ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

RULING ON THE ISSUE OF ILLEGALITY

CITATION: Saiab Mohammed v. Aliya Ramcharan

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 416 of 2012

DELIVERED ON: 21st January 2013

CORAM: Her Worship Magistrate Nalini Singh

St. George West County

Port of Spain Petty Civil Court Judge

TABLE OF CONTENTS

1.0 INTRODUCTION

1.1 By ordinary summons dated and filed on the 8th October 2012, the Claimant, Saiab Mohammed claimed the sum of $2000.00 from the Defendant, Aliya Ramcharan as monies outstanding on an oral loan agreement which was made between the two parties in or about October 2011. At the trial it appeared from the evidence coming from the Claimant that he had loaned the money in pursuance of an agreement between him and the defendant, in order to create the impression to the officials at the American Embassy that the defendant had an account in her own name with a certain amount of cash in it, when she did not.

1.2 The issue which concerns this Court is whether the oral loan agreement is so tainted by illegality that the contract is not enforceable. In these circumstances the appropriate place to start, on an examination of the pertinent facts, is with the particulars of claim filed.

2.0 THE PARTICULARS OF CLAIM

2.1 The Claimant set out in his particulars of claim dated the 29th August 2012 and filed on the 8th October 2012, his version of the events. According to the Claimant, in or around October 2012 the Claimant agreed to loan to the Defendant the sum of $10,000.00. It was agreed that this sum would be repaid by the Defendant by June 2012. Pursuant to this agreement the Claimant deposited the said sum into a Unit Trust Corporation account which he opened in the name of the Defendant. A copy of the transfer form evincing the transfer of funds by the Claimant was annexed to the Claimant's statement of case.

2.2 The Defendant did not repay the loan by June 2012 as was agreed and the Claimant made repeated attempts to contact the Defendant to secure the repayment of the $10,000.00.

2.3 In or about the middle of June 2012, the Defendant repaid the Claimant the sum of $8,000.00 but a balance of $2,000.00 remained unpaid despite repeated attempts by the Claimant to recover same. It is against this backdrop that legal proceedings were instituted by the Claimant against the Defendant.

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

3.0 THE DEFENCE

3.1 The Defendant by defence dated the 19th November 2012 and filed on the 5th December 2012, categorically denied that she entered into any oral loan agreement with the Claimant in or around October 2012 or at all.

3.2 The Defendant agreed that the Claimant advanced to her the sum of $10,000.00 but this represented reimbursement for services rendered by the Defendant to the Claimant in the course of her employment as a manager of the Claimant's business.

3.3 The Defendant further stated that after the money was advanced to her, the Defendant had an altercation with the Claimant's mother and she believed that the claim was brought against her because of this altercation.

3.4 In light of the above the defendant asserted that she was not liable to the Claimant for monies owned on a debt.

4.0 THE TRIAL

4.1 The Claimant did not seek leave to file a reply and the matter was accordingly set for trial on the 8th January 2013.

4.2 On the 8th January 2013 the trial into this matter commenced with the Claimant giving evidence in chief. During the course of this evidence, surprisingly, the Claimant admitted to the Court, and quite candidly I might add -that the money which he loaned to the Defendant was really to give the Embassy Officials at the American Embassy the impression that the Claimant was in possession of a bank account in her name with money in it. He went on to tell the Court that he had done this so that the Claimant would have a better chance of securing an American Visa. This fact was never pleaded by either litigant in any of the documents before the Court. As soon as this utterance was made on oath the Court explained to the litigants that an issue of law had arisen which could require that an adjournment be taken. The matter was accordingly adjourned for the Court's ruling.

4.3 These events have given rise to three issues.

5.0 THE ISSUES

5.1 The three issues which have arisen for determination by me are:

4. Whether the loan agreement is an illegal one.

5. Whether the loan agreement is enforceable.
6. Whether the fact that illegality was not pleaded as a defence precludes the Court from considering the matter of illegality.

6.0 THE LAW

1. Whether the loan agreement is an illegal one.

6.1.1 It has been held that parties to an otherwise legitimate contract will have to forgo any rights of claim they may have under that contract if it is that they entered the contract in the hope that its existence would create a misleading impression in the minds of third parties. Indeed the courts have held that these agreements are illegal on the basis that the main object of such agreements is the deception of third parties. Not surprisingly, there are only a few reported cases in which one member of a co-conspiracy launched proceedings against his co-conspirator on account of failure to observe the terms of the agreement. It is to an examination of these cases that I now turn.

