



[2018] JMSC Civ 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV2049

BETWEEN	RICHARD DENNIS	CLAIMANT
AND	RAYMOND HEW	DEFENDANT

IN OPEN COURT

Mrs. La Toya Green, Ms. Kimica Hibbert & Mr. Winston Young instructed by Green & Co. for the Claimant

Mr. Pierre Rogers, Mr. Shane Williams and Ms. Moneaque Mcleod instructed by Rogers and Associates Law Offices for the Defendant

Heard: March 14, 15, 23 & 28, 2018

Contract – Illegality – Whether contract illegal by virtue of statute

Contract – Fraud – Whether claimant induced by fraud

Civil Procedure – Pleadings – Amended particulars of claim filed without permission of the court – Whether properly before the court

CAROLYN TIE, J

The claim and defence

[1] The litigants herein entered into a number of written contracts wherein the defendant was to invest various sums of money on behalf of the claimant. The claimant has not received the return of his principal sums or the promised

interest hence the suit before the court for breach of the said agreements and for the recovery of the sum of US\$128,851.05.

- [2] The defendant concedes that he received the various sums of money in issue but contends, contrary to the assertion of the claimant, that he had not agreed to personally invest the money but rather that it was verbally agreed that the money would be invested with OLINT where he, the defendant, was an existing account holder. He explained that the claimant was unable to invest directly as OLINT was no longer accepting new accounts.
- [3] The defendant contends that the claimant cannot succeed on his claim as the contracts on which he seeks to rely are illegal as he, the defendant, was not licenced as required by legislation, specifically the Bank of Jamaica Act, the Securities Act and the Financial Institutions Act.
- [4] By way of an amended particulars of claim, the claimant also alleges fraud and seeks damages for same. The particulars of fraud as pleaded are:
- i. Falsely and or knowingly representing to the claimant that he was an investment trader and had the capacity to accept deposits for the purposes of investment
 - ii. Falsely and or knowingly establishing a course of dealing with the claimant and paying the claimant interest on the principal sums invested when he knew or ought to have known that he was not licenced so to do
 - iii. Falsely and or knowingly inducing the claimant to contract with him and accepting the claimant's deposits when he knew or ought to have known that he that he did not have the capacity to do so
 - iv. Falsely and or knowingly representing to the claimant and contracting with the claimant to repay to the claimant the principal invested plus interest
 - v. Falsely and or knowingly guaranteeing the claimant a fixed rate of interest on said sums deposited with him
 - vi. Falsely and or knowingly representing to the claimant that his principal sum would be repaid pursuant to said agreements signed between himself and the claimant

vii. Falsely and or failing to return to the claimant the said principal sum despite the claimant's repeated request for same

- [5] On the issue of fraud, the defendant submits that the amended particulars of claim is not properly before the court and therefore ought not to be considered as it was filed without the permission of the court which is required in instances where the amendment arises after the expiry of a relevant limitation period.
- [6] The defendant asserts that even if the issue of fraud was properly before the court, evidentially the claimant cannot succeed.

The submissions of the claimant

- [7] The claimant maintained that the defendant, having held himself out to be an investment trader in United States dollars, ought to be held to the terms of the written agreements signed by the parties wherein it was agreed that he would pay the claimant a fixed monthly interest and would return the claimant's deposit on either party giving one month's notice.
- [8] On the issue of illegality as raised by the defence, the claimant argued that section 22 of the Bank of Jamaica Act was inapplicable since the parties were not in the business of buying, selling, lending or borrowing foreign currency.
- [9] The claimant refuted the notion that the contracts are void for illegality as the illegality is borne out entirely of the actions of the defendant who induced the claimant to contract with him knowing that he did not possess the requisite licence. The claimant further submitted that it would be wrong for the defendant to profit from his own wrongdoing which would result in him being unjustly enriched.
- [10] The claimant relied primarily on the authorities of **Hughes v Asset Managers Plc** 3 All ER 609 and **Patel v Mirza** [2016] UKSC 42.
- [11] The former case involved parties that had entered into a discretionary investment management agreement. The investments made substantial losses. The party

who had handed over money to the defendants for investment sought recovery of same on the basis that the agreement was invalid and void under the legislation as the person who had signed the agreement on behalf of the investment company was not authorised at the time as required by the Prevention of Fraud (Investment) Act which made it illegal for a person to deal with securities without the requisite licence. The Court of Appeal therein held that the Act did not have the effect that non-compliance would render the contract void.

- [12] In the latter case of **Patel v Mirza** the issue of illegality and its effect on contracts was considered by the court. In that case Patel transferred money to Mizra for the purpose of betting on the price of shares using insider information which Mizra expected to obtain. Using advanced insider information to profit from trading in securities was an offence under the Criminal Justice Act. The intended scheme did not materialise but Mizra nonetheless failed to repay the sums of money that he had received. The court determined that a claimant who satisfied the ordinary requirements of a claim for unjust enrichment should not be debarred from enforcing his claim simply because he was seeking to recover money paid pursuant to a contract to carry out an illegal activity.
- [13] On the issue of fraud, the claimant relied on the House of Lords decision of **Derry v Peek** [1889] All ER 1 and the dicta of Lord Herschell that, “fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, carelessly whether it be false or true.”
- [14] The claimant argued that the defendant led the claimant to believe that he was a legitimate investment trader. He explains that he observed the defendant trading and when he made enquiries of the defendant about how trading was done, the defendant showed him a number of graphs on his computer screens indicating points at which he would buy and sell United States dollars. Additionally, the defendant encouraged him to invest with him in United States dollars.

[15] The claimant contends the defendant knowingly made false representations that he was an investment trader and that he had the capacity to accept deposits for the purposes of investment when he knew that he did not possess the requisite licence.

The defendant's submissions

[16] The defendant takes no issue with the fact that the defendant received from the claimant the sums in issue. The defendant however submitted that the contracts between the parties are illegal and relied on the provisions of the Bank of Jamaica Act, the Securities Act and the Financial Institutions Act.

[17] Section 22A(2) of the Bank of Jamaica Act prohibits a person from carrying on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorised dealer.

[18] Section 7 of the Securities Act prohibits a person from carrying on a securities business or holding himself out as carrying on a securities business unless he is possessed of a dealer's licence issued under the Act.

[19] Section 3 of the Financial Institutions Act makes it unlawful for a person other than a company duly licensed from, inter alia, carrying on the business of accepting deposits.

[20] The defendant argues that the contracts between the parties are illegal as they could not be performed without breaching the aforementioned legislation.

[21] In support of this position reliance was placed on **Miller and Miller v Stewart**, [2013] JMSC Civ. 138 where in the learned judge indicated at paragraph 31 that;

“No court ought to be called upon 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 attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality.”

[22] The defendant relied also on the authority of **Holiday Inn Jamaica Incorporation v Ava Chambers SCCA 23/2007**, wherein the authorities of **Re: An arbitration between Mahmoud and Ispahani [1921] 2 KB 716** and **St. John Shipping Corporation v Joseph Rank Ltd. [1956] 3 ALL ER 683**, were considered.

[23] Reference was made to the dicta of Scrutton L.J. in the former case wherein he stated at page 728;

*“If this contract is prohibited by what is equivalent to a statute, the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no defence. I think the law is laid down in **Cope v Rowlands** 2M. & W. 157, where Parke B., delivering the judgment of the Court said: ‘It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, **Bartlett v. Vinor**. Carth. 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?’ If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.”*

[24] The reference to the case of **St John Shipping Corporation v Joseph Rank Ltd.** focussed on the two general principles which were discussed by Devlin, J. at page 687

“The first is that a contract which is entered into with the object of committing an illegal act is unenforceable The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute . . . if the statute prohibits the contract it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act that contract will be unenforceable. In the latter case one has to consider not what acts the statute prohibits but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties entered into a prohibited contract, that contract is unenforceable.”

[25] On the issue of fraud, the defendant urged that the amended particulars of claim which introduced the issue of fraud is not properly before the court and therefore ought not to be considered. The basis of this contention is that the amended particulars of claim was filed without permission, which is required by Civil Procedure Rule (CPR) 20.1(b) once a relevant limitation period has expired. The defendant argued that on the claimant's pleadings the demand for repayment was made by the claimant in September 2008, and according to the agreements, the principal was payable within thirty days of request. The limitation period for this claim would therefore have expired in October 2014. The amended particulars of claim was filed on November 6, 2015.

[26] The defendant asserts that even if the issue of fraud was properly before the court, evidentially the claimant has failed to prove the allegations as pleaded.

Analysis

[27] Having carefully considered the evidence I am inclined to accept the claimant's version that the agreements that existed between the defendant and himself was for the defendant to personally invest his money.

[28] I have scrutinised the evidence and find that the defendant's contention that he was to lodge the money received from the claimant to his OLINT account not to be supported by the evidence. The various agreements signed by the parties make no mention of OLINT. The defendant's testimony that the claimant was to make direct payments into the OLINT account was also not supported by the evidence, nor was there evidence to support the defendant's stance that the claimant would also present the defendant with managers cheques made in favour of OLINT. Indeed enquiries made of the claimant's bank reveal that cheques were not made payable to OLINT. On the evidence all sums were handed directly to the defendant and all cheques were made in favour of the defendant. There was also no evidence on the print out of the defendant's OLINT account, as provided by the defendant, that the various sums of money were paid into OLINT, as admitted by the defendant. Further, there is no

indication that payments to the claimant were made directly from the defendant's OLINT account.

- [29]** On the issue of the legal status of the agreements, it is clear that the defendant would be prohibited from accepting money and investing same in the manner agreed, that is trading United States currency without authorisation under the various statutes. The defendant was not possessed with the requisite authorisation. I am satisfied that the Bank of Jamaica Act and the Financial Institutions Act prohibit contracts wherein the object is the doing of the very acts which the statutes prohibit.
- [30]** I am of the view that the defendant was in the business of buying, selling, lending or borrowing foreign currency. Though the parties are disagreed as to how the defendant was to investment the money, there is consensus that he was to profit from his activities. Contrary to the defendant's position that he was to receive a fixed commission, the claimant conceded that the defendant was not expected to work for free but indicated that his takings were not agreed and that the defendant "must know what he can make off of it after he pay me." It is therefore clear that the claimant himself accepts that the defendant would profit from his activity. This coupled with the fact that the parties engaged in numerous transactions comfortably lends to a conclusion that the defendant's activities were of a business-related nature and hence falls within the purview of the Bank Of Jamaica Act.
- [31]** The defendant was also not licenced under the Financial Institutions Act and hence would have been prohibited from carrying on the business of accepting deposits.
- [32]** For the defendant to legally engage in the activities described by the claimant, the defendant would have had to be licenced. He was not. He was therefore not legally capable of doing that which the parties agreed. I find that the contracts between the claimant and the defendant are illegal.

[33] I am further satisfied that the claimant knew, or at the very least ought to have known that the defendant was unlicensed or was deliberately unconcerned in this regard. I arrive at this conclusion as there is nothing on the evidence which suggests that the defendant ever indicated that he was licenced. The circumstances described by the claimant as regards the operation of the defendant suggested a most informal set-up wherein he operated out of his home and would not easily lead one to assume that he was operating legitimately. Indeed all of the contracts signed were drafted at the insistence of and by the claimant himself who never enquired about the bona fides of the defendant to function in the manner intended under the contracts. I am satisfied on a balance of the probabilities that both parties were aware that the defendant was not licenced to act in the manner intended.

[34] I have considered the posture of the claimant that the illegality of the contract ought not to result in the contract being struck down based on the analysis in the case of **Hughes v Asset Managers Plc** wherein the circumvention of the statute therein did not render the contract void for illegality.

[35] The circumstances of that case are however, to my mind, distinguishable from those of the case at bar. The statute in issue in that case imposed criminal sanctions upon principals or agents engaged in the business of dealing in securities without a licence. Therein it was common ground that the respondents carried on the business of dealing in securities within the meaning of the legislation. It was also common ground that while the respondent held a principal's licence, the person who actually made and signed the agreements on behalf of the respondent did not at the time hold a representative's licence and thus acted in contravention of the statute. In that case it was noted by Lord Justice Saville that there were two matters worthy of note.

*“The first of these is that the particular prohibition under discussion is not on its face directed against deals themselves but against the servant or agent making the deals; **while the second is that this prohibition is not directed against either of the contracting parties to the deal but to the agent of one of them.**” (Emphasis supplied)*

He further concluded that from the wording of the legislation, parliament could not have intended that deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective.

- [36] That case is patently distinguishable from the case herein. In the case herein the defendant himself could not legitimately perform under the contract in the manner expected by the claimant.
- [37] The claimant has urged the court to adopt the rationale in **Patel v Mizra** and not allow the illegality of the contract to bar the claimant from recovering money paid to the defendant.
- [38] In that case Patel transferred money to Mizra for the purpose of betting on the price of shares using insider information which Mizra expected to obtain. The expected insider information was mistaken and the intended scheme did not materialise. Mizra however failed to repay on the basis that the agreement was illegal since using advanced insider information to profit from trading in securities was an offence under the Criminal Justice Act. Patel brought a claim based on contract and unjust enrichment for the return of the money paid.
- [39] The United Kingdom Supreme Court held unanimously that Patel could recover the money, declaring that the test in **Tinsley v Milligan** [1994] 1 AC 340, that the defence of *ex turpi causa* must apply in all circumstances where a claim involves reliance on the claimant's own illegality, was no longer representative of the law.
- [40] According to Lord Toulson, "*A claimant, such as Mr. Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose.*" The court determined that Patel's claim should be allowed since it would have the effect of returning the parties to their positions prior to the illegal contract, as well as prevent Mizra from being unjustly enriched.

- [41] The circumstances in that case are quite different from those in the instant case. As a preliminary matter, Patel's claim was put on a number of bases including contract and unjust enrichment for the return of the money paid. The claim herein was based on contract as well as fraud but did not include a claim for unjust enrichment, which was the basis of Patel's success.
- [42] Moreover, even if the claim of Mr. Dennis had been based on unjust enrichment, the evidence would not support the application of the principles expounded in the **Patel** case. In the **Patel** case the intended bet, the purpose of Patel transferring the money to Mizra, did not take place. The defendant Mizra would therefore have received this money without acting on the contract. There is no evidence to support the contention that Mr. Hew retained the money for himself and didn't invest the money.
- [43] I therefore find that the contracts are illegal and the claimant cannot seek to rely on them to support this claim as formulated in the pleadings.
- [44] On the issue of fraud, the amended particulars of claim was filed on November 6, 2015 and introduced allegations of fraud and damages for same.
- [45] CPR 20.1 stipulates that *"A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either-*
- (a) ...
 - (b) *rule 20.6 (amendments to statement of case after the end of the relevant limitation period) applies.*
- [46] Rule 20.6 addresses the issue of amendments to a statement of case after the end of a relevant limitation period and restricts same to correcting mistakes as regards the name of a party.
- [47] As it relates to claims in contract, the cause of action for same arises when the breach occurs and as such time begins to run when the contract is breached.

The statutory limitation for matters of this nature is six (6) years by virtue of section 46 of the Limitation of Actions Act which is to be read together with the United Kingdom Statute 21 James Cap 16 1623, which is received law.

- [48] From the claimant's pleadings the limitation period for this claim would have expired in October 2014 given that the demand for repayment was made by the claimant in September 2008 and according to the agreements the principal sum was payable within thirty days of request. The amended particulars of claim having been filed in November 2016, the defendant would have been in a position to rely on the statutory defence.
- [49] There is no provision in the C.P.R. for the addition of a new cause of action after expiry of a limitation period. It is manifestly clear that the amendment introduces a distinct allegation from that which prior thereto existed on the pleadings, and hence introduced a new cause of action.
- [50] In these circumstances, it is difficult to fathom an application for amendments of the nature contained in the amended particulars of claim being allowed, had an application been made, given that it would deprive the defendant of a valid defence.
- [51] In any event, such a determination is academic given the deficient state of the evidence as regards the allegations of fraud.
- [52] It is trite that fraud is a false representation of fact made knowingly or without belief in its truth, or recklessly not caring whether it is true or not. (**Derry v Peek** (1889) 14App. Cas.337).
- [53] In placing reliance on an allegation of fraud, such a charge must be specifically pleaded and sufficiently particularized. This has been the accepted legal position as evident in **Davy v Garrett** (1877) 7 Ch. D. 473, as per Thesiger, L.J. at 489: *"In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts"*.

[54] Indeed Selborne, L.C. in **Wallingford v. Mutual Society** 5 App. Cas. 685 at 697 stated that;

“ . . . general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice”.

[55] Furthermore, in addition to being strictly pleaded and particularised, it must be strictly proved on the clearest, most cogent and indisputable evidence on a balance of the probabilities as noted by McDonald Bishop, J (as she then was) in **Linell Bent (Administrator of the Estate of Ellen Bent, deceased) et al v Eleanor Evans** (CL 1993/B115). At paragraph 88 the learned judge in examining the nature of the evidence required to establish fraud in civil proceedings, relied on the dictum of Rowe J, (as he then was) in **Chin v Watson’s (Off Course Betting)** 1974, 12 JLR, 1431, stated thus;

“... fraudulent conduct must be distinctly proved and it is not allowable to leave it to be inferred from the facts (Davy v Garret cited: after following the guidance given by Lord Wentbury in McCormick v Grogen (1869) LR4,HL82, the learned judge noted that while it is true that fraud can be proved from circumstantial evidence that proof must be of the clearest and most indisputable evidence.”

[56] Given the legal requirements as regards proving an allegation of fraud, the evidence will be examined as regards the particulars of fraud as pleaded.

[57] I have already indicated that I find that the claimant knew that the defendant was unlicensed and could not legitimately act in the manner expected under the agreements or was deliberately apathetic in this regard. This in itself would defeat any claim for fraud as any representation allegedly made by the defendant would not have induced the claimant.

[58] Even if the claimant was unaware of the defendant’s lack of bona fides, I find that the claim of fraud has not been established. I find the pleadings to be inexact and failed to identify the words or actions which would have disclosed fraudulent behaviour, as did the evidence.

[59] The claimant alleges that the defendant ‘falsely and or knowingly represented to the claimant that he was an investment trader and had the capacity to accept deposits for the purposes of investment.’

[60] On the pleadings there has been no indication as to the manner in which he made these representations to the claimant. It is apparent that the evidence seemingly relied on by the claimant in regard to this allegation is that he saw the defendant trading on computers at his home and that he, the claimant enquired of him how trading was done whereupon the defendant showed him a number of graphs on his computer screens. The claimant testified that the defendant subsequently encouraged him to invest with him.

[61] The evidence does not reveal any utterance or conduct on the part of the defendant from which it could be concluded that the defendant represented to the claimant that he was an investment trader or that he was capable of legitimately accepting deposits. There was never a discussion in this regard nor did the claimant himself ever raise the issue. I find that the evidence does not support this allegation of fraud.

[62] It is also alleged that the defendant was fraudulent in that he ‘falsely and or knowingly established a course of dealing with the claimant and paid the claimant interest on the principal sums invested when he knew or ought to have known that he was not licenced so to do.’ The very evidence of the claimant that the defendant had paid interest in accordance with the terms of their agreement is antithetical to the concept of fraud as alleged. I find that the evidence does not support this allegation of fraud.

[63] The particulars of fraud contend that the defendant falsely and or knowingly induced the claimant to contract with him and accepted the claimant’s deposits when he knew or ought to have known that he that he did not have the capacity to do so. On the pleadings there has been no indication as to the manner in which he induced the claimant to contract with him. The claimant testified that the defendant subsequently encouraged him to invest with him. The evidence in

this regard however is sparse and insufficient. The evidence does not support this allegation of fraud.

[64] I found the pleadings in regard to the remaining particulars of fraud to be deficient as they were either seemingly incomplete or not indicative of fraud.

[65] The claim for the recovery of the sum of US\$128,851.05 as presented and for damages for fraud, had it been properly before the court, cannot succeed.

[66] In the circumstances judgment is entered in favour of the defendant with costs to be agreed or taxed.