

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 1992

BETWEEN:

THOMAS WEEKES

Appellant

and

JOSEPH GIBBONS

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M.Dennis Byron - Justice of Appeal
The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Kenneth Allen for the Appellant
Mr. Samuel N. Barzey for the Respondent

JUDGMENT

1992: October 16;
1993: April 26.

SIR VINCENT FLOISSAC, C.J.

The central issue in this appeal is whether the Registration of Building and Civil Engineering Contracting Undertakings Ordinance 1968 (Act No. 23 of 1968) nullifies building contracts which have not been registered as required by the Act. In order to resolve that issue, it is necessary to determine whether the Act expressly or impliedly nullifies unregistered building contracts or expressly or impliedly prohibits the performance or enforcement of such contracts. Since there is no such express nullification or prohibition in the Act, the issue is reduced to the question whether such nullification or prohibition may properly be implied.

Statutory implications are derived from legislative intention. We are therefore required to decide whether the statutory context (the words, object and other surrounding circumstances of the Act) indicates a legislative intention to nullify unregistered building contracts or to prohibit the performance or enforcement of such contracts. Since we are here concerned with illegality, an important (if not the most important) circumstance is public policy.

In *Vita Foods Products v Unus Shipping Co.* (1953) 1 A.E.R. 513, Lord Wright (delivering the opinion of the Privy Council) said (at p 523):

"Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

In this case, there are at least four surrounding circumstances which militate against the implication of a legislative intention to nullify unregistered building contracts or to prohibit the performance or enforcement of such contracts.

(1) The object of the Act is to penalise rather than to nullify.
 (2) The Act does not prescribe contractual terms for the protection of the building owner or the public. (3) The automatic illegality and nullity of unregistered building contracts would result in injustice to those building owners who are not in *pari delicto* with their building contractors and who as a result of the illegality and nullity would be left with no enforceable right to damages for breaches of those contracts by their building contractors. (4) There is no discernible ground of public policy which could justify the illegality and nullity of unregistered building contracts and the severe consequences of such illegality and nullity.

For these reasons (which are amplified in the leading judgment of Singh J.A.), I concur with the conclusions in that judgment and agree that the appeal should be allowed.

SATROMAN SINGH, J.A.

On October 3, 1990, the appellant sued the respondent on an oral contract whereby the appellant undertook to carry out certain building works on the respondent's house for a price. The matter

was heard by Georges, J, who on July 31, 1992, dismissed the appellant's case with no order as to costs on the ground that in entering such a contract, the appellant failed to comply with the provisions of the Registration of Building and Civil Engineering Contracting Undertakings Ordinance 1968 (Act No.23 of 1968) (the Act). This Act provides for the registration of certain building and civil engineering contracts undertaken in Montserrat and makes it an offence attracting penal sanction for the contravention of any of its provisions. The learned Judge found that the failure by the appellant to comply with the above law rendered the contract in issue unlawful and consequently unenforceable. It is accepted that the contract referred to in this matter was one to which the Act applies, that the contractor breached the provisions of the Act in that he did not register the contract in accordance with the provisions of the Registration of Records Act and that he performed on the contract without it being so registered.

The appeal is from that judgment on the following grounds:-

- "(1) The Learned Trial Judge erred in law when he based his decision on a matter which was not pleaded, never at any time throughout the trial became an issue, and was never even mentioned in addresses to the court.
- (2) The Learned Trial Judge did not address his mind to the fact that the Plaintiff/Appellant made an alternative claim for work done and labour supplied, that the work for which the Plaintiff claimed under this head was already completed and that the Plaintiff/appellant would have been entitled to this sum in any event.
- (3) The Learned Trial Judge erred in his interpretation of the Registration of Building and Civil Engineering Contracting Undertaking Ordinance 1968, in holding that this Ordinance rendered unenforceable the agreement made between the parties and/or that it deprived a workman from claiming against an employer for work done and labour supplied".

It is common ground, that the issue of illegality upon which the learned judge based his decision, was not pleaded, neither was it made an issue at the hearing of the matter. The neat point to be determined in this appeal is whether in these circumstances the Judge erred in basing his decision on his own motion on this issue.

In *Scott v Brown, Doering McNab & Co.* (1892) 2 Q.B. at 728, Lindley L.J. said:-

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the prson invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. at p 343.

In *Re. Mahmoud and Ispahani's Arbitration* (1921) A.E.R. Rep. 217, Scrutton L.J. opined:

"In my view the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge come from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract".

These authorities set out the basic principles upon which a Court will act in dealing with illegal contracts. When summarised these principles emerge: Where in the interest of the protection

of the public a statute prohibits the making or performance of a Contract that is against morality or public policy, such a contract is illegal and unenforceable and cannot be sued on. If the contract is sued on, and if the illegality is duly brought to the notice of the Court, and, if the person invoking the aid of the Court is himself implicated in the illegality, then the court ought not to assist him and it matters not whether or not the defendant had pleaded the illegality or whether or not the illegality was made an issue in the matter between the parties. The Court is bound, once it knows that the contract is illegal in the context aforementioned, itself to take the objection and to refuse to enforce the contract.

However, before these principles can be applied to the instant matter, it is necessary to determine whether the Act absolutely prohibited as being against morality or public policy building undertaking or civil engineering contracting undertakings of \$10,000.00 or more, unless such undertakings were performed pursuant to a registered agreement or, whether the Act was created mainly for revenue purposes. If the former, then based on the above authorities, I would hold the view that the trial Judge did not err but not if the latter situation prevails. In *Anderson Ltd. v Daniel*, Court of Appeal (1923) Vol. X TLR 61, in dealing with a case where there was a statutory penalty for supplying fertilisers without an invoice *Bankes L.J.*, quoting Mr. Justice Buckley in *Victorian Daylesford Syndicate, Limited v Dott* (21 The Times L.R. 712); (1905) 2 Ch., at p 629 had this to say at p 63.

"There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads - those in which a penalty is imposed against an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue

purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope v Rowlands* (2 M. and W., 149) and *Fergusson v Norman* (5 Bing. N.C., 76), Baron Parke, in the former case, says the question to determine is whether the Act is "meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it, or whether one of its objects be the protection of the public, and the prevention of improper persons acting as Brokers". If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal".

For the purposes of determining this issue it is necessary to set out the provisions of Sections 3 to 6 of the Act -

"Section 3:

- (1) No person shall carry out any building undertaking or civil engineering contracting undertaking, unless there is in force an agreement completed between the parties for the construction of such undertaking:

Provided that the provisions of this subsection shall not apply where the cost of the construction of such undertaking is less than ten thousand dollars.

- (2) Every such agreement must be registered by the Contractor in duplicate in accordance with the provisions of the Registration and Records Act.
- (3) The provisions of this Ordinance shall not apply to any building undertaking or civil engineering contracting undertaking agreement entered into by or on behalf of the Crown".

Section 4:-

- "(1) There shall be charged for the use of Her Majesty Her heirs and Successors upon any agreement specified in the Schedule to this Ordinance, the stamp duty in the said Schedule specified and on other duty.
- (2) All moneys realised within the Colony in respect of stamp duty shall be paid into the Treasury for the use of the Colony".

Section 5:-

"Any person who acts in contravention of or fails to comply with any of the provisions of this Ordinance shall be guilty of an offence against this Ordinance."

Section 6:-

Any person who commits an offence against this Ordinance shall be liable on summary conviction to a fine not exceeding five hundred dollars, and in the case of a continuing offence to a further ten dollars in respect of each day of which the offence continues after conviction".

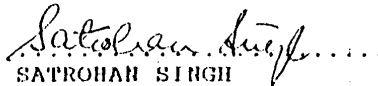
Looking at the Act as a whole, it is observed that the requirement for the registration of the Contract only applies if the undertaking is for not less than \$10,000.00; and that it has no application whatsoever when the undertaking agreement is entered on behalf of the Crown. Also, looking at the penalty clause, there is provision of additional penalties if the offence was continued. I interpret this clause to mean that such a contract is not absolutely prohibited and that there can be performance on it without registration provided the Contractor is prepared to pay the initial and additional penalties, and that the Contractor's default in not registering the contract can be remedied if, when the default is discovered, the Contractor then complies with the provision for registration. Also, I do not think it can be successfully argued that the carrying out of a building undertaking or civil engineering undertaking or the carrying out of building works on the respondent's house without a registered contract can be said in Montserrat to be immoral or against public policy. This is not the case where a statute prohibited the making or performance of certain contracts. What this statute really does is to provide for the registration of certain contracts and for the imposition of a continuing penalty if there is performance on such contracts without such contracts being registered.

For these reasons, in my judgment, I do not find that it was the intention of the legislature that the requirement for registration in this law was for any purpose other than for the protection of the revenue. I find the enforcement of the penalty was the only remedy contemplated by the statute for the infringement of its provisions. Accordingly, I do not find that this requirement in the statute for the registration of the contract was created either expressly or by implication for the protection of the public thereby absolutely prohibiting the performance of the contract in issue if there was no such registration. I therefore hold that the appellant could have sued on the contract and that its non-registration did not affect its enforceability.

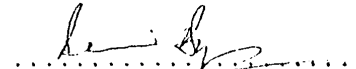
In the result, I agree with the submission of Counsel for the appellant and I hold that the learned trial judge in the context of this matter, was wrong to take the objection on illegality as he did in this case and to dismiss the case of the appellant on that issue without more. I would therefore allow this appeal and set aside the judgment of the trial judge. Counsel for the appellant advised this Court and Counsel for the respondent confirmed that the trial judge in dismissing the matter said that had it not been for the "illegality" he would have entered judgment for the appellant. That being so, this Court, instead of ordering a rehearing of the matter, would enter judgment for the appellant for damages to be assessed and remit the matter to the High Court for an assessment of such damages. The appellant will have his costs in this Court and the Court below.



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SIR VINCENT FLOISSAC
Chief Justice


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SATROHAN SINGH
Justice of Appeal

I concur.


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C.M. DENNIS BYRON
Justice of Appeal