IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV656 of 2021

BETWEEN:

[1] TEK MULTI-SERVICE LIMITED

Claimant

and

[1] THE ATTORNEY GENERAL OF BELIZE

[2] THE MINISTER OF NATURAL RESOURCES

[3] THE REGISTRAR OF LANDS

Defendants

Appearances:

Mr. William A. Lindo for the Claimant
Ms. Samantha Matute for the Defendants

2023: August 25;
2024: February 19.

JUDGMENT

[1] **ALEXANDER, J.:** On 27th January 2020, the Minister of Natural Resources ("the Minister") approved Tek Multi-Service Limited's ("the claimant") application to purchase Lot E19119 comprising approximately 782,397 square meters of land situate along the sea coast, Caribbean Shores Registration Section, Block No. 45, Belize City, Belize District. The purchase price was two thousand dollars ($2,000.00) and the claimant was required to pay the purchase price immediately or within three years of approval. Other conditions of purchase included the lease No. BZC-54/2019 remaining in effect until

the freehold title was issued and a down payment of three hundred and thirty-three dollars and thirty-three cents ($333.33) to be paid to the Land and Surveys Office within three months of the approval. The claimant accepted the conditions and on 11th May 2020 completed full payment of the purchase price.

[2] The Registrar of Lands ("the Registrar") issued a Land Certificate dated 12th June 2020 under the Registered Land Act Cap. 194 R.E. 2011 ("RLA") conferring on the claimant the title absolute over the land described in paragraph 1 above, which was by now labelled as Parcel 5112 on the Land Certificate. I shall refer to that parcel as "the disputed lands."

[3] About eight months after receiving the Land Certificate for the disputed lands, the claimant received a letter dated 22nd February 2021 from the attorneys-at-law for the West Landivar Citizens Action Committee demanding that the claimant cease what it described as unlawful activity on the disputed lands. The attorneys pointed out that the disputed lands form part of the National Public Reserve Dolphin Park ("the Dolphin Park Reserve") which was so declared on 16th October 2007, and published in the Gazette of 20th October 2007 "for the protection of the mangrove reserve and marine life." The letter accused the claimant of unlawfully causing the illegal subdivision of the Dolphin Park Reserve and unlawfully purchasing the disputed lands without any de-reservation having occurred under the National Lands Act Cap.191 R.E. 2003. The claimant was warned that a failure to comply with the demand to cease and desist from dealing with the disputed lands would result in further legal action.

[4] The West Landivar Citizens Action Committee ("the Committee") is a duly registered company in Belize. By way of an agreement dated 15th August 2007 with the Belize City Council, the Committee was appointed as the custodian of the Dolphin Park Reserve.

[5] By letter dated 30th March 2021, the claimant's attorneys wrote to the Minister stating that the claimant was "shocked" that title for the disputed lands "was issued in the 'Dolphin Park Reserve' without the then Minister taking steps to dereserve the disputed

lands." The letter called upon the Minister to exercise his powers under section 6(7) of the National Lands Act to dereserve that portion of the disputed lands falling within the Dolphin Park Reserve or alternatively for the payment of damages to the claimant for breach of contract being the market value of the disputed lands. The Minister acknowledged receipt of the claimant's letter and requested an extension of time to allow the Ministry to complete its "investigation and assess the options for an amicable resolution" before the commencement of any proceedings in the Supreme Court. The claimant received no further word from the Minister.

[6] While letters were being exchanged between the Committee, the claimant and the Minister, the Registrar by Instrument LRS-202101677 on 23rd February 2021 placed a Restriction over the disputed lands on the Register pursuant to section 135 of the RLA. The reasons disclosed by the Registrar were that: a national reserve cannot be owned by a private individual; a de-reservation of the Dolphin Park Reserve did not occur; unlawful subdivision of the Dolphin Park Reserve via Subdivision Entry Plan 19119 dated 2nd January 2020 citing the name Dolphin Park; damage and destruction to mangroves; and the blocking of the Dolphin Park Reserve and its nearby public access boat slip. From the Restriction Instrument, the Committee is listed as a reason or ground for the placement of the restriction on the Register. Indeed, the defendants pleaded that the restriction was entered on the application of the Committee.

The Claim

[7] By claim dated 25th October 2021, the claimant commenced proceedings against the defendants for a declaration that it is entitled to possession of the said land and specific performance of the contract of sale. In the alternative, the claimant sought general and special damages for breach of the contract of sale, and aggravated damages for the high-handed way in which the Registrar registered the Restriction on the Land Register.

[8] In their defence, the defendants denied that the claimant is entitled to any of the reliefs claimed. They averred that the claimant was at all material times aware that the disputed lands formed part of the larger portion designated as the Dolphin Park Reserve comprising 9987.7 square meters. Since there was no de-reservation of the

Dolphin Park Reserve, any sale by the Minister would be contrary to the National Lands Act Cap. 191 R.E. 2003 and is a nullity and any agreement for such a sale would likewise be an illegality, null and void.

[9] For its part, the claimant replied and denied any knowledge that the disputed lands formed part of the Dolphin Park Reserve. The claimant stated that it was the Minister who had failed to take the necessary steps to ensure that title to the disputed lands was passed to the claimant free from all encumbrances in breach of contract. A failure to dereserve does not void the sale or the agreement for the sale of the disputed lands and it remains open to the Minister to dereserve the disputed lands and pass a good title to the claimant.

[10] Before the filing of witness statements and the trial of this claim, I acceded to an application by Ms. Matute to determine, as a preliminary issue of law, the question of whether the sale of the disputed lands was ultra vires the National Lands Act rendering the agreement between the claimant and the Government of Belize (represented by the Minister) null and void. By an order dated 5th June 2023, I directed the parties to file written submissions on this preliminary issue.

The Statutory Framework

[11] It is convenient at this point to set out the material provisions of the National Lands Act:

> 5. (1) National lands shall not, save as is excepted by section 6, be dealt with or disposed of, except in the manner hereinafter provided.
>
> (2) The Minister shall appoint an Advisory Committee to advise him generally on all matters relating to land administration.
>
> (3) The Minister may appoint local committees to assist him in the consideration of applications for all tenants of national lands and other matters relating to land distribution.
>
> 6. (1) Nothing contained in this Act shall prevent the Minister from excepting from sale in the ordinary manner and reserving to the Government of Belize the right of disposing of in a manner as for the public interests may seem best, such lands as may be required as reserves, public roads or other internal communications, or commons, or as the sites

of public buildings, or as places for the interment of the dead, or places for the education, recreation and amusement of the inhabitants of any town or village, or as the sites of public quays, wharves or landing places on the sea coast or shores of streams, or for the construction of tram or railways or railway stations, or canals, or for the purpose of sinking shafts and digging for minerals, or for any purposes of public defence, safety, utility, convenience or enjoyment, or for otherwise facilitating the improvement and settlement of Belize, or for special purposes.

(2) The Minister shall also have power to alter, vary or add to the ordinary terms and stipulations upon which any grant, lease or licence is made, should it be considered expedient to do so in any special instance.

(3) All reserves shall be notified in three successive issues of the Gazette and in one issue of a local newspaper and set forth on plans in the office of the Commissioner.

(4) All dereservations of reserves shall be notified in three consecutive issues of the Gazette and in one issue of a local newspaper.

…

13. (1) National lands may be sold at such prices and on such terms and conditions as to improvements and otherwise as the Minister may prescribe on the advice of the Advisory Committee.

(2) An application to purchase national lands shall be made in the form of the Second Schedule.

The Defendants' Submissions

[12] Ms. Matute submits that the National Lands Act prohibited the contract for the sale of the disputed lands making the contract illegal and void ab initio. The object of the National Lands Act is to govern national lands. The legislative intent to be discerned from section 5(1) is that it dictates the lawful manner of disposal of national lands. It prescribes that national lands can only be lawfully dealt with or disposed of in conformity with the provisions of that Act, which at section 13 confers on the Minister a discretionary power to sell national lands where an application has been made. However, section 5(1) also contemplates and authorizes the disposal of national lands in accordance with section 6.

[13] According to Ms. Matute, the purpose of section 6 is to exempt national lands from sale in the ordinary manner provided for under section 13 and to reserve the same to the

Government of Belize in service of the public interest. Section 6(4) provides for the de-reservation of national lands previously reserved in accordance with sections 6(1) and 6(3), such that those national lands would once again become vendable by the Minister under section 13. In other words, until de-reservation, reserved lands are "untouchable" by the Minister. In support of this construction, she relies on paragraph 47 of the unreported decision of Conteh CJ in **Chawla v Attorney General**[1] (which paragraph will be reproduced in my analysis below).

[14] It is against that backdrop that Ms. Matute argues that although sections 5, 6 and 13 do not expressly prohibit the contract for the sale of the disputed lands, that prohibition is a necessary implication in the National Lands Act. In that regard, she submits that the relevant questions for this court are (i) does the National Lands Act prohibit contracts for the disposal of national lands and if yes, (ii) was the contract for the sale of the disputed lands of the kind prohibited by the Act?

[15] She submits that there is a clear implication that section 5(1) intends to prohibit contracts which purport to dispose of national lands in a manner inconsistent with the National Lands Act. Given this, it would be absurd to contend that the Act permits contracts which purport to do exactly that which the Act prohibits. Section 5(1) contemplates and expressly authorizes the disposal of national lands in accordance with section 6. As such, a contract which purports to dispose of national lands in a manner inconsistent with section 6 would accordingly be prohibited by section 5(1). Accordingly, Ms. Matute contends that as the whole or any part of the Dolphin Park Reserve was not dereserved in accordance with section 6(4), the Minister had no authority to sell the disputed lands to the claimant or any other person. Moreover, the sale of the disputed lands was not made legal by the execution of the contract as between the claimant and the Minister. Therefore, the National Lands Act impliedly prohibits the contract for the sale of the disputed lands, which undoubtedly belongs to the class of contracts which section 5(1) intends to prohibit and it is illegal and void ab initio.

[1] Claim No. 831 of 2009

The Claimant's Submissions

[16] While Mr. Lindo accepts that the disputed lands fall within the Dolphin Park Reserve, he submits that that fact does not automatically render the disputed lands incapable of sale by the Minister. He argues that the decision in **Chawla** was arrived at *per incurium* and is not a valid statement of the law. The decision was *per incurium* because Conteh CJ failed to consider the provisions of the Land Reserves (other than Indian and Carib reserves) Regulations, which by regulation 13 reserves to the Government, the right to sell any Crown land in any reserve not occupied at the time of the exercise of that right. Therefore, Mr. Lindo submits that Conteh CJ embarked upon an implied reading into section 6 that unless notification was done in accordance with section 6(4), there was an automatic proscription preventing the Minister from selling or dealing with reserved lands. That exercise was not permissible having regard to the express language, of section 13 of the National Lands Act and the Land Reserves (other than Indian and Carib reserves) Regulations, which places into the Minister's absolute discretion the decision on the disposal of Crown lands.

[17] According to Mr. Lindo, these Land Reserves (other than Indian and Carib reserves) Regulations also apply to the Dolphin Park Reserve since there were no special regulations created. He contends that section 13 of the National Lands Act is not subject to section 6 and that there is nothing in the Act which states that non-compliance with section 6(4) (the procedure for de-reservation) would prevent the Minister from exercising his powers under section 13. Section 6(4) is no more than a procedure for notification. Notification does not amount to actual de-reservation and is not a condition precedent to de-reservation. I understand this submission to be that the Minister's power to dereserve does not come from section 6(4) but stems from the Minister's overall discretion conferred by section 13 to decide how Crown lands are disposed of or otherwise dealt with and that a failure to notify pursuant to section 6(4) does not invalidate a decision by the Minister to dereserve. In this way, if the Minister makes a decision to dereserve by entering into a contract for the sale of reserved land, the non-publication of the Notices under section 6(4) does not invalidate the contract.

[18] Mr. Lindo also submits that the Land Certificate dated 12th June 2020 conferred upon the claimant indefeasible title pursuant to section 26 RLA. The guarantee of title provided for by section 26 RLA is subject only to the statutory exceptions under sections 30 and 31 RLA, neither of which applies to or affects the claimant's title to the disputed lands. Therefore, the claimant continues to enjoy the title absolute to the disputed lands.

[19] On the question of illegality, Mr. Lindo contends that on a proper reading of section 6 of the National Lands Act along with Regulation 13 of the Land Reserves (other than Indian and Carib reserves) Regulations it is pellucid that the sale of reserved land is not prohibited. Further, a sale of national land without the relevant notification in accordance with section 6(4) does not amount to a proscription of the sale of such land. He submits that there is also no clear implication in section 6 which prohibits or restricts the power of the Minister under section 13 and invites this court to find that there ought to be no such implication. However, if the court does find the contract to be 'statutorily illegal' it should follow the approach of Burgess JCCJ in **Belize International Services Limited v The Attorney General of Belize**[2] which leads unwaveringly to the conclusion that there was no illegality.

[20] Mr. Lindo reiterates that if the court finds favour with the defendants' submissions that the contract is illegal, the claimant's alternative case is one for general damages for breach of contract and not specific performance. According to him, the claimant has committed no illegal act and the grant of damages for breach of contract will not compromise the integrity of the legal system by encouraging individuals to enter purported illegal contracts. Conversely, to allow the defendants to succeed on the defence of statutory illegality would amount to allowing the defendants to profit from their own wrongdoing/negligence and not holding the Government of Belize to its rule of law obligations. It would be harsh and unconscionable for the Court to uphold the position of the defendants that owing to the Minister's own illegality that the Claimant should suffer.

[2] [2020] CCJ 9(AJ)

Analysis

The Law

Definition & Rationale

[21] The resolution of this preliminary issue sounds in the notoriously complex area of the law known as the common law defence of illegality. The illegality defence arises when the defendant in a private law action argues that the claimant should not be entitled to its normal rights or remedies because it has been involved in illegal conduct which is linked to the claim. If the courts accept the illegality defence, it often involves granting an unjustified windfall to the defendant, who may be equally implicated in the illegality. However, if the courts refuse, they may be seen to be helping a claimant who has behaved illegally. See generally the **UK Law Commission Report "The Illegality Defence" (Law Com No.320)**.

[22] Illegality is a defence existing at common law which applies to conduct which is a transgression of a statutory prohibition or breach of a common law rule.

[23] According to Lord Mansfield CJ in **Holman v Johnson**[3]:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.

[24] Therefore, illegality provides a defence to claims in many circumstances on the civil side of the law. In the law of contract, a contract may be prohibited either expressly or impliedly by a statute. It may be entered into for an illegal purpose (whether statutory

[3] (1775) 1 Cowp 341

or common law), and its performance may involve the commission of an offence or other unlawful act. In **St John Shipping Corp v Joseph Rank Ltd**,[4] Devlin J said:

> If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, 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.

[25] Where the illegal act is a breach of statute, some statutory construction is necessary at the onset to determine whether the contract is prohibited by statute or not. There will be cases where the contract is not so forbidden but elements of the contract, its purpose or performance may be contrary to statute. In those circumstances, the contract is said to be tainted by illegality and the question to be determined is what is the effect of the statute on the acts done in pursuance of that tainted contract. Statutory construction is necessary to determine to what extent the act complained of is in breach of the law before going on to consider whether the defence of illegality is made out.

[26] A contract may also be tainted with illegality where it conflicts with a principle of the common law. But unlike cases of statutory illegality where the policy underpinning the illegality is supplied by the statute, in cases of common law illegality the policy is to be identified and evaluated by the court. The aim is to determine whether the policy of the law requires the defeat of an otherwise valid claim. This is not unlike the exercise that must be undertaken where a contract is not prohibited by a statute but contains elements which conflict with legislation.

[27] It is now important to rehearse the approach of the courts in appraising where the public interest lies to determine if there is a nullity on account of the illegality.

[4] [1956] 3 All ER 683 at 690

The reliance principle

[28] For many years the reliance principle guided the courts in navigating the choppy waters of the illegality doctrine. That principle emerged from the case of **Tinsley v Milligan**[5] which involved the purchase of a home by Miss Tinsley and Miss Milligan. Both parties contributed to the purchase price, but the property was transferred into the sole name of Miss Tinsley, which assisted Miss Milligan in making false claims for social security benefits. Miss Milligan eventually confessed and came to terms with Her Majesty's government but her relationship with Miss Tinsley broke down and the latter brought an action against her for possession of the home. Miss Milligan counterclaimed that by virtue of the joint contributions to the purchase price, the house was held on trust for the parties in equal shares. Miss Tinsley resisted on the basis that the purpose of the transaction was illegal. The House of Lords held that title to property could pass under an unlawful transaction, but the court would not assist an owner to recover property if he had to rely on his own illegality to prove his title. Miss Milligan succeeded because all she had to rely on to show a resulting trust was the joint contribution of the purchase money and a common intention that the parties were joint owners. There was no necessity to rely on the illegal purpose of the conveyance into a single name.

[29] Lord Browne-Wilkinson reasoned by way of analogy that the result would be different if the relationship between the parties had been that of mother and daughter and both had contributed to the purchase price. The presumption of advancement would operate in the daughter's favour and the mother would be compelled to rely on the illegal purpose of the transaction to rebut the presumption and the doctrine of illegality would destroy the mother's claim. The only difference between the example and the facts of **Tinsley v Milligan** was procedural. Lord Borwne-Wilkinson acknowledged some unease with this procedural approach when he observed at page 89 that "the effect of illegality is not substantive but procedural". The question therefore is, "In what circumstances will equity refuse to enforce equitable rights which undoubtedly exist."

[5] [1993] 3 All ER 65

[30] **Tinsley v Milligan** and the line of authority it birthed became the subject of heavy criticism both by judges and academic commentators within and without England to the effect that in order to do justice in a particular case, judges had to strain the application of relevant rules and create exceptions to the general rules to avoid unnecessarily harsh outcomes and reach decisions that were generally fair.

[31] The Law Commission in *The Illegality Defence (Law Com. 320) paragraphs 2.13. to 2.15* considered that the reliance principle was arbitrary, uncertain and had the potential for injustice. It is arbitrary because whether or not the illegality has any effect on the recognition or enforcement of the trust does not depend on the merits of the parties or the policies that underlie the illegality defence. The outcome of the case will turn solely on the procedural issue of whether any legal presumption is in play and how closely the illegality is tied up with any evidence that the parties may wish to rely on. The uncertainty stems from the confusion over exactly what amounts to "reliance." Because of its arbitrary operation, the reliance principle has the potential to force the courts into unjust decisions. The Commission pointed out that whether or not illegality has any effect on a case should be determined by reference to the policies that justify the existence of the defence. This will allow the court to take into account such matters as the conduct of the parties, the seriousness of the illegality involved and the value of the interest at stake. By focusing solely on procedural matters, the reliance principle does not permit these issues any relevance.

The retreat from Tinsley v Milligan

[32] An enhanced 9-member panel of the Supreme Court of the United Kingdom had the opportunity to confront the correctness of the **Tinsley v Milligan** approach in **Patel v Mirza**.[6] The majority, led by Lord Toulson, overturned the approach in **Tinsley v Milligan** and introduced a 'range of factors' test. At paragraph 120 he opined:

> [120] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of

[6] [2017] 1 All ER 191

> which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust, or disproportionate.

A prescriptive or definitive list of factors would not be attempted because of the infinite possible variety of cases. Potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability. The integrity and harmony of the law permitted and required such flexibility.

[33] In **Patel v Mirza**, Mr. Patel paid £620,000 to Mr. Mirza for the purpose of using the money to trade in shares using insider information which Mr. Mirza expected to obtain. As it turns out, no such information was obtained, and no trading took place with the funds. The agreement between them thus amounted to a conspiracy to commit an offence of insider trading. Mr. Mirza failed to repay the money to Mr. Patel and the latter brought an action for recovery of the funds on the bases of contract and unjust enrichment. To establish his claim for the return of the money, Mr. Patel had to rely on the nature of the agreement which reveals a conspiracy to commit insider trading. At first instance, the claim was rejected in accordance with the reliance test since it could only be established if Mr. Patel relied on his own illegality.

[34] The Supreme Court disagreed and disapproved of the reliance test. It held that a claimant, such as Mr. Patel, who satisfied the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money, which he sought to recover, was paid for an unlawful purpose. There might be rare cases where for some reason the enforcement of such a claim might be

regarded as undermining the integrity of the justice system, but there were no such circumstances in the present case. After examining the policy underlying the statutory provisions about insider dealing, there was no logical basis why considerations of public policy should require Mr. Patel to forfeit the moneys which he had paid into Mr. Mirza's account, and which were never used for the purpose for which they were paid. Such a result would not be a just and proportionate response to the illegality. Mr. Patel was seeking to unwind the arrangement, not to profit from it.

[35] Therefore, the law in the United Kingdom has moved on from the strict reliance test and its labyrinthine exceptions. It now focuses on the policy factors involved and the nature and circumstances of the illegal conduct in determining whether the public interest, in preserving the integrity of the justice system, should result in denial of the relief. The question was whether the relief claimed should be granted.

[36] Countries which retain the judicial committee of the Privy Council such as Trinidad and Tobago have adopted the **Patel v Mirza** approach.

The law in Belize

[37] In **Belize International Services Limited v The Attorney General of Belize**[7] ("**BISL**"), a majority of the CCJ (Wit, Anderson and Rajnauth-Lee JJCCJ) held that **Patel v Mirza** was not part of the law of Belize and that the Court of Appeal was wrong to simply apply it. All three judges reserved the question of whether **Patel v Mirza** should be adopted into the law of Belize for another day in a more appropriate case. See paragraphs 9 and 23. Burgess and Jamadar JJCCJ preferred to follow the approach in **Patel v Mirza**.

[38] The facts of **BISL** were that BISL entered into an agreement with the Government of Belize to assist in the development and management of two statutory bodies, the International Merchant Marine Registry of Belize ('IMMARBE') and the International Business Companies Registry of Belize ('IBCR'). The income earned by these two registries (in the form of fees, taxes, and penalties) was to be deposited in several

[7] [2020] CCJ 9(AJ)

escrow accounts of these registries. From these monies, BISL was entitled to take 40% for expenses and from the remaining net income 60% would be paid to the Government (who would then pay that amount into the Consolidated Revenue Fund). The original agreement was set to run for a period of ten years with an option to renew for another term of ten years. In 2003, BISL exercised the option of renewal, extending the term to June 2013. BISL and the Government subsequently agreed to extend the contract to June 2020 and BISL paid the Government US$1.5 million as consideration. This latter agreement was described as the extension agreement.

[39] In June 2013, the Government forcefully took control of both IMMARBE and IBCR from BISL who commenced proceedings against the Government in 2015 for damages for breach of contract. The Government defended the claim on the basis that the extension agreement was unlawful because:

i. it was not put out to tender in compliance with the Financial Orders 1965;
ii. the Executive did not have the authority to lawfully approve and bind the Government to that agreement; and
iii. the extension agreement, as far as it continued the original agreement, was inconsistent with section 114 of the Constitution and section 4 of the Finance and Audit Act ("FAA").

In effect, the Government raised the defence of illegality. The extension agreement was unlawful, therefore, the court should not enforce an illegal agreement and the claim should be dismissed.

[40] The CCJ was unanimous that while some elements of the agreements were tainted by illegality, the agreements were enforceable, and the Government was in breach. BISL was held to be entitled to damages for the breach of contract to be assessed. However, the members of the court differed drastically in their approach to the unanimous outcome.

[41] Wit JCCJ found that the first question to be answered was whether the original agreement was valid or 'tainted by illegality'. He recognised that in a strict sense, the agreement did not meet the formal payment structure stipulated in section 114 of the Constitution (as repeated in section 4 of the FAA). However, he agreed with reference

to the analysis of Burgess JCCJ, that it was inconsistent with the letter but overall not, as he put it, with the spirit of the Constitution. In this respect, he specifically highlighted the underlying purpose of section 114 of the Constitution, which is to enable Parliament to exercise proper control over expenditure and the raising of public revenue, and the provisions of the agreement which created an obligation on BISL to allow inspection of records "at any time deemed necessary" by the Government and requiring accounting and auditing by the Auditor General. He stated, however, that even if his perspective was incorrect, and parts of the Agreement were inconsistent with section 114 of the Constitution, as his colleagues had concluded, then the question of severance would arise, allowing a simple "legal surgery" of the payment aspect of the contract. Such severance would not be problematic as BISL was seeking enforcement of the agreement through an award of damages, which only concerns the question how much money BISL was entitled to and not how that money was to be paid. Severance, therefore, would leave a valid and healthy agreement for which damages could be claimed. It was thus unnecessary for him to go on to consider the proper illegality test or approach. If severance was not possible, Wit J expressed an affinity to the alternative approach adumbrated by Jamadar JCCJ. See paragraph 18 of his judgment.

[42] Anderson JCCJ, with whom Rajnauth-Lee JCCJ agreed, approached the case from a more traditionalist perspective and took as his north star the law prior to **Patel v Mirza**, which may be set forth in four propositions:

> [31] … These propositions are set out hereunder and discussed, so far as they are determinative of the issues involved in this case. The four propositions are these:
>
> i. A contract that is prohibited by law will not be enforced by the courts.
>
> ii. A contract that is not prohibited by law, but which is nonetheless otherwise tainted with illegality, may be enforced by the courts if to refuse enforcement would be disproportionate to the degree of illegality involved.
>
> iii. The prohibition by law of a contract does not prevent the return of moneys or other property or benefit transferred under the contract if such restitutionary relief does not entail the enforcement of the contract.
>
> iv. The return of moneys or other property or other benefit transferred under the contract will be denied, even where no enforcement of the contract is

involved, if such restitutionary relief would lead to the stultification of the law prohibiting the contract.

It is clear from this matrix that the courts in this country had moved some distance from the **Tinsley v Milligan** reliance test even before **Patel v Mirza** changed the law in the United Kingdom, with a greater emphasis being placed on proportionality and justice. In that analysis, there is significant scope for judicial discretion.

[43] Regarding the first proposition, Anderson JCCJ explained that a contract may be prohibited by either statute law or the common law. A contract prohibited by law is unenforceable. There can be no recovery at all under such an illegal contract. Whether a "contract is prohibited by statute law is, necessarily, a question of statutory interpretation." Where the statute uses clear words, there is a case of 'express' prohibition; there may also be 'implied' prohibition but only where there is a 'clear implication' or 'necessary inference' that this was what the statute intended. Common law illegality occurs where the contract runs counter to one of the established heads of common law public policy.

[44] He scoffed at what he described as the introduction by Lord Toulson in **Patel v Mirza** of a distinction between the enforcement of contracts prohibited by statute as opposed to those prohibited by common law. According to Anderson JCCJ, it was made clear by the majority that a policy-based 'range of factors test' would apply to common law illegality but not statutory illegality. In his opinion however, there should be no distinction between contracts prohibited by statute and those contrary to an established head of the common law of public policy. At paragraphs 59 and 60, he states:

[59] It must be entirely clear that a contract prohibited by statute is unenforceable because a court of law is bound to give effect to the terms of the statute. Where a statute prohibits a contract (whether expressly or by implication) it cannot lie in the mouth of any court to give effect to such a contract (in the absence of legislative provision such as that in section 62 of the UK Criminal Justice Act 1993) by reference to the "range of factors test". That would necessarily be perverse and a threat to the rule of law. It would raise profound philosophical considerations going to separation of powers and democratic rule. Where the contract is rendered illegal and void by statute there is nothing to enforce and that is the end of the matter.

[60] But there is no obvious reason that there should be a major or substantive difference where the contract is prohibited, not by statute but under the common law. Where a contract is prohibited under an established head of the common law of public policy it would be a contradiction in terms not to find that that contract is, in consequence, void and unenforceable. As Leong JA suggested in Ochroid Trading, to hold otherwise would render the whole doctrine of common law illegality entirely nugatory as well as illusory…

[45] According to Anderson JCCJ, this was a case of statutory illegality so the 'range of factors test' can have no applicability to the first issue in this case as concerns allegations that the Extension Agreement was itself prohibited by the Constitution, legislation, and regulations. He considered that the agreement, by providing for the moneys collected to be paid into escrow, and not directly to the Consolidated Revenue Fund, was not in compliance with section 114 of the Constitution and section 4 of the FAA. Therefore, the agreement was tainted with illegality in as much as it provided for the payment of public moneys into an escrow account and not into the Consolidated Revenue Fund as required by the Constitution and legislation.

[46] His Lordship concluded that the agreement cannot reasonably be said to have been prohibited by the Constitution, the FAA or the IBC Act. An important aspect of the agreement, the payment of sums collected under the two Registers, was indeed inconsistent with two statutory instruments. However, this inconsistency was not central to the pith and substance of the agreement. That illegality was not such as to render the agreement illegal and therefore unenforceable.

[47] This conclusion triggered the second proposition whereby a contract that is not prohibited by law, but which is nonetheless otherwise tainted with illegality, may be enforced by the courts if to refuse enforcement would be disproportionate to the degree of illegality involved. Anderson JCCJ considered that the correct approach involved the application of principles of proportionality. In weighing proportionality, he enunciated the policy factors suggested by the Law Commission of England and Wales as including a) furthering the purpose of the rule which the illegal conduct has infringed, b) consistency, c) that the claimant should not profit from his or her own wrong, d) deterrence and e) maintