[2012] JMCA Civ 63

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 74/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**SMITH'S TRUCKING SERVICE LIMITED**	**1st APPELLANT**
AND	**ESTATE SELVYN SEYMOUR SMITH (Represented by Cynthia Lamore Smith)**	**2ND APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**RESPONDENT**

Ms Carol Davis and Mrs Charmaine Smith Bonia for the appellants

Miss Maliaca Wong and Krishna Desai instructed by Myers Fletcher and Gordon for the respondent

28, 29, 30 September 2011 and 20 December 2012

MORRISON JA

[1] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[2] This is an appeal from the judgment of Brooks J (as he then was) given on 6 May 2009, wherein he made the following orders:

"1. Judgment be entered for the Defendant on the claims;

2. Judgment be entered for the Defendant on the counterclaim in a sum to be determined by the Registrar of the Supreme Court after taking an account of the consolidated loan established on April 23, 1990;

3. In taking the account, the Registrar shall use such interest rates as may be proved to have [sic] communicated to the Claimants by Jamaica Citizens Bank Ltd. and/or Jamaica Citizens Trust and Merchant Bank Limited up to January 31, 1996, and failing such proof shall use the rate of 35% *per annum;*

4. Interest shall accrue on the principal sum, found due by the Registrar as at 1st February 1996 at the rate found to be applicable as at that date, until payment;

5. The injunction granted by Ellis, J on 16th August, 1995, in Claim No.E328/1994 is hereby discharged;

6. Costs to the Defendant on the Claims and Counterclaim, to be taxed if not agreed;

7. Liberty to apply."

[3] Notice of appeal was filed on 10 June 2009, and contained the following eight grounds of appeal:

"i The Learned Trial Judge erred in finding that the equipment leases between the Appellant and the Respondent were not illegal and/or enforceable [sic].

ii The Learned Judge erred in finding that the mortgage over the 2nd Appellant's property was enforceable.

iii The Learned Trial Judge erred in finding that the mortgage of the 2nd Appellant's property was not tainted with illegality.

iv The Learned Trial Judge erred in finding that the Bill of Sales was not tainted with illegality and enforceable.

v The Learned Trial judge erred in finding that the Consolidated Loan was not tainted with illegality and/or unenforceable

vi In the alternative, the Learned Trial judge erred in finding that the mortgage of the 2nd Appellant's property secured a sum in excess of $2,000,000.00

vii The Learned Judge having found that the Respondent's [sic] had not proved their [sic] claim, erred in ordering that the Registrar of the Supreme Court take an account of the consolidated loan established on April 23, 1990

viii The Learned Trial Judge erred in discharging the injunction of Ellis J granted on 16th June, 1995."

[4] The appellants sought orders to the effect that the equipment leases, the mortgage endorsed on the 2nd appellant's property and the consolidated loan were all illegal or tainted with illegality and unenforceable; and in the alternative that the said mortgage did not secure a sum in excess of $2,000,000.00. Additionally, they also sought an injunction restraining foreclosure of the mortgage.

[5] I agree with the categorization given to the above grounds of appeal by counsel for the respondent, in that they cover three defined areas, namely (i) illegality, (2) the effectiveness of the mortgage under the Registration of Titles Act (ROTA), and (3) the computation of the accounts, and I will endeavour to deal with the submissions and my analysis of the arguments in that way later in this judgment.

Background facts

The pleadings and evidence in the court below

[6] There were initially two actions: suit no E327/1994, which involved the 1st appellant against the Jamaica Citizens Trust and Merchant Bank (JCT&MB) and suit no E328/1994, which involved the 2nd appellant against JCT&MB and Jamaica Citizens Bank Limited (JCBL). Both actions had already been consolidated when they were tried by Brooks J, and the defendants had been substituted by the respondent in this appeal, Jamaica Redevelopment Foundation Inc (JRFI), as subsequent to the commencement of the claims both institutions had ceased to exist, and some of their receivables, including those said to be debts owed by the 1st and 2nd appellants had been assigned to the respondent.

[7] In suit no E327/1994, the 1st appellant claimed, as an incorporated body operating out of the parish of Saint Mary, that it had been for several years engaged as a haulage contractor by Kaiser Bauxite Company (Kaiser Bauxite), a recognized bauxite producer, under the provisions of the Bauxite and Alumina (Encouragement) Act ("the Act"). It was the 1st appellant's case that Kaiser Bauxite facilitated the importation of certain articles pursuant to the Act, which articles were introduced into the island free of customs duty and subject to certain conditions also pursuant to the said Act. The 1st appellant applied for a loan to purchase the said articles and referred to and relied on a letter dated 5 May 1989 from JCT&MB offering to make the loan available to the 1st appellant on certain terms and conditions, "including coverage of the importation of the

articles as listed therein". Subsequently, JCT&MB tendered an equipment lease to the 1st appellant, "incorporating an Instrument of Sale of the said articles" by JCT&MB to the 1st appellant, and "thereby contravened the Act". JCT&MB later seized and sold the articles under the said equipment lease and the 1st appellant alleged that it had failed and/or neglected to account for the proceeds of sale of the same. The particulars of negligence stated inter alia that JCT&MB had failed to advertise in a relevant market, or to obtain advice with regard to the true value of the articles, and therefore sold the articles at an undervalue. It was pleaded that at the time the articles were seized, their market value was $12,900,000.00, and the forced sale value was $9,900,000.00. The loan, if any, did not exceed $8,853,926.07. As a consequence of the foregoing, the 1st appellant pleaded loss and damage.

[8] The 1st appellant also sought several declarations namely that the agreements entered into with JCT&MB including the equipment leases, were all contrary to the Act and unenforceable; that the loans should be credited with certain sums which ought to have been realized on the sale of the articles; that the loans had been fully discharged; and that there be a full accounting for all sums received from the 1st appellant pursuant to the transactions.

[9] In suit no E 328/1994, the claimant, Selwyn Smith, who died subsequent to the judgment having been delivered and the appeal having been filed, was the managing director of the 1st appellant and the registered proprietor of the lands comprised in certificates of title registered at Volume 950 Folio 287 and Volume 916 Folio 99 of the Register Book of Titles. In this suit, the 2nd appellant (the claimant) pleaded that he

applied for a loan in early 1989 and that he was offered a loan upon certain terms and conditions in May 1989, upon which he intended to rely at the trial. He confirmed the equipment leases incorporating the instrument of sale of the articles, and then pleaded specifically the letter of 21 May 1990 in which the respondent consolidated the debts of the 1st appellant under the equipment leases and collateral agreement, into a single demand loan providing for a mortgage over the 2nd appellant's property which was given. The appellants sought at the trial the true construction of this documentation.

[10] Additionally, the appellants pleaded that the mortgage was not in conformity with the provisions of the Registration of Titles Act and was therefore unenforceable, or alternatively, if valid, only secured the amount of $2,000,000.00. The defendant banks were therefore not entitled to foreclose on the mortgage, or entitled only to the sum of $2,000.000.00, and the mortgage could therefore be discharged on tender of the same. In any event, as the debts had been discharged by the seizure and sale of the articles, the mortgage could not be utilized for settlement of those debts. Also, the appellants were relying on the fact that the mortgage had been procured for an illegal purpose, namely the sale and lease-back of articles imported into Jamaica duty free pursuant to the provisions of the Act which had thus been contravened. The 2nd appellant sought similar declarations as those prayed for in the suit filed by the 1st appellant.

[11] The defences filed by the respective banks were similar in content. Essentially they denied any knowledge that the articles had been imported by the appellants pursuant to the Act. It was the banks' position that the appellants had applied for a loan

for working capital and for the purpose of purchasing motor vehicles and equipment for the business, which had been given on the terms and conditions set out in the letter of 5 May 1989. The defences set out that JCT&MB was a subsidiary of JCBL, and that both institutions were engaged in the business of providing banking facilities and finance to customers. They agreed that they had entered into the equipment lease agreement. Additionally, the loan granted in May 1989, by both banks, was then consolidated into a new loan in the amount of $6,300,000.00 from JCBL on the terms and conditions which were set out in letters dated 23 April 1990 and 21 May 1990, and as a consequence the obligations of the 1st appellant under the equipment lease dated 7 December 1989 were discharged. Pursuant to the terms of the agreement set out in the letter dated 23 April 1990, JCT&MB acting for JCBL entered into a bill of sale on 29 May 1990, in respect of the equipment.

[12] It was the banks' further position that as the appellants failed to pay the loan, they exercised their powers of seizure and sale under the Bill of Sale. It was denied that the equipment was sold at an undervalue, the same having been valued by Powertrac Limited, a company engaged in the advertisement and sale of heavy duty equipment. Indeed, it was claimed that the equipment was sold for $4,500,000.00, the best price that could have been obtained, which sum was credited to the outstanding balance which was then, $11,592,393.50. As interest continued to accrue, and no further sums had been paid since the sale of the equipment, the banks claimed that a sum of $14,177,907.61 was due to them as at 15 January 1997.

[13] In suit no E 328/1994, JCBL specifically denied that the letter of 21 May 1990 made any reference to mortgage no 490772, given by the 2nd appellant to JCBL, on or about 30 December 1988, and relied on the true interpretation to be ascribed to the letter and the mortgage. They accepted that notice of foreclosure in respect of the said mortgage had been given, denied that the mortgage did not conform with the provisions of the Registration of Titles Act. They also denied that in the alternative, if valid, the mortgage only covered an amount of $2,000,000.00, and that the mortgage could therefore be discharged by the tender of that sum, particularly since the amounts outstanding were as stated above, and increasing, as interest continued to accrue on the outstanding amount. The banks specifically denied that the outstanding amount had been discharged.

[14] At the trial the appellants relied on the evidence of the 2nd appellant and on the expert witness reports of John Wiggan, public and international accountant and Noel Tomlinson, mechanical engineer and equipment broker. The respondent relied on the evidence of Merline Patterson.

[15] The witness statement of the 2nd appellant was consistent with the pleadings filed on behalf of the 1st appellant and on his behalf. He referred specifically to the equipment which had been brought into the island by the 1st appellant pursuant to the Act, namely (i) 1981 D9L Caterpillar Tractors; (ii) 1982 988B Caterpillar Tractors; (iii) 1982 988B Caterpillar Front End Loader; and (iv) 1978 Euclid 35 ton Dump Truck, and which were subject to the restrictions prohibiting transfer of ownership of the same

within five years of the date of importation, unless payment of the full custom duties was made. There was no dispute that any customs duties were ever paid.

[16] He deposed to the fact that he had become a good friend of Mr Colin Orrett, and remained so for over 20 years. Mr Orrett was initially the bank manager at Bank of Nova Scotia, Ocho Rios branch, and then of JCBL. The 2nd appellant trusted him and through that relationship the loan offer by way of the letter of 5 May 1989 was made by the bank to the 1st appellant and the equipment lease incorporating the instrument of sale of the said articles was executed by the 1st appellant. He indicated that Mr Orrett was familiar with the details of the transaction. The 2nd appellant confirmed the offer of loan from JCBL to the 1st appellant in the amount of $11,638,371.76, of which he said only $2,700,000.00 was taken. He confirmed the inability of the 1st appellant to meet the monthly payments on the loan and the consolidation of all outstanding loans into a single demand loan of $6,300,000.00 by virtue of the letter dated 21 May 1990. He maintained that the 1st appellant could not obtain statements or any details from the bank in respect of the amounts due on principal or interest or information in writing on the changing interest rates.

[17] It was his evidence that prior to the consolidation of the loans he had given a mortgage over his matrimonial home situated at Mammee Bay in the parish of Saint Mary registered at Volume 916 Folio 99 and Volume 950 Folio 287 of the Register Book of Titles to guarantee the loan, but only in the principal sum of $2,000,000.00 with no provision for interest. He deposed that the equipment was seized pursuant to the equipment lease and he had received no accounting in respect of the sale proceeds. He

said that at the time of seizure he reminded the bank that its actions were illegal based on the conditions relative to the sale of the equipment under the Act. He complained that the equipment was sold at an under-value, and that the sum owed to the bank at the time of the sale of the equipment was $853,926.07 less than the value of the equipment at the time, namely $9,900,000.00.

[18] He therefore claimed that as the banks knew of the conditions upon which the equipment was imported into the island, and with that full knowledge had prepared the relevant documentation, the equipment lease, the consolidated loan, and the mortgage were all illegal and that the mortgage did not comply with the provisions of the ROTA. In any event it only covered $2,000,000.00 and the monies recovered from the sale of the equipment would have satisfied all sums due on the loan which would therefore have been fully discharged.

[19] In cross-examination at the trial he insisted that the 1st appellant had paid sums of $1,000,000.00 and $3,000,000.00, which had not been credited to the account. He stated that the bank had not acknowledged these payments. He declared that in 1992 the business of the 1st appellant had not been good as it could not get any jobs and that was affecting the viability of the business. He confirmed that some of the equipment was in need of repair at the time of the sale of the same. Indeed, one unit was without an engine, as the company was not permitted to install the same before sale. He said the equipment was all sold to a competitor. He confirmed the amounts that he said the 1st appellant had owed and denied the large amounts claimed by the bank for interest which, he said, had never been submitted to him.

[20] Mr Wiggan, in his witness statement, said that he had perused the accounting records and other documentation and had been unable to substantiate the "various amounts and or the source from which the consolidated amount of $6,300,000.00 was derived". He, however, indicated that he had used that figure for the basis of his report pending confirmation from the bank, failing which he would use the figure of $2,700,000.00. He set out various items of correspondence which suggested various charges in respect of interest rates, but stated that he found no basis to confirm the changing rates or the correct source of the loan amounts. He concluded that the 1st appellant had overpaid the bank in the amount of $1,327,524.00; that there was no substantiating evidence to prove the loan of $6,300,000.00 or proper notices for the changes of interest allegedly charged; that there was no indication that the proceeds of sale of the equipment had been applied to the account of the 1st appellant; and that the sums of $1,000,000.00 or $300,000.00, paid to the bank by the 1st appellant's attorney, Delroy Chuck, could not be traced due to the lack of statements from the bank. In cross-examination he maintained this position.

[21] Mr Noel Tomlinson, the managing director of Equipment Engineering Services, in his witness statement, indicated that he had been a heavy equipment engineer and valuator for over 20 years. He stated that he had inspected several items of equipment for the purposes of preparing a valuation report. He set out the equipment previously mentioned herein and indicated that he would have valued the same at $9,900,000.00. He said that the equipment was easy to sell as they were widely used in the construction and mining industries, and as such, there had been no need for the bulk

sale of the equipment and the resulting financial loss. He said that at least two months should have been given for all interested bids to have been obtained and that more than one advertisement should have been published to attract the attention of all potential purchasers in order to get the best price.

[22] He stated in cross-examination that although some of the equipment was in need of repair he had not seen any report indicating that one of the engines had been missing. He also could not agree that the market was 'soft' in July 1993. It was his evidence that equipment depreciates over time and the longer the bank delayed in selling the same, the greater the cost for insurance and storage. He stated that in any event the true market price of goods was what persons were prepared to pay for it. Notwithstanding that, he gave the caveat that even given a demand for an item in the market place, one must still consider that someone may be willing to offer a price which might only be taking advantage of the situation. He maintained that although offers were an indication of what the market can bear, to get the best value the equipment should have been sold individually.

[23] Miss Merlene Patterson, at the time of deposing her witness statement on behalf of the respondent, was a loan recovery manager for Dennis Joslin Jamaica Inc (Joslin), agent for the respondent and the account officer for the account of the 1st appellant. She had had a career in banking for over 20 years. It was her evidence that from the records, the indebtedness of the 1st appellant to JCBL was assigned to Joslin in 2002, with notice given to the 1st appellant in 2003. She referred to the commitment letter of 5 May 1989 granting credit facilities by JCBL and JCT&MB in the amount of

$11,638,371.76, the stated purpose of which, she said, was "to provide working capital support for an existing overdraft, a demand loan to assist with the purchase of a 1988 Isuzu 4WD pick-up and a 1988 Mitsubishi Gallant, another demand loan to pay out liabilities at Canadian Imperial Bank of Commerce, a guarantee, letter of Credit and Lease". She set out the securities which had been given for the loan, which included some of the equipment mentioned herein, Bills of Sale registrable with Power of Attorney, and an unlimited guarantee from the 2nd appellant supported by a first legal mortgage over his residence in Mammee Bay in the parish of Saint Ann, stamped to cover $2,000,00.00.

[24] She deposed also to the three equipment lease agreements, two dated 7 December 1989 and one dated 12 December 1989, all relating to the equipment set out in para [15] herein. She mentioned that the agreements were supported by warranties, stating that the 1st appellant had the right to sell, and indemnifying the bank against all actions and loss. She stated that all debts of the company were consolidated by letter of 23 April 1990 and a fresh commitment letter was signed for a loan in the amount of $6,300,000.00, which was confirmed by letter dated 21 May 1990. The securities for the consolidated loan were the said securities mentioned above.

[25] Miss Patterson further testified that as the 1st appellant defaulted on the loan, the bank proceeded to sell the equipment pursuant to the Bills of Sale. She indicated that prior to the sale, the banks had received valuations of the equipment and had properly advertised the same in the Daily Gleaner. The equipment was sold to the highest bidder who offered to purchase all the equipment. It was her position that the

bank had acted properly in the sale. She also deposed that the bank's records revealed that "the sale of the equipment was pursuant to the Bills of Sale,.. and not under the Equipment Leases, which Leases were not utilized after the consolidation of the debt in 1990". The Mammee Bay property, she stated, was put up for auction subsequent to notice of default having been issued, but, as no bids were received, the bank then sought to foreclose on the same. She referred to the mortgage stamped to cover $2,000,000.00, but indicated that there was provision in the mortgage to up-stamp if the bank wished to do so. She stated clearly that it was the respondent's position that the 1st appellant was indebted to it in the sum of $22,193,531.27, of which the principal sum was $3,255,683.97.

[26] In cross-examination Miss Patterson admitted that she had no personal knowledge of the transactions referred to in her witness statement as she had never been employed at JCBL or JCT&MB, and as a consequence, she could not say specifically what sums had been disbursed by the bank. Additionally, she disclosed that the records did not show how much of the consolidated loan was made up of demand loans or by way of overdraft. It was her evidence that once the consolidated loan had been given, all other loans were extinguished and should have been brought to zero, although she admitted that she had not seen any record to that effect. She indicated that leases are part of a trust company's financing, and in the instant case the records showed that the bank had purchased the said equipment, and leased it to the seller, and she had seen no document evidencing the sale of the equipment back to the 1st appellant.

[27] She confirmed that the Mammee Bay property was part of the security for the consolidated loan although given as security prior to the loan, but she stated no debts existed after the consolidated loan had been established, save that loan, as they all would have been extinguished. She maintained that the only loan which had been assigned to the respondent was the said consolidated loan of $6,300,000.00. She confirmed that she had never seen any records indicating that the proceeds of sale of the equipment had been credited to the account of the 1st appellant and she also was unaware that the company had been repeatedly asking for information on its accounts. She indicated, that to her knowledge, the mortgage in respect of the Mammee Bay property had never been upstamped.

The decision of Brooks J (as he then was)

[28] The learned trial judge identified that there were four issues to be decided. They were as follows:

> "1. Were arrangements made in 1989 between the banks and the company concerning the company's equipment, rendered void and therefore unenforceable, by virtue of alleged breaches of the provisions of the Bauxite and Alumina Industries (Encouragement) Act;
>
> 2. Were arrangements made in 1990 between the banks, the company and Mr. Smith concerning the company's equipment and Mr. Smith's real estate, rendered unenforceable, by virtue of a link with the transactions conducted in 1989;
>
> 3. In the event that the answers to 1 and 2 are in the affirmative, what remedy, if any, is to be granted to Mr. Smith and the company in respect of the company's equipment and the steps taken against Mr. Smith's property;

4. In the event that the answer to question 1 and/or 2 is in the negative, what are the entitlements of each party?"

The learned judge correctly decided that the fourth question required consideration of other subsidiary issues which he further identified as follows:

"a. did the banks act properly in respect of the sale of the equipment;

b. what is the effect of the fact that the mortgage was stamped in respect of a sum smaller than the eventual debt;

c. did the banks act properly in respect of the steps taken pursuant to the mortgage of Mr. Smith's real estate;

d. has the JRF proved the debt, or rendered a proper account of the debt to Mr Smith or the company?"

[29] The learned judge, having set out the provisions of section 6 of the Act, construed the same as expressly prohibiting any transaction which breached the conditions of the lawful sale or gift of the relevant articles. He stated,

> "Any contract which purports to bring about such a sale or gift would therefore, on my interpretation of section 6, be illegal. The result would be that such a contract would be unenforceable."

He cited with approval the dictum of Bankes LJ in **Anderson Ltd v Daniel** (1923) 40 TLR 61, endorsed by the Court of Appeal of the Eastern Caribbean States in **Weekes v Gibbons** (1993) 45 WIR 142, namely that "there is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced".

[30] The learned trial judge set out the transactions in 1988, which, he said, were not impugned, which were the earlier credit facilities given by the bank with similar securities offered by the appellants, and those in 1989 which he stated were "much maligned". In respect of the latter, he referred to the equipment set out in para [15] herein, having been sold by the 1st appellant to JCT&MB, which in turn had leased each item back to the company. He referred to the documents which effected the transaction, namely: the invoice, Conditions of Sale, Receipt Certificate of Inspection and Acceptance, Equipment Lease, Addendum to Equipment Lease; Security Deposit Agreement and the Guarantee. He accepted that "although the attack has been leveled at the leases, the offending transaction would not be the lease agreement but rather the sale of the new equipment to Citizens Trust". Having reviewed the documentation against the section in the Act, he concluded that the several sales of the respective pieces of equipment were illegal. He relied on the dictum of Bankes LJ in **In re an Arbitration between Mahmoud and Ispahani** [1921] 2 KB 716 to the effect that

> "…as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

He also relied on the dictum of Devlin J (as he then was) in **St John Shipping Corp v J Rank Ltd** [1956] 3 All ER 683, where he stated:

> "… 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; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not."

[31] After stating that, he had reviewed the authorities in the light of the provisions of the statute, Brooks J observed that the court was less likely to deem unenforceable, any contract which is not expressly forbidden by it, if the relevant statute is mainly aimed at the protection of the revenue as opposed to the protection of the public.

[32] The learned trial judge concluded as follows, which was determinative of the first main issue in the case:

> "In the instant case, it is not the lease which is made illegal by the statute. The question therefore is whether the rights of Citizens Trust under the leases are directly resulting from the illegal act. I have come to the conclusion that they are not. It is true that, without the sale, Citizen's Trust could not have leased the equipment. However, Citizens Trust's rights under the lease are independent of the illegal sale. Citizens Trust is not required to disclose the manner by which it acquired ownership of the equipment in order to establish its claim to payment under the leases."

