IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

2018-HC-DEM-CIV-FDA-49

GUYANA BANK FOR TRADE AND INDUSTRY

Appellant (Plaintiff)

-and-

1. **QUALITY RICE MULTIPURPOSE FARMERS COOPERATIVE SOCIETY LIMITED**
2. **RUIMZEIGHT RICE INDUSTRIES LIMITED**

Respondents (Defendants)

BEFORE THE HON. JJ'S FRANKLIN HOLDER AND NARESHWAR HARNANAN

MR. RALPH RAMKARRAN SC FOR THE APPELLANT

MR. PARMANAND MOHANLALL FOR THE 1ST RESPONDENT

MR. VIDYANAND PERSAUD SC FOR THE 2ND RESPONDENT

UNANIMOUS DECISION OF THE COURT:

HARNANAN, J:

BRIEF FACTS:

1. The Guyana Bank for Trade and Industry [hereafter GBTI], filed proceedings on the 15th February, 2016 in the High Court to recover **GYD$175,943,410.00** with interest, as money lent to *Quality Rice Multipurpose Farmers' Cooperative Society* [hereafter, QR] by way of an overdraft on a promissory note; and the sum of **GYD$100,000,000.00** with interest, against *Ruimzieght Rice Industries Ltd* [hereafter, RR] as guarantor of QR's indebtedness to GBTI.
2. QR filed a defence on the 18th May, 2016 to the claim admitting receiving the disbursement claimed, but contended that they entered into the loan contract with GBTI because RR who was heavily indebted to them had agree to guarantee the loan to the extent of ***$100,000,000.00***, and

further that RR agreed to indemnify them against the payment of any and all sums to GBTI that was in excess of $100,000,000.00.

3. QR further contended that RR agreed with them to liquidate part of its total indebtedness of $481,694,911.00, by paying to GBTI the sum being claimed together with interest, after which that sum would have been deducted from the total owed. That debt is currently the subject of High Court proceedings. QR's defence therefore, was to rely on the indemnification agreement between itself and RR.

4. RR enters the fray with a Summons dated the 28th December, 2016 – close to a year after the action had commenced. They prayed for orders that the Statement of Claim be struck out and the action be dismissed on the ground that:

    I. they are frivolous or vexatious and,
    II. the action is otherwise an abuse of the process of the Court, under the Rules of the High Court, and under the inherent jurisdiction of the Court.

5. The orders sought was based on advice of their Counsel, *inter alia*, that the loan agreement with GBTI was prohibited by the Cooperative Societies Act and its regulations, which prohibits QR from incurring liability for loans in excess of the limit sanctioned by the Commissioner for Cooperative Development.

6. RR contended that GBTI and QR failed to obtain the approval for the Commissioner for the transaction and therefore the loan was wrongfully and unlawfully extended and therefore ultra vires the Cooperative Societies Act.

7. They argued therefore that the failure to receive the sanction of the Commissioner created no debt against the Society QR and the securities and or guarantees given by QR and RR have no legal force or effect, as the loan transaction was void *ab initio*.

8. After the filing of RR's Summons in December 2016, QR then files its own Summons a week later on the 6th January 2017, claiming similar relief, belatedly joining with RR's contention that the loan contract was void *ab initio* and wholly unenforceable.

9. The Honourable Trial Judge agreed with the arguments of Counsel for QR and RR, in granting relief prayed for in the two Summons and dismissing GBTI's action, on the ground, *inter alia*, that the *Cooperative Societies Act* prohibited QR from borrowing money in excess of a limit fixed by the Society and sanctioned by the Commissioner, which did not operate in the circumstances before the Court below.

10. The Court took the view that the loan transaction was prohibited by statute, therefore void and incapable of being enforced.

11. It is that decision which this Full Court is called upon to review by GBTI on the grounds stated in the Notice of Appeal filed.

ISSUE:

12. *The main question which this Court has to resolve is whether the Trial Judge erred in dismissing GBTI's claim on the ground that the loan transaction was void and unenforceable in law.*

The law and analysis:

13. Counsel for QR and RR argue that the instant appeal concerns the effect of statutory provisions and the approach of the Courts on the interpretation and application of Acts of Parliament – that what is done in contravention of an Act of Parliament cannot be made the subject matter of an action: See ***Langton v Hughes*** [1813] *per Lord Ellenborough CJ.*

14. Further, they assert that judicial declarations in all Divisions of the Court have reaffirmed that no special circumstances, unforeseen contingency or emergency can erode or dilute the plain and straight-forward meaning of statutory powers and limits expressed in statutes – and the invocation of estoppel will not and cannot derogate from the sanctity of statute: See ***Beesly v Hallwood Estates Ltd*** [1960] 2 All ER *per Buckley J.*

15. Counsel further submits that the attempt to have one arm of the State lend its authority towards the enforcement of an illegal transaction is a clear abuse of process.

16. Counsel for GBTI argues, *inter alia*, that it is only in plain and obvious cases will a Court strike out a case – and that so long as the claim discloses some cause of action or raises some question fit to be decided by a trial, the mere fact that the case is weal and not likely to succeed, is no ground for striking it out.

17. Further, they submit that the question for the Court is whether Statute impliedly prohibits the contract and whether the prohibition is one of public policy: See ***Willis v Earl Beauchamp*** [1886] 54 LT 298; ***Shaw v Groom*** [1970] 1 QB 504 and ***Vita Food Producers Inc v Unus Shipping Co Ltd***. [1939] 17 AC 277.

18. Reliance was placed on the dicta of *Devlin J.* in ***St. John Shipping Corp. v Joseph Rank Ltd*** [1957] 1 QB 267, where he said at page 288 of the report:

> It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression…

19. They contend along that line that the Court was unable to assess the totality of the evidence after a trial, and GBTI should have been given an opportunity to raise issues relating to duties of the parties surrounding any limitations on QR's ability to borrow and whether any failures in that regard amounted to a minor transgression which would render the loan agreement incapable of being enforced by the lender GBTI. Instead, they contend, the Trial Judge finally determined the issues at an interlocutory stage.

20. Further, they raised the issue of whether the circumstances fell to be considered within the principle of unjust enrichment citing ***St. John Shipping Corp.*** (above) *per Devlin J.*, that:

> The Courts are sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who is in breach of his statutory obligations…

21. It is clear that there are duties imposed by the ***Cooperative Societies Act*** when it comes to borrowing by registered Societies, like QR. These duties relate to preconditions for the receipt of loans or deposits from non-

members (of the Society). The relevant pre-conditions in the instant case required the fixing of a maximum liability of the loan at a general meeting of the Society, and that maximum approved by the Commissioner. There is an expressed prohibition against the Society receiving loans which exceeds the maximum limit sanctioned by the Commissioner: See ***Section 31*** and ***Regulations 11(1)*** and ***(2)***.

22. QR and RR argue that because these preconditions were not complied with, the loan agreement is void and unenforceable by GBTI.

23. In the authoritative text, ***Spencer Bower: Reliance-Based Estoppel, The Law of Reliance-Based Estoppel and Related Doctrines***, 5th Edition, Bloomsbury Publishing, 2017, the authors discussed the estoppel doctrine in relation to the defence of illegality and the protection of statutory and common law rules, at page 282 of the text:

> 7.5 It is, for the most part, the conferral of a right, the imposition of a duty, the limitation of a power, or the requirement of a formality for validity by *statute* that has been considered by the courts to carry the implicit intent, as a matter of public policy, that it should not be susceptible to reversal by estoppel. This is not a matter of doctrinal necessity, but is rather because it is rare that such public policy survives only as common law rather than being embodied in statute. As a result, however, this principle has been identified as being that estoppel 'cannot be invoked to negative the operation of statute'[1]. This is misleading for two reasons: first, because it suggests that *only* statute will defeat an estoppel, whereas the public policy embodied in a rule of common law may also do so…secondly, because (the formulation) suggests that *any* statute will defeat an estoppel, as opposed to only those which are held by the court to establish, as a matter of public policy, a right, duty or limitation of power that is no susceptible to waiver by contract or estoppel. Before it so holds, the court will consider whether the public policy embodied in the statute

[1] ***Beesly v Hallwood Estates Ltd*** (cited earlier, and relied upon by QR and RR)

outweighs the demands of justice in the instant case, requiring, for furtherance of that public policy, that the unfairness founding the estoppel should go unremedied…

24. The authors relied on the dicta of *Viscount Radcliffe* in ***Kok Hoong v Leong Cheong Kweng Mines Ltd*** [1964] AC 993, at pages 1015-1016 of the report, when he spoke of:

> …a principle that appears in our law in many forms, that a party cannot set up an estoppel in the face of a statue…It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application…
>
> [He outlined a test] Whether the law that confronts the estoppel can be seen to represent social policy to which the Court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.

25. ***Spencer Bower*** went on further commenting on page 283 of the text that:

> *Viscount Radcliffe* applied this refinement of the test laid down by *Atkin LJ* in ***In Re A Bankruptcy Notice*** of whether the '*law relied upon is imposed in the public interest or on grounds of general public policy'* only to a case '*where the laws of money lending or monetary security are involved'*, but it has been adopted as a criterion of general application, for instance, by *Beldam LJ* in ***Yaxley v Gotts***, saying '*The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it'*; and in ***Scottish & Newcastle Plc v Lancashire Mortgage Corporation Ltd***, *Mummery LJ* reaffirmed that '…*the application of this principle depends on the nature of the statute,*

the purpose of the particular provision and its social policy. It is a general principle not an absolute rule'.

26. It is therefore observed that the contentions of the unlawful nature of the loan transaction between QR and GBTI for non-compliance with the Regulations made under the ***Cooperative Societies Act***, may not be as absolute as, since there was non-conformity with the provisions of the statute, it voids the agreement from its inception, and therefore is wholly unenforceable.

27. In *R. A. Buckley's,* ***Illegality and Public Policy***, 4th Edition, 2017, the author noted at paragraph 1-02 of the text:

> When the law of contract is used as a vehicle for the pursuit of broad objectives determined by the interests of the public, as distinct from those of the parties, it is inevitably a somewhat blunt instrument. If the outcome is the denial of enforceability, there is the obvious danger that one party may suffer a loss far greater than any penalty which a criminal court might have imposed, even assuming that what occurred would have come within the purview of the criminal law. At the same time, the other party will gain a corresponding windfall even though he may have been at least equally responsible for the illegality. In some cases it is possible to mitigate such adverse consequences by combining unenforceability with, for one of the parties, a degree of restitutionary relief.

28. And further at paragraph 1-04 of the text:

> Thus, even if a contract was entered into with the conscious intention, by one or both parties, of committing a criminal offence or a tort, it appears that there can be exceptional situations in which the contract could be enforced even by the party primarily responsible for the illegality…the *Second American Restatement of Contracts* makes the following suggestion:
>
> > 'A and B make an agreement for the sale of goods for $10,000, in which A promises to deliver the goods in his own truck at a designated time and place. A municipal

> parking ordinance makes unloading of a truck at that time and place an offense punishable be a fine…A delivers the goods to B as provided. Because the public policy manifested by the ordinance is not sufficiently substantial to outweigh the interest in the enforcement of B's promise, enforcement of his promise is not precluded on grounds of public policy.'

29. In the instant circumstances, there is a monetary fine of $200.00 prescribed by ***Section 60*** of the ***Cooperative Societies Act***, for non-compliance with any act obliged to be done by provisions of the Act. Does the policy surrounding the application of this penalty of $200.00 outweigh the interest in the enforcement of a loan agreement of approximately $175,000,000.00? It is recalled that QR admitted receiving the disbursement.

30. Enters the case of ***Patel v Mirza*** [2017] AC 467. Here the majority of the Supreme Court re-oriented the law which enabled the courts the leeway to discuss more in a transparent fashion the policy surrounding decisions to reach a more just outcome in cases involving the illegality doctrine in English law.

31. The Court expressly recognised that proportionality is one of the factors to be taken into account in determining whether or not a claim should fail on grounds of illegality and moreover, that the purpose of the rule giving rise to the illegality should also be considered. The case itself concerned a claim for unjust enrichment, which the defendant sought to resist on the ground that both parties had been involved in a plan to profit by inside information, and hence unlawfully, from movements in share prices. The Supreme Court held unanimously that the defence of illegality would fail and that the claim would succeed[2]. *Lord Toulson* in delivering the majority decision noted:

> 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

[2] See Illegality and Public Policy (cited earlier) at paragraph 1-06

> be harmful to the integrity of the legal system…In assessing whether the public interest would be harmed in that way, it is necessary, (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the 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…The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach cable of producing results which may appear arbitrary, unjust or disproportionate…

32. The majority and minority decisions in ***Patel*** confirmed also the overruling of the often-cited case on illegality, ***Tinsley v Milligan*** [1994] 1 AC 340 – citing that it should no longer be followed.

33. The author of ***Illegality and Public Policy*** (cited earlier) discussed the issue of Statutory illegality at paragraph 22-04 of the text, thus:

> In ***Anderson v Daniel*** a vendor of fertiliser who failed to provide documentation, as required by Statue, when supplying the fertiliser was held to be prevented by illegality from enforcing the contract to recover the price. On the other hand, in ***Shaw v Groom*** a landlord who failed to provide his tenant with a rent book, as required by Statute, was nevertheless permitted to sue for rent. In practice the courts are apt to ascribe their decisions in cases of this type to the intention of the legislature in the particular statute in question. This usually means that the level of penalty will be taken into account (e.g. a small fine might count against illegality), alongside the court's perception of the gravity of the context and the extent to which allowing contractual enforcement might thwart the statutory purpose.

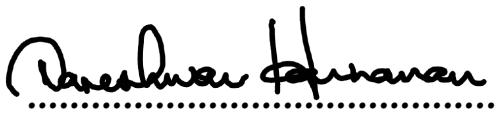
34. This Court is of the view therefore that Trial Judge was precipitate in granting the prayers sought in the Summons of QR and RR. The

considerations as adumbrated by the authorities on the issue of estoppel and illegality, culminating with the principles pronounced in one of the latest authorities out of the Supreme Court of the UK clearly illustrate that there must be a principled and transparent assessment of the factors in the circumstances, after which the Court can take its decision one way or the other.

35. The justice of the instant case demands that this can only be done after there has been a complete process of pleadings and trial, where evidence relative to the principles outlined are addressed.

Conclusion:

36. Therefore, this Court orders that the decision of the learned Trial Judge dismissing the Appellant/Plaintiff's claim be set aside and the matter is remitted to the Registrar for fixture for directions and hearing thereafter before a Judge of the High Court. There will be costs to the Appellant/Plaintiff to be paid by RR and QR each in the sum of $300,000.00.



Nareshwar Harnanan
Puisne Judge
3rd January 2019