

ILLEGAL CONTRACTS AND RIGHTS OF PROPERTY

The Privy Council judgment in *Sajan Singh v. Sadara Ali*¹ helps to illumine one of the dimmer recesses of the common law. An appeal from the Court of Appeal of the Federation of Malaya, it was heard by a strong board comprising Lords Denning, Cohen and Jenkins. The judgment—an impressively lucid one—was delivered by Lord Denning.

The facts of the case were that the plaintiff Sadara Ali wanted to acquire a lorry and use it on his own account, but as he had no chance of obtaining a haulage permit, he made an arrangement with the defendant Sajan Singh whereby the defendant was to acquire a lorry, register it in his own name and obtain a haulage permit. The defendant acquired a lorry, registered it in his own name and obtained a haulage permit which was personal to the holder. The plaintiff however paid for the lorry which he possessed and used as his own but all the time operated it in the defendant's name. These transactions were in contravention of certain regulations which governed the transfer and use of motor vehicles. Both the plaintiff and the defendant were aware of the illegality of their transactions. They were in fact "fellow conspirators engaged in practising a deceit on the public administration of the country."² Sometime afterwards the defendant seized the lorry from the plaintiff's possession and claimed that it was his own. The plaintiff brought this action asking for a declaration that he was the authorised owner of the vehicle, coupling this claim with a claim for detainue.

Their Lordships held that despite the illegality of the contract and the fact that the lorry was registered in the defendant's name, the property in the lorry had passed to the plaintiff by its sale and delivery. Accordingly, they held that the plaintiff had a good claim in detainue since he had the right to immediate possession when the action commenced. Their Lordships also found that on the facts of the case the plaintiff was entitled to rely on his possession and could equally succeed in a claim for trespass to goods.

Lord Denning, in the course of the judgment, said: "Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them

17. For an example where an order *venire de novo* was made, see *R. v. Cronin* [1940] 1 All E.R. 618; 27 Cr. App. Rep. 179, and for where it was refused, see *R. v. Neal* [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438; 33 Crim. App. Rep. 189.

18. [1960] 2 W.L.R. at p. 313.

1. (1960) 26 M.L.J. 52; [1960] 1 All E.R. 269.

2. *Per Smith J.* in the Court of first instance, quoted by the Board. See (1960) 26 M.L.J. at p. 53.

transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin, see *Scafe v. Morgan*.³ The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means, by which he did it—he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The parties to the fraud are, of course, liable to be punished for the part they played in the illegal transaction, but nevertheless the property passes to the transferee.”

The case of *Bowmakers Ltd. v. Barnet Instruments Ltd.*⁴ was referred to and the decision of the Court of Appeal in that case was tacitly approved. The doubts created by that case were however not discussed by their Lordships and these doubts therefore must await future clarification. It is clear that the court will not assist a plaintiff who cannot maintain his cause of action without founding his claim upon an illegal contract—*ex turpi causa oritur non actio* and *in pari delicto potior est conditio defendentis* are well established maxims. It is equally clear that property transferred under an illegal contract is recoverable “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,” for a man’s right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use. These two principles are clear in their formulation. Difficulty, however, arises in their application. Which of these two competing principles will be invoked by the court in a particular case cannot be predicted with any certainty. It may be that no precise test can be found to determine whether the one principle or the other is to be applied in a given fact situation. It is certainly possible to conceive of situations where both these principles could equally apply. The choice of principle which the Court makes in such situations depends not on logic but on considerations of public policy and justice between the parties. It is therefore no surprise that the cases, few though they are, which turn on the application of these principles appear inconsistent and difficult to reconcile. Thus in *Taylor v. Chester*⁵ the plaintiff deposited with the defendant, a brothel keeper, the half of a £50 note by way of a pledge to secure payment of money due for wines and suppers supplied by the defendant for the plaintiff’s consumption at her brothel. The plaintiff sought to recover the note in an action based, *inter alia*, on detinue. However, despite the argument of Herschell (who appeared for the plaintiff) that the plaintiff’s claim was not founded on any contract but on his right of property in the half-note,⁶ the court (Hannen and Mellor JJ.) held that the plaintiff must fail because there was an existing and valid pledge⁷ conferring a special property in the half-note upon the defendant. The plaintiff could not impugn this pledge without setting forth the immoral and illegal character of the contract upon which the note had been deposited. From *Taylor v. Chester* it would therefore appear that if A deposits property with B in pursuance of an illegal transaction, B acquires a special interest in the property which is indefeasible merely on demand. Similarly, if A leases a house to B for an illegal purpose and they are *in pari delicto*, the balance of judicial opinion is against the recovery of the premises by A for breach of covenant to pay rent before the expiry of the term. This is because the illegality of the transaction does not affect the validity of the lease and prevent the vesting of the leasehold interest in B, and so long as the illegal lease exists, A will be precluded from relying

3. (1838) 4 M. & W. at p. 281, *per* Parke B.

4. [1945] K.B. 65; [1944] 2 All E.R. 679.

5. (1869) L.R. 4 Q.B. 309.

6. *Ibid.* at p. 311.

7. Since the plaintiff had not tendered the amount due.

on it.⁸ But once the term of years has expired A can recover possession of the premises by virtue of his ownership although there is as yet no English decision on the point. *Bowmakers Ltd. v. Barnet Instruments Ltd.*⁹ however raised some doubts which still remain to be dispelled. There the plaintiffs delivered certain tools to the defendants under three hire-purchase agreements which were illegal as they were in contravention of certain war-time rules and orders. The defendants, after paying only some of the instalments of the hire reserved, sold the tools delivered under two of the agreements and refused to return those delivered under the third agreement. The plaintiffs sued in conversion and the Court of Appeal (Scott and du Parc L.JJ., and Uthwatt J.) held that they were entitled to succeed as at the date of the conversion the defendants had lost their special right to possession of the tools by their acts and consequently the plaintiffs could base their action on their ownership of the tools. The Court did not, however, differentiate the various acts of the defendants and allowed the plaintiffs to recover even in respect of those tools which the defendants had merely refused to return on demand after their failure to pay the agreed instalments. This aspect of the decision in the *Bowmakers* case cannot be reconciled with *Taylor v. Chester*¹⁰ and the cases of illegal lease¹¹ except on the barest technicality. It amounts to enforcement of an illegal contract by indirect means.

In *Bigos v. Boustead*¹² the Court missed a golden opportunity to settle the doubts created by the *Bowmakers'* case. There a share certificate was deposited by the defendant in pursuance of an illegal contract. He sought to recover the certificate in a counterclaim on the ground that he was entitled to a *locus poenitentiae* as the contract had not been performed. This contention was rightly rejected by the Court (Pritchard J.) as the performance of the illegal contract was merely frustrated by the other party. No claim in conversion or detinue was brought and the *Bowmakers'* case was not brought to the notice of the court. But if the reasoning of the *Bowmakers'* case is adopted it would appear that the share certificate could be recovered by the defendant on the strength of his title.

The difficulties and doubts which have been noted above with regard to the application of the two competing principles (viz., that no action can be founded on an illegal contract but where the plaintiff has an independent cause of action and is not forced to rely on the illegal contract he may recover) are not discussed in *Sajan Singh v. Sadara Ali*, much less resolved. *Sajan Singh v. Sadara Ali* is actually not a case where the plaintiff seeks to recover property which he has transferred to the defendant under or in pursuance of an illegal transaction. It is really a case where the plaintiff seeks to recover property which has been transferred to him by the defendant under an illegal contract but which the defendant has subsequently seized out of his possession. Unlike the *Bowmakers'* case where the plaintiffs sought to rely on their rights of property to recover goods which had been transferred by them to the defendants under an illegal agreement, the plaintiff in *Sajan Singh's* case is simply relying on his right to possession of the lorry which had become vested in him by the illegal contract. Although the decision in itself is commendable, it is difficult to see why reference was made at all to the *Bowmakers'* case. Did the court in *Sajan Singh's* case purport to apply the *Bowmakers'* case? If so, how? Moreover, their Lordships seem to approve of the decision in the *Bowmakers'* case but ignore its difficulties.

It is also interesting to note that in 1953 in the case of *Bergenger v. Rozario*¹³ the Singapore High Court (Whitton J.) expressly invoked the principle enunciated

8. *Alexander v. Rayson* [1986] 1 K.B. 169, at pp. 186-7; *Edler v. Auerbach* [1950] 1 K.B. 359.

9. [1945] K.B. 65; [1944] 2 All E.R. 579.

10. (1869) L.R. 4 Q.B. 309.

11. See n.7.

12. [1951] 1 All E.R. 92.

13. (1953) 19 M.L.J. 239.

in *Bowmakers Ltd. v. Barnet Instruments Ltd.* and reached a result which appears to be hardly reconcilable with *Sajan Singh's* case. The plaintiff in this case promised to buy the defendant a new car if she would cohabit with him. The contract being made in consideration of future illicit cohabitation was illegal.¹⁴ The plaintiff purchased a car and lived with the defendant for a few months after which they separated. The defendant retained possession of the car, and the plaintiff sought to recover it by relying on his title. The learned judge found that the contract was illegal and that the defendant's retention of the car was a direct consequence of the illegal contract. Nevertheless he held that the plaintiff was entitled to rely on his title and recover possession of the car as his claim was one which fell within the principle laid down by the court in the *Bowmakers'* case. The decision is not free from doubt. The learned judge gave no explanation as to how the title still remained in the plaintiff. He did not appear to have even considered whether the contract was executory or executed. But as the defendant had cohabited with the plaintiff for some months it would appear that the contract was executed. If this is so the property in the car ought to have passed to the defendant regardless of its registration in the plaintiff's name (this would have been in accordance with *Sajan Singh's* case). Moreover, this is not a case where the illegal purpose involved a mere temporary right of possession or the creation of a limited interest in the defendant. The plaintiff promised to buy the defendant a car if she should cohabit with him; he did not make a condition that the car was to be hers only for so long as she remained with him. On the facts of the case it is therefore difficult to see how the plaintiff could still have relied on his title. *Bergenger v. Rozario* was not cited to the court in *Sajan Singh's* case (in either the Court of Appeal or the Privy Council). Its authority is considerably weakened, if not destroyed, after *Sajan Singh's* case.

The problem of adjusting the rights of parties to an illegal transaction has caused great difficulties for the courts in recent years. In order to avoid injustice caused by the maxims *in turpi causa oritur non actio* and *in pari delicto potior est conditio defendantis*, the courts have drawn a distinction between proprietary claims and contractual claims. But the dividing lines between contractual claims and proprietary rights appear to be vague and fluctuating. A distinction may however be drawn between cases where property is absolutely transferred under an illegal contract and cases where property is transferred for a temporary period creating a limited interest. Only in the latter type of case can the principle in *Bowmakers Ltd. v. Barnet Instrument Ltd.* operate. The basic question is, however, whether the court will in the case before it assist the plaintiff to recover the property. The attitude of the court in this matter will perhaps to a great extent depend on the nature of the illegality involved and the circumstances of each particular case.¹⁵

Sajan Singh v. Sadara Ali indicates, it is submitted, a further and distinct trend in this sector of the law of contracts — the recognition by the courts of the rights of a party acquired under a fully executed contract regardless of the fact that the contract is tainted with illegality. A man is therefore entitled to have his rights of property protected regardless of their illegal origin. As such the decision of the board in *Sajan Singh's* case is highly commendable. What is difficult to understand is that their Lordships regarded the *Bowmakers'* case as being decided on the same

14. See *Benyon v. Nettlefold* (1850) 3 Mac. & G. 94. This part of the decision is not clearly brought out but as the learned judge held the contract to be illegal he could only have done so on the basis that the contract was made in consideration of future illicit intercourse. A contract made in consideration of past illicit cohabitation is not illegal but merely unenforceable, if not made under seal for want of consideration. See *Nye v. Moseley* (1826) 6 B. & C. 133; *R. v. Bernhard* [1938] 2 K.B. 264.

15. As to the judicial recognition of the various degrees of illegality see e.g. the *Bowmakers' case* itself [1945] K.B. at p. 72 and *Marles v. Philip Trant & Sons, Ltd.* [1954] 1 Q.B. 29. In the latter case Denning L.J. (as he then was) remarked that "there are cases nowadays where a man can be guilty of a crime without any moral culpability at all."

principle although it deals with a radically different situation and is decided on a logically different principle. It is true that both these cases concern proprietary claims; but whereas *Sajan Singh's* case deals with the rights of property acquired under a fully executed illegal contract, the *Bowmahers'* case deals with the right of property prior to and independent of the illegal contract which enables the owner to recover the property he transferred to the defendant under the illegal transaction.

It is also interesting to speculate whether the board intended to lay down an absolute principle in *Sajan Singh v. Sadara Ali* or whether the rule enunciated should be qualified by considerations of public policy and the degree of turpitude involved.

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