The learned judge recognized that the competing positions were powerful and persuasive in their own way but preferred to be guided by the voice of caution which he indicated was counseled by Devlin J in **St John Shipping Corp**, when he said thus:

> "...I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken."

And later on in the judgment he admonished:

> "…courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear."

Brooks J commented that the parties were merely using standard legitimate methods of financing, and there was no evidence of "wicked intent" and he concluded that as "neither the lease nor the method of giving effect to it are in contravention of the Act I find that it is not tainted by the illegal sale which preceded it".

[33] With regard to the second issue, the learned judge found the challenge to the efficacy of the 1990 Bill of Sale without merit, as the document had a provision which assigned the goods to the lender, and as the equipment leases were found by the judge not to be illegal, and the loan which incorporated them not to be tainted by the illegal sales, the Bill of Sale was also not invalid by virtue of the previous transactions. In any event it was his view that rights of title could still pass even if the transaction was tainted with illegality. He also found with some diffidence, as there was no direct evidence to support the fact that the equipment had been retransferred to the company, though the parties had proceeded as if they had been, that the 1990 Bill of Sale was one of the methods used to provide security for the consolidated loan. The court had found that the 1st appellant had accepted the consolidated loan on the terms set out in the letter dated 23 April 1990. As a consequence of the above, the third issue was no longer relevant.

[34] The learned judge found in respect of the fourth issue that the proceeds of the equipment sold under the Bills of Sale were credited to the consolidated loan account. The learned judge, relying on the authorities of **Singh v Ali** [1960] 1 All ER 269 and **Belvoir Finance Co Ltd v Stapleton** [1970] 3 All ER 664, and accepting the submission of counsel for the respondent, also found that even if the sales were illegal, title to the equipment did pass to JCT&MB, and the bank was therefore entitled to take possession of the equipment and pass good title to a bona fide purchaser. In arriving at that decision he observed that the company had warranted that it had a right to sell the goods and the fact that the equipment had not been forfeited to the Crown under section 6(2) of the Act made the principle applicable.

[35] In answer to the question posited by him in his reasons for judgment, "Did the banks act properly in the sale of the equipment?", the judge found that they had, and in so doing rejected some of the evidence of Mr Tomlinson, given on behalf of the appellants. This aspect is not an issue in the appeal and so I will say no more about it. With regard to the same question posed by the court in respect of the real estate, the court found that the issue of the correctness of the procedure in respect of the foreclosure, and whether the proper steps had been undertaken was a matter to be proved to the satisfaction of the Registrar of Titles. This, too, is not an issue on appeal.

[36] The judge asked this question, "Was there any resultant effect due to the fact that the mortgage was stamped for a sum smaller than the eventual debt?" In answer he referred to the fact that the mortgage was for $2,000,000.00 with a provision for interest and increase of the stamp duty if the principal amount was increased. The

mortgage, he said, was stated to be a "continuing security". The learned judge found that the respondent was entitled to upstamp the mortgage. He also found that as the instrument specified that the sum was due on demand, the fact that there was no date stated for repayment of the debt, did not render the same unenforceable.

[37] With regard to the issue of whether the respondent had proved the debt or rendered a proper account of the debt to the 1st appellant, he rejected the evidence of Mr Wiggan that the starting point in respect of the loan was $2,700,000.00, and was equally not satisfied that the $6,300,000.00, the amount of the consolidated loan set out in the letter of 23 April 1990, had been proved as having been fully disbursed. However, as there was an order for foreclosure based on the debt, and that on any interpretation, even on the 1st appellant's own evidence a debt was still owed to the respondent, then he said, "the justice of the case requires that an account be taken to determine what is the amount of the debt". He concluded that an order for liberty to apply was appropriate in the circumstances.

The appeal

[38] As indicated, I intend to deal with the grounds of appeal under three categories: namely: the illegality (which covers grounds 1, 3 and 5); the effectiveness of the mortgage under the Registration of Titles Act (grounds 2 and 6); and the computation of the accounts (grounds 7 and 8) Ground 4 in respect of the effect of the Bills of Sale is not being pursued on this appeal.

Submissions and Analysis

The illegality

[39] Counsel for the appellants in submitting on the law on illegality referred to the Act, the proper interpretation to be given to it and the applicability of the provisions to the instant case, and submitted that the contract to sell the equipment imported pursuant to the Act, within the five years without payment of the customs duty was illegal and contrary to statute (whether expressly or by implication) and unenforceable. Counsel submitted that the learned judge had found that the sales of the equipment were illegal and submitted that once the sales were illegal any contract collateral to those sales would have been tainted with the illegality and would be unenforceable, namely the leases, the mortgage, the Bill of Sale and the consolidated loan. She relied on several authorities to support this submission, namely, (**De Begnis v Armistead** (1833) 10 Bing 107, **M'Kinnell v Robinson** (1838 3 M & W 434, **In re An Arbitration between Mahmoud and Ispahani** and **Spector v Ageda** [1971] 3 WLR 498.

[40] With specific reference to the equipment leases, counsel relied on the doctrine of "ex turpi causa non oritur actio" (an action does not arise from a base cause) "to ground the submission that the respondent ought not to be permitted to found [its] case on [its] own illegality". The leases, counsel submitted, could not have been granted had the sales not taken place. The two, she contended, were inextricably linked, in that the leases were founded on the bank's illegal act of purchasing the

equipment. The leases, counsel maintained, were not as the respondent asserted, independent of the illegal sales. Both parties had proceeded, counsel stated, knowing of the provisions of the Act, and that they were acting unlawfully. It was counsel's submission that there was, to the contrary, no evidence that the parties did not have "wicked intent", and in any event once the transaction was contrary to the provisions of the statute and therefore illegal, the intent of the parties was not important.

[41] Counsel also submitted that the appellants did not dispute that title to the equipment had passed, and were not seeking to defeat the respondent's title to the same, but instead were asserting the illegality of the sales and relying on the House of Lords' judgment in **Moore Stephens (a Firm) v Stone Rolls Limited (in Liquidation)** [2009] UKHL 39, to say that the respondent's claim could be defeated, even if the respondent did not have to assert, the illegal purpose in making its claim, once the appellants could show that the contract was for an illegal purpose.

[42] Counsel submitted further that although the mortgage originally secured the loan made to the 1st appellant in 1988, that loan was no longer extant, and as the only loan relied on by the respondent was the consolidated loan, made in April 1990, then to the extent that the consolidated loan was a partially illegal loan, as it comprised the leases, the overdraft and demand loans, all of which had not been given for the purchase of the equipment but which latter had been found to be illegal, as the loan could not be specifically separated, the whole loan was tainted with illegality, and also the mortgage which secured it. Counsel submitted that the learned judge found that as the leases were not illegal the consolidated loan was not illegal. However, she asserted that as the

learned judge agreed that the loan could not be separated, then if this court found that the leases were illegal, this court ought to find that the consolidated loan was illegal also.

[43] Counsel for the respondent submitted that the learned judge was correct in finding that the leases were not prohibited by the Act, that the bank's rights under the leases were independent of the sale, and the consolidated loan although incorporating the leases, was not illegal. Counsel further submitted that notwithstanding the illegal origin, once title to the equipment was transferred, it remained with the respondent. She relied on **Singh v Ali** [1960] 1 All ER 269 and **Belvoir Finance Co Ltd v Stapleton** [1970] 3 All ER 664. Also, since title had passed, as owners of the equipment, by law, the bank had all the rights of ownership which they could assert against the whole world, which included the right to lease the equipment. Counsel referred to **Tinsley v Milligan** [1994] 1 AC 340 which, she submitted, remained good law, indicating that of importance in this case, was the fact that although its contract to lease the equipment, may have arisen from the illegal contract to sell the equipment, the bank did not have to rely on the illegal sales to recover its debt. Indeed, it was the appellants who were seeking to use the illegality to escape their obligations under the contracts. Counsel maintained that the judge was correct to state that one must peruse the statute carefully to ascertain the purpose of the protection. In the instant case the purpose of the protection was for the revenue and not in respect of the interest of the public, and this, she submitted, affected how the courts viewed the interpretation and efficacy of the contracts.

The effectiveness of the mortgage

[44] Counsel for the appellants referred to and relied on sections 103 and 105 of, and the 8th schedule to, the ROTA. Counsel submitted that to be valid as a security under the ROTA the mortgage document must include "the principal sum", the date of repayment of the same and the rate of interest at which the mortgage is to be repaid. The reference to "the original amount for stamp duty purposes - $2,000,00.00," was not sufficient, counsel indicated, to identify the principal sum, as this sum was never disbursed as a loan amount, and resulted in a clog on the equity of redemption. Counsel insisted that these were matters of substance, and having been omitted from the instrument, resulted in the mortgage endorsed on the certificate of title for Mammee Bay not being effective as a security pursuant to the ROTA, and in losing its protection under section 71 of the ROTA. Counsel relied on **Geon Contractors and Associates Ltd v National Commercial Bank et al** (1991) 28 JLR 409.

[45] Counsel submitted in the alternative, that the mortgage if valid, should only be security for the sum of $2,000,000.00, and the appellants should be permitted to redeem the same on payment of that amount.

[46] Counsel for the respondent submitted that both the ROTA and the dictum of Langrin J (as he then was) in **Geon Contractors and Associates** recognized that alterations of the forms in the schedule to the ROTA were permissible, and any omissions from the mortgage instrument would not result in the security being unenforceable, having been accepted by the registrar for registration. Counsel further

submitted that the original sum stated in respect of stamp duty purposes was $2,000,000.00, plus interest. The mortgage was, she stated, collateral to the guarantee, and the repayment of it was on demand at the rate applicable at the particular time, which was ascertainable. Counsel submitted that this was not a case dealing with priorities of registration and protection of subsequent third party rights. The respondent, she argued, would be restricted to the amount registered on the certificate, until the mortgage was upstamped, but the injunction obtained by the appellants had prevented any dealings with the title including the upstamping of the mortgage to reflect the amounts due.

Order for the accounts

[47] Counsel for the appellants submitted that the counterclaim of the respondent was not for an account, it was for a specific sum which the respondent had failed to prove and so the proper course, in those circumstances, which the judge ought to have adopted, was to give judgment for the respondent on the counterclaim with nominal damages. He certainly, counsel argued, should not have given the respondent another "bite at the cherry" to prove its case, which opportunity in any event would be futile, as the evidence before the court had already been found to be insufficient by the learned trial judge, and on the authorities no further evidence was admissible. Additionally, counsel submitted, the registrar of the Supreme Court had no power to assess any amounts due in these circumstances, as the judge had not ascertained the starting point, so the matter was not merely one of calculation. She referred to the evidence of Merline Patterson who had indicated that certain information pertaining to

the accounts which had not been placed before the court, could yet be obtained, produced and sent, which evidence had found favour with the judge. She submitted that, pursuant to rule 28.14 of the CPR, the respondent should not be permitted the use of any documents at the trial, and even moreso at this stage of the proceedings, which had not been previously disclosed. Counsel argued strenuously that equally, in the alternative, the matter ought not to be sent to a judge in the court below for the accounts to be assessed, as the matters the subject of this appeal have their genesis some 16 years ago and the 1st appellant has since died and any such approach would be very unfair. Counsel also contended that if there was no sum owing or the payments on the mortgage were not in default, or the amount owing had been satisfied, even after the land had been offered for sale, the order for foreclosure ought not to have been made, as it would have been invalid, and the injunction would have been properly granted.

[48] Counsel for the respondent submitted to the contrary, that the learned trial judge did find that the respondent had proved its claim, as he found that the appellants were indebted to the bank, but stated in his judgment that the amount was to be quantified. Counsel submitted further that the judge was empowered by the Judicature (Supreme Court) Act to direct the registrar to take accounts, which is what had been done in this case. It was a mathematical computation and this court, she submitted, should hesitate to overturn the discretion exercised by the court below to order the accounting exercise, unless there were exceptional circumstances, which do not exist in this matter (see **Charles Osenton & Co v Johnston** [1942] All ER 130). The registrar,

she stated, had been given parameters as to how to proceed, and in any event the judge had given liberty to apply. It was counsel's contention that in the situation which obtained, the order for foreclosure by the Registrar of Titles could not be faulted.

Analysis

Illegality

[49] Sections 4 and 5 of the Act clearly state that no customs duty or other similar impost or general consumption tax would be payable on certain articles, as set out in Parts I and II of the schedule to the Act, and other materials as described in the sections, if imported into Jamaica by any recognized bauxite producer and alumina producer. It is not in dispute in this case that the equipment purchased by the 1st appellant and imported into Jamaica by Kaiser Bauxite was exempted from these duties. The issue in the case below but not on appeal was whether the sale of the equipment to JCBL and JCT&MB was illegal. The judge found that it was and there has been no counternotice filed on behalf of the respondent challenging that finding. For clarity section 6(1) of the Act reads as follows:

> "Where any articles are imported into Jamaica free of customs duty pursuant to the provisions of this Act such articles shall not be sold or given away at any time within five years next after the date of their importation into Jamaica except to a person who under the provisions of this Act would have been entitled to import such articles into Jamaica free of customs duty or other similar impost or general consumption tax unless at the time when such articles are so sold or given away there is paid to the Commissioner of Customs and Excise or the Commissioner of General Consumption Tax all sums which would have been

> payable in respect of customs duty or other similar impost and general consumption tax in respect of the importation into Jamaica of such articles if such articles had not been imported into Jamaica under the provisions of this Act."

Section 6(2) of the Act states that if the articles are sold or given away other than specified in subsection (1) they will be forfeited to the Crown, and the parties to the transaction will be guilty of an offence. There is no provision for subsequent payment of the duties.

[50] The transaction between the parties appears to have taken place in this way. The equipment was imported into the country under the aegis of Kaiser Jamaica Bauxite, a bauxite producer, with the 1st appellant as a co-consignee on the import entry documentation due to its contract with Kaiser Bauxite. In May 1989, JCBL offered the 1st appellant credit facilities and the loan documentation was by way of (as an example), an invoice, which was exhibited showing: "Seller: Smith's Trucking Ltd: Sold to JCT&MB, 1 EUCLID 21 CTD END DUMP TRUCK SE IAL #66844, valued at $337,500.00, dated 12 December 1989" with (i) to which was attached conditions of sale, stating inter alia that the seller had the right to sell the equipment, that the equipment was of a merchantable quality and free from any lien, charge or encumbrance whatsoever, (ii) a receipt acknowledging monies paid for the equipment, (iii) guarantee warranting inter alia that the seller had the right to sell the equipment free from any lien, and that the property in the equipment passed free from any lien, (iv) the equipment lease between the owner of the equipment, JCT&MB and the 1st appellant, the hirer stating that the hirer covenanted inter alia not to sell or mortgage the equipment and to pay a monthly rental sum over a term of years, (v) addendum to

the equipment lease by which the parties agreed to pay an "additional cost of funds" certified by a chartered accountant of the owner, and (vi) Security Deposit Agreement wherein both parties agreed to waive the payment of any deposit which could be applied to any indebtedness under the rental agreement.

[51] The learned trial judge found as previously stated that the sale of the equipment to JCT&MB, without the payment of any customs duties was a breach of the Act. The letter of 5 May 1989 set out details of the offer of the credit facilities. The amount offered was $11,638,371.76 to be disbursed by way of overdraft, demand loans, a guarantee, a letter of credit, and a lease, the purpose of which was to, inter alia, provide working capital support and to assist with the purchase of motor cars and the equipment which is the subject of the appeal. Different rates of interest, tenure and repayment were stated. The letter of 23 April 1990 from JCBL offered to the 1st appellant the sum of $6,300,000.00 to be disbursed as a demand loan, the purpose stated therein, was to consolidate the overdraft, existing demand loans and leases. The rate of interest stated was 35% per annnum, "subject to adjustment at any time based on money market conditions and calculated on a 360 days basis". The security for the loan included a 1st mortgage on the Mammee Bay property and a Bill of sale over the equipment which had been sold to the bank. It was stated in the letter that "this commitment letter expires on May 22, 1990", but the bank submitted a letter dated 21 May 1990 which referred to a meeting held earlier in the bank with the 1st appellant, and confirmed inter alia, that all outstanding debts in the name of the company had been consolidated, and required repayment of the consolidated loan to be effected in

the manner stated therein, and that the security for the loan, particularly with regard to the equipment, should be protected and preserved.

[52] The question which arises, on appeal is, in the light of the above documentation in respect of the loan facilities provided to the 1st appellant from the banks, how did the finding of the learned trial judge that the sale of the equipment to the bank was illegal being contrary to the Act, affect the ability of the respondent, to whom the 1st appellants' debt was assigned, to recover the funds advanced by JCBL and JCT&MB to facilitate the purchase of the said equipment? The appellants of course submitted that the loan and all security provided for it was tainted by the illegality, and the respondent took the position that the loan transaction was independent of the illegal sales and enforceable.

The Law

[53] It is trite law 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 intent."

It is also a fundamental principle that "the court will not enforce a contract which is expressly or impliedly prohibited by statute." (Halsbury's Laws of England 4th edition reissue, para 869). Of course, if there is no express provision, the matter is one of

construction of the statute, which may affect either the formation or the performance of the contract (para 870).

It is also accepted that:

> "A contract or security not in itself illegal will be tainted with illegality and hence be unenforceable if it is founded upon another, illegal contract... the second contract will be enforceable if, though factually connected with the original illegal contract, it is remote from it and cannot be said in reality to spring from, or be founded on it." (Halsbury's, para 878)

One of the leading authors on the law of contract, Sir Guenter Treitel, in his text states the principle in this way:

> "Collateral transactions may be infected with the illegality of a principal contract if they help a person to perform an illegal contract, or if they would, if valid, make possible the indirect enforcement of an illegal contract. Thus a loan of money is illegal if it is made to enable the borrower to make or to perform an illegal contract, or to make an illegal payment or to pay a debt contracted under an illegal contract."

[54] The authorities of some antiquity set out the principle as stated above with the same clarity. In **De Begnis v Armistead**, which related to the recovery of money payable under an agreement between the parties to share the profits to be derived from opera and ballet performances in a theatre known by them to be unlicensed, contrary to the specific provisions of a statute, Tindal CJ indicated that he had no doubt that the agreement between the parties was an illegal agreement. He endorsed the dictum of Holt CJ in **Bartlett v Vinor** (Carth. 252) to this effect:

> "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute"

He also endorsed the dictum of Lord Ellenborough in **Langdon v Hughes** (1 M & S 596) who said this:

> "what is done in contravention of the provisions of an act of parliament, cannot be made the subject of an action."

[55] In **M'Kinnell v Robinson**, the defendant refused to pay the plaintiff's claim for monies lent on the basis that the amount had been borrowed by him, as the plaintiff well knew, to settle his gaming debts which arose out of his playing an illegal game of Hazard in an illegal gambling room. Lord Abinger CB had no difficulty in stating that the law had been fully settled that the repayment of money, lent for the express purpose of accomplishing an illegal object cannot be enforced. In this case he stated that the monies had been lent for the express purpose of "a violation of the law, and enabling the borrower to do a prohibited act". The defendant succeeded.

[56] In **re An Arbitration between Mahmoud and Ispahani**, the facts were that the plaintiff who had a licence to sell linseed oil sold same to the defendant who misrepresented that he too had a licence when he did not. It was unlawful at the time to buy or sell linseed oil without a licence pursuant to a 1919 Order. The defendant refused delivery and relied on the prohibition to reject the claim of the plaintiff. He succeeded. It was held that the contract of sale was prohibited and that the prohibition

was in the public interest, so no claim could be made under the contract. Bankes LJ made this clear statement:

> "The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into…"

He added, as set out before in para [30] herein but which bears repetition:

> "..as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

Scrutton LJ made his contribution forcefully in this way. He indicated that the law had been laid down in **Cope v Rowlands**, (2 M&W 157) where Parke B in delivering the judgment of the court had stated:

> "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."

The learned judge was adamant that it mattered not whether the prohibition in the statute was in protection of the revenue or any other object, although this approach has been viewed differently in the Court of Appeal of the Eastern Caribbean States (see **Weekes v Gibbons**). Scrutton LJ indicated that;

> "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." (emphasis supplied)

It was also his view that it mattered not whether the contract could be performed lawfully or unlawfully. In that case, the contract was absolutely prohibited, and if the

act is prohibited by statute for the public benefit, "the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality".

[57] In **Spector v Ageda**, sums were lent by the plaintiff solicitor to liquidate sums previously lent by her sister to borrowers, which she knew included an amount representing compound interest which was in breach of the Moneylenders Act, and illegal. The sister was not licensed under the Act. Megarry J in a painstakingly thorough analysis of fairly complicated facts, involving other issues, stated at page 510C-D:

> "It seems to me that where, as here, the subsequent transaction is entered into by a person who not only knows of the partial illegality of the prior contract but also is in a real degree responsible for it and wishes to avoid the consequences of it (as I think that Mrs Spector probably did) then unless that partial illegality is shown to relate solely to some defined portion of the subsequent transaction, so that only that defined portion is affected, the whole of the subsequent transaction will be affected by the illegality."

Earlier, he also made it clear at page 509-D that:

> "...if Mrs Spector lent money to the borrowers knowing that it was to be used for the discharge of an illegal loan, Mrs Spector's loan is also tainted with illegality, and she cannot enforce repayment of her loan."

[58] In my view, applying the above authorities, the following is clear:

(i) Whereas the funds supplied by the bank for the purchase of the equipment were not prohibited by the Act, and were certainly not to discharge unlawful obligations or relative to transactions with persons who were unregistered or unlicensed, the sale of the equipment, to the contrary, was

in clear breach of the Act, being expressly prohibited by the Act. The equipment lease however, relating to the hireage of equipment on the payment of a monthly rental was not made unlawful by the Act or any statute, and was not entered into with the object of committing an illegal act. The purpose of the consolidated loan was to consolidate the overdraft, existing demand loans and leases. The mortgage was given as one of the securities for it.

(ii) The specific prohibiting words of the legislation referred to, namely that the articles shall "not be sold or given away", do not capture the essence of what was done by the respondent, that is, what the learned judge described as the "standard legitimate methods to provide financing". The statute did not specifically address loans, and/or leases, and did not prohibit entering into contracts for the hiring of equipment for a specific sum. It cannot be said that the rental of the equipment was for the express purpose of an illegal object.

(iii) The consolidated loan and the leases were not therefore absolutely prohibited as the sales of the equipment for which customs duties had not been paid obviously were.

(v) Whilst the letter of May 1989 included one of the purposes of the loan as being the lease, which was stated to be a "sale and lease back", this loan was incorporated into the consolidated loan, the purpose of which, as

stated above, had no reference to the sale of the equipment and was the instrument by which the respondent acted.

[59] Counsel for the respondent as indicated had drawn the court's attention to two authorities which she stated were more applicable to the facts of the instant case, namely **St John Shipping Corp** and **Weekes v Gibbons**. In the former, Devlin J, as he then was, enunciated the principles and concluded that a fundamental and determining factor is the true effect and meaning of the statute. He stated at page 690 A-B:

> "the fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive."

[60] It is important therefore to construe the provisions carefully as one may find that in doing so the provisions of the statute do not prohibit the contracts collateral or subsequent to it. In this case, one must ask the question whether the statute which prohibits the sale of goods, unless certain conditions are met, extends to the prohibition of contracts which expressly provide for the hire of the purchased equipment at a monthly rate. This must be considered in the light of the fact that the initial contract was illegal pursuant to the Act, being a sale of the equipment and the party purchasing the equipment to hire, provided the funds for the initial purchase of the equipment. Additionally, do the provisions in the statute, as Devlin J put it, have as their centre or indeed "filling the whole space within their circumference", the

prohibited act of rental of equipment? I would think not. And that is so even though this must be viewed within the context of the evidence that the parties knew of the prohibition in the statute relating to the sale of the equipment.

[61] Devlin J further stated that each case must be determined with reference to its own particular statute and not by comparison with other cases. He also indicated that it was well accepted that a party cannot succeed if to do so he/she must disclose that he/she had committed an illegality. So, in this case one must ask the question does the respondent have to disclose the illegal sales to succeed in recovering on the equipment leases and the consolidated loan? I think not, which would therefore make the contract for the rental of the equipment and the consolidated loan enforceable.

[62] The Court of Appeal of the Eastern Caribbean States in **Weekes v Gibbons** decided that a very relevant and important consideration in determining whether a contract is unenforceable due to the prohibition in the statute is to consider the purpose of the prohibition, which is essentially one of public policy. Satrohan Singh JA, having set out the relevant principles with regard to how the court ought to act when dealing with illegal contracts, took the position that it was necessary to determine whether the particular Act absolutely prohibited the act being reviewed as being against morality and public policy or whether the prohibition was created merely for revenue purposes. In his view, with which the court agreed, in the latter circumstances, the contract could be enforced. In the instant case, in my opinion, the prohibition in the Act was in respect of the protection of the revenue and not in respect of morality or the public interest. It is also true, as stated earlier, that unlike the **Weekes v Gibbons**

case, which related to whether the particular statute expressly or impliedly nullified unregistered building contracts, or expressly or impliedly prohibited the performance or enforcement of such contracts, there is no provision for the subsequent payment of the customs duties in the Act, but it is still not at all clear how any absolute prohibition, if that is what it is in the Act, could be applicable in respect of the equipment leases and the consolidated loan which subsequently incorporated it, I find that the prohibition does not extend to them.

[63] However, as the respondent submitted, which found favour with the learned trial judge, there still remains the issue and the consequence in law, once title has passed in the equipment, irrespective of the illegal origin of the transaction. **Singh v Ali**, the Privy Council case, arising from Malaya concerned the acquisition of a lorry by agreement between two parties by which the lorry became registered in the name of one of them who had a haulier's permit, the lorry having been paid for by the other who did not have a permit, and this agreement was in contravention of certain Malayan motor vehicle regulations and in deceit of the responsible authority. When the party in whose name the lorry was registered took possession of it from the other who operated it, and who therefore sued for its return and/or damages for detinue, the court found that he had acquired the lorry and was entitled to relief, either in detinue or in trespass, and as the vehicle had not been returned, its value. Lord Denning explained the principle with his usual clarity. He stated at page 272 H-I:

> "Although the transaction between the respondent and the appellant 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 respondent. 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 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 **Scarfe v Morgan**, per Parke B. 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."

[64] Lord Denning confirmed this position in the Court of Appeal case in England, namely **Belvoir Finance Co Ltd v Stapleton**. This was another case of property being transferred through a conspiracy to effect a fraudulent and illegal purpose. The court held that the property remained vested in the transferee notwithstanding its illegal origin. It seems that even if possession of the property has not occurred, as long as the contract has been executed and the title has passed, the property belongs to the transferee who can claim it and enforce it. The transfer would neither be void, tainted with the illegality which preceded it, nor unenforceable, and that is so even if the claimant had to prove its title by relying on the illegal contract.

[65] In my view, it is clear from the above cases, and I agree with the finding of the learned trial judge, that once the title in the equipment passed in this case, the bank could assert a title better than anyone, to the whole world, and could exercise all rights incidental to the rights of ownership, including the rental of equipment to the 1st

appellant who participated with the bank in the initial illegal contract. This would be so even if they had to refer to evidence of the illegal contract, which in the instant case they did not have to do.

[66] The most recent authority to shed light on this difficult area of the law is the House of Lords' decision of **Moore Stephens (a firm) v Stone Rolls Limited (in liquidation)** delivered a few months after the decision of Brooks J in the court below. The facts were much different from those of the instant case. In that case the claimant company, sued its auditors in contract and in tort for failing to discover earlier than they did, fraudulent actions by the sole directing mind and will of the company, its managing director and sole beneficiary, which resulted in severe losses to the company which ultimately went into liquidation. The auditors accepted that they owed the company a duty of care which they had breached as they had failed to detect the fraudulent activity timeously, but they pleaded and relied on, successfully, the defence of *ex turpi causa.* One of the main issues in the case was whether the acts of the managing director could be considered the acts of the company, so that the company could not rely on its own illegality to ground the action, and whether the defence of *ex turpi causa* should succeed as it was the "very thing" that the auditors had a duty of care to prevent.

[67] Lord Phillips of Worth Matravers, in his speech, as a member of the majority of the House referred to and relied on the principles distilled from the earlier decision of the House, namely **Tinsley v Milligan**, which had been very clearly set out by Lord

Browne Wilkinson, also representing the majority of the House, wherein he stated as follows at pages 369, 375 and 377:

> "… it is now clearly established that at law (as opposed to in equity), property in goods or land can pass under, or pursuant to, such a contract. If so, the rights of the owner of the legal title thereby acquired will be enforced, provided that the plaintiff can establish such title without pleading or leading evidence of the illegality…
>
> … A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality.
>
> …
>
> … In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the plaintiff's case."

Lord Phillips however went on to say that:

> " 21. The House in **Tinsley v Milligan** did not lay down a universal test of *ex turpi causa.* It was dealing with the effect of illegality on title to property. It established the general principle that, once title has passed, it cannot be attacked on the basis that it passed pursuant to an illegal transaction. If the title can be asserted without reliance on the illegality, the defendant cannot rely on the illegality to defeat the title... The House did not hold that illegality will never bar a claim if the claim can be advanced without reliance on it. On the contrary, the House made it plain that where the claim is to enforce a contract the claim will be defeated if the defendant shows that the contract was for an illegal purpose, even though the claimant does not assert the illegal purpose in making the claim – see **Alexander v Rayson** [1936} 1 KB 169.."

He made the further point, with reference to other authorities, that the defence of *ex turpi causa* can still defeat a claim when the claimant has not asserted the illegality.

Also, he confirmed that the House had recently remarked that the maxim expressed a policy more than a principle, which is based more on a group of reasons than a single justification which would vary in different situations (Lord Hoffmann in **Gray v Thames Trains Ltd** [2009] UKHL 33).

[68] In the instant case, as already noted, the statute did not expressly prohibit the loan and the leases, which were not for an illegal purpose, title to the equipment had passed, and the respondent did not assert the previous illegality in proceeding with the action to recover the funds advanced. Additionally, the respondent's claim was not based on the "very thing" that the statute expressly prohibited, which was the sale of the equipment. These grounds therefore fail.

The effectiveness of the mortgage

[69] This aspect of the matter can be disposed of quite summarily. Section 103 of the ROTA permits a proprietor of land to register a mortgage in the form set out in the 8th schedule, which requires information on the principal sum lent, the terms of repayment and the rate of interest charged. Pursuant to section 105 of the ROTA the mortgage once registered shall have effect as a security. However section 172 of the ROTA reads as follows:

> "the forms contained in the several Schedules, and the forms for the time being in force under this Act, may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms respectively in any respect, not being matters of substance, shall not affect their validity or regularity."

[70] In my view, the section clearly provides for omissions and adjustments without the form being considered void. There was a sum mentioned in the schedule to the mortgage, as the "original amount for stamp duty purposes" namely $2,000,000.00 with interest. The instrument of mortgage had efficacy as a security for at least that amount, and I do not understand the 1st appellant to be saying that at the time the mortgage was given by the 2nd appellant there was not at least that amount owed by the 1st appellant to the bank and also at the time when the debts were consolidated and the mortgage remained a security for that loan. The mortgage supported an unlimited guarantee given by the 2nd appellant. The rate of interest was stated in the guarantee, and the mortgage which was stated to be a continuing security specified that the mortgagor covenanted with the bank to pay on demand all sums due by virtue of the guarantee. Clause 2(e) of the mortgage, where relevant to this discussion reads,

> "… then this Mortgage shall be impressed in the first instance with stamp duty covering an aggregate mortgage indebtedness in the amount stated in the said Schedule as original Amount for Stamp Duty purposes and in such latter case the Bank shall be and it is hereby empowered at any time or times hereafter (without any licence or consent on the part of the Mortgagor and whether before or after sale of the mortgaged property) to impress additional stamp duty hereon covering any sum or sums in excess of the Original Amount for Stamp Duty purposes guaranteed to the Bank by the Mortgagor to the Bank as aforesaid as the stamp duty impresses hereon will extend to cover."

There is no doubt that the above provision can only be construed to mean that the aggregate mortgage indebtedness was $2,000,000.00, however, the respondent had the power to upstamp the mortgage to cover additional amounts guaranteed by the

mortgagor, at any time, without the consent of the mortgagor and even after sale of the mortgaged property.

[71] In my view, counsel's reliance on the judgment of Langrin J in **Geon Contractors and Associates Ltd v National Commercial Bank et al**, is misconceived. In that case the real issue was whether amounts later advanced by the 1st defendant, who had registered its mortgage to secure the monies mentioned in the mortgage stamped to cover $1,100,000.00 could gain priority for further advances made after the caveat registered by the plaintiff's, who had purchased the mortgage properties from the registered proprietor had been registered. Could these advances be "tacked on" to the amount stated in the mortgage? The judge held that under the Torrens System the lodging of the caveat to protect an equitable charge upon the land operates as notice to all the world, and as the 1st defendant had been negligent in registering the increased amount, and the plaintiff had acted in reliance on the amount registered before the caveat was lodged, and the fact that the system of "tacking" does not operate in Jamaica where the Torrens System of registration is operative, the subsequent registering of the 1st defendant's interest by upstamping could not render the caveat invalid, and it would have priority over the subsequent advances.

The appellants could not succeed on these grounds.

Order for the Accounts

[72] The learned trial judge recognized that whereas the total sums realized for the sale of the equipment, namely $4,750,000.00 had been credited to the consolidated

loan account, there were sums which had not been credited to the 1st appellant's account, namely $1,000,000.00 and $300,000.00, and he had rejected that the sums disbursed on the loan were $2,700,000.00. He appeared to accept Miss Patterson's evidence that the respondent could produce further documentation which had been sent to the 1st appellant to prove that the amount disbursed on the consolidated loan was $6,300.00, as stated in the letter of 23 April 1990. The appellants' challenge to this is based on rule 28.14 of the Civil Procedures Rules (CPR). There has been no specific response to this submission. However, there is provision in the Judicature (Supreme Court) Act (section 43) which states that subject to the rules of court any judge of the Supreme Court can direct the registrar to take accounts, make enquiries and give such assistance as he thinks fit. Any person aggrieved by any act or decision of the registrar can appeal to the court. The acts of the registrar are subject to ratification by the court, and in that way become binding on the parties. On enquiry, it may yet be shown that the information in respect of the accounts had been disclosed. The judge has indicated in his order that the interest rates to be utilised are only those which can be proved to have been communicated to the appellants by the banks, and failing such proof, the rate to be utilized is 35% per annum, from 1 February 1996, on the principal sum found due by the registrar, until payment. In my view, the order for the inquiry of accounts by the registrar seems quite appropriate in the circumstances. Any decisions taken are subject to review by the court.

[73] In **Charles Osenton & Co v Johnson** [1942] AC 130, the House of Lords was dealing with the issue of whether an official referee should be utilized to decide matters

relating to the professional competence of estate agents and surveyors with no provision for appeal, pursuant to the English Judicature Act, on the ground that a prolonged examination of documents or a scientific or local examination would be necessary. The House held that as the reputation of professionals was involved, the matter should be tried in the normal way, before the High Court and a jury. This case is not very helpful, therefore, in the deliberations before us, and I understand that the authority was only used by the respondent's counsel by way of analogy to show the wide breadth to which the provision similar to section 43 had been used in cases by the courts. Counsel attempted to place greater reliance on the dictum of Viscount LC, wherein he re-stated the principles governing the interference of the appellate tribunal with the exercise of the discretion of a judge of the lower court, which, he stated, were well known and recognized. That notwithstanding, in this case, the court found that the making of the order was a wrong exercise of the discretion which it was the duty of the House to correct.

[74] In the instant case, it is my view that this was a matter that could be dealt with by the registrar. There was the jurisdiction for the making of the order, the taking of accounts appeared to be, in the main, mathematical considerations in order to arrive at the amounts ultimately due to the respondent from the appellants. The court was not abandoning its responsibility to make a final decision, as the judge had given guidance as set out above and as stated in his judgment (page 28). Additionally, there was liberty to apply, and the decision of the registrar was subject to ratification by the judge to be binding on the parties.

[75] With regard to the issue of the proceedings of foreclosure by the Registrar of Titles, I have already indicated that the mortgage in respect of the Mammee Bay property was in keeping with the requirements of the ROTA and that it was not tainted by any illegality. Sections 119 and 120 of the ROTA set out in detail the basis on which the application for foreclosure can be made, and the processes which should be adopted in order for the registrar to make such an order. On this point, I agree with counsel for the appellants that once the accounts are taken, if no sums are owing to the respondent then the application for foreclosure would not be applicable, as the application commences with, and the threshold of the same, is evidence of default of payment of principal and interest of money secured on the mortgage. As a consequence, until the process of the order on the accounts has been completed, the court, in my view, ought not to address the issue. When the registrar of the Supreme Court has completed the taking of the accounts and that process has been ratified by the court, the efficacy of the order for foreclosure can be reviewed by the Registrar of Titles.

In my view, these grounds do not appear to have any merit and must fail.

Conclusion

[76] I would dismiss the appeal with costs to the respondent to be agreed or taxed.

McINTOSH JA

[77] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

MORRISON JA

ORDER

The appeal is dismissed. The orders of Brooks J are affirmed. Costs to the respondent to be taxed if not agreed.