6.1.2 One case is that of **Birkett v. Acorn Business Machines [1999] 2 All E.R. Comm. 429.** On the facts of this case, in 1993 the claimant acquired a Canon photocopier from M by entering into a leasing and maintenance agreement with L. The agreement was for the duration of five years.

6.1.3 In 1994 the defendants, who were office equipment suppliers, took over M's business, including the maintenance agreements. The defendants encouraged their customers to replace

their old copiers ‘free of charge, under existing costs’. Following negotiations, the claimant entered into an agreement with the defendant that the defendants would supply a Panasonic photocopier to the claimant by means of a hire agreement between the claimant and MA, that the claimant would return the Canon photocopier to the defendants and enter into a maintenance agreement with them for the Panasonic photocopier and that the defendants would discharge L’s charge for premature termination of the earlier agreement. This new agreement was conditional on MA accepting the hire agreement with the claimants.

6.1.4 What happened next was that MA informed the defendants that the agreement was unacceptable because they would only finance telecommunications equipment so the claimant therefore agreed, by signing a new agreement, to obtain a photocopier/facsimile machine. On paper, the claimant would apply to MA for the hire of a photocopier fax machine but in reality, the claimant would still be provided by the defendants with the photocopier originally requested.

6.1.5 The claimant subsequently issued proceedings in relation to the agreement. The judge refused to enforce the agreement, holding that it was illegally performed to the knowledge of both of the parties. The claimant appealed and this appeal was dismissed. The court held that there could no doubt that the claimant understood that the finance agreement which he had signed was to be used for the purposes of deceiving MA into payment to the defendants of the price of equipment which was never delivered. Whether MA was or was not deceived was irrelevant. So far as the claimant was concerned, the agreement was indisputably one under which MA was to be deceived. It was therefore an agreement with at least one illegal object and that object rendered it contrary to public policy and was therefore unenforceable.

6.1.6 In arriving at this decision, Sedley L.J. made the following observation at pages 434-435 that it was "(w)ith misgivings, but in the end without doubt" that he agreed with the conclusion that the contract was illegal. He said that this was "one of those cases where (at least in my view) law and justice part company". He then went on to note that:

> "If therefore the question were, as the judge took it to be, one of illegality of performance, I would hold the evidence to be insufficient to meet the peculiarly high standard demanded by authority and principle. But the first question was not this: it was whether the contract itself was tainted by illegality. On the material before the judge it undoubtedly was. The claimant had agreed, at the defendant's instigation, to lie about the make of photocopier in order to obtain finance. It follows that the contract between these two parties was founded upon an intended fraud on a third party, and this, I agree, was enough to render it unenforceable (emphasis mine)."

6.1.7 I pause here to note that in this case which is very much like the matter before the Court, the illegal scheme was entered into to mislead an innocent third party to confer a benefit on one of the coconspirators to which they were not entitled in the ordinary scheme of things.

6.1.8 Another case in which it was held that contracting parties to an otherwise legitimate contract had to forfeit rights under it if they entered the agreement in the hope that its existence would create a misleading impression in the minds of third parties is **Scott v. Brown, Doering, McNab & Co. [1892] 2 Q.B. 724**. On the facts of this case the plaintiff brought an action against the defendants, stockbrokers, for rescission of a contract to purchase shares in a

company, and to recover the purchase-money paid by him to the defendants for the shares, on the basis that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them on the Stock Exchange. At the trial it appeared from the evidence adduced on behalf of the plaintiff that he had paid the money in pursuance of an agreement between him and one of the defendants, by which the latter was to purchase the shares on the Stock Exchange at a premium in order to create the impression to the public that the shares in the company were at a premium when they were not. It was held that the action was founded on an illegal contract and could not be maintained.

6.1.9 It is to be noted that in this case, the intention of the plaintiff had been to attract investors by giving a false impression to the public, and the actual agreement for the purchase of the shares had been genuine and the price had indeed been paid. This notwithstanding, the Court of Appeal described the agreement as a "deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company".

6.1.10 Another example of an agreement made with the object of misleading a third party is illustrated by the case of **Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd [1957] 2 QB 621.** On the facts of this case, the defendants intended to ship orange juice to Hamburg. They knew their chances of being paid would be better if they could present clean bills of lading. The plaintiffs, as agents of the owners of the vessel on which the orange juice was to be shipped informed the defendants that the barrels containing the orange juice were old and frail and that some were leaking and on this basis they would not be issued with that a clean bill of lading. At the defendants' request however, and on a promise that the defendants would give to them an

indemnity, the shipowners signed bills of lading stating that the barrels were "shipped in apparent good order and condition". The defendants then entered into the indemnity to indemnify the master and the owners of the vessel against all losses which might arise from the issue of clean bills of lading in respect of the goods. What happened next was that when the barrels when delivered at Hamburg, they were found to be leaking and the shipowners had to make good the loss. The plaintiffs sued the defendants under the indemnity and the defendants refused to pay, alleging that the contract of indemnity was illegal, because it had as its object the making by the shipowners of a fraudulent misrepresentation. It was held that the shipowners by making in the bill of lading a representation of fact that they knew to be false with intent that it should be acted upon were committing the tort of deceit, and that the defendants' promise to indemnify the shipowners against loss resulting from the making of that representation was accordingly unenforceable.

6.1.11 This principle was recognised in Hong Kong as well. So in the matter of **Mid-Green Enterprise Co Ltd v. Lau Shing & Another [1991] HKLY 150**, P was a tenant of restaurant premises leased from A. B wished to take over the lease and continue to run the restaurant. P purported to sell the contents of the premises to B. Payment of the purchase price was guaranteed by D. P surrendered the lease to A who in turn re-let it to B at a favourable rental. It had been represented to A that, save for the sale price, P derived no further benefit. In fact included in the payments guaranteed by D was an extra sum which represented payment for securing the lease for B and were wholly unrelated to any sale. The sale agreement was made dishonestly with the intention of misleading A. It was held that the agreement between P and B, having been made

with the intention of deceiving A was illegal and unenforceable. The guarantees which formed part of that agreement were therefore unenforceable.

6.1.12 Before moving off of the cases which have illustrated the operation of this principle I mention the Canadian case of **Gurdave Singh v. Official Administrator (Pritam Singh Estate) (1963) 39 DLR (2d) 510; 42 WWR 190** the facts of which I have found to be entirely distinguishable from the instant matter. On the facts of this case, the deceased, Pritam Singh, in his lifetime, wanted to bring his nephew to Canada from India. He did not have sufficient assets to meet the requirements of the Canadian immigration authorities required of anyone acting as a sponsor for a proposed immigrant. So on the 10th July 1961, he requested his friend, Gurdave Singh, the plaintiff in this action, to loan to him $1000.00 which was to be deposited to the credit his savings account so that he could furnish evidence to the immigration authorities that he had sufficient assets to act as a sponsor for the admission of his nephew as a proposed immigrant. It was agreed that the $1000.00 would be repaid as soon as the deceased received a letter of authorization for the entry of his nephew into Canada as an immigrant, or alternatively, soon as the deceased either earned or saved enough to repay it. Before the letter of authority was received Pritam Singh died. Evidence was introduced that between the 1st July 1961, and the date of Pritam Singh's death, the deceased had earned $1,488.14.

6.1.13 The defendant resisted the plaintiff's claim on the basis that the contract was illegal and therefore on the grounds of public policy, the court could not assist either of the parties to the unlawful transaction.

6.1.14 The court held that Pritam Singh never intended to sponsor his wife, or unmarried child under 21 years of age, his father, if over 65 years of age, or his mother, if over 60 years of age – and these were the only persons in respect of whom one could sponsor. On this basis, the financial standing of a sponsor was irrelevant when the proposed immigrant was not within the limited class of persons who could be granted entry via the sponsorship method. Accordingly no law was contemplated by the partes to be breached and judgment was awarded to the plaintiff.

6.1.15 On the facts of the instant matter however, the plaintiff herself would have been entitled to receive a visa once evidence could be furnished by her of a financial standing which was acceptable to the Embassy Officials. For this reason this Court finds the matter of *Gurdave Singh v. Official Administrator (Pritam Singh Estate)* to be of limited assistance.

6.1.16 I direct myself accordingly and find that this oral loan agreement was really an agreement that was made with the object of deceiving a third party and it is therefore illegal.

2. Whether the loan agreement is enforceable.

6.2.1 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'".

6.2.2 Specifically on the issue of the deliberate deception of a third party, **Halsbury's Laws of England Volume 22 (5th edition) 2012 at paragraph 427** states that:

> "…there is a wider principle that a contract made with the purpose of committing a fraud on a third person… cannot be enforced".

