting party to base his claim on illegality or, disclose illegality in proving the claim. Indeed losses lie where they fall. As Lord Eldon put it in **Muckleston v. Brown (1801) 31 ER 934 at page 942**:

> "[T]he plaintiff stating, he has been guilty of a fraud upon the law, … to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty, the court will not act; but would say 'let the estate lie where it falls'".

5.22 With collateral contracts, the position is slightly different in that, if the claim arises from one contract and that contract is not itself tainted by illegality, but is only related to an illegal transaction, if the claim is capable of being proved without the aid of the illegal transaction, then the claim will succeed. This principle has been stated in a number of authorities. According to **Halsbury's Laws of England Volume 9 (4th edition) at paragraph 431, page 298**:

> "A contract or security not in itself illegal will be tainted with illegality and hence unenforceable if it is founded upon another, illegal, contract".

The following also appears in the same paragraph:

> "Notwithstanding the general rule, the second contract will be enforceable if, though factually connected with the original illegal contract, it is remote from it and cannot be said in reality to spring from, or be founded on it".

Similarly, quoting from **Chitty on Contracts Volume I (30th edition) at paragraph 16-176:**

> "Although the ex turpi causa principle precludes a plaintiff from being able directly to enforce an illegal contract, it does not prevent him from enforcing causes of action which are collateral to the contract. By this means the courts have to some extent mitigated the severity of the illegality doctrine."

This principle is also dealt with in **Cheshire, Fifoot & Furmston's Law of Contract by Michael Furmston (Oxford University Press: United States, 2006) 15th edition at page 503**:

> "A subsequent or collateral contract, which is founded on or springs from an illegal transaction, is illegal and void. It would be singular if the law were otherwise. It is irrelevant that the new contract is in itself innocuous, or that it formed no part of the original bargain, or that it is executed under seal, or that the illegal transaction out of which it springs has been completed. If money is due from A to B under an illegal transaction and A gives B a bond or a promissory note for the amount owing, neither of these circumstances is enforceable by B".

Then, the following was said on the matter in **Illegal Transactions by Dr. Nelson Enonchong (Lloyd's Commercial law Library: London, 1998) at para 2-4.B.II:**

> "It is not in every case that a plaintiff's claim under one contract will fail because of illegality in another contract to which he is a party. A claim under a lawful contract will not fail by reason of illegality in another contract if the plaintiff can make out his claim without reference to the illegal agreement".

In fact, a test of sorts was laid down in **Clark v. Hagar 1894 22 SCR 510 at para 19 by Gwynne J:**

> "What is meant in this case, and in all cases as to the application of the test is, that in very case, whether in *indebitatus assumpsit* or in an action upon a bond, note or other instrument, it appears either by admission on the pleadings, or in the evidence given upon the issues joined upon the pleadings in the case, that the action is connected with an illegal transaction to which the plaintiff was a party, the question arises whether he can or cannot succeed in his action without relying upon the illegal transaction. If he cannot, the action fails; if he can, it prevails".

5.23 A number of cases illustrate the operation of this principle. One is **Bowmakers Ltd v. Barnet Instruments Ltd [1945] K.B. 65** where it was held that no claim founded on an illegal contract will be enforced by the court, but as a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim. This is how the principle was explained at pages 70 to 71 by Du Parcq LJ:

> "Why then should not the plaintiffs have what is their own? No question of the defendants' rights arises. They do not, and cannot, pretend to have had any legal right to possession of the goods at the date of the conversion. Their counsel has to rely, not on any alleged right of theirs, but on the requirements of public policy.

He was entitled, and bound, to do so, although, as Lord Mansfield long ago observed, "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. No court," Lord Mansfield added, "will lend its aid to a man who founds his cause of action upon an immoral or an illegal act:" Holman v. Johnson 2. This principle, long firmly established, has probably even been extended since Lord Mansfield's day. Mr. Gallop is, we think, right in his submission that, if the sale by Smith to the plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the plaintiffs are not now relying on these agreements or on the third hiring agreement. Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the defendant in Pearce v. Brooks 3, supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words

"illegal contract" must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words "founded on an illegal contract." The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the courts act are Scott v. Brown, Doering, McNab & Co. 4 and Alexander v. Rayson 5, but, as Lindley L.J. said in the former of the cases just cited 6: "Any rights which [a plaintiff] may have irrespective of his illegal contract will, of course, be recognized and enforced."

In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim" *(emphasis mine).*

5.24 Another English case which illustrates the operation of the principle that a party who claims under a lawful contract with another contracting party will succeed in his claim if it can be made out without reference to an illegal collateral contract is, **Pye Ltd. v. B.G. Transport Service Ltd. [1966] 2 Lloyd's Rep. 300.** On the facts of this case, the plaintiff radio manufacturers sold 1100 radios to Persian buyers and contracted with the defendant road haulage

contractors for carriage of those radio sets from the plaintiff's premises to the London docks. 850 radios were loaded into one van which was locked up and left in the street without being immobilised while the remainder was loaded up. The van was stolen and later recovered with only 200 sets left in it. The plaintiffs claimed on a contract of carriage for the loss of their goods which were stolen in Stepney. The plaintiffs had agreed with their buyers that the goods, which were to be shipped to Persia, would be invoiced at less than the true price in order to deceive the Persian customs authorities. That deception involved the plaintiffs in breaches of English law. The carriers raised the defence of illegality, claiming that the plaintiffs could not recover more than the values stated in the invoice. The defence failed. It was held that the claim against the carriers under the contract of carriage had nothing to do with the plaintiff's contract with the buyers. In this case the plaintiffs were not saying that they had suffered any loss in connection with their contract with the buyers. Their loss (the goods which were stolen) could be measured by reference to the market values of the goods at the time of the loss. As the judge put it at page 309:

> "The Plaintiffs do not have to rely on their contract with Lapman Company Ltd to establish or support their cause of action against the defendants, and it is quite irrelevant for that purpose. The measure of damages is prima facie the market value of the goods at that time of their loss. Even if the plaintiffs had agreed to make a free gift of these goods to Lapman Company Ltd, they could still recover the value of the goods against the defendants".

5.25 A more recent English authority illustrating the same point is the case of **Euro-Diam v. Bathurst [1990] 1 QB 1.** In this case the plaintiffs, diamond merchants, had insured their

diamonds under a contract of insurance with the defendants. The diamonds were stolen in Germany where the insured had sent them under a sale or return contract. When the diamonds were sent to Germany, the insured, at the request of the putative buyer V, had understated the value of the diamonds in an invoice which was sent with the goods. V used the understated invoice to deceive the German tax authorities. But the sending of the diamonds was correctly recorded in the plaintiff's register and the plaintiffs had also declared the sending under their policy and had paid the correct premium for it. When they claimed under the policy for the loss of the diamonds, the insurers contended that the claim had failed because of illegality involved in the understating of the invoice. According to Kerr LJ at page 37, this contention was rejected because in their claim under the policy, the plaintiffs did not need to rely on the invoice "since the policy provided that the basis of valuation should be 'as per register' and… the plaintiffs register contained a correct record of the value".

5.26 The Canadian case of **Tucker Real Estate v. Gillis 1988 53 DLR (4th), 90 NBR (2d) 391, 228 APR 391** also illustrates the application of the principle. The facts of this case are that in 1975 the late Dr. Tucker purchased a sailboat called the "Wandrian III" for $45,000.00. To avoid the payment of New Brunswick sales tax in respect of its purchase, Dr. Tucker registered the boat in the name of his daughter, the appellant Annette Gillis, who resided in the Province of Alberta where there was no sales tax. At her father's request, Mrs. Gillis executed a chattel mortgage in favour of Dr. Tucker for $45,000.00 on the security of the boat and its equipment. The chattel mortgage was payable upon demand but without interest. It was established that the "Wandrian III" was sold by Dr. Tucker in May 1980 for $42,500.00 which he deposited to his account. The chattel mortgage was not discharged.

5.27 In September 1980, Dr. Tucker purchased a second sailboat named the "Dynamique", for $30,500.00. Again, this boat was registered in the name of Mrs. Gillis to avoid the payment of sales tax. Dr. Tucker did not request any security document in respect of this transaction.

5.28 On the 13th September 1982, Dr. Tucker died leaving a will which made no reference to either boat. Mrs. Gillis was named a residuary legatee along with the testator's other eight children but, unlike her brothers and sisters, she did not receive any specific bequest under her father's will. Upon learning the terms of her father's will Mrs. Gillis, who had never had possession of either boat, insured the "Dynamique" and claimed possession of it. At the same time Dr. Tucker's Estate claimed ownership of the "Dynamique" and sought a declaration that Mrs. Gillis held title to the boat in trust for the Estate or, in the alternative, claimed payment of the sum of $45,000.00 under the chattel mortgage.

5.29 It was initially held that Mrs. Gillis had never sailed on the "Dynamique" nor had she ever "looked after either the 'Wandrian III' or the 'Dynamique' or paid any bills relating to them". It was also found that "Nothing in the will, or elsewhere for that matter, indicates what Dr. Tucker intended to leave the 'Dynamique' to [Mrs. Gillis]". The judge was also satisfied "that Dr. Tucker's sole motive or reason in putting both boats in [Mrs. Gillis's] name, ... was to avoid paying the sales tax, it was not to make a gift inter vivos to [Mrs. Gillis]". The judge concluded that the registration of title to the "Dynamique" in the name of Mrs. Gillis gave rise to a presumption of advancement and that it was not open to the Estate to rebut that presumption by submitting evidence of an illegal scheme to defraud the provincial revenue. The Estate having

failed to rebut the presumption of advancement by Dr. Tucker to his daughter, the judge declared that Mrs. Gillis was the owner of the boat but he also held that she must pay the Estate the amount due under the undischarged chattel mortgage, i.e., $45,000.00.

5.30 Mrs. Gillis appealed the finding that she was liable under the chattel mortgage. It was held on appeal that the evidence established that Mrs. Gillis was the registered owner of the boat "Dynamique" pursuant to the Canada Shipping Act which defined an owner of a registered ship as "the registered owner" only. The Court went on to hold that to recover title in this, the Estate had to rebut the presumption of advancement which applied when Dr. Tucker conveyed property to his daughter. To do this the Estate would have had to rely on the illegal scheme to defraud the revenue as evidence of the deceased's true intentions. So the Estate would have had to rely on the illegal scheme to make out its case. As such it was held on appeal that the Estate could not "throw over the transfer" as Mrs. Gillis could assert ownership of the boat against the world. The chattel mortgage was an agreement which was collateral to the illegal scheme to defraud the revenue and was therefore unenforceable by the Estate of the mortgagee. Indeed it was said to "[l]et the estate lie where it falls".

5.31 Another Canadian case illustrates the principle. It is the case of **Lechner v. Northern Metals Ltd. 1993 112 Sask. R. 77.** In this case the plaintiff wanted to borrow $10,000 from the defendant. The defendant wanted security for the loan. The plaintiff had a loader worth between $19,000 and $29,000. The defendant checked for registered liens against the machine. None were found. However, the search disclosed several writs of execution against the goods of plaintiff. The defendant drew a bill of sale from the plaintiff to himself for the loader and back-

dated the agreement to predate the date of the writs of execution. The bill of sale was signed by both parties. The sum of $10,000 was advanced by the defendant to the plaintiff. The plaintiff defaulted on the loan. The plaintiff brought an action for lost revenue as a result of defendant not returning the loader. The defendant counterclaimed for repayment of the loan plus interest. The action was dismissed and the counterclaim was allowed. The court found that by back-dating the agreement, the defendant was attempting to defeat the plaintiff's creditors who had registered writs of execution. This would constitute a fraud on the creditors which raised the issue of an illegal contract. Indeed the act of back-dating the agreement was for an unlawful purpose, namely, to defeat the right of lawful creditors of the plaintiff which caused the bill of sale to be void and of no force and effect. But, since the loan and the bill of sale were separate transactions, the loan was enforceable even though the bill of sale was not.

Findings

5.32 In the instant case, the contract to wire the structure at #1 De Nobriga Street, Morvant was an agreement collateral to an illegal scheme to disconnect and reconnect without T&TEC permission, the supply of electricity at that location. Applying the test in *Clark v. Hagar (supra)* and considering the approach of the courts in the cases set out above, I ask the question 'whether the plaintiff requires any aid from the illegal transaction to establish his case'. I find that proof of monies owed under the contract to wire the structure at #1 De Nobriga Street, Morvant is not inextricably intertwined with the illegal collateral scheme to disconnect and reconnect the existing supply of electricity at that location and is asserted independently of it. In these circumstances I find that the claim before this court is not an attempt by the claimant to gain a benefit from a contract which is tainted by illegality and to obtain the Court's aid in respect

thereof. As such proof monies owed under the agreement to wire the structure at #1 De Nobriga Street, Morvant is not offensive to the Court and is capable of being received and acted upon by the Court.

5.33 Having considered the evidence in this matter I am satisfied on a balance of probabilities of the following:

1. The claimant and the defendant entered into a contract for the defendant to wire the structure at #1 De Nobriga Street, Morvant.
2. The defendant received $9000.00 cash from the claimant.
3. The receipts evincing this payment were tendered into evidence before this Court.
4. The defendant purchased materials with some of this money.
5. The materials purchased are still in the defendant's possession.
6. The defendant has not done any work which was contemplated under the contract in respect of the new structure at #1 De Nobriga Street, Morvant despite repeated requests from the claimant and the time which has elapsed from the formation of the contract to date.
7. The defendant is in breach of the contract to wire the structure at #1 De Nobriga Street, Morvant.

I therefore find that the claimant's claim has been made out against the defendant.

5.34 It was stated in **Maksymetz v. Kostyk 1992 2 WWR 354 at paragraph 8** that the court's:

> "…sympathies lie with the plaintiff because the defendants cannot be prevented from benefiting from their illegally obtained bounty… If one associates oneself with thieves and participates in illegality, one cannot come later before the court and ask that the thieves be punished…".

The plaintiff in the case at bar is not precluded from seeking redress from this Court notwithstanding the fact that the second scheme was tainted by illegality. In the circumstances I proceed now to make the following orders in this matter:

6. ORDER

6.1 The orders of the Court are therefore as follows:

1. **The defendant's counterclaim is dismissed.**

2. **Judgment for the plaintiff in the sum of $9000.00.**

3. **Costs to Counsel for the Claimant in the sum of $1000.00.**

4. **Stay of execution 28 days starting from today the 24th July 2012.**

DATED 24TH JULY 2012.

7. POSTSCRIPT

7.1 The Court takes the opportunity to thank Ms. Alice Daniel and Ms. Shoba Nandalal for the benefit of their industry. In this matter, the Court had the very helpful oral submissions of both advocates. Such assistance offered by them is greatly appreciated.

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge