

## CASES ON ILLEGALITY

### 3. THE CONSEQUENCES OF THE VARIOUS FORMS OF ILLEGALITY

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#### (1) ENFORCEMENT

##### ***Saunders v Edwards*** [1987] 1 WLR 1116

A contract had been made for the sale of a flat and the furniture in it. The purchaser had been induced to enter into the contract by the vendor's fraudulent misrepresentation that the premises included a roofgarden. The contract was also illegal in that £5,000 of the agreed price of £45,000 was attributed to the furniture, which was worth no more than £1,000. This was apparently done at the suggestion of the purchasers, with a view to saving them £300 in stamp duty. Their claim for damages of over £7,000 for the vendor's deceit was nevertheless upheld.

##### ***St John Shipping Corp v Rank Ltd*** [1957] 1 QB 267

The shipowner succeeded in his claim for freight although he had overloaded his ship. However, he could not have enforced the contract if he had at the time of contracting intended to overload his ship.

##### ***Ashmore & Co v Dawson Ltd*** [1973] 1 WLR 828

A contract to carry two 25-ton loads was performed by using lorries which could not lawfully carry loads of more than 20 tons. This was known both to the carrier and to the owner of the goods, whose claim for damage done to them in the course of transit was rejected as he not only knew of the illegality but "participated" in it.

##### ***Bloxsome v Williams*** (1824) 3 B&C 232

A person sold a horse on a Sunday and thereby committed an offence under the Sunday Observance Act 1677, as he was a dealer. The buyer did not know that the seller was a dealer and recovered the money he had paid for the horse as damages for breach of warranty.

##### ***Archbalds (Freitage) Ltd v Spanglett Ltd*** [1961] 1 QB 374

The defendants contracted to carry the plaintiffs' whisky in a van which was not licensed to carry goods belonging to third parties. In carrying the whisky in this van, the defendants committed a statutory offence. The whisky was stolen and the plaintiffs, who did not know that the van was not properly licensed, recovered the value of the whisky as damages for breach of the contract.

##### ***Re Mahmoud and Ispahani*** [1921] 2 KB 716

A contract was made to sell linseed oil at a time when it was (under delegated legislation) an offence to buy or sell such oil without licence. The seller had a licence to sell to other licensed dealers and was induced to enter into the contract by the buyer's fraudulent representation that he also had a licence. The buyer later refused to accept the oil, and it was held that the seller could not claim damages for non-acceptance, even if his lack of *mens rea* would exonerate him from criminal liability.

***Strongman Ltd v Sincoc*** [1955] 2 QB 525

The defendant employed a firm of builders to modernise his house. He promised to get the necessary licences (without which it was illegal to do the work), but he only got licences for part of the work and refused to pay for the rest on the ground that the contract to do it was illegal. The builders could not sue on the contract to do the work although they acted in good faith. But they recovered damages (amounting to the value of the unlicensed work) for breach of the defendant's collateral undertaking to get the necessary licences.

***Shelley v Paddock*** [1980] QB 348

The plaintiff was by the fraud of the defendant induced to enter into a contract to buy a house in Spain and to make payments under it which were illegal as they violated exchange control regulations. Since the plaintiff's breach of the law was innocent and resulted from the defendant's fraud, she was entitled to damages for that fraud.

**(2) RESTITUTION**

***Parkinson v College of Ambulance*** [1925] 2 KB 1

The plaintiff gave £3,000 to the defendants on the understanding that they would obtain a knighthood for him. It was held that a contract to procure a knighthood was illegal as it might lead to corruption and as it was "derogatory to the dignity of the Sovereign." Recovery of the money paid was denied under the general rule of non-recovery.

***Atkinson v Denby*** (1862) 7 H&N 934

The plaintiff was insolvent and offered to pay his creditors a dividend of 5s. in the £. All the creditors were willing to accept the dividend in full settlement of their claims, except the defendant, who said he would accept it only if the plaintiff first paid him £50. The plaintiff did so, but was later allowed to recover back the £50 on the ground that he had been forced to agree to defraud the other creditors. (Note: This was a convenient way of avoiding the general rule of non-recovery where the rule would have led to the undesirable result of enabling one creditor to keep more than his fair share of the assets of the insolvent debtor)

***Hughes v Liverpool Victoria Legal Friendly Society*** [1916] 2 KB 482

The plaintiff effected a policy of insurance with the defendants on a life in which he had no insurable interest. The contract was illegal (under s1 of the Life Assurance Act 1774), but the plaintiff was able to recover back the premiums he had paid as he had been induced to make the contract by the fraudulent representation of the defendants' agent that the policy was valid. (Note: The decisive factor in such cases is the fraud of the defendant, and not the innocence of the plaintiff.)

***Oom v Bruce*** (1810) 12 East 225

The plaintiff, as agent for the Russian owner of goods in Russia, took out a policy of insurance on the goods with the defendant. Neither party knew (or could have known) that Russia had declared war on this country before the contract was made. It was held that the plaintiff could get back his premium as he was not guilty of any fault or blame in entering into the illegal contract. (Note: Here again no useful purpose would be served by applying the general rule of non-recovery.)

***Taylor v Bowers* (1876) 1 QBD 291**

The plaintiff was being pressed by his creditors. To prevent certain machinery from falling into their hands, he transferred it to one Alcock. He then called two meetings of creditors in an attempt to reach a settlement with them, but none was reached. The plaintiff successfully claimed the machinery back from the defendant, who was one of the creditors and had obtained the machinery from Alcock with notice of the fraudulent scheme and in the hope of benefiting from it. The decision is based on the fact that the illegal purpose had not been carried out; no creditor had been defrauded.

***Kearley v Thomson* (1890) 24 QBD 742**

The plaintiff had a bankrupt friend. He paid the defendants £40 in return for their undertaking not to appear at the bankrupt's public examination and not to oppose his discharge. The defendants duly absented themselves from the public examination, but before any application had been made for the bankrupt's discharge the plaintiff claimed back the £40. His claim failed. It was held that *Taylor v Bowers* was distinguishable from *Kearley v Thomson*, since in the latter case there had been "a partial carrying into effect of an illegal purpose in a substantial manner."

(Note: This distinction looks at first sight tenuous, but it must be remembered that the illegal purposes in the two cases were quite different. The illegal purpose in *Taylor* was to defraud creditors, and no creditor was defrauded. The illegal purpose in *Kearley* was to interfere with the course of public justice, and some such interference took place when the defendants stayed away from the bankrupt's public examination. Thus it seems that the repudiation is in time if it takes place after mere preparation to achieve the illegal purpose, but that it is too late if it takes place after performance of the illegal purpose has actually begun.)

***Bigos v Boustead* [1951] 1 All ER 92**

The defendant wished to send his daughter to Italy for health reasons, but because of Exchange Control Regulations could not get sufficient funds out of the country to make her an adequate allowance while abroad. He contracted with the plaintiff that if she made £150 of Italian money available to his daughter in Italy, he would give her £150 in England and gave the plaintiff some share certificates as security. The whole transaction failed and the defendant sought recovery of his share certificates. The court would not aid the defendant to recover his share certificates as the whole transaction was illegal. (Note: The withdrawal here was because of the plaintiff's breach of contract?)

***Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65**

Machine tools had been let out under hire-purchase agreements which were illegal as they contravened war-time maximum price and licensing regulations. The hirers failed to pay the instalments due under the agreements, sold some of the goods and kept the rest. The owners successfully claimed damages for the conversion of all the goods. They did not have to found their claim on the illegal contract or plead its illegality in order to support their claim, but relied simply on their title. (Note: The hirers' right to possess the goods ceased as soon as they defaulted in paying instalments. The defendant's special property in the goods which they had sold also came to an end by this repudiatory breach, the sale.)

***Tinsley v Milligan* [1993] 3 WLR 126**

There was an agreement between the plaintiff and the defendant relating to a house in which they lived as lovers and which they jointly ran as a lodging house. The house had been purchased with money provided by both parties; and, although the parties accepted that the house was to be owned by them jointly, it was conveyed into the sole name of the plaintiff. This was done to enable the defendant to make false claims for social security benefits on the footing that she did not own her home; and such claims were in fact made.

The parties later quarrelled and it was held that the defendant was entitled to an order for the sale of the house and to a declaration that it was owned by the parties in equal shares. The defendant was entitled in equity to a half share in the house by virtue of the presumption which normally arises in equity where one party transfers property to another, or provides money for the acquisition of property by another, that the property is held by the latter party on a resulting trust for the former party. It was this presumption of resulting trust which gave rise to the defendant's equitable title. To establish that title, she had no need to impeach the transaction by relying on its illegality. It was on the contrary, the plaintiff who sought to impeach the transaction by relying on its illegality in order to deprive it of its normal effect of giving the defendant an equitable title. (Note: The defendant's position was in substance the same as that of the buyer of goods under an illegal contract: she had acquired her equitable title, just as such a buyer can acquire a legal title, in spite of the illegality.)

#### **4. THE RULES OF SEVERANCE**

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***Bennett v Bennett* [1952] 1 All ER 1088**

A husband and wife separated. The wife petitioned for divorce and sought maintenance for herself and her son. Prior to the proceedings she promised not to pursue her claim, in return for which the husband agreed to pay her an annuity and convey the property to her. The husband failed to make the payments and was sued by his wife. It was held that the promise not to seek maintenance was illegal as contrary to public policy and void. Since this formed the main part of the agreement, severance was not ordered and therefore the wife could not claim the annuity since it was founded on consideration that was void.

***Goodinson v Goodinson* [1954] 2 All ER 255**

A contract was made between a husband and wife who were separated to the effect that the husband would pay the wife a weekly sum of maintenance and, in consideration, the wife would indemnify him against all debts incurred by her, would not pledge his credit and would not take any proceedings for maintenance. The promise by the wife not to sue for maintenance was held to be void as it ousted the jurisdiction of the courts, but it was not the main consideration provided by the wife. Therefore, her promise on maintenance would be excluded and the contract upheld.

***Mason v Provident Clothing* [1913] AC 724**

A contract in restraint of trade provided that a canvasser should not enter into a similar business, (that is, selling clothes), "within 25 miles of London". An application was made to substitute "in Islington". This amounted to redrafting the covenant and not severance and could not be done by the court.

***Goldsoll v Goldman* [1915] 1 Ch 292**

The seller of imitation jewellery undertook that he would not deal in real or imitation jewellery in the United Kingdom, or certain named places abroad, for two years. The covenant was too wide in area as the seller had not traded

abroad, and in the subject matter as he had scarcely dealt in real jewellery. It was held, however, that the reference to the places abroad and to real jewellery could be severed.

***Attwood v Lamont*** [1920] 3 KB 571

The plaintiff owned a general outfitters business in Kidderminster which had several departments, each with a supervisor who signed a contract that he would not after leaving the plaintiff's service "be concerned in any of the following trades ... a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter within 10 miles of Kidderminster". The defendant, the supervisor in the tailoring department, started up a tailor's shop and the plaintiff, attempting to enforce the covenant, admitted that it was too wide and should be limited to tailoring only.

The court decided that severance as proposed by the plaintiff would alter the nature of the covenant, which was intended to protect the whole business and not merely part of it and, therefore, could not be effected. Further, the clause could not be regarded as a series of covenants for the protection of each department.