

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 1990

BETWEEN:

UNIVERSAL CARIBBEAN ESTABLISHMENT

Appellant

and

EGG-HILL HOLDING COMPANY LIMITED

Respondent

Before: The Honourable Chief Justice Floissac - President
The Honourable Miss Monica Joseph, J.A. (Ag.)
The Honourable Satrohan Singh, J.A. (Ag.)

Appearances: Dr. Fenton H. Ramsahoye, Q.C., Mr. John E. Fuller
with him for Appellants

Mr. Time Kendall, Q.C., Mrs. Simon with him for
Respondents

November 29, 1991
February 24, 1992

J U D G M E N T

JOSEPH, MONICA J.A. (Ag.)

This is an appeal against the judgment of the learned trial Judge in which he gave judgment for the respondents in the sum of \$1,232,186.10 ordered the return of twenty Bally Slot Machines and ten Polymat Rouletters or their value to the respondents and dismissed the appellants counterclaim.

FACTS

About December 1983, the appellant company, which operates the Jolly Beach Hotel, (the hotel) imported into Antigua twenty Bally Slot Machines and ten Polymat Roulette Machines. As the appellant had no licence to operate these machines, customs refused clearance of the machines which were impounded and stored at the customs warehouse. The manager of the appellant company sought the help of Samuel Ellis, Managing Director and principal shareholder of the respondent company.

After holding discussions with the appropriate authorities Samuel Ellis obtained permission to clear the machines if all the accrued storage charges, duties and consumption tax, totalling \$106,000.00 be paid prior to clearance of the machines.

The parties entered into an agreement the respondent would purchase the machines from the appellant, the latter advancing in cash all funds necessary to pay customs duty, storage charges and any other charges, and the respondent would rent the machines to the appellant at a rate of \$150.00 a week for a slot machine and \$200.00 a week for a roulette machine.

The respondent paid these charges upon receipt from the appellant of the sum of \$106,526.00 advanced, and the appellant also advanced the sum of U.S.\$39,451.00. The sums advanced to the respondent were to be amortized against the weekly rental rate of the machines which was worked out at \$5,000.00E.C.

The respondent cleared the machines from customs, had them overhauled and checked by technicians at its workshop. The machines were installed at the appellant's hotel towards the end of March beginning of April 1984, were put into operation about the first week of April 1984, and at the date of the trial were in use and operated by one Velardi.

When Samuel Ellis of the respondent company went to the hotel around the end of March to the first week of April, 1984, he was told by the General Manager of the appellant company that the respondent company would no longer be involved in the operation of the equipment as he had been informed by the Permanent Secretary of the Ministry of Finance that if the respondent operated the machines they would be confiscated. Further, he told Ellis that Velardi would be operating the machines.

Following this conversation Samuel Ellis wrote a letter dated 13th April 1984, to the General Manager of the appellant referring to their agreement: stating that the information received from the Government and any arrangement made with Velardi would not alter the agreement for rental of the machines to the appellant and indicating that the machines will remain in place as had been

agreed. The respondent informed the appellant, that in the meantime, clarification would be sought from the Ministry of Finance.

Another letter dated 12th November 1984, followed enclosing a statement of account covering the machines which showed a debit balance of U.S.\$2,665.00 due to the respondent. The respondent also informed the appellant that, commencing from the week of 19th November 1984, the appellant would be billed weekly for the rental of the machines and requested settlement on presentation of bills.

There being no response to this letter, on 6th February 1985, the respondent's solicitor wrote to the appellant requesting payment of U.S.\$2,665.00 for 'divers business transactions during the period 25th January 1985.' The appellant replied by letter of 11th February 1985, asking for a breakdown of the outstanding charges and stating that it was not aware it owed monies to the respondent.

In reply solicitor for respondent sent the appellant a copy of the statement of account previously forwarded to the appellant showing the sum owed: U.S.\$2,665.00 and solicitor's costs of U.S.\$266.50.

By letter of 2nd March 1986, the appellant replied thus:

"... I previously explained to this company the ridiculousness of this statement in writing which they never acknowledged, however, please allow me to advise as follows: In January of 1984, Eg-Hill offered to buy our Bally and Polymat machines. They further offered to lease these machines back to us, to supply us with all operational materials, to maintain these machines under a maintenance contract and they would submit to us a

proposal with leasing rates, maintenance costs, etc. All the above, however, never happened. They never purchased the machines and obviously never paid us. They never finalised a lease agreement, they never delivered the operational materials except for 50% of the coins which we prepaid to them and we are still awaiting the balance.

As a matter of fact, we never heard from this company any more, we awaited for months to receive their proposals and finally we had to make alternative arrangements since it appeared to us that the owner of the company disappeared.

Then all of a sudden, more than 10 months after the above described events, we are presented with an invoice which is totally ridiculous."

Then followed the institution of legal proceedings by the respondent claiming that, under a credit sale agreement made between the parties on 25th January 1984, the respondent agreed to buy from the appellant twenty Bally Machines at the price of U.S.\$1,095.00 per unit for a total value of U.S.\$21,900.00 and ten Polymat Video Rouletters for U.S.\$8,950.00 (which sale is admitted by the appellant in its defence): that the appellant would defray all expenses involved in the purchasing and setting up of spare parts for the machines at the appellant's hotel: payment of U.S.\$59,257.48 being arrears of rental due on the machines, that is, E.C.\$150.00 for the slot machines and \$200.00 for the roulette machines: that the appellant would set off all rentals and other sums due or to become due from the respondent against the sums which the respondent would owe the appellant under the credit sale agreement until all such sums owing by the respondent to the appellant are fully paid and thereafter the hire rentals to be paid

to the respondent so long as the hire rent should continue to subsist between the parties, and for the return to the respondent of the machines or their value.

The respondent alleges that on the 25th January 1984, the appellant loaned to the respondent U.S.\$39,451.00 to assist in defraying customs duty on the machines and advanced U.S.\$25,000.00 to the respondent to defray the costs of spare parts, setting up costs and services for installing the machines at the hotel. These claims the appellant admits but states that they were subject to the conditions that the respondent was duly licensed and legally empowered by the Government to operate the machines at the hotel and that this was a fundamental term of the contract.

Gaming concession:

By a letter dated 3rd August 1978, under the hand of the Deputy Premier and Minister of Economic Development and Tourism the respondent was informed that Cabinet had accepted its proposal to introduce a slot machine into Antigua.

A letter signed by the Minister of Finance dated 1st April 1991, extended the period of the concession to operate gaming slot machines. Paragraph 8 of this letter reads: "Installation of gaming (slot) machines shall be limited to (a) all hotels; and (b) such other locations as have been approved to date, or may be approved from time to time by this Ministry in writing."

A letter dated 8th September 1980, from the Ministry of Finance informed the Commissioner of Police that permission is granted to Cimpex Associates, under which name the respondent was then operating, to operate slot machines at all hotels.

The learned Judge found that the respondent and Velardi were given permission to operate slot machines at the hotel.

Was transaction outside the law?

The grounds of appeal are that - The learned trial Judge erred in law in holding that as the appellant did not specifically plead illegality based on the Gaming Act, it could not succeed: that the learned Judge erred in law in failing to hold that the appellant did plead illegality, and that the Judge failed to hold that it was an implied term of the contract, that the respondent could be lawfully entitled to perform the contract.

Counsel for the appellant submitted that the real issue is whether a contract shown to have been made in the pursuit of an unlawful gaming activity can be enforced by the respondent.

Learned counsel for the appellant argued that the whole transaction is outside the law as both sides acted outside of the Betting and Gaming Ordinance 1963, No.10 of 1963 (the Gaming Act): that the sale was invalid as it was part of a contract for the respondent to purchase machines for an illegal purpose, that is, to operate in unlicensed premises, and to pay monies received from the operation of this illegal purpose to the respondent.

The claims made by the respondent, argued counsel, are inextricably linked with the maintenance and operation of the machines in unlicensed premises with the result that all gaming activities conducted on those premises contravened the provisions of section 27 of the Small Charges Act, and that the Ministry of Finance's letter dated March 1983 is ultra vires as the transaction it contemplates contravenes the Small Charges Act.

Counsel for the respondent contended that it matters not that payment to the respondent was to be made from money from rental of the machines: that the agreement between the parties was a simple question of hire providing for rental payments to be made which payments were not made and that the respondent is entitled to those rental payments.

Section 27(1) of the Small Charges Act provides:

"Any person who knowingly permits any building or place in his occupation to be used for the purpose of gaming therein shall be deemed to be a rogue and a vagabond within the meaning of this act and shall be liable to imprisonment for a term not exceeding three months."

However, the Gaming Act permitting gaming under licence was passed. Section 3 which provides for the granting of a gaming licence, reads:

(1) Where in the case of any premises there is for the time being in force a licence authorising the holder of the licence to use those premises for the purposes of gaming (in this Ordinance referred to as a 'gaming licence'), then subsection (1) of section 27 of the Small Charges Act shall not apply to the use of those premises for the effecting of any gaming transaction with or through the holder of the licence or any servant or agent of his.

(2) Nothing contained in any rule of law, or in subsections (1) to (7) of section 27 of the Small Charges Act shall apply to gaming or betting, or to any lottery promoted, organised, conducted or carried on by any person in any building or place in accordance with the terms and conditions of a valid gaming licence issued under this Ordinance.

Under section 4 the 'Administrator may grant to any person a gaming licence', and section 5 empowers the Administrator to make regulations for the purpose of controlling gaming. The Betting and Gaming (General Control of Gaming Premises) Regulations, 1963 (No.35/1963) (the Regulations) were made by the Governor General.

Under section 4 of the Gaming Act a gaming licence must do two things - it must licence the holder in addition to licensing

the premises where the license holder operates. The intent of the regulations seems to be to permit gaming in hotels and licence fees are payable for the granting of a gaming licence. Regulation 4 provides:

"Persons to whom licences may be granted. Licences may be issued to any person who owns or manages a hotel which gives tourists the freedom of its facilities, where gaming rooms can be established or who owns the building where such an establishment is located."

Counsel for the respondent admitted that a gaming licence can only be granted to a person who owns or manages an hotel and conceded that as the respondent could not satisfy any of these conditions it did not qualify for a gaming licence. So there are two factors which raise illegality: the fact that the respondent could not hold a gaming licence and the fact that the appellant's premises are not licensed for gaming. There can therefore be no doubt that the contract entered into by the parties is illegal and a Court, even when illegality is not pleaded, cannot assist a litigant in obtaining the proceeds of an illegal contract.

In St. John Shipping Corporation v Joseph Rank Ltd., (1956) 3 AER page 683 at page 687, letter 'E' Devlin J. in dealing with the principles relating to illegal contracts said:

"There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. ...The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class

it does not matter what the intent of the parties is: if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not."

This case seems to fall within the first category. The intent of the appellant was that its unlicensed hotel be used for gaming by securing the release of the gaming machines from customs with the help of the respondent who itself was unlicensed. There was a mutual intent to do something which the law prohibits, that is, to conduct gaming in unlicensed premises by a person who is unlicensed.

Learned counsel conceded that the concession granted to the respondent was outside the Act. Consequently, the respondent cannot be aided in recovering rental monies for the machines due under the contract between the parties.

Counsel also conceded that if the contract was illegal then the contract was terminated but submitted that the question of detention of the respondent's machines by the appellant arises for consideration.

Ownership of machines and detinue

Learned counsel for the respondent's contention was that when customs impounded the machines and the appellant approached the respondent the latter became the importer of the machines. This argument is without any merit as the fact that an approach was made to the respondent did not and could not make the respondent the importer. Further, the appellant pleads that he sold the machines to the respondent, thereby admitting that it was the importer and that it was upon sale that ownership passed to the respondent.

Du Paroq L.J. in his judgment in Bowmakers Ltd. v Barnet instruments (1945) 1 KB page 65 at page 70 said:

"Prima Facie, a man is entitled to his own property, and it is not a general principle of our law (as was

suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by action."

Although the "true owner" might seem to be the respondent, I do not consider this opinion to be of assistance to the respondent. Earlier in the judgment I held that this case falls within the first principle enunciated in **St. John Shipping Corporation v Joseph Rank Ltd.** (supra), that is, that the contract was formed with the object of committing an illegal act. In these circumstances a Court cannot accede to the respondent's application for a detinue claim as in effect that would be assisting a party to an illegal contract to obtain the proceeds of that illegal contract. As Devlin J. said in the **St. John Shipping case**:

"If the intent is mutual (as I have found it is) the contract is not enforceable at all".

I would allow the appeal. I make no order as to costs.

SATROHAN SINGH, J.A. (Ag.)

As a matter of law, gambling in the State of Antigua is illegal. However, by R4 of the Betting and Gaming (General Control of Gaming Premises) Regulations 1963 No.35 of 1963, any person who owns or manages a hotel which gives tourists the freedom of its facilities where gaming rooms can be established or who owns the building where such an establishment is located, may be issued with a licence to permit gambling on those premises if that person satisfies the requirements of those regulations.

By S.4(1) of the Betting and Gaming Ordinance 1963 No.10 of 1963 it is the Administrator (Governor) who may grant such a licence and S.27(1) of the Small Charges Act makes it an offence punishable by imprisonment for a term not exceeding three months with the offender being deemed a rogue and a vagabond, if he

knowingly permits any building or place in his occupation to be used for the purpose of gaming.

It is admitted on both sides that the respondent herein cannot qualify for a licence under the aforementioned law as he does not own or manage a hotel, neither does he own the building where such an establishment is located, and that the Jolly Beach Hotel at all material times did not have a licence issued by the Governor in accordance with the aforementioned provisions to operate gaming on its premises. Jolly Beach is owned by the appellants and is the hotel involved in this matter.

It is also admitted that customs regulations require a licence from an importer before he can bring into Antigua slot and roulette machines and that the respondents had such a licence but not the appellants.

Having made these initial observations I now go to the incident which gave life to this appeal.

Briefly put, in December 1983 the appellants imported into Antigua slot and roulette machines without satisfying customs regulations by obtaining the relevant authority to do so. The respondents had the relevant authority to bring such machines into Antigua. Customs seized the machines with a threat of forfeiture of same. In order to save the machines, the appellants entered into an agreement with the respondents. As a result of that agreement, the machines were cleared from Customs and installed in a working condition at the appellants Jolly Beach Hotel.

By the terms of this agreement, with the respondents incurring no initial expenses whatsoever, the appellants sold the machines to the respondents on a credit sale basis for \$30,400.U.S. advanced \$106,000 to the respondents to defray the Customs charges and \$39,451 U.S. to have the machines installed. It was also agreed

that the machines would be placed in the appellants' premises on a rental basis of \$5,000.E.C. per week for the respondents and that all sums advanced by the appellants to the respondents including the sale price on the credit sale agreement of the machines to the respondents, would be amortised against the aforesaid weekly rate of \$5,000 E.C. It was also a term of this agreement that the respondents would be responsible for the operation of the machines at the Jolly Beach Hotel.

What happened next is that the appellants having amortised the rents and recovered what was due to them from the respondents, they then refused to pay the respondents any future rent.

The respondents then brought suit for what was owed to them. Redhead J. found in favour of the respondents and dismissed the appellants' counterclaim.

This appeal arises from that decision. At the hearing of this appeal Dr. Ramsahoye abandoned his appeal against that part of the learned Judge's Order whereby the Appellants' counterclaim was dismissed.

The appellants filed ten grounds of appeal but the only issue argued by counsel for the appellants was whether a contract shown by evidence to have been made in the pursuit of unlawful gaming activity in Antigua can be enforced by the respondents.

Queen's Counsel Dr.Ramsahoye argued that the Contract is an illegal one and is therefore unenforceable at law by either party, hence his abandonment of the appellants' appeal against the Judge's dismissal of his counterclaim. Learned Counsel's argument is that illegality permeated every inch of the contractual terms and that there was not one step that was not affected. He contends that if you have to reply on the illegality to prove your claim then you lose on public policy.

Queen's Counsel Mr. Time Kendall in reply argues that it was only the operation of the machines at Jolly Beach that was illegal and that the respondents were not involved contractually with that operation. However, learned Counsel's attention having been drawn to his own pleadings quite properly conceded without hesitation that it was part of the contract that the respondents would operate the machines on the appellants' premises.

The issue then is, should the law lend its aid to a litigant who seeks benefits from a Contract that is illegal in its performance when by agreement he is a party to its illegal performance.

In **Chitty on Contracts 26th Edition Vol. 1** the law is set out thus:

Neither party can sue upon a contract if

- (a) both knew that it necessarily involved the commission of an act which, to their knowledge is legally objectionable, that is illegal or otherwise against public policy or
- (b) both knew that the Contract is intended to be performed in a manner which to their knowledge is legally objectionable in that sense or
- (c) the purpose of the Contract is legally objectionable and that purpose is shared by both parties or
- (d) both participate in the performing of the Contract in a manner which they know to be legally objectionable.

In his **Textbook of Roman Law** in dealing with the creation of contracts in its earlier days J.A.C. Thomas after setting out how this aspect of the law developed had this to say at p.245

"But the case was different if the object or purpose of the contract were illegal or immoral since to allow the normal legal remedies in respect of transactions with so tainted an end would have been an abuse of the processes

of the law. The Jurists accordingly recognised that no redress would be allowed in respect of any contract the object of which was illegal or Contra bonos mores.

But if one party were unaware of the illegal purpose of the other, as would be possible where the illegality did not appear on the face of the Contract and was the secret of the other party, the innocent party could recover the amount that he had paid or the value of what he had done before becoming aware of the illegality or immorality by a Condictio ex turpi causa".

The ex turpi causa defence ultimately rests on a principle of public policy that the Courts will not assist a plaintiff who has been guilty of illegal or immoral conduct of which the Court should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the Court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts. Where both parties are equally privy to the illegality the plaintiff's claim will fail, whether raised in Contract or Tort, for potior est condicio defendentis. Euro Diam Limited v Bathurst (1988) 2 WLR 517 per Kerr L.J. at 527. The findings on the facts by the learned trial Judge show that Jolly Beach was not licensed for the operation of those machines. The evidence shows that both the appellants and the respondents knew this at the time of the making of the Contract.

On those findings I hold the Contract to be illegal in its performance and unenforceable by either parties to this appeal.

Mr. Kendall then argued that in the event of the Court going this way, that the respondents be entitled to the return of their machines and damages for the time the appellants kept the machines until delivers. His claim here is in Detinue.

In **Bowmakers, Ltd. v. Barnet Instruments Ltd. (1945) 1 KB 65**

the following learning appears:

"No claim founded on an illegal contract will be enforced by the Court, but as a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim. An exception to this general rule arises in cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all."

To my mind this learning does not assist the respondents on their claim in *Detinue* because in order to prove ownership of the machines they have relied on the illegal contract.

In **Gordon v. Chief Commissioner of Metropolitan Police 1910 2 K.B. 1080** **Vaugh Williams L.J.** at p.1090 gave this understanding of the law:

"An action to recover property will not in my opinion be defeated by the application of the principle embodied in the maxim "*Ex turpi causa non oritur actio*", unless it is an action to recover some specific thing such as would be recovered in an action of *trover* or *detinue*. The thing the subject of the action must have been directly acquired through the medium of a transaction which was fraudulent or illegal. It is not sufficient to induce the Court to refuse its assistance to a plaintiff that he has acquired the property under a contract which is void

in law. The property must have been acquired in an illegal transaction."

The respondents fail on this issue.

For these reasons I would allow this appeal and set aside the Order of the trial Judge insofar as it relates to the respondent's claim. The appellants having abandoned their appeal against the counterclaim, I would affirm the order of the trial Judge on the counterclaim.

I would make no order as to costs for the above reasons.

(Sgd.) Monica Joseph
Justice of appeal, (A.G.)

(Sgd.) Satrohan Singh
Justice of Appeal, (Ag.)

I concur.

(Sgd.) V.F. Floissac Q.C.
Chief Justice