THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 009 of 2014
Claim No. CV2011-04593
HCA 3386 of 2004

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

And

TRINSALVAGE ENTERPRISES LIMITED

Respondent

PANEL:
N. BEREAUX, J.A.
P. MOOSAI, J.A.
J. JONES, J.A.

Date of Delivery: December 21, 2018

APPEARANCES:
Mr. R. Harnanan, Mr. N. Byam and Ms. M. Benjamin appeared on behalf of the Appellant
Ms. M. Tiwary and Mr. A. Singh appeared on behalf of the Respondent

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ P. MOOSAI J.A.

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ J. JONES J.A.

JUDGMENT

Delivered by Bereaux J.A.

Introduction

[1] This is an appeal from the decision of Seepersad J in which he held that the contract executed between the parties was ultra vires the Central Tenders Board Act Chap 71:91 (the Act) and void. However he ordered that the respondent be paid damages on a quantum meruit basis and directed pursuant to a prior consent application that the parties appoint a joint independent expert to determine or ascertain the value of the works. The appellant Attorney General contends that the Permanent Secretary (the P/S) had no authority to contract in respect of a project in excess of twenty-five thousand dollars ($25,000.00) because the Act restricted his authority to contracts to the value of twenty-five thousand dollars ($25,000.00 or less). I have not been able to verify that that amount was in fact the limit under the Act. It is however not disputed that the works did considerably exceed the P/S' statutory authority to bind the State. The Attorney General contends that the respondent is entitled to nothing and

the judge's award stultifies the policy of the Act. I shall, for the purposes of clarity, refer to the respondent as the claimant.

Summary of decision

[2] The appeal is dismissed. While the contract was ultra vires the Act, it cannot be said that the policy of the Act is stultified by allowing the appellant to claim damages on a quantum meruit basis. There is nothing in the Act that showed the intention was to deny the respondent its restitutionary remedy.

Facts

[3] The claimant is a limited liability company carrying on the business of, inter alia, marine construction services. In August 2000, the P/S in the Ministry of Works and Transport purported to contract with the claimant for the provision of certain goods, materials and services in relation to a harbor in San Fernando ('the San Fernando Harbour Project'). The works included coastal reclamation in the vicinity of a derelict jetty. The claimant claims to have done work in excess of the stipulations of the contract and that this work was reasonably required for the fulfillment of the contract. Despite the position of the Attorney General that the contract is void, we were advised by Mr. Harnanan from the bar table that the principal amount under the contract was paid. The issue in question concerns a variation of the works, made pursuant to the contract by the respondent, amounting to four million, nine hundred and ninety-seven thousand and twenty-one dollars and forty-seven cents ($4,997,021.47).

[4] The statement of agreed issues filed on March 18th, 2013 listed the issues as:

1. Whether the P/S or Lee Young and Partners, the engineers, had the

authority, apparent or ostensible, to enter into the contract on behalf of the State or the authority or any apparent authority to bargain for or accept the services which were the subject of the contract. (It is unclear why reference is made to Lee Young and Partners.)

2. Whether the appellant is estopped from raising the averments as the Ministry of Works received the benefit of the claimant's services, was unjustly enriched and the claimant had received payments for some of the works and services from the Ministry of Works, its servants and/or agents.

By a consent application filed on January 21st 2013 the parties agreed, in relation to the issue of quantum, to appoint a joint independent expert to determine or ascertain the value of the works if necessary and to be bound by the valuation of the joint independent expert. The parties also agreed that the issue of quantum would be considered if the liability was determined in the claimant's favour.

[5] The judge determined that the central issue was whether the claimant could properly maintain the claim against the appellant. He held that the P/S had no authority, either apparent or ostensible, to enter into the contract and had acted ultra vires the provisions of the Act and its regulations. However, he found that even though the Permanent Secretary had acted ultra vires the provisions of the Central Tenders Board Act, the State had been unjustly enriched and the claimant was entitled to recompense. He noted that the work was effected over an extended four year period, in a public place which would have been under the control and charge of the State and the work was done on property belonging to the State. The judge ordered that the respondent was entitled to be paid, on a quantum meruit basis, for the work effected.

The appellant's submissions

[6] The appellant submitted that:

(i) The claimant cannot maintain an action for breach of contract against the appellant because the exclusive authority to bind the State in a contract of this value lay with the Central Tenders Board. Neither the Ministry of Works nor the P/S, Ministry of Works was so authorized.

(ii) A claim for quantum meruit cannot lie given that the P/S lacked authority and there was no compliance with the Act. To hold otherwise would be to legitimize ultra vires acts (and thereby disregard the consequent private law concepts of want of authority and capacity) and to stultify, nullify or repeal the Act.

According to the appellant, a claim for quantum meruit is ordinarily made where a contract between private parties is void but that did not apply to a void contract entered into by a State entity or a public body because no action by an employee of the State or by the public body could bind the State to do something which the law does not permit it to do.

[7] Further, an estoppel cannot extend powers conferred and limited by statute.

Claimant's submissions

[8] Ms. Tiwary, in her written submissions, submitted that the case of **Haugesund Kommune v Depfa ACS Bank [2011] 1 All ER 190** makes it clear that restitution can be given as long as it does not stultify the statute. The consequences of any ultra vires action depend on the facts of each case (**Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1**). The modern cases show that the principles and rationale underlying ultra vires do not prevent

the court from giving alternative remedies such as restitution unless it can be shown that it would stultify the relevant statute. In granting restitution the court is not enforcing the contract but enforcing another and legitimate cause of action which is independent of the contract.

Law and Conclusions

[9] Before going on to consider the central issue in this appeal, I shall dispose of the estoppel point summarily. Ms. Tiwary did not appear to pursue the point. In my judgment she was right to do so. The words of Harman J in **Rhyl UDC v Rhyl Amusements Limited [1959] 1 WLR 465** are apt. He said at page 474: "***If the plaintiffs were private people this would be a strong plea, but in my judgment a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires***…" That is the short answer to any suggestion that the appellant can be estopped from contending that the contract is void.

Whether contract ultra vires the Act

[10] In my judgment the contract is ultra vires the Central Tenders Board Act. The authorities show that a contract made by an agent of the State, the scope of which was outside of the agent's limited authority is void and unenforceable and will not bind the principal. In **The Attorney General for Ceylon v A.D. Silva [1953] AC 461**, the plaintiff sought to recover damages for breach of contract in respect of a contract which the Principal Collector of Customs had no authority, actual or ostensible, to enter into and to bind the Crown. Giving the decision of the Board, Mr. L.M.D. De Silva stated at page 479:

> ***"It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the***

> ***right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise."***

The same principle would apply to an officer of the State. As to the hardship caused to the plaintiff in being unable to recover under the contract, Mr. De Silva stated at page 480:

> ***"It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But where, as in the case of the Customs Ordinance, the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. This is illustrated in the case under consideration. The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual."***

[11] In the case at bar, the P/S had no statutory authority to bind the State to the extent of the works and the contract he signed (on behalf of the State) with the respondent was void and unenforceable. The decision of the Privy Council in **National Transport Co-operative Society Limited v The Attorney General of Jamaica [2009] UKPC 48** is a more recent authority which affirms this position. In

that case, an award made by arbitrators in relation to a dispute between the Society and the Government of Jamaica, acting through the Attorney General, was set aside because the contracts (described as Franchise Agreements) were found to be void and unenforceable for non-compliance with section 3(1) of the Public Passenger Transport (Corporate Area) Act (the PPT Act). The Court of Appeal had upheld the trial judge's decision and the Society appealed to the Judicial Committee of the Privy Council. The Board upheld the decision of the Court of Appeal that the contract did not comply with section 3(1) but held that the contracts were not ultra vires because they satisfied section 63 of the Road Traffic Act.

[12] The comments of Lord Neuberger, who gave the decision of the Board, are pertinent. In holding that the contracts did not comply with section 3(1) of the PPT Act, Lord Neuberger considered the effect of such non-compliance. He stated:

> ***"30. The conclusion that, because the Franchise Agreements were not authorised by section 3(1), they were ineffective and unenforceable (unless saved by other statutory provisions) is unattractive, as the observations quoted above from Brooks J's judgment demonstrate. However, in the light of the principles and authorities cited on this appeal, it seems to the Board that the conclusion to that effect, as reached by the Courts below, is correct, subject to the Franchise Agreements being, as it were, saved by other legislation.***
>
> ***31. In Credit Suisse v Allerdale Borough Council [1997] QB 306, the English Court of Appeal decided that a guarantee given by a local authority that a loan would be repaid to a bank was***

unenforceable by the bank as the purpose of the loan was to enable a company set up by the authority to carry out a development which was outside the powers conferred by statute on the authority. Neill LJ said at 343D that, "[w]here a public authority acts outside its jurisdiction … the decision is void", and that where the "decision [is] to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity. I see no escape from this conclusion." Peter Gibson LJ agreed, starting his judgment at 344D in terms not dissimilar from Brooks J in this case, describing the authority "seeking to assert the illegality of its own action in entering into the contract of guarantee" as "unattractive". Hobhouse LJ also agreed, explaining at 357C that "[w]ant of capacity is a defence to a contractual claim", in contrast with some other, public law grounds for impugning a decision.

32. The present case is, of course, concerned with a contract entered into by a Government minister, not by a local authority. In that connection, it is perhaps worth noting that Hobhouse LJ seems to have thought that the same considerations would, at least in some circumstances, apply to the acts of a minister. At 352H, he said that "[a] minister who purports to exercise a delegated power to legislate must act within that power and, if he does not, the purported delegated legislation is void and of no legal effect". The notion that ministers, as members of the executive arm of government, can only act within the power granted to them by the legislature, appears to accord with principle. If it were otherwise, there would be no point in

legislation conferring powers on ministers or government departments: legislation would solely be relevant in that connection with curbing ministerial powers. It would therefore follow that, when a Minister enters into a contract which grants a franchisee a licence to provide public transport in circumstances where the licence is on terms not permitted by legislation, the contract is unenforceable, even [if] it has been acted on.

33. Support for this conclusion is to be found in Cudgen Rutile (No 2) Pty Ltd v Chalk [1975] AC 520. In that case Lord Wilberforce, giving the opinion of the Board, said at 533A-B, that it was "fully established … that … in … states of the Commonwealth of Australia, the Crown cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute". Accordingly, at 533C, he approved a dictum of Griffith CJ that "no Minister of the Crown has any authority to enter into any agreement for the disposition of an interest of the Crown in Crown lands which is not authorized by the law". From this, said Lord Wilberforce, at 533F-G, it followed that a Minister, to whom a statute gave certain powers and discretions in relation to disposals of interests in Crown land could not contractually fetter himself in relation to the exercise of such discretions. It followed that the contract in that case, whereby the Minister had agreed with the appellant to fetter his statutorily bestowed discretions, was ultra vires, and, even though the appellant had expended substantial sums in reliance on that contract, it "could [not] give rise to any contractual obligation enforceable in the courts"

(including founding a claim for breach of contract) – 535D-E.

34. It therefore follows, as the courts below concluded, that, subject to the third and final question on this first issue, the Franchise Agreements were unenforceable because the Minister did not have power under section 3(1) to grant them."

Lord Neuberger was considering the case of the Minister not having the power under section 3(1) of the PPT Act but I consider that his comments apply equally to that of a Permanent Secretary. The decisions in **Credit Suisse** and **Cudgen Rutile (No. 2)** were also relied on by Mr. Harnanan. Lord Neuberger's references to them are sufficient for the purposes of this appeal.

[13] In this case, it is undisputed that the P/S lacked the capacity to contract beyond the sum provided in the Regulations. In those circumstances the contract he purported to sign was unenforceable. The judge was therefore right in concluding that the contract was not binding on the State.

Quantum Meruit

[14] The next question is whether the claimant can recover under the principle of unjust enrichment even though the contract was ultra vires the Act. There was a question as to whether this issue had been pleaded but Mr. Harnanan graciously did not pursue the point because it had been fully argued certainly before us. He submitted that compensation on a quantum meruit basis on a claim for unjust enrichment which would ordinarily apply to a contract between private parties which is void, does not apply to a void contract in which the State is a party. He stated that no action by an employee of the State can bind the State to do something which the law does not allow it to do.

He added that while hardship may be caused by the application of the ultra vires rule, the courts will not permit the legitimising of an ultra vires act by allowing the party to an ultra vires contract to recover in restitution. He pointed to the dictum of the Court of Appeal in **A.D. Silva** to the effect that it would be a greater evil to permit public officers by unauthorised acts to nullify or extend the provisions of a statute.

[15] He also relied on the decision of the House of Lords in **H. Young & Co. v Royal Leamington Spa (1883) 8 App. Cas. 517**. In that case, section 174 of the Public Health Act 1875 provided that "every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority." The plaintiffs entered into a contract to perform certain works for sums considerably in excess of the fifty pound (£50) limit but the contract was not under seal. The question was whether that was fatal to the plaintiff's right of recovery. The House of Lords held that the provision was mandatory and applied to a contract of which (as in this case) the urban authority had had the full benefit and enjoyment. Lord Blackburn in his judgment approved the following dicta of Lindley L.J. in the Court of Appeal.

> ***"The last point urged for the plaintiffs was, that as the contract has been performed and the defendants have the benefit of the plaintiffs' work, labour, and material, the defendants are at all events liable to pay for these at a fair price. In support of this contention cases were cited to shew that corporations are liable at Common Law quasi ex contractu to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they***

require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them. The case of Frend v. Dennett (1) - and in Chancery before Page Wood V.C.(2) - is an authority in support of this view, and was, in my opinion, rightly decided. The additional works there in question had been executed, and there was the common count for work and labour and materials as well as a special count on the alleged contract; but the defendant was held not liable either at law or in equity. It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship. For these reasons I am of opinion that the

decision of the Court below was correct, and that this appeal ought to be dismissed, with costs."

Lord Blackburn then stated at page 526:

"We ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law; and in the present case I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. I think, bearing in mind this, it is not possible to construe sect. 174 as meaning anything else than that when the subject-matter of a contract exceeds £50 in value the contract must be under seal; and that the distinctions and differences which, according to the opinions of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary corporation should not do so when the contract was by an urban authority, and related to a subject-matter above that value. This was the construction put upon the Act in Hunt v. Wimbledon Local Board (1), as well as in the Court below. I think it is right, and it disposes of this appeal."

[16] The trial judge never considered this decision in his judgment but the omission is not fatal. It is quite an old decision. The common law approach to illegal contracts has developed significantly since then. The modern approach is to identify the policy behind the statute and to consider whether that policy has been stultified. I consider that had such an approach been taken in **Young**, the

result would have been different. Substance should prevail over form.

[17] The decision of the UK Supreme Court in **Patel v Mirza [2016] 3 WLR 399** epitomizes that approach. The decision in that case concerned a contract which was illegal not because it was ultra vires the statute but because it was made in breach of the criminal law. But the approach of the Supreme Court is instructive. The facts are taken from the headnote. The claimant sought to recover moneys paid to the defendant under an agreement which was contrary to section 52 of the Criminal Justice Act 1993 which prohibited insider dealing. The claimant had paid a large sum of money to the defendant so he could bet on the movement of shares. The bet was based on insider information which had been expected to be provided. It could not be carried out because the information was not forthcoming. The judge at first instance dismissed the claim as being barred for illegality. He held that:

(i) The claimant's case relied on the illegal agreement, since in order to prove his case, the claimant had to prove the illegal purpose for which he had paid the money to the defendant and the failure of that purpose; and

(ii) Although the claimant could not have been barred from relief if he had ultimately withdrawn from the illegal agreement before its performance, he was so barred because the agreement had been frustrated by the fact that the expected insider information was not forthcoming.

[18] The Court of Appeal allowed the appeal, holding that a party who had withdrawn from an illegal agreement because it could no longer be performed was not prevented by public policy from relying on the agreement, provided that no part of it had been carried into effect. The Supreme Court, dismissing the appeal held that the general rule was that a person who satisfied the ordinary

requirements of a claim in unjust enrichment should be entitled to the return of his money or property and such a person should not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which had failed in whole or in part was an unlawful consideration; and that, since an order for restitution of the money paid by the claimant to the defendant would merely return the parties to their previous position before the conclusion of the illegal contract and prevent the defendant gaining by unjust enrichment, such an order should be made.

[19] Lord Toulson, who gave the leading judgment endorsed the approach of Gloster LJ in the Court of Appeal. He said at paragraph 115:

> ***"In the present case I would endorse the approach and conclusion of Gloster LJ. She correctly asked herself whether the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would be stultified if Mr Patel's claim in unjust enrichment were allowed. After examining the policy underlying the statutory provisions about insider dealing, she concluded that there was no logical basis why considerations of public policy should require Mr Patel to forfeit the moneys which he paid into Mr Mirza's account, and which were never used for the purpose for which they were paid. She said that such a result would not be a just and proportionate response to the illegality. I agree."***

[20] In my judgment a similar approach was adopted in **Haugesund Kommune v Depfa ACS Bank [2011] 1 All ER 190**. There, the English Court of Appeal held that a lender under a borrowing contract which was void because it was ultra vires could still recover the sum lent in a restitutionary claim in law but that any

such claim was, of course, subject, where appropriate, to any available restitutionary defences including any that could legitimately be based on public policy. In coming to the decision that the restitutionary claim was not barred, the Court of Appeal held that the English court should take account of the express or implied intention of the foreign statute in deciding to what extent a restitutionary remedy should be available despite the *ultra vires* contract. This decision demonstrates that one must look to the intention of the governing statute in deciding whether the claim of restitution is maintainable.

[21] The recent decision of this court in **The Attorney General of Trinidad and Tobago v. Mootilal Ramhit and Sons Contracting Ltd., Civil Appeal No. P 031 of 2018** is relevant on this question. In that case the court examined the provisions of the Act with a view to determining its policy. Rajkumar JA who delivered the decision of the court (Mendonça, Jones JJA concurring) stated at paragraph 27:

> ***"27. The CTBA is quite specific in its language as to who can act in the name of and on behalf of the Government. The CTB, save for specified exceptions, shall have the sole and exclusive authority to do so in accepting offers for the supply of articles, or for the undertaking of works necessary for carrying out the functions of Government. Examination of the CTBA itself reveals:***
>
> ***a. an intention to largely insulate the Government from direct participation in the procurement process by the mechanism of the interposition of a separate independent body, the CTB. (Section 4, 20, 26)***
>
> ***b. an intention to provide transparency with respect to expenditure of State funds on non-excepted contracts by requiring the CTB to be interposed between a tenderer and the Government via the mechanisms of:***

i. requiring the Government to make written requests to the CTB to invite on its behalf offers;

ii. requiring the CTB, not the Government to invite such offers;

iii. requiring acceptance of such offers to be notified by the CTB not the Government;

iv. only at that point requiring a formal contract to be entered into between the Government and the successful tenderer;

v. requiring publication in the Gazette (section 26) of the names of the parties to whom contracts are awarded, the date on which the award was made, and the amount of the tender.

28. The CTBA thus provides mechanisms for public procurement that minimize the possibility of collusion or favouritism in the award of contracts and the allocation of State funds. These mechanisms are consistent with a deliberate intention to avoid circumvention of its terms by mechanisms which evade the involvement of the CTB.

29. The purpose of section 4 of the CTBA was considered in the case of Jusamco Pavers Limited v The Central Tenders Board H.C.A. No. 1413 of 1999 delivered 31st January 2000 per the Honourable Mendonça J (as he then was). (all emphasis added)

> ***Section 4 of the Ordinance establishes the Respondent and provides that it shall have the sole and exclusive authority to act on behalf of the Government and the Statutory Bodies to which the Ordinance applies in inviting, considering and accepting or rejecting offers for the supply of articles for the undertaking of works or any services in***

connection therewith necessary for carrying out the functions of Government or any of the Statutory Bodies. The Ordinance seeks to place in the hands of the Respondent the responsibility for the procurement of goods and services on behalf of the Government and the Statutory Bodies. The Board is made up of public officers and other members appointed under the Ordinance. (page 9)

Quite clearly the Ordinance seeks to place the function of procuring goods and services on behalf of Government and Statutory Bodies in the hands of an independent body namely the Respondent. The Board is made up of public officers and other members of the public appointed by the President. The Government and Statutory Bodies are removed from the process. An indication of this may be found in Section 26(3) of the Ordinance which requires the Board to determine the terms and conditions of the contract into which the successful tenderer may enter. (page 10)

It is for the Board to determine the information necessary for the assessment of the offer and the tenderer's capacity to execute the offer. If apart from providing the description of the goods and services required, the Government or Statutory Body could also dictate the appropriate price of the articles and services and how the tenders are to be assessed that would deprive the Respondent of much of the purpose for its existence and would rob the

Ordinance of its meaning. (page 11)

> ***30. The CTBA is specifically drafted to avoid the State's bypassing its procurement procedures to directly incur liability (in a contract such as the instant one) except via the CTB, its sole authorized agent. Therefore, even if EFCL arranged for the provision of such works at the request and direction of the State, this cannot override the express statutory prohibition against any party, not being the CTB, being an agent of the State for this purpose."***

[22] That case was concerned with whether a contract with a wholly State owned limited liability company could bind the State and Rajkumar JA's comments on policy were directed at that issue alone. The respondent contended that the company in question was an agent of the State and the State was actually the principal of the company, whether undisclosed or otherwise. The argument was rejected on the basis that the Act gave authority solely and exclusively to the Board to bind the State in respect of contracts, inter alia, for the undertaking of works in connection with the functions of the government. It was not a claim in unjust enrichment by which the claimant sought to recover on a quantum meruit basis. Indeed unjust enrichment was expressly excluded as an issue in the appeal. At paragraph 12, Rajkumar JA noted that that issue was not ventilated before the trial judge but *"may be the subject of further consideration by the trial judge"*.

[23] Unjust enrichment is a direct issue in this appeal. I have carefully considered the provisions of the Act and I can discern no policy within the provisions of the CTB Act, express or implied, which will be stultified if the claimant succeeds in his claim in unjust enrichment. The Act establishes the Board but its provisions do not show any underlying intention to prohibit the

enforcement of the rights of an innocent party who has entered into a contract which is ultra vires its provisions. I consider that the limitations placed on the P/S' power to contract appear at best to be for purely administrative convenience. I would also have expected that the Act would have explicitly prohibited the enforceability of any legal or equitable rights arising out of any contract which was outwith its provisions. The decisions of this court in **Water and Sewerage Authority v. Sooknanan Singh, Civil Appeal No. 106 of 1989** and **The Attorney General of Trinidad and Tobago v. Mootilal Ramhit and Sons Contracting Ltd., Civil Appeal No. 124 of 1996** (to which I shall come) support this approach.

[24] Mr. Harnanan submitted, per **Young**, that the courts will not permit the legitimizing of ultra vires acts. I do not agree that the grant of damages on a quantum meruit basis legitimises the ultra vires act, rather, it does justice between the parties. As the trial judge noted, the works took place over an extended four year period on property belonging to the State and under its control, for the public benefit.

[25] I am fortified in my view by the dictum of de la Bastide CJ in **Water and Sewerage Authority v Sooknanan Singh**. One of the issues in that case was whether the failure of the parties to sign a formal agreement (after the acceptance of the respondent's tender by a letter dated 8th May 1981 and the payment of a performance deposit) meant that the contract was illegal and unenforceable. The Court of Appeal upheld the contract even though no formal contract had been executed. Section 26(1) of the Act provided (as relevant):

> ***"Where an offer has been accepted by the Board … the Government or the statutory body at whose request the invitation to offer was issued and the person whose offer has***

been accepted shall enter into a formal contract for the supply of the articles or the undertaking of the works or services, as the case may be."

Subsection 2 of the same section 26 provides:

"A formal contract shall be in such form, and contain such terms, conditions and provisions, as the Board may determine."

[26] In contrast with **Young**, de la Bastide CJ considered that section 26(1) was not mandatory, and in doing so he looked at the intention of the Act:

"I have no hesitation in holding that it is purely directory. If it were otherwise, and it was intended to visit non-compliance with the section with the extreme penalty of rendering void contractual arrangements made by a statutory authority after negotiations, consisting of tender and acceptance, have been properly conducted through the agency of the Central Tenders Board, I would have expected that there would have been some more explicit indication of such an intention in the statute. I am not prepared to accept that the failure to enter into a formal contract, which one would normally expect to be initiated by the statutory authority, would serve to defeat the contractual rights of a party who, as in this case, has been assured by the Central Tenders Board that it has succeeded in establishing a binding contractual nexus between himself and the statutory body in question."

The issue in **Sooknanan Singh** was different of course. The contract was awarded by the Central Tenders Board and there was no doubt that the Central Tenders Board intended to contract with the claimant. But the dictum of de la Bastide CJ

supports the view that any prohibition against the enforceability of the informal contract should be, as a matter of policy, clearly spelt out in the Act.

[27] In my judgment, the same applies to the case at bar. If it were intended to prohibit the enforcement of rights other than through a contract issued under the authority of the Central Tenders Board, it surely, as a matter of policy, would have been expressly set out in the Act. Further, not only has the State benefitted from the works, but all moneys due on the principal have been paid in full although the contract was unenforceable. Indeed, the full facts of this case have surely not been revealed. It is more than a little odd that no objection was taken to payment of the principal which was comfortably over the statutory limit of the P/S' authority but such strong objection to the variation costs has been taken. The approach of de la Bastide CJ in **Sooknanan Singh** is consistent with the modern approach.

[28] In **The Attorney General of Trinidad and Tobago v Mootilal Ramhit and Sons Contracting Limited Civil Appeal No. 124 of 1996**, a similar argument was made that the contracting officer lacked the actual authority to contract with the respondent under the Central Tenders Board Ordinance. Nelson JA stated at page 7:

> "***The provision of work and services to the government is not expressly or impliedly prohibited by the Ordinance. In the present case the Ordinance prescribes penalties for illegal performance on the part of the government and public officers only: see section 16(1) and (3) of the Ordinance. When "the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain***

formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties… But the other party to the contract is not deprived of his civil remedies because of the criminal default of the guilty party": see Chitty on Contracts 25th edition para 1152. Where a government agent breaches the Ordinance in the absence of knowledge or collusion the other contracting party is entitled to avail itself of its civil remedies. The Respondent is therefore entitled to recover the sums claimed."

[29] The same must apply here. There is no suggestion that the claimant was aware of the P/S' lack of authority or that there was otherwise some element of collusion on its part such as to circumvent the provisions of the Act. The respondent was not seeking to go behind the Act's provisions. It is simply that the P/S, as a matter of fact, lacked the authority which, on the face of it, he appeared to have. The respondent was not deliberately seeking to circumvent the provisions of the Act. It should not be punished except by clear statutory provision for the P/S's error. Indeed, it would have been an entirely different matter if it had been shown that the respondent was well aware of the P/S' lack of authority. The Act does not prohibit it from pursuing its remedies. The contract was ultra vires because the P/S as agent of the State had no authority to bind the State for so large an amount of works and services. It does not appear from the Act that there is any penalty imposed on the P/S in this case. Even more compelling is the fact that the principal has been paid in spite of his lack of authority. But there is certainly no provision in the Act barring the claimant, an

innocent party, from recovering damages on a quantum meruit basis on a claim for unjust enrichment.

[30] Mr. Harnanan sought to rely on the decision of this court in **Barrow v. The National Insurance Board**, **Civil Appeal No. 59 of 2011** per Mendonça JA that *"[the Board] cannot therefore be liable on a claim for unjust enrichment based as it is on the failure to ignore the Minister's approval and pay higher salaries when it did not have the authority to do so."* It is sufficient to say that Mendonça JA's statement was in answer to a submission of the appellant which was both far-fetched and misconceived. His dictum lays down no general principle as to the relationship between an agent's lack of authority and the doctrine of unjust enrichment.

In the result the appeal is dismissed. The orders of the trial judge are affirmed. We will hear the parties on the costs of the appeal.

/s/ Nolan P.G. Bereaux
Justice of Appeal