6.2.3 Being guided by the aforementioned cited authorities I find that the oral loan agreement in this matter is unenforceable.

3. Whether the fact that illegality was not pleaded as a defence precludes the Court from considering the matter of illegality.

6.3.1 Having arrived at the conclusion that this contract is tainted by illegality and illegal contracts are unenforceable, I note that the defence of illegality was never pleaded. The question which therefore confronts the court is this. What approach should a court adopt in a case where

evidence of illegality is before the court but has not been relied on in the pleaded defence? **Halsbury's Laws of England Volume 22 (5th edition) 2012 at paragraph 426** states that "In the event that unpleaded facts are revealed in evidence and show that the contract is illegal or void, the court should decline to enforce the contract, if satisfied that all the relevant facts are before it".

6.3.2 This learning is borne out in the cases as well. So in the matter of *Scott v. Brown, Doering, McNab & Co. (supra)* where the agreement for "rigging" the market came to light during the presentation of the plaintiff's case, Lindley L.J. made the point at page 656 that:

> "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of LORD MANSFIELD in *Holman v Johnson* (1)".

6.3.3 Similar sentiments were made by Kennedy J. in the matter of **Gedge v. Royal Exchange Assurance Corpn [1900] 2 QB 214 at page 219** that*:*

> "It appears to me that when upon the trial of an action the plaintiffs' case, as happens here, discloses that the transaction which is the basis of the plaintiffs'

claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim".

6.3.4 Similarly, in **Montefiore v. Menday Motor Components Co Ltd [1918] 2 KB 241** it was held that once illegality of a contract was disclosed on the evidence, although it was never pleaded, a court has a duty to take the objection. As Du Parcq J. stated at page 90 of **Commercial Air Hire Ltd. v. Wrightways Ltd. [1938] 1 All ER 89:**

> **"**There is no plea here by the defendant that the contract was illegal, or that the purposes for which the contract is made were illegal, but it is, of course, clear law that, even though the defendant does not take the point that the contract is illegal, and therefore against public policy, the court must take it and consider it, and, if necessary, if the point is a good one, send the parties away without further considering their claim, or, at any rate, without awarding damages to a person who comes before the court as one who either broke the law or did his best to break the law".

6.3.5 What then is the approach to be taken when confronted with this issue? The approach was set out in the judgment in **Edler v. Auerbach [1950] 1 QB 359, 371**. In that case Devlin J stated four propositions which emerged from the earlier decision of the House of Lords in **North Western Salt Company Limited v. Electrolytic Alkali Company Limited [1914] AC 461** as follows:

> "First that, where a contract is ex facie illegal, the court will not enforce it whether the illegality is pleaded or not. Secondly, that where, as here, the contract

is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded. Thirdly, that where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because perhaps no objection was raised or because they were adduced for some other purpose) the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract whether the facts were pleaded or not."

6.3.6 Sedley L.J. in *Birkett v. Acorn Business Machines (supra)* qualified this approach by adding that:

"… it is only where the court can eliminate any possible answer with complete confidence that an unpleaded case of illegality should be allowed to succeed. …

… anything which leaves open a genuine possibility that the apparent illegality may not in reality have occurred is enough to prevent the making of the finding".

6.3.7 There is nothing in the material before me which leaves open a genuine possibility that the apparent illegality may not in reality have occurred. Being so satisfied, I find that this illegal oral loan agreement which is unenforceable remains unenforceable in law and the fact that illegality was never pleaded is does not preclude the Court from so finding.

7.0 CONCLUSION

7.1 It is clear that there was an actual transfer of funds by the Claimant but it is also true that the sole object of the transfer-on the case for the Claimant was to mislead the officials at the American Embassy. Under these circumstances it is the inexorable conclusion of this Court that the Claimant must look elsewhere than to this Court of Justice for such assistance as he may require against the person he conspired with, if the claim to such assistance is based on illegality.

7.2 Upon this ground and without going further into the case I find that the Claimant is not entitled to judgment in this Court.

7.3 In so finding, I cannot help but note the dicta in **Maksymetz v. Kostyk 1992 2 WWR 354 at paragraph 8** that:

> "… If one associates oneself with thieves and participates in illegality, one cannot come later before the court and ask that the thieves be punished…".

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge