IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 11 of 2011

BETWEEN

FIRST NATIONAL CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

Appellant

AND

TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION

Respondent

DOC'S HOMES LIMITED

Ancillary Defendant

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
M. Mohammed, J. A.

APPEARANCES:
Mr. F. Hosein for the Appellant
Mr. K. Garcia for the Respondent
Mr. P. Deonarine for the Ancillary Defendant

DATE DELIVERED: January 25th, 2017

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

M. Mohammed,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça J.A.

1. The appellant, First National Credit Union Co-operative Society Limited (FNCU), claimed against the Trinidad and Tobago Housing Development Corporation, the respondent to this appeal, monies that were allegedly payable to it pursuant to an assignment of funds under a contract made between the respondent and Doc's Homes Limited (DOC's). The respondent denied liability and also commenced ancillary proceedings for an indemnity or contribution against DOC's in the event that it should be held liable for FNCU's claim or any part of it. The judge dismissed the claim of FNCU on the basis of illegality and accordingly made no order on the ancillary claim by the respondent against DOC's. FNCU has appealed and the respondent has cross appealed against certain findings made by the trial judge. With that brief introduction, it is now necessary to provide a more detailed background to this appeal.

2. The National Housing Authority (the NHA), which was established by the Housing Act, is the predecessor in title to the respondent. The respondent was established by the Trinidad and

Tobago Housing Development Corporation Act and the assets, liabilities, rights and obligations of the NHA were transferred to and became vested in the respondent by section 41 of that Act which came into on September 13, 2005. As this appeal refers to events primarily occurring prior to the commencement of the Trinidad and Tobago Housing Development Corporation Act, I will refer to the respondent as the NHA.

3. In 2003, the government of Trinidad and Tobago formulated a policy aimed at alleviating the housing shortage in the country. The NHA was charged with implementing that policy. In an effort to give effect to the said policy, on May 29th 2003, the NHA entered into a joint venture agreement with DOC's to develop lands owned by the NHA into a housing estate comprising of different types of housing units with the associated infrastructure of roads, driveways, water, sewer and drainage. The joint venture agreement provided that DOC's shall, *inter alia,* design and construct the works and shall provide the finance required for carrying out and completing the design and construction of the works and the remedying of any defects therein.

4. The joint venture agreement also provided that the parties immediately after the signing of that agreement were to enter into an agreement for the design, finance and construction of the works. It was provided that the latter agreement, (hereinafter referred to as the construction agreement), shall incorporate the conditions of contract for EPC/Turn-Key Projects First Edition 1999 published by the Federation International des Ingenieurs-Conseils (FIDIC) and except as otherwise provided by the joint venture agreement, the construction agreement shall govern the rights and obligations of the parties with respect to the design, finance and construction of the works.

5. The joint venture agreement further provided that the selling price for a housing unit would be the aggregate of the cost of land, infrastructure, design and construction of the housing unit and the administrative expenses of the NHA in connection therewith. It was agreed that from the sale of the premises the NHA would retain for itself that part of the purchase consideration representing the cost of land, infrastructure and administrative expenses and pay to DOC's the remainder thereof at the times and in the manner provided in the construction agreement.

6. As agreed by the parties in the joint venture agreement, DOC's and the NHA entered into the construction agreement for the construction of 96 housing units and associated works at a cost of $15,472,946.42.

7. In order to finance the works as required by its agreement with the NHA, DOC's contracted the services of Financial Concept Limited to procure the necessary financing. Financial Concept Limited identified the FNCU as the financier, which was prepared to grant a loan in the sum of $8,667,011 to DOC's. Financial Concept Limited was paid a commission of 10 percent of that amount by DOC's.

8. By agreement between FNCU and DOC's, as evidenced by letter dated August 12th 2003, FNCU agreed to make available to DOC's a finance facility in the form of a loan in the amount of $8,667,011. The loan was to be disbursed during the first six months of the construction schedule subject to "an independent Q.S. review" of FNCU's choosing. The loan was repayable with interest at the rate of 16.5 percent per annum by three lump-sum payments, in months ten, twelve and fifteen. The loan agreement also provided for the payment of a penalty fee of .25 percent per month on the principal amount outstanding after the fifteen month project period.

As security for the loan, FNCU required an assignment of "contract proceeds as per contractual arrangement" between the NHA and between DOC'. By letter dated August 15th 2003, FNCU wrote to the NHA as follows:

> ***Re DOC'S HOMES LIMITED DESIGN, FINANCE & CONSTRUCT 86 APARTMENTS AT PLEASANTVILLE 1C PLEASANTVILLE CIRCULAR ROAD, PLEASANTVILLE***
>
> *"Our customers DOC'S HOMES LIMITED have agreed to the assignment of all contract funds to the FIRST NATIONAL CREDIT UNION with immediate effect regarding the above named contract in accordance with contract agreement dated 29th May 2003, when due for payment. Doc's Homes Limited have also requested that, in the event of termination of any dealings with you any funds which may become due to them under the above mentioned contract must be forwarded to us.*
>
> *Kindly confirm that you accept these instructions, which are irrevocable and cannot be cancelled without the FIRST NATIONAL CREDIT UNION and DOC'S HOMES LIMITED written consent, by signing, stamping and returning the attached copy of this letter."*

9. The NHA and DOC's signed the copy of the letter under the following clause

> "*We hereby confirm that it will be in order to accept the above instructions to which we have agreed and can only be cancelled by the parties as indicated above in writing."*

10. There is no dispute that FNCU is a co-operative society registered under the Co-operative Societies Act (the Act).

11. It is also not in dispute that FNCU received no monies from the NHA under the assignment. Accordingly FNCU commenced these proceedings claiming against the NHA monies allegedly due to it under the assignment. In its statement of case it averred that it advanced DOC's under the loan agreement the sum of $6,046,398 but the NHA in breach of its obligations consequent upon the assignment refused to pay to FNCU monies which became due to DOC's under the construction agreement. FNCU alleged that at the date of the commencement of the proceedings

the sum of $9,588,441.96 was due and owing under the assignment. This sum comprised the amount loaned to DOC's under the loan agreement together "with interest and penalty or late payment charges" calculated up to August 31st 2006. FNCU therefore claimed from the NHA payment of that amount with interest at the rate of 16.5 percent per annum and a penalty fee of 25 percent per annum on the amount of $6,046,398 from September 01st 2006.

12. NHA in its defence denied liability. It admitted that monies were paid by it to DOC's but averred that no "contract funds" however became "due for payment" from it to DOC's under the construction agreement and consequently there were no funds which were caught by the assignment. The reasons for this denial are set out in paragraph 7 a. to h. of its defence and are as follows:

    a. … by letter dated October 6, 2003 … Doc's Homes wrote to the Defendant advising, inter alia, that the Claimant was unable to provide the promised financial facilities;

    b. … subsequently, Doc's Homes produced to the Defendant a copy of a dishonoured cheque drawn by the Claimant in favour of "Shymdeo Gosein" (Doc's Homes' Managing Director) in the sum of $1,927,223.04 dated November 3, 2003 … and represented to the Defendant that same demonstrated the Claimant's continuing failure to provide Doc's Homes with the promised financial facilities;

    c. in the premises of, inter alia, the matters stated at a. and b. … the Defendant came to the bona fide conclusion that the Claimant was unable to provide to Doc's Homes the promised financing facilities and in good faith entertained Doc's Homes' application that the Defendant should consider funding the contract works directly (thereby in effect providing the financing facilities promised by the Claimant);

    d. … the Defendant, in good faith, commenced and continued financing the project directly, advancing to third parties and/or to Doc's Homes directly, for payment to third parties, payments and/or monies required to finance the contract works, amounting in total, to the sum of $21,592,724.41, particulars of which are hereunder set out.

PARTICULARS

Date	Amount	VAT	Total
25.7.03	$773,647.32		$773,647.32
6.10.03	$1,910,979.00		$1,910,979.00
7.10.03	$72,765.00		$72,765.00
10.12.03	$863,865.86	$129,597.88	$993,445.74
22.12.03	$867,845.72	$130,176.86	$998,022.57
2.2.04	$448,334.35	$67,250.15	$515,584.50
26.2.04	$1,356,838.57	$203,525.79	$1,560,364.36
26.2.04	$1,438,989.18	$215,848.38	$1,654,837.55
28.5.04	$1,057,538.19	$158,630.73	$1,216,168.92
21.6.04	$645,955.03	$9,689.25	$742,848.28
19.7.04	$883,812.68	$132,571.90	$1,016,384.58
10.8.04	$737,497.54	$110,624.63	$848,122.17
1.9.04	$741,686.13	$111,252.92	$852,939.05
08.10.04	$873,241.10	$130,986.17	$1,004,227.27
12.11.04	$555,805.58	$83,370.84	$639,176.42
03.12.04	$715,775.20	$107,366.28	$823,141.27
13.1.05	$261,348.44	$39,202.27	$300,550.71
4.2.05	$648,287.47	$97,243.12	$745,530.59
2.3.05	$598,033.45	$89,705.02	$687,738.47
11.4.05	$425,000.00	$63,750.00	$488,750.00
6.5.05	$506,660.33	$75,999.05	$582,659.38
10.06.05	$625,757.54	$93,863.63	$719,621.18
2.8.05	$830,910.00	$124,636.50	$955,546.51
7.10.05	$635,368.32	$95,305.25	$730,673.57
7.11.05	$660,000.00	$99,000.00	$759,000.00
	$19,135,942.00	$2,369,578.62	$21,592,724.41

e. … by reason of the aforementioned advances and/or payments, Doc's Homes became indebted to the Defendant and under obligation to repay to and/or reimburse and/or indemnify the Defendant in respect of the said advances and/or payments, and that such obligation required to be discharged and/or fully discharged before Doc's Homes could become entitled to any contract funds and/or before any such funds could become and/or became due for payment;

f. … such obligation remained unsatisfied and/or less than fully satisfied as of the date of the commencement of these proceedings, by reason whereof no right to any contract funds has arisen in favour of Doc's Homes and/or no such funds have become or are yet due for payment to Doc's Homes;

g. in the result, … no such funds being yet due for payment to Doc's Homes, there is nothing in respect thereof to be paid over by the Defendant to the Claimant whether under the assignment or otherwise;

h. does not admit the advance by the Claimant to Doc's Homes of the total sum of $6,046,398.00 as alleged therein, or at all.

13. NHA commenced ancillary proceedings against DOC's claiming against it in the event that the NHA was found liable to FNCU as alleged by it, a "contribution and/or indemnity" to the full extent of such part or parts of the claim of FNCU for which it may be held liable. The basis of the claim by the NHA against DOC's was that if any funds paid to DOC's were in fact subject to the assignment, DOC's would have been unjustly enriched by the payment of monies to it that were properly due to FNCU.

14. DOC's in its defence to the ancillary claim had contended that the High Court, however, did not have the jurisdiction to hear this matter as it touches the business of FNCU and so should have been referred to the Commissioner of co-operative societies pursuant to section 67 of the Act. The trial judge heard that issue as a preliminary issue and held that the matter was properly before the High Court

15. DOC's also averred in its defence to the ancillary claim that FNCU had breached its loan agreement with it. It further contended that DOC's is not a member of FNCU and accordingly in accordance with the Act is not entitled to receive a loan from FNCU nor is Financial Concept Limited entitled to act as agent of the FNCU. Accordingly, "any assignment in relation to the loan is illegal and of no effect and any monies paid thereunder are irrecoverable and unenforceable".

16. The trial judge found that FNCU had advanced to DOC's the sum of $6,046,368 under the terms of the loan agreement. There has been no challenge to this finding on this appeal. There is no

dispute that DOC's did not pay any money to FNCU under the loan agreement. The trial judge further found that monies did become due and payable by the NHA to FNCU under the construction agreement and were caught by the assignment. Accordingly FNCU, subject to issues raised in the ancillary proceedings in relation to illegality, was entitled to the payment of the monies due to it under the assignment. The judge, however, agreed with the averment by DOC's in the ancillary proceedings that the loan by FNCU to DOC's was illegal and irrecoverable.

17. The judge noted that there was no suit between FNCU and DOC's and that the issue of illegality was raised by DOC's in the ancillary claim. That, however, in the opinion of the trial judge, was not an obstacle in considering the illegality of the loan agreement and its impact on the claim because once the question of illegality came to her attention she was bound to consider that issue and whether it affected the claim. The judge concluded that as the loan agreement was illegal, FNCU could not rely on it as the basis for the enforcement of the assignment on which it sued. As the loan agreement was illegal, the assignment fell with it. The judge, therefore dismissed the claim of FNCU and in the circumstances made no order on the ancillary claim.

18. The FNCU has appealed and the NHA has filed a counter-notice of appeal. FNCU by its notice of appeal challenges the judge's dismissal of its claim on the basis of the illegality of the loan agreement and seeks an order setting aside the judgment of the trial judge and that judgment be entered in its favour on its claim. The counter-notice of NHA challenges the judge's decision that FNCU is entitled to the payment of the monies due to it under the assignment but for the illegality of the loan by FNCU to DOC's. By its counter-notice it asks this this Court to set aside that decision and find that the NHA has no liability under the assignment. Alternatively, the

NHA seeks an order that in the event it is found liable on the assignment that there be an order that DOC's do pay a 100% contribution in respect of such liability.

19. I will first refer to NHA's counter-notice of appeal in relation to its liability on the assignment. Counsel for the NHA submitted that no contract funds ever became due for payment from NHA to DOC's under the construction agreement. Accordingly, nothing became payable under the assignment which applied to "all contract funds" that became due under the construction agreement. This was so for three reasons. First, the construction agreement was abandoned and a new arrangement put in its place. Second, and in the alternative, the contract funds had not become due under the terms of the construction agreement. And third and in the further alternative, the NHA was absolved from liability under the assignment because it was forced to make payments to DOC's to save the project. I will refer again to these submissions later in this judgment in more detail.

20. To put the NHA's submissions in context it is necessary to consider the provisions of the construction agreement relating to the obligation of the NHA to make payment to DOC's and the evidence before the trial judge.

21. As provided for in the joint venture agreement, between NHA and DOC's, the construction agreement incorporated the FIDIC conditions referred to earlier in this judgment. They consisted of general conditions some of which were amended by conditions of particular application. Clause 14 of the general conditions as amended made provisions for payment by the NHA to DOC's for work done under the construction agreement.

22. Clause 14.2 of the conditions provided for an advance payment of 5 percent of the contract price to be paid by NHA to DOC's. It is not in dispute that this payment was made by NHA to DOC's and that this was made prior to the assignment on which FNCU sued in these proceedings. It is therefore not in contention that the advance payment is not caught by the assignment.

23. Clause 14 of the conditions, however, also makes provision for interim payments and for a final payment to DOC's.

24. With respect to the interim payments, clause 14.3 provides for the submission by DOC's of a statement (together with supporting documents) after the end of each month, showing in detail the amount to which DOC's considers itself to be entitled. Clause 14.3 provides at subparagraphs (a) – (f) what the statement should contain and then at (g) it is stated:

> "The amount due for payment to the Contractor as determined by subparagraphs (a) – (f) above shall be released by the Mortgage Finance Companies of the purchasers of the completed housing units in accordance with Sub-Clause 14.6.

25. Clause 14.7 deals with the timing of payments. So far as interim payments are concerned 14.7(b) provides:

> "Except as otherwise stated in Sub-Clause 2.5 [Employer's claims] [which is not relevant to this appeal], the Employer shall pay to the Contractor
>
> > the amount which is due in respect of each statement, other than the Final Statement, within 56 days after receiving the Statement and supporting documents and/or 90 days after the date of issue of the Taking Over Certificate by the Employer whichever is later."

The effect of these provisions so far as interim as payments to DOC's were concerned was that the amounts due were to be released by the mortgage companies of the purchasers who were purchasing the housing units and were to be paid within 56 days after the receipt by the NHA of

the statement and supporting documents in accordance with clause 14.3 or within 90 days after the issue of the Taking Over Certificate by the Employer, whichever was later.

26. This is reflective of what appears in the Employer's Requirements and which also forms part of the construction agreement. In relation to interim payments it is there provided that:

> "Valuations for interim payments will be made on a monthly basis **for completed units only** in accordance with the Delivery Schedule. Payments will be made from the funds released from the nominated Mortgage Finance Company ninety (90) days from the date of the issue of the Taking Over Certificate by the NHA …"

27. The timing of the final certificate is also governed by clause 14.7 and this provides that the final amount due shall be paid within 42 days after receiving the final statement and/or 90 days after the issue of the Taking Over Certificate by the Employer, whichever is later. So in relation to the final payment the due date for payment is within 42 days of receipt of the final statement or within 90 days of the issue of the Taking Over Certificate by the NHA, whichever is later.

