

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CIVIL

CLAIM NO: ANUHCV 2008/0494

BETWEEN:

BERTRAND BURKE

Respondent / Claimant

and

GEORGE DUBERRY

Applicant / Defendant

Appearances:

Ms. C. Debra Burnette for the Respondent / Claimant

Dr. David Dorsette for the Applicant / Defendant

2008: December 18; 2009: April 23, May 28

RULING

- [1] **Thomas J (Ag.):** The matter before the Court is an application by the applicant / defendant to strike out the claimant's statement of case.
- [2] The background is that on 25th August 2008, the claimant filed a fixed date claim form seeking a number of remedies against the defendant.

[3] At paragraph 4 (1) of the statement of claim, it is pleaded as follows:

"It was expressly agreed that the defendant would on behalf of the claimant:

(1) Perform, execute and manage certain survey work ("the survey work") three (3) employees in the performance of the survey work. A list of the work comprising the survey work is annexed hereto and marked as 'B.B 1'."

[4] The content of this exhibit is as follows:

"LIST OF SURVEY WORKS

The defendant agreed to:

(i) Seek confirmation from the Development Control Authority (DCA) whether a service road as shown on the subdivision plan of Block 34-2780A Parcel 87 and Block 35-2870A Parcel 386 hereinafter referred to as 'the Piccadilly' needed adjustment.

(ii) Do the adjustment survey (if necessary) in order for the plan to be amended for the DCA's signature on the mutation forms and subsequent authentication by the Chief Surveyor. The sum of \$1,900.00 could then be collected on behalf of the claimant.

(iii) Receive the sum of \$3,200.00 for survey work done on the Blache Frank survey at the Golf Course (four lot subdivision with cost of \$800.00 per lot) once the DCA approved the plan and the authentication was provided for by the Survey Department.

(iv) Relocate pegs for the McKay survey at New Winthropes and receive the sum of \$700.00 upon completion on behalf of the claimant.

(v) Conduct field work for Eva Philips at Barnes Hill survey: Block 41-2095E Parcel 66 and send the measurements to the claimant and receive the calculations and plans from the claimant and submit the same to the Chief Surveyor for demarcation and receive the sum of \$700.00 on behalf of the claimant upon completion.

(vi) Relocate all boundary pegs, survey and layout access roads for H. Marshall at Willoby Estate / Savanna Estate for the total sum of \$23,000.00. The sum of \$8,000.00 was collected by the defendant to cover some expenses and the remaining \$15,000.00 was to be collected afterwards. Copies of the email correspondence dated April 23rd 2008, and May 12th 2008 are hereto bundled and marked, 'A'.

(vii) Adjust the completed survey of Hazel Barnes at Galley Bay to fit the Data Sheet at Survey and Lands and receive the sum of \$6,000.00 on behalf of the claimant upon completion. The plans were given to the defendant to do the adjustment survey.

(viii) Receive the calculations from the claimant with regards to Mr. Horsford's survey at Monks Hill and have the plan drawn, checked and authenticated and to collect the sum of \$2,000.00 on behalf of the claimant upon completion.

(ix) Collect all outstanding sums of money from Alexis Thomas for the Seatons survey and receive a total sum of \$1,500.00 on behalf of the claimant upon completion (the claimant received the sum of \$1,000.00, there is an outstanding sum of \$500.00)."

[5] In his application filed on 5th December 2008 the applicant / defendant applies for an order that the claimant's case for an account be struck out and costs.

[6] The grounds of the application are:

1. The statement of case as cause of action relating to an account be given by the defendant is founded on an illegality to wit an agreement contrary to section 15 of the **Land Surveyors Act**.¹
2. The defendant is an employee of the claimant and not a fiduciary and being a non-fiduciary there is no duty to account.

[7] In his affidavit in support the applicant / defendant deposes at paragraph 1 and 2 thereof as follows:

- "1. I am the defendant in this matter I am a surveyor assistant and from 1996 have served as an employee, a surveyor assistant of the claimant. I respond to the claimant's affidavit filed on 17th November 2008.
2. I have been advised by my attorney, Dr. David Dorsett, and do truly believe that the claim for an account is founded on an illegal contract which the claimant references at paragraph 4 of his affidavit. I am advised and do truly believe that the illegal contract is prohibited by section 15 of the **Land Surveyors Act**.
3. With respect to paragraph 3 of the claimant's affidavit, I repeat that I have been employed by the claimant since 1996."

[8] Expressly or impliedly the applicant acknowledges that a contract exists but he is saying that it is founded on an illegality. The illegality arisen for the following reasons:

1. The definition in regulation 2 purports to permit the assistant to take measurements using the equipment when the surveyor is not present. On the other hand in the Act "assistant" is permitted to engage in survey work "directly under the control of the surveyor."
2. There is no question of the surveyor being present when the assistant is using the surveying instrument to make measurements during the course of a survey.

¹ Cap. 239 (Laws of Antigua and Barbuda).

What I did on that occasion was to ask you to file submissions on the question of severance in light of the position taken.

The enactments

- [9] With respect to the survey work the applicant is saying that this could only be prepared by a licence surveyor as surveying is a regulated activity. As such the defendant could not perform such work lawfully.
- [10] The respondent holds to the definition of surveyor's assistant in the Land Surveyors Regulations which purports to allow a surveyor's assistant to do survey on his own, that is to say in the absence of a licensed surveyor.
- [11] The Court had previously in chambers given its thinking on the matter of the definition "assistant surveyor" in the Land Surveyors Regulations being *ultra vires*, the **Principal Act**. The basic principle being that subordinate legislation cannot exceed the vires of the enabling enactment. In the circumstances the Court requested that submissions be filed on the question of severance.
- [12] But it follows from the *ultra vires* point that the contract is illegal since it called for the performance of survey work by someone who is not licensed to perform. Survey in the Act is defined as, defining boundaries of any land. The authorities also establish the principle that a contract that is subject to licensing or similar requirement is illegal if it is performed (or intended to be performed without the requested license)². And neither party may enforce such a contract even if unaware of the illegality, see *Re: Mahmoud by PC in Yin v Son*.³
- [13] The Court therefore agrees with learned counsel for the applicant / defendant that at every juncture the claimant's claim is rooted and grounded in illegality.
- [14] And it is no less so because of the matter and servant relationship. The point here is that while a master and servant relationship is lawful, it only retains lawful character so long as the purpose is lawful. *Ab initio*, the applicant contracted to do survey work – illegal as to formation.⁴

² *J. Dennis & Co. Ltd v Mann* [1949] 2 KB 327, *Bigos v Bousted* [1951] 1 All ER 92.

³ [1962] AC 304

⁴ With respect to a contract that is illegal as to formation the learning in Vol. 1 of *Chitty on Contracts* (29th ed.) at para. 16-005 reads in this way: "Where the contract is illegal as formed, or it is intended that it should be performance in legality prohibited manner the Courts will not enforce the contract, or provide any other remedies arising out of the

[15] Section 30 of this Act in this context is very much part of the equation. It provides that:

“Where there exists a relationship of master and servant, principal and agent or corporation and officer of that corporation, every such person concerned in that behalf shall be jointly and severally responsible for compliance with provisions of this Act.”

[16] At this midway juncture it is important to set out verbatim the content of section 15 of the Act. It is in the form of a prohibition and provides thus:

“15. No person, other than a surveyor shall-

- (a) survey any holding or land for the purpose of preparing any plan which is attached to or is referred to in any document or instrument purporting to confer, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title or interest; whether vested or contingent to or over any holding or land, being a document or instrument which is required to be registered or is ineffectual until registered under any law for the time being in force relating to the registration of a transaction in or of title to, land; or
- (b) perform any survey which affects or may affect the definition of the boundaries, or the location of survey marks, or of any holding or land registered under any law for the time being in force relation to the registration of land or of title to land.”

Severance

[17] Learned counsel on both sides have in compliance with the order of the Court, filed substantial submissions on the question of severance.

[18] In the case of learned counsel for the applicant / defendant comes down to the following at paragraph 32:

“When one considers in the round the case brought forward by the claimant and the agreement that he relies on, it is respectfully submitted that there can be no severance. The transaction and arrangement for the defendant to ‘perform, execute and manage certain survey work’ was expressly illegal and contrary to section 15 of the Land Surveyors Act. The defendant was required to do an ‘adjustment survey’ to relocate pegs, to conduct field work for a surveyor and to have a certain plan drawn. All of this is the work of a surveyor of land. In the circumstances it is respectfully submitted that the illegality cannot be divorced from the agreement and as such the claim must fail.”

contract. The benefit of the public and the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract.”

[19] The submission is buttressed by two dicta from **Varante v Governing Body of Addey and Stanhope School (No.2)**⁵ and **Clinton Softleigh v Jasmine Jones ANUHCv 2006/0048** to the effect that the Court will not assist litigants in their illegality.

[20] In the case of learned counsel for the claimant / respondent she examined all of the constituents of the Exhibit **BB1** and made submissions which either turned on the master and servant relationship or the definition of "assistant surveyor". The ruling has already made on these two matters and as such no reliance can be placed on them in the face of a patent illegality.

[21] But for the avoidance of doubt the actions required under paragraphs (ii), (iv), (v), (vi) and (vii): "do the adjustment survey," "relocate the pegs," "conduct field work," "relocate all boundary pegs," and "adjust the completed survey" all involved acts which an assistant surveyor cannot do lawfully unless the surveyor is present.

[22] So that Court again re-states the ruling that the acts contemplated by the agreement are illegal. This disposes of Ms. C. Debra Burnette's submissions on the point.

[23] But learned counsel has not given up what she contends in the alternative, severance is applicable. The final submission on the point is as follows:

"15. In the instant case, it is submitted that of the Court were to find that any part of the terms of the agreement were illegal, the same can be severed and the claimant can enforce the remainder of the contract. It is the submission of the claimant, however, that the entire contract is valid and enforceable."

[24] An earlier submission is that the tasks to be performed by the defendant are independent of each other and the non-performance of one does not depend on the other. For this proposition **Carney v Herbert et al**⁶ is cited.

[25] In Vol. 9 (1) **Halsbury's Laws of England (4th ed. Re-issue)** the following principles on severance are set out as follows:

"First as a general rule, severance is probably not possible where the objectionable parts of the contract involve illegality and not mere word promises, at least where the illegal covenant forms a main part of the consideration or is against public policy. However, in one type of case, the Courts have adopted what amounts almost to principle of severance by holding that, if a statute allows work to be done up to a financial limit without a licence above that limit, then, where work are done under a

⁵ [2004] EWCA CIV 10 05

⁶ [1985] 1 All ER 438

contract which does not specify an amount but which in the event exceed the financial limit permitted without a licence, the cost of the works up to that limit is recoverable.

Secondly, where severance is allowed, it must be possible simply to strike out the offending parts; the Court will not re-write or re-arrange the contract.

Thirdly, even if the promises can be struck out as previously mentioned, the Court will not do this if to do so would alter entirely the scope and intention of the agreement.

Fourthly, the contract shown of the offending parts must retain the characteristics of a valid contract, so that if severance will remove the whole or main consideration given by one party, the contract becomes unenforceable. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable.”

Conclusion

[26] Taking the first principle quoted from *Halsbury’s Laws* above, and given the objectionable parts of the contract severance is not possible. The objectionable terms being those which require the applicant / defendant to perform survey work *ab initio*. These are sub-paragraphs (ii), (iv), (v), (vi) and (vii) of Exhibit BB1.

[27] In *Chitty on Contracts Vol. 17*, it is stated that: “Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the Courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit to the public; and not the advantage to the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract.”

[28] It can also be said that the requirement to perform illegal acts dominates the contract as five out of nine terms call for a prohibited activity, as opposed to three relating to the collection of fees and one which may be termed administrative. Further, it is the submission of learned counsel for the applicant / defendant that are the claimant’s statement of case arises out of and is clearly connected or inextricably bound up with his illegal conduct.

[29] Learned counsel for the respondent / claimant has cited the case of *Carney v Herbert*⁸ in which severance was ordered in the context of both legal and illegality. The essence being a lawful sale of shares but illegal mortgages relating to the sale. It was held that:

“Since the contract was essentially concerned with the sale by the respondent to the applicant or his nominated company of shares in A Ltd and since the mortgages, like the guarantee, were ancillary to that contract and were for the sole purpose of ensuring due performance of the contract by the purchaser, the mortgages could not be said to go to the heart of the transaction and their elimination

⁷ (25th ed.) at para.1036

⁸Loc cit.

would not alter the subject matter and primary obligations of the parties thereto. Accordingly, the mortgages could be severed from the remainder of the contract.”

[30] Dr. Dorsett on the other hand relies on the matter of the illegalities, which are patent, to say that severance could not be ordered. But the cases show that it is not that clear a solution on an application of the rules.

[31] In *Carney v Herbert*,⁹ Lord Brightman speaking for the Privy Council reviewed a line of authorities where contracts contained an illegal or void term and more often than not the term was severed and the contract permitted to stand as it still had the characteristics of a valid contract. With that said, it is of some significance to note that in *Halsbury's Laws* the rules quoted above, speak of “severance is probably not possible where the objectionable parts of the contract involve illegality and not mere void promises.” The emphasis is on the word ‘probably’.

[32] To return to Lord Brightman he relied on dicta of Chief Justice Jordan in *McFarlane v Daniell*¹⁰ in terms of the appropriate test of severability. The dictum is as follows:

“This approach was echoed by Jordan CJ in *McFarlane v Daniell* (1938) 38 (NSW) 337. That was a case in which an actor sued for his remuneration under a contract of employment which contained a restrictive covenant which was void as being in unreasonable restraint of trade. The employer boldly contended that the actor could not recover his remuneration because the contract was wholly void. Jordan CJ said (at 345):

‘When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature... If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable... If the substantial promises were all illegal or void, merely ancillary promises would be inseverable.’

He added later (at 346):

‘The exact scope and limits of the doctrine that a legal promise associated with, but severable from, an illegal promise is capable of enforcement, are not clear. It can hardly be imagined that a Court would enforce a promise, however, inherently valid and however severable, if contained in a contract one of the terms of which provided for assassination.’ ”

[33] The critical test of the question whether or not the terms of the contract constitutes an indivisible whole. And quite often the division is made and the offending term is severed. And as to whether the remainder is enforceable terms on questions of public policy and or moral turpitude. As noted

⁹ Loc cit.

¹⁰ [1938] 38 SR (NSW) 337

the example given is one for the carrying out of an assassination. Tritel¹¹ refers to the circumstance as a crime or immoral promise.

[34] In this case as noted before that the term in the agreement may be divided into surveying work, collection of fees and administrative. And based on what has been said before in light of sections 2 and 15 of the Act the term relating to survey work are illegal. The question then becomes whether these terms apply the test noted above can be severed. In other words are they part of an indivisible whole which cannot be taken to pieces without altering the whole? The answer must be in the negative. And with respect to the remainder there is nothing criminal or immoral about them so that they are enforceable and there is no need for alteration by the Court.

[35] Therefore based on the authorities the order of the Court is that the terms of the contract set out in sub-paragraphs (ii), (iv), (v), (vi) and (vii) of Exhibit BB1 must be severed and the residue can be enforced.

[36] **ORDER**

IT IS HEREBY ORDERED as follows:

1. The definition "assistant surveyor" in the **Land Surveyors Regulations, Cap. 239** is, *ultra vires*, the **Land Surveyors Act** which contains a definition of "assistant."
2. Section 15 of the **Land Surveyors Act, Cap. 239** expressly places restriction on surveying which encompass the applicant.
3. The terms of the agreement which require the applicant to do certain acts of surveying work without a licensed surveyor being present are illegal.
4. The residue of the agreement which require the applicant to perform certain acts of collecting fees and a certain act in relation to the DCA, all in relation to surveyors are not prohibited by the Act.

¹¹ The Law of Contract (7th ed.) at p.448

5. Applying the test of severance as to whether constitute an indivisible whole, the residue of the agreement can be severed and enforced as the severance only changes the extent but nature of the agreement.
6. The application to strike out the claimant's statement of case is referred.
7. Matter to be set down by the Court Office for the first hearing.

[37] Given the fact that on 23rd April 2009, the order was given in chambers without the written ruling, the Court now fixes the date of the ruling as being 28th May 2009 at which time the written ruling will be available.



Errol L. Thomas
Judge (Ag.)