28. Mr. Mayon Murray, the general manager of DOC's gave evidence. He outlined the loan agreement between Doc's and the FNCU, the advances made by FNCU to Doc's under it and that Doc's refused or neglected to repay the loan or any part of it. He further referred to the assignment of the contract proceeds and that no payments were received. He also referred to correspondence passing between the NHA and FNCU prior to the commencement of these proceedings in which the NHA provided its reasons for not making any payment under the assignment. I will make reference to the correspondence later in this judgment.

29. Mr. Noel Garcia gave evidence on behalf of the NHA. He was employed by the NHA from January 2nd 2003 to June 30th 2008, during which time he was the executive director and subsequently managing director. He stated in his witness statement that in or around early October 2003, Mr. Shymdeo Gosine, the managing director of DOC's visited him at the offices of the NHA and told him that contrary to the terms of the loan agreement between FNCU and DOC's, FNCU had failed to advance any sums to enable DOC's to finance the construction of the housing unit. Mr. Gosine said that FNCU had told him that it was having severe cash flow problems which prevented it from providing the finance. As a consequence, Mr. Gosine told Mr. Garcia that because FNCU was unable to finance the construction of the housing units, DOC's was being left without any money to perform the construction contract and that if DOC's did not secure a source of funding, DOC's would have no choice but to quit the project altogether. According to Mr. Garcia, Mr. Gosine told him that due to the absence of funding at that stage that he was particularly worried about obtaining certain moldings that were necessary for the construction of the housing units and if funding was not obtained so that the moldings could be quickly acquired the entire project would be jeopardized and at the very least the timing for the delivery of the housing units would be irremediably compromised. Subsequently by letter dated October 06th 2003, Mr. Gosine wrote to the NHA formally requesting the NHA advance the necessary monies to secure the supply of the moldings.

30. Mr. Garcia stated (at para 22 of his witness statement) that in the face of Mr. Gosine's request, the NHA considered:

> "a. the acute shortage of housing in Trinidad and Tobago and the policy of the Government to alleviate such acute shortage, in partial fulfillment of which the Contract with Docs had been entered into;

b. the representations which had been made by NHA to the public about the expected availability of new homes at Pleasantville area pursuant to the Contract, and the public expectations that had been engendered thereby;

c. the dire housing conditions in that area of the country at the time; and

d. the demand for affordable housing and improved living conditions in that area that were being heavily pressed upon the NHA at the time. The NHA noted that such demand far outstripped even the 84 apartment units that had been promised the public under the Contract.

The NHA was clear that both the policy of the Government in relation to housing, and the public interest, made it imperative that the project be completed."

31. The NHA also considered that:

"a. Docs had not – as the NHA had been told by Docs – been able at that stage to find a source of funding alternative to FNCU;

b. the immediate need as regards the financing of the construction of the apartment units was for money to secure the supply of the moldings for use at the project; and that

c. given that the moldings were the foundation block of the entire project, the project would fail at the outset if the moldings were not obtained."

(See para 24 of Mr. Gosine's witness statement)

32. Mr. Garcia further stated (at paras 25 and 26 of his witness statement):

"[25] Having regard to the matters set out in paragraphs 22 to 24 hereof, the NHA considered that, if (as both policy of the Government in relation to housing, and the public's interest required) the project were to be completed, the NHA was left with no choice but to advance the monies being requested by Docs to secure the supply of the moldings for use at the project. In the result, the NHA advanced the monies requested by Docs to secure the supply of the moldings for use at the project. Such monies were advanced by way of a forced involuntary loan made to Docs in order to keep the work going under the Contract.

[26] At all times, it was contemplated by the NHA and Docs that this advance should operate as a loan by the NHA to Docs. Both Docs and the NHA agreed that Docs would repay this loan by having the NHA make, from the interim payments that were subsequently expected to fall due to Docs (upon Docs undertaking and satisfactorily completing the works) under the Contract, appropriate deductions to recover the

> amount loaned. It was agreed that the loan would be treated as a liability on Docs' part arising under the Contract, which liability Docs would discharge, before any contract funds became due to Docs under the Contract."

33. A formal agreement was prepared for execution by the parties containing the terms of the loan agreement (referred to at paras 25 and 26 of Mr. Garcia's witness statement as set out above) but it was not executed. However, according to Mr. Garcia that unexecuted agreement reflected the agreement the parties arrived at for the repayment of the monies advanced for the purchase of the moldings. Mr. Garcia further said in his witness statement that subsequently Mr. Gosine returned on numerous occasions to say that FNCU was still experiencing severe cash flow problems. During one of the visits, Mr. Gosine produced a dishonoured cheque dated November 03rd 2003 issued by the FNCU and made payable to him. Throughout the course of his visits, Mr. Gosine pleaded with Mr. Garcia for the NHA to provide funding to keep the project afloat. Mr. Garcia also stated that in view of Mr. Gosine's representations, the NHA considered that it was left with no choice but to provide the funding necessary to keep the project afloat.

34. Mr. Garcia claimed that the parties walked away from the contract and abandoned it. A new arrangement was established in its place under which the NHA assumed responsibility for the design, financing, supervision of the project. The NHA directly paid to DOC's to keep the project afloat over 21 million dollars. The payments were based on calculations as to the sums that were owed to DOC's suppliers and sub-contractors. Mr. Garcia also stated that the process adopted for making payments to DOC's was as follows:

> "50 At that time, the NHA had, with the approval and in accordance with the directions of the Minister of Housing, negotiated with First Citizens Bank Limited ("FCB") the availability of a Five Year Fixed Term Loan Facility in the sum of 450 Million Dollars at a rate of 5.95% per annum, in order to fund its current housing construction programme.

> [51] The abandoned Contract was not included in the scope of housing construction projects for which this facility had been earmarked (because the finance element of the Contract was to have been provided by Docs itself). There was, however, no other source of funding available to the NHA to finance the construction of the apartment units.
>
> [52] Accordingly, in order to save the project, and for the reasons stated in paragraphs 22, 23 and 24 a., hereof, the NHA was left with no alternative but to access the facility to draw down the funds necessary to finance the construction of the apartment units.
>
> [53] Clause 5(2) of the Facility Agreement provided that in order for the NHA to obtain drawdowns on the loan amount, FCB had to be presented with a written certificate of a qualified architect certifying as payable costs, fees and expenditure incurred in constructing housing units, apartments whether townhouses and related infrastructural work.
>
> [54] In order to access the funds necessary to finance the construction of the apartment units, therefore, the NHA had to secure the preparation by Docs of makeshift "Interim Certificates" to present to FCB to obtain the required funds.
>
> [55] In every case, the makeshift Interim Certificates so drawn up by Docs were made out in the sums required to cover the amounts that were owed from time to time, to Docs' suppliers or sub-contractors working in the project site…"

35. Mr. Gosine, the managing director of DOC's, gave evidence on behalf of DOC's in the ancillary proceedings. In his witness statement he, inter alia, referred to the construction agreement between DOC's and the NHA. He said that in order to finance the works he came to know a Mr. Lambert of Financial Concept Ltd. Mr. Lambert represented to him that he would be able to source financing for the works and had earmarked FNCU to finance the project. He further stated that FNCU was prepared to loan the amount of $ 8, 667,011.00 and he paid Financial Concept Ltd. a commission of 10% of the loan amount. According to Mr. Gosine, Mr. Lambert represented to him that his company had an agreement with FNCU to supervise the project and that in order to obtain the financing Mr. Gosine had to become a member of FNCU. Mr. Gosine stated that the project fell into problems. He said that that although drawdowns were made on the loan they were not timely due to the fault of FNCU. On some occasions cheques issued by

FNCU were dishonoured. Letters were written to FNCU complaining about the delay but there was no response.

36. It should be noted be noted that there was no cross examination of Mr. Murray by counsel for DOC's and no cross examination of Mr. Gosine by counsel for FNCU. The trial judge took the position that as there was no claim between FNCU and DOC's that she would not allow them to cross examine each other's witnesses.

37. Counsel, in light of the evidence and the provisions of the contract, argued that the construction agreement was abandoned and a new arrangement was substituted in its place under which the NHA paid DOC's and which was not subject to the assignment. In any event according to the terms of the construction agreement no monies ever became due as there was no evidence that the mortgage companies for the purchasers had released any funds nor was there evidence that the NHA had issued the Taking Over Certificate in accordance with the FIDIC conditions of contract referred to above. Further the NHA was absolved from any liability under the assignment as the payments to DOC's were for the bona fide purpose of saving the construction project. In this regard counsel referred to the cases of **Brice v Bannister (1877-78) LR 3 QBD 569** and **Shepherd v Livingstone 1924 Carswell Alta 78**.

38. Similar submissions were made before the trial judge but rejected by her. The judge noted that the effect of the assignment, which is not disputed, was to require the NHA to make payments to FNCU of all contract funds when due for payment. She noted that $21,592,724.41 was paid by the NHA to DOC's, which also is not disputed. The judge however did not accept that the construction agreement was abandoned. She found that those monies were paid in respect of

interim certificates issued under the construction agreement. The interim certificates were not makeshift certificates as the NHA contended but were issued under the construction agreement and confirmed that in the mind of the NHA the construction agreement was still in existence and that under it DOC's was entitled to monies for works completed. She was of the view that in advancing the monies to DOC's for works completed under the construction agreement and not to FNCU pursuant to the assignment, without either confirming the truth of the factual position conveyed by Mr. Gosine to Mr. Garcia or advising FNCU of the position, the NHA could not have been acting in a bona fide manner.

39. The judge did not accept that the NHA was absolved from paying the monies under the assignment and found that the cases relied on by counsel for the NHA were distinguishable in material particulars.

40. The judge in the circumstances concluded that but for the illegality, to which I will come to later in this judgment, FNCU was entitled to payment from the NHA of the monies due under the assignment.

41. As I mentioned, it was common ground among the parties that the assignment applied to funds under the construction agreement when due for payment by the NHA to DOC's. The NHA was required to pay these funds over to the FNCU. So the question whether the contract was abandoned or whether funds became due to DOC's under the construction agreement is relevant.

42. With respect to the claim of an abandonment of the construction agreement, it is relevant to note that an abandonment of the agreement was not pleaded. The NHA in its pleadings was clear as

to the reasons on which it denied liability under the assignment and an abandonment of the construction agreement was not one of them. An abandonment was however alleged by Mr. Garcia in his evidence. That was the first time the issue of abandonment arose. In those circumstances it is necessary to approach the evidence of Mr. Garcia with some caution as the judge did. When reference is made to the documentary evidence, the notion of an abandonment of the contract is not supported by the evidence and is not borne out by the surrounding circumstances.

43. First, there was no allegation that DOC's did not build the housing units that were the subject of the construction agreement. Indeed the inference is that the housing units were built.

44. Second, there is no evidence of an express agreement between DOC's and the NHA to abandon the construction agreement and it cannot be inferred from the evidence that there was such an agreement. An agreement to abandon the contract may be inferred from the conduct of the parties but the evidence does not support such a finding. According to Mr. Shymdeo Gosine of DOC's, he informed Mr. Garcia that "the contract was in jeopardy and [he] would not be able to go forward". This was put to Mr. Garcia to support the request for funding by the NHA. But Mr. Gosine said nothing to suggest that DOC's conducted itself in such a manner from which it can be inferred that the agreement had been abandoned. It is not sufficient if one party to the contract assumes or acts as if the contract had been abandoned.

45. Third, before these proceedings were commenced, the NHA, in response to demands made on behalf of the FNCU for payment of funds under the assignment, sought in two letters to explain why funds were not paid to FNCU and why it was not liable under the assignment to do so. In the first letter dated May 2nd 2006, written on behalf of the NHA by its attorneys, it was stated

that prior to the assignment, DOC's had become indebted to the NHA and it was agreed between DOC's and the NHA that the latter would recover the advances from interim payments to which DOC's would become entitled under the terms of the construction agreement. The NHA was, in essence, contending that the assignment to FNCU of the contract funds under the construction agreement was subject to that prior arrangement between DOC's and the NHA. There is no mention of an abandonment of the construction agreement but to the contrary it was acknowledged by the NHA to be in existence and that it would recover its advances to DOC's from deductions from interim payments to which DOC's became entitled under the construction agreement.

46. In the second letter, again written on behalf of the NHA by its attorneys, the NHA altered its position for not making payments to DOC's under the assignment. In this letter too, there is no mention of an abandonment of the contract. On the contrary it is again argued that advances were made to DOC's by the NHA, not before the assignment to FNCU, but before it became operational and effective and the arrangement with DOC's was that the NHA would recover its advances by deductions from interim payments to which DOC's became entitled under the construction agreement. That arrangement it was argued in effect had priority over the assignment to FNCU. Again there was an acknowledgment by the NHA of the fact that the construction agreement was subsisting.

47. Fourth, according to Mr. Garcia, an agreement was prepared embodying the terms governing the repayment of advances to DOC's to purchase the moldings. That agreement was never signed by the parties but it was Mr. Garcia's evidence that the document reflected the agreement between DOC's and the NHA. That unsigned agreement referred to the agreement for the

construction of the housing units, which it referred to as the project. The agreement further recited that under the contract, the NHA would make interim payment for works undertaken and satisfactorily completed at various stages of the project and that the advances made to DOC's would be recovered from a deduction of a portion of the amount certified under each interim certificate. That unsigned agreement therefore recognized the continued existence of the construction agreement.

48. Fifth, the interim certificates, which were all approved by the NHA and pursuant to which monies were paid to or on behalf of DOC's by the NHA, are, on their face, consistent with the existence of the construction agreement. Mr. Garcia's evidence that they were make shift interim certificates, or in other words not issued in accordance with the construction agreement was rejected by the judge and in my view she was entitled to do so. The certificates each refer to the construction of the units, the contract price, the advance payment made under the construction agreement and appear to be issued on a monthly basis as required under the terms of the construction agreement. Each certificate show the value of the work being claimed by DOC's and that works executed to the date of the certificate were the subject of an engineer's estimate of work executed to date and not simply the amount to pay suppliers and sub-contractors as contended by Mr. Garcia.

49. The effect of Mr. Garcia's evidence is that the certificates were a fabrication and were a misrepresentation of the matters therein stated. As the judge noted to accept this evidence will be a serious indictment on the NHA and its offices and the judge was entitled to reject it as she did.

50. Even if the evidence of Mr. Garcia in relation to the certificates were accepted, it would not reflect an abandonment of the construction agreement. At the highest they would support the variation of the terms of payment under the construction agreement. In all the circumstances I do not accept that there was an abandonment of the construction agreement and the trial judge was correct to reject the NHA's submission that the construction agreement had been abandoned.

51. The second submission advanced by counsel for the NHA is that there is no evidence that the monies became due under the terms of the construction agreement as there is no evidence that there was a release of the funds by the mortgage companies of the purchasers of the housing units and the issue of the Taking Over Certificates by the NHA under the FIDIC conditions. In the circumstances there were no contract funds due for payment as contemplated by the assignment.

52. The judge seemed to think that the effect of the FIDIC conditions of contract as they relate to payment was that the NHA was obligated to pay the interim amounts due on the certificates within 56 days of the receipt of the statements and supporting documents pursuant to clause 14.3. The judge, however, in coming to that conclusion seemed to have overlooked the amendments to clause 14 as occasioned by the conditions of particular application referred to above. The effect of the amendment to the conditions, as I noted above, is that the amounts became due for payment under the certificates on the release of the funds by the purchasers' mortgage companies and within 56 days after NHA received the statements and supporting documents and/or 90 days after the issue of the Taking Over Certificate by the NHA whichever is later. There was no evidence that these events occurred. Indeed, the effect of Mr. Garcia's

evidence is that payments were made on the interim certificates during the course of the construction of the housing units when it is apparent that the Taking Over Certificate would not have been issued. He also stated in answer to a question in the course of cross-examination by counsel for DOC's that up to the time he was at the NHA, no monies had been released by the mortgage companies. According to Mr. Garcia, he left the NHA in 2008 which was after the commencement of these proceedings so up to the time of the commencement of these proceedings monies had not been released by the mortgage companies and accordingly, the contract funds had not become payable.

53. However, it was never part of the case for the NHA that these events (i.e. the release of the funds by the purchasers' mortgage companies and the issue of the Taking Over certificate) had not occurred prior to the commencement of these proceedings. Those issues were not raised by the NHA in the correspondence before the commencement of these proceedings. They were not part of NHA's pleaded case nor were they mentioned in the witness statement of Mr. Garcia filed on behalf of the NHA and which stood as the evidence in chief on behalf of the NHA. To put it simply, the question whether monies had not become due under the construction agreement because of non-occurrence of the said events was never an issue in these proceedings and it would be unfair to permit that issue to be raised as a defence to the claim on the assignment.

54. It would be correct to infer from the evidence, as I have alluded to above, that the interim certificates were not paid in strict compliance with the conditions of contract. That would amount to a variation or waiver of the conditions as to payment. The parties to the contract, however, could not do so as to the defeat FNCU's entitlement under the assignment. It is, however, the contention of the NHA that as the payments were made to keep the contract afloat

they were in the nature of a "forced involuntary loan" by NHA to DOC's and accordingly it is absolved from its liability under the assignment. It is to this submission that I now turn.

55. To support this proposition counsel for the NHA placed reliance on the cases of **Brice v Bannister (supra)** and **Shepherd v Livingstone (supra)** to which reference was made earlier.

56. **Brice v Bannister** is a decision of the English Court of Appeal. The facts of the case as taken from the head note are as follows:

> "G agreed to build a vessel for the defendant, the price of which was to be paid by installments. Before the vessel was finished, G, being indebted to the plaintiff, by instrument in writing directed the defendant to pay to the plaintiff £100 out of monies due or to become due from the defendant to G. At the time of giving this direction all the installments which were due had been paid by the defendant to G. Notice in writing of the above-mentioned instrument was given to the defendant but he refused to be bound by it, and afterwards paid to G the balance of the price of the vessel amounting to more than £100."

By a majority it was held that the instrument in writing constituted a valid assignment of £100, part of the monies due or to become due from the defendant to G and that the plaintiff was entitled to recover that amount from the defendant, notwithstanding the subsequent payments by him to G.

57. The case therefore stands as authority for the proposition that where the debtor disregards the notice of the assignment and pays the assignor and not the assignee, he does so at his own at his own peril and will be liable to pay twice over. That principle is not disputed in this case. Counsel however, sought to rely on the following portion of the judgment of Bramwell L.J., (at p. 581) who was one of the two judges, in the majority:

> "On the other hand, if [G] had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and bona fide, not to defeat the plaintiff

> but to protect himself, advanced money to [G] before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted bona fide I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory."

58. Bramwell L.J. agreed with the principle that the defendant should not be permitted to ignore the assignment even where the practical effect would be that he would be liable to pay twice over. He however, seemed to think that the factual scenario outlined in the above passage would provide an exception to that rule. The implication is that where the debtor is faced with a breach of contract or a threatened breach and bona fide makes payments to the contractor to save the project so that such payments are in essence compulsory, he is absolved from liability to the assignee under the assignment. That statement, however, finds no support from the other judges in the matter.

59. Brett L.J., who was in the minority, was of the view that the parties to the building contract should be able to modify it notwithstanding the assignment of the proceeds payable thereunder save where they might have done so in bad faith with the intention of defeating the assignee. He stated (at p. 580):

> "The defendant had a right, with the consent of the builder [G], to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect whatever. Therefore, I am of the opinion that the defendant in this case is entitled to succeed."

Of course, that view was not shared by the other two judges and is not the exception referred to by Bramwell L.J.

60. Cotton L.J., who was the other judge in the majority, referred to the payments made by the defendant to G and to the submissions that the payments were necessary to secure completion of the vessel and said: (at page 577):

> "The contention of the defendant was that though, after notice of the assignment to the plaintiff, he had paid monies exceeding £100 to [G], he did so not in payment of the price under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder, having failed in his contract, the person for whom he was building put an end to the contract and completed the work. In such a case, the builder, if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor building under the contract with the defendant …. It is probable that [G] would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel; but a charge for the money lent after 27th of October [being the date that notice of the assignment was received by the defendant] by any person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to [G], could not be preferred to the plaintiff's claim."

61. That view of Cotton L.J. does not support that of Bramwell L.J and indeed it seems to be in conflict with it. According to Cotton L.J., if monies are paid under the contract, even if they be necessary to complete the vessel, they are still caught by the assignment. The position would be different where the contract is lawfully terminated and the monies are paid to the builder under a new arrangement.

62. Other than the undisputed proposition for which **Brice v Bannister** stands as authority, it is difficult to extract from it the principle for which counsel argues.

63. **Shepherd v Livingstone** is a decision of the Supreme Court of Alberta, Appellate Division. The question in that case was whether the defendant was liable under an assignment which provided for payment of a sum of money to him "should any sum be due and payable on

completion of the contract" between the defendant and the contractor to drill for oil on lands in respect of which the defendant held an oil lease. The majority held that the defendant was not liable and gave four reasons for coming to that conclusion. The third reason was an application of that paragraph appearing in the judgment of Bramwell L.J. In the majority judgment it is stated (at para 25):

> "In the third place, even assuming the completion of the contract by Norman I think the facts exist which Bramwell L.J said in *Brice v Bannister* would have made him hesitate long before holding the defendant liable. It is clear that Norman "threatened to break his engagement" that Livingstone acted bona fide not to defeat Shepherd but to protect himself and that his action was really compulsory and in no sense voluntary. For this reason also I think we are not forced by *Brice v Bannister* to hold the defendant liable. The case is distinguishable also upon this ground of fact as to the position and threatened action of the contractor."

64. The court advanced no reason for applying the statement of Bramwell L.J. other than the facts in that case were similar to those as referred to by Bramwell L.J. in the paragraph of his judgment set out above. The court did not consider the fact that the statement of Bramwell L.J. was not supported by the other judges in the matter and is difficult to reconcile with the judgment of Cotton L.J. Further, no reference is made to cases decided after **Brice v Bannister** which state that the assignor is not subject to any later arrangement which may be made between the debtor and the assignee. For example in **Roxburghe v Cox (1880) 17 Ch. D. 520, 526**, James L.J. stated the law in these terms:

> "Now an assignee of a chose in action, according to my view, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice."

65. In the circumstances, I am not persuaded to place any reliance on that statement of Bramwell L.J. in **Brice v Bannister**.

66. Of course it is not the position that the assignee is immune from all claims arising after notice of the assignment is received by the debtor. However, for the assignee to be subject to those claims, it must amount to a substantive defence such as equitable set-off. The claim must be such that it impeaches the title of the assignee or as it has been expressed in more recent times, it must flow out of and be inseparably connected with the dealings and transactions which also give rise to the assigned right (see **Government of Newfoundland v Newfoundland Railway Co and others (1887) 13 App. Cas. 199** and **Bank of Boston Connecticut v European Grain and Shipping Limited [1989] AC 1056**).

67. In this matter the NHA did not plead an equitable set-off. Nor did the NHA raise any argument in this court or the court below relating to it. But even if the NHA were to argue that it has a cross-claim in the nature of an equitable set-off, I do not believe that it can be reasonably contend that the set-off would exceed the sum that is the difference between the contract price and the amount paid by the NHA to DOC's. The set-off would therefore not impact on the principal amount claimed by FNCU under the assignment.

68. In view of the above, in my judgment there is no merit in the limb of counter notice of appeal of the NHA that seeks to set aside the finding of the trial judge that, apart from the issue of the illegality of the loan by FNCU to DOC's, it is liable on the assignment.

69. I now turn to the appellant's notice of appeal which challenges the finding of the trial judge that the loan agreement is illegal and irrecoverable.

70. Counsel for DOC's submitted that the loan is infected by multiple breaches of the Act namely of section 43(1) and of section 69(1) as well as regulation 40 of the Co-operative Societies Regulations made under the Act. These provisions are as follows:

> **43(1)** A society may not, save with the consent of the Commissioner, make a loan to any person other than a member.
>
> **69(1)** Any member, agent or employee of a society who corruptly accepts, agrees to accept, obtains or attempts to obtain whether for himself or another, any gift of consideration as an inducement or reward for doing or forbearing to do any act relating to the business of the society or for showing favor or disfavor to any person in relation to the business of the society and any person who corruptly gives, agrees to give, offers such gift or consideration to any such member, agent or employee of a society as such inducement or reward, is liable on summary condition to a fine of four thousand dollars and to imprisonment for two years and on conviction on indictment imprisonment for five years.
>
> **Regulation 40**
> Where a loan is made the borrower and his sureties, if any, shall execute an instrument in writing containing the terms of repayment of the loan and such other terms and conditions as the board or committee may consider necessary, but if he is required to provide security for the loan he shall execute an instrument of charge in the form set out as Form 2 in the Second Schedule.

71. According to counsel for DOC's, the loan was made to a non-member in breach section 43(1) of the Act. Further, DOC's was not required to execute an instrument of charge pursuant to regulation 40 of the Co-operative Societies Regulations and it was illegal being in breach of section 69(1) for Financial Concept Limited to obtain a commission when it sourced the loan for DOC's. In those circumstances the loan is illegal and irrecoverable and the claim on the assignment must fail. These submissions were supported by counsel for the NHA.

72. I will discuss section 43(1) later in this judgment but I will first refer to regulation 40 and then section 69(1).

73. The judge was of the view that the failure of DOC's to execute an instrument of charge pursuant to regulation 40 was contrary to the regulation. I however do not agree. Regulation 40 is part of the Co-operative Societies Regulations which were made under section 81 of the Act. This section provides that the Minister may make regulations to carry out the purposes of the Act and in particular, such regulations may, *inter alia,* (a) prescribe all things required by the Act to be prescribed.

74. Regulation 40 should be read in conjunction with section 29(1) of the Act which provides that where a member of the society is loaned money he may be required to create a charge in such form as may be prescribed. Regulation 40 provides, *inter alia,* for the form of the charge a member may be required to execute. Like section 29(1), regulation 40 is to be read as applying to loans to members. This is made clear from regulation 37(1) of the Cooperative Societies Regulations which provides "loans, when approved, shall be granted to members in accordance with regulation 40". Section 43(1) provides that a loan, with the consent of the Commissioner, may be made to a non-member of the society. Where such a loan is granted, section 29(1) and accordingly regulation 40 have no application. In the context of this matter which relates to a loan to a non-member the fact that the society did not take a charge as provided for in regulation 40 is of no moment.

75. With respect to section 69(1) this does not appear to have been argued before the judge. In any event, no mention is made of it in the judge's judgment. I, however, do not believe that the

section is of any relevance to this matter. It is clear from this section that it applies to "any member, agent or employee" of the society. For such a person to come within the section he must corruptly accept or agree to accept or obtain or attempt to obtain for himself or another, any gift or consideration for doing or forbearing to do any act relating to the business of the society or showing favor or disfavor to any person in relation to the business of the society. Financial Concept Limited is not an employee or member of FNCU and the evidence does not suggest that it was an agent of FNCU. According to the evidence, DOC's secured the services of Financial Concept Limited to secure finance on its behalf for the project and that company was paid the sum of $86,000 for so doing by DOC's. That does not suggest that Financial Concept Limited was the agent of FNCU but on the contrary the evidence seems to establish the fact that it was the agent of DOC's. The fact that it was appointed fund manager does not cast any different light on the issue since what that entails was not explored at the trial. Nor is there any evidence that will satisfy the other requirements of section 69(1), and even if there were, it is difficult to see its relevance to the recoverability of the loan. In my judgment section 69(1) is not relevant to this appeal.

76. This leaves section 43(1) of the Act. The judge found that the loan was illegal, being in breach of this section. The illegality of the loan was not raised in the pleadings in the principal claim between FNCU and the NHA. It was however, raised by DOC's in the ancillary proceedings between the NHA and DOC's. Counsel for FNCU argued that the judge ought not to have considered the illegality argument in deciding on the liability of the NHA under the assignment, as the illegality was not an issue in FNCU's claim on the assignment against the NHA. A similar submission was raised before the trial judge and rejected by her. I think she was right to do so.

77. Where on the claimant's claim it appears that it is illegal, the court should refuse to entertain it whether illegality is pleaded or not. However the court must act fairly and should only deal with an alleged illegality which is not pleaded where to do so does not cause unfairness to the parties (see **North-Western Salt Company Limited v The Electrolytic Alkali Company Limited [1914] AC 461**).

78. In this case, the assertion is that the loan agreement is illegal as being contrary to section 43(1) as it was made to a non-member of the FNCU without the Commissioner's consent. Assuming that these facts make the agreement illegal, the court may act on the illegality even if not pleaded if the facts are in evidence before the court and the claimant has had a fair opportunity to properly bring forward any evidence and arguments in rebuttal. In this case there was no dispute that the loan was made to a non-member and that the consent of the Commissioner was not obtained. The illegality argument was raised in the submissions below and FNCU was not denied an opportunity to answer them. There would, therefore, have been no unfairness to FNCU by the court dealing with the illegality issue even though it was not pleaded in the claim between FNCU and the NHA.

79. Section 43(1) does not present any difficulty in its interpretation. Where a society lends its money to a non-member, it must obtain the consent of the Commissioner. When it lends its money to a non-member without the Commissioner's consent, it does so in breach of section 43(1).

80. Counsel for DOC's argued that in this case the Commissioner's consent could not have been obtained because the words "any person other than a member" in section 43(1) do not refer to a corporation but refer only to an individual or another society registered under the Act. He submitted that in those circumstances, the mere fact that the loan was made to DOC's meant that the loan violated section 43(1), and was accordingly illegal and irrecoverable. I however, do not agree. In my judgment, the words "any person other than a member" are capable of referring to a corporation (see section 16(1) of the Interpretation Act). A society may, therefore, with the consent of the Commissioner make a loan to a non-member that is a corporation and the fact that the loan was made to a corporation (in this case DOC's) does not of itself render the loan in breach of section 43(1).

81. Section 43(1) does not provide what happens to the loan agreement where a loan is made in breach of the section. Nor does any other section of the Act so provide. The question that must therefore be asked is whether despite the loan being made in breach of section 43 (1) it is recoverable. In other words, does the Act prohibit the loan agreement in the sense that it is void or unenforceable? It may be said that in so far as section 43(1) does not permit the making of a loan to a non-member without the consent of the Commissioner that by implication a contract of loan is void and unenforceable but that is not necessarily so. In **Yango Pastoral Company Pty Limited v First Chicago Australia Limited [1978] HCA 42**, the question arose whether a loan agreement made by a body corporate carrying on the business of banking in breach of the relevant statute was illegal and void. It was held that on a proper construction of the statute it was not. Gibbs A. CJ, in the course of his judgment said (at paras 5 & 6):

> "[5] It is often said that a contract expressly and impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide expressly or impliedly that the contract will be valid and

> enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by statute. Where a statute imposes a penalty on the making of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.
>
> [6] The question whether a statute, in its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes. "The determining factor is the true effect of the meaning of the statute" (*St John Shipping Corporation v Joseph Rank Limited (1957) 1 QB 267, at p 286).* One must have regard to the language and to the scope and purpose of the statute"…

82. To similar effect was Mason J, where he said (at para 13):

> "The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statue prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statue itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.

83. The question then is whether on a proper construction of the Act, the loan agreement is void and unenforceable. In deciding whether it is void and unenforceable, one must have regard to ordinary principles of statutory construction and so one must have regard to the language of the statute which may or may not touch upon the question and also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention.

84. The Act is designed to promote the continued existence and viability of the co-operative movement which is premised on the voluntary coming together of people with a common interest who are encouraged to pool their resources to promote their economic welfare. This is no less so in the case of a society which is a credit union such as FNCU. It think this is evident from the definition of credit union in the Act which means "a society which has as its objects the promotion of thrift and the creation of a source of credit for its members, the majority of whom are not agriculturalists, for provident of productive purposes". The aim of the Act is to protect the existence of the co-operative society. As the judge noted, "the intention of the Act is to foster the continued existence of co-operative societies like credit unions for the benefit of members while ensuring that the funds and the property of its members are protected." I agree. Indeed as was advanced by counsel for FNCU the requirement of the Commissioner's consent to grant a loan to a non-member is that the Commissioner may want to satisfy himself that the lending of money by the society to a non-member is not putting the society at risk.

85. As I have mentioned, neither section 43 nor any other section of the Act states explicitly whether a contract of loan is void or unenforceable. I think in those circumstances, it is reasonable to draw inferences from the language, scope and purpose of the Act as to the intention of the legislature.

86. If the proceeds of the loan are irrecoverable this could have dire consequences for the society and by extension for the members themselves who may have had no part to play in the making of the loan. So the very entity and persons the Act was meant to protect and promote could be ruined. It would be irrational to think that in those circumstances it was the intention of Parliament to render the loan irrecoverable. It would also be irrational to think that it would be

the intention of Parliament to allow the borrower to escape with a windfall of the society's and by extension its members' money.

87. It is apparent from the passages quoted above from the **Yango** case that a material consideration is whether the statute intends only to penalize the person who contravenes the statute or whether it prohibits the enforceability of the contract made in contravention of it. Section 71(1) of the Act is as follows:

> A society or any officer or member thereof or any other person who fails without reasonable cause or willfully neglects or refuses to comply with any requirement of this Act or the regulation or to furnish any information or who purporting to comply with any such requirement knowingly furnishes false information is guilty of an offence:

Section 71 therefore makes failure to obtain the consent of the Commissioner an offence where the society, a member or officer has failed without reasonable cause to do so or willfully neglected or refused to comply with that requirement.

88. The Act provides no specific penalty for the failure to comply with section 43(1), but section 73 of the Act provides that where no penalty is specifically provided, every society, officer or member thereof or other person guilty of an offence under the Act is liable on summary conviction to a fine of $2,000 and in the case of a continuing offence to a further fine of $100 for each day that the offence continues after conviction thereof. It was common ground that where a loan is made without consent and offends section 71 that it is not a continuing offence. The penalty therefore where a loan is made to a non-member without the consent of the Commissioner, is $2,000. Each and every loan made without reasonable cause to obtain the consent of the Commissioner or where there is a willful neglect or refusal to do so would attract a similar penalty. In my judgment, such provisions are more indicative of an intention to merely

penalize the society, officer or member who contravenes the Act than to render the loan irrecoverable. It would be remarkable if the Act made the failure to obtain the consent of the Commissioner an offence only where the mental element set out in section 71 exists but makes the loan irrecoverable when there is simply an absence of consent under section 43(1). Of course, in this case the existence of the mental element was not an issue and was not explored at the trial.

89. There is also the possibility that the society may be wound-up by the Commissioner. The Commissioner has the power to hold an enquiry into the operations of the society and having done so, it seems that he has the power to direct that it may be wound-up and appoint a liquidator (see sections 4 and 58 of the Act). Of course, a function of the liquidator will be to get in the assets of the society and pay the creditors of the society. It would not be rational to think that it was Parliament's intention to render the loan irrecoverable since the effect of that could very well impact adversely on innocent creditors.

90. Of course, in the event of a winding-up, the members of the society who played no part in the grant of the loan could also be adversely affected if the loan were irrecoverable. It is unlikely that that would be the intention of the legislature.

91. In my judgment, when due regard is paid to the language, scope and purpose of the Act it cannot be concluded reasonably that it is the intention of Parliament where the loan is made in contravention of section 43(1) that the contract of loan is void and unenforceable. It follows from that that the loan is not irrecoverable and FNCU's claim, which is on an assignment as security for the loan, should also succeed.

92. This analysis based as it is on the proper construction of the Act avoids or bypasses the illegality argument but it is appropriate to consider that argument as well. It is based on the principle that no court will lend its aid to a person who grounds his/her cause of action upon an immoral or illegal act. That principle is grounded on public policy considerations. The passage often relied on in support of that proposition is to be found in the judgment of Lord Mansfield in **Holman v Johnson (1775) 1 Cowp 341, 343**, where he said:

> "If from the plaintiff's own state and otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter will then have the advantage of it; for where both are equally in fault potior est conditio defendentis."

93. Where a contract is made illegal by statute the court will not lend its aid to a claim under the contract. In this case if the contract were illegal then the court will not lend its aide to a claim on the contract. In this case, however, it must be noted that the cause of action is not on the loan agreement but on the assignment of the proceeds of the construction agreement which is the security for the loan. In those circumstances, counsel for FNCU submitted that as the claim is on the assignment and not on the loan agreement then even if the contract of loan were illegal, as the cause of action is not founded on the illegal contract and as FNCU does not have to ground its cause of action on the illegality, it should succeed. In support of that proposition, counsel referred to the case of **Tinsley v Milligan [1994] 1 AC 340**.

94. In that case, a house was purchased by the joint contributions of both parties but put into the sole name of Ms. Tinsley, so as to assist Ms. Milligan to make a false claim from the Department of Social Security (DSS) which she did for a number of years with the connivance of Ms. Tinsley.

Monies received from the DSS helped to pay their bills but played only a small part in the acquisition of the equity in the house. The parties eventually fell out. Ms. Tinsley gave Ms. Milligan notice to quit and brought a claim for possession. Ms. Milligan counter claimed for an order for sale and for a declaration that the property was held by Ms. Tinsley on trust for them both in equal share.

95. The House of Lords by a majority held Ms. Milligan was entitled to succeed. She established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and Ms. Tinsley that they owned the house equally. Ms. Milligan had no need to allege or prove why the house was conveyed into the name of Ms. Tinsley alone since that was irrelevant to the claim. Lord Browne-Wilkinson who gave the leading judgment stated:

> "In my judgment the time has come to decide clearly that the rule is the same whether the plaintiff finds himself on a legal or equitable title; he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which she relied was acquired in the course of carrying through an illegal transaction."

Ms. Milligan was therefore entitled to succeed as she did not have to rely on the illegality to establish her claim. The reliance test as formulated in **Tinsley v Milligan** over the years has acquired a more universal application as a defence to an illegality claim.

96. In **Patel v Mirza [2016] UK SC 42, Tinsley v Miligan** was over-ruled by a majority of a nine member panel of the Supreme Court of the UK. It was noted by Lord Toulson who gave the leading judgment that **Tinsley v Milligan** had been the subject of much criticism in England and other jurisdictions. He thought it was time to do away with the "reliance test" applicable to the illegality defence as formulated in **Tinsley v Milligan.** The most striking difficulty with the test

was that it produced different results according to procedural technicality which had nothing to do with the underlying policies that justify that the existence of the defence.

97. Lord Toulson noted that there are "two broad discernable policy reasons for the common law doctrine of illegality". One was that the person should not be allowed to profit from his own wrongdoing. The other is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.

98. Lord Toulson observed that the statement that the claimant will not be allowed to profit from his/her wrongdoing does not fully explain why particular claims have been rejected. He considered that it may have the undesirable effect of tempting judges to focus on whether the claimant is "getting something" out of the wrongdoing rather than on the question whether allowing recovery for something which was illegal would produce an inconsistency and disharmony in the law and so cause damage to the integrity of the legal system. He was of the view that this leaves open what is meant by inconsistency or disharmony in a particular case but did not see that as a weakness. He then stated (at para 101):

> "It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question, I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are after all in the area of public policy. That trio of necessary considerations can be found in the case law."

99. Later in his judgment, Lord Toulson further articulated the test in this way (at para 120):

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the

> legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it was necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim, (b) to consider any other relevant public policy in which denial of the claim may have an impact, and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

100. With respect to proportionality, Lord Toulson was of the view that various factors are "potentially" relevant including (1) the seriousness of the conduct, (2) its centrality to the contract, (3) whether it was intentional, and (4) whether there was marked disparity in the parties' respective culpability.

101. For the reliance test, therefore, there has been substituted a multifactor test for how the courts should treat with claims that are founded on or include some aspect of illegal conduct. It is now necessary to consider the following factors: (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will been enhanced by denial of the claim; (b) any other relevant public policy on which the denial of the claim may have an impact; (c) whether denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is matter for the criminal courts.

102. What answer to the illegality defence does a consideration of the factors provide in this case?

103. The first consideration is the underlying purpose of the prohibition which has been transgressed and whether denial of the claim enhances that purpose. As I had mentioned, the

Act is, *inter alia*, designed to promote the co-operative movement, foster the continued existence of the society, and ensure that its property and that of its members is protected. The purpose of seeking the Commissioner's consent is to be seen in furtherance of that. The concern of the Commissioner is as to the prudence of the loan. Presumably if he thinks that the monies of the society will be put at risk he will withhold his consent. The denial of the society's claim to attempt to recover monies loaned cannot be seen as enhancing the underlying purpose of seeking the Commissioner's consent.

104. With respect to any other relevant policy on which denial of the claim might have an impact, I think it is appropriate to consider that the law does not permit a person to be unjustly enriched and provides a remedy for that. Ordinarily therefore a person who is unjustly enriched at the expense of another would be required to repay the monies. In the **Patel** case, even though Mr. Patel paid to Mr. Mirza a sum of money for an illegal purpose, he succeeded on his claim in unjust enrichment. The court upheld Mr. Patel's claim that Mr. Mirza had been unjustly enriched and held that he was entitled to have the monies repaid. If this claim is denied there would be no question of DOC's having to repay the money and it would receive a windfall in excess of $6,000,000, whereas if the claim is allowed, it is likely that the court would grant NHA's claim against DOC's. This is the relevant consideration in this case.

105. Counsel for DOC's submitted that the real vice of the loan transaction is that if recovery of the loan is allowed that it would be to condone FNCU's acting in breach of section 4(1) of the Financial Institutions Act 1993 (FIA), since it would be carrying on the business of banking. I however do not think that is a relevant consideration.

106. Section 4(1) if the FIA provides that any person other than a person licensed by the Central Bank shall carry on the business of banking. Section 4(2) of the FIA defines "business of banking" or "banking business" to mean, inter alia, the business of making loans. Certain institutions are exempted from the provision of the FIA and they include societies registered under the Act. The exempting of societies from the provision of the FIA means that a society is authorized by the Act to carry on the business of banking in the sense that it is authorized to lend money to its members and non-members albeit in the case of the latter with the consent of the Commissioner. The lending of money by a society is therefore not in itself prohibited by the FIA. Further if what is contended is that the making of loans to nonmembers is carrying on the business of banking then in this case it is relevant to note that there is evidence of only one loan which is the loan to DOC's. One loan would not amount to "the business" of making loans. So that it cannot be reasonably argued if the loan were recovered the effect of it would be to condone FNCU carrying on the business of banking in breach of section 4 of the FIA.

107. As regards whether the denial of the claim would be a proportionate response to the illegality, as I mentioned potential relevant factors identified by Lord Toulson include the seriousness of the conduct, the centrality to the contract, whether it was intended and whether there was a marked disparity in the parties' respective culpability. I view these as the relevant factors in this matter.

108. Section 43(1) makes the obtaining of the Commissioner's consent a condition precedent to the making of the loan. The Act deals with the failure to obtain the consent in two ways. First, under section 71, as I mentioned, that may be an offence depending on whether the mental element exists, that is to say whether there was a failure without reasonable cause or whether

there was a willful neglect or refusal to obtain the consent. These matters were not explored at the trial so one cannot say that the offence was committed. But if the offence were committed the Act imposes a penalty $2,000 which I would not consider to be a large fine. In view of the way the failure to obtain consent is treated under section 71, it would seem to me that the failure to obtain consent is not sufficiently grave that it should be further punished by the possibility that the society should not recover the loan. This will be a disproportionate response to the conduct involved. That that is so is I believe underlined when it is considered that if the loan is irrecoverable that would adversely impact on members of the society (probably the vast majority) who would have had nothing to do with the making of the loan.

109. The other way the Act treats with the failure to obtain the Commissioner's consent, as I have already mentioned, is the possibility that the society may be wound-up. The Commissioner has the power to order the winding-up after an enquiry is held under section 4 which the Commissioner may do on his own notion. Of course there is nothing in this case to suggest that the Commissioner has taken any such step. But if in addition to the society being wound-up it would not be able to recover the advances made and have that available for the payment to its creditors and distribution (in the event of a surplus) to its members, most of whom may have had no involvement in the making of the loan, that will certainly be overkill and would be a disproportionate response to the conduct involved as well.

110. As to the centrality of the contract, the obtaining of the consent is a condition precedent to the making of the loan and in that sense is central to the loan agreement and the same could be said with respect to the assignment.

111. As to whether the failure to obtain the consent was intentional and whether there was a marked disparity in the parties' respective culpability, counsel for DOC's submitted that there was a deliberate intention by the FNCU to circumvent the Act. The trial judge was of the view that FNCU knew or ought to have known that the loan was illegal. I do not disagree that FNCU ought to have known of the requirement for the Commissioner's consent. But whether it knew it to be illegal and deliberately circumvented the Act are different questions. Those were certainly not issues raised on the pleadings or in the evidence and as I have mentioned whether it was an offence was not explored in the evidence. There are matters that may point to a deliberate circumvention of the Act such as the efforts to make the managing director of DOC's a member of the society and the disbursement of portions of the loan to him. But the witness for FNCU was not cross-examined on those matters and it was not suggested to him these matters showed that there was a deliberate effort to circumvent the Act. If there was an intention to breach the provisions of the Act by the FNCU, then there is no reason to suppose that Financial Concept Limited, which was the agent for DOC's in procuring the loan, was also not aware that the loan was in breach of section 43(1). There is, of course, nothing to suggest that the NHA was aware of the requirement for the consent of the loan at the time of the assignment.

112. It was noted in **Patel v Mirza** that the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so will be harmful to the integrity of the legal system. In weighing the trio of considerations outlined by Lord Toulson, I do not consider that it would be harmful to the integrity of the legal system if the FNCU's claim were allowed.

113. Of course the case of **Patel v Mirza** was not decided at the time the trial judge decided this matter and therefore was not available to her. Nor it seems was the **Yango** case referred to her. Had it been otherwise she no doubt would have arrived at a different conclusion.

114. bIn all the circumstances, I will therefore allow this appeal and order that the NHA pay to FNCU the sum of $6,046,398 (being the sums advanced by FNCU to DOC's under the loan agreement) on the claim on the assignment.

115. FNCU claims interest at a rate of 16.5 percent per annum plus penalty interest of .25 percent per annum which are the rates of interest agreed to be paid by DOC's on the loan. In my view NHA is not liable for interest at the contractual rate on the loan agreement and that rate is considerably higher than what the Court in the exercise of its discretion would usually award. . Interest however should be awarded and I would award interest at the rate of 4 per cent per annum from September 15th 2006.

116. It is unfortunate that at the time that NHA chose to ignore the assignment and pay none of the contract funds to FNCU that it acted only on the basis of what was told to them by Mr. Gosine. According to Mr. Garcia, Mr. Gosine conveyed the notion that FNCU had advanced no part of the loan proceeds to DOC's. NHA did not seek to verify this or advise FNCU of the position. The judge found that in so doing that the NHA acted in bad faith. I do not think that that finding is justified if by that the judge meant that it was done with the intent of defeating the claim of FNCU to the contract proceeds. But it was certainly reckless and irresponsible on the part of the NHA to act in the manner it did. Perhaps, if appropriate enquires had been conducted, this claim might have been avoided altogether.

117. In relation to the ancillary claim by the NHA against DOC's, as I mentioned in its counter notice of appeal the NHA seeks an order of contribution to the full extent of the claim of FNCU for which the NHA may be found liable. The ancillary claim is premised on the basis of unjust enrichment as I have outlined earlier in this judgment. The essence of the claim is that if the payments made to DOC's or on its behalf by the NHA are found to have been subject to the assignment then DOC's would have been unjustly enriched by the making of the payments to it or on its behalf by the NHA and not to FNCU. The judge found that DOC's had been unjustly enriched at the NHA's expense but as she found the loan tainted with illegality and not recoverable there was no need to make any order on the ancillary claim. There has been no appeal from the judge's findings in relation to the claim in unjust enrichment. In any event, I am of the view that she was correct to come to the conclusion that the elements of the claim in unjust enrichment had been made out.

118. In its written submissions, DOC's outlined as an issue whether the breach of the loan agreement by FNCU would extinguish or reduce the liability of the NHA to FNCU thereby reducing any sum by way of indemnity. I do not, however, consider that is an issue in this appeal. It has not been established that DOC's has a claim against FNCU for breach of the loan agreement. As I have mentioned there was no claim between DOC's and FNCU. Further Doc's neither pleaded nor led any evidence of any loss that it may have suffered as a resulted of the alleged breach of the loan agreement. The fact that over twenty one million dollars was paid by the NHA to DOCs and may point to the fact that the works exceeded the contract price of $15,472,946.42 is not evidence of loss caused by a breach of the loan agreement.

119. Having held that the defence of illegality fails and that the NHA must pay monies under the assignment to FNCU, the NHA is entitled to a 100% contribution from DOC's in respect of the judgment awarded against the NHA in favor of FNCU. I would therefore order that DOC's do pay to the NHA a 100% contribution in respect of the judgment awarded herein against the NHA in favor of FNCU.

120. I would hear the parties on costs.

A. Mendonça,
Justice of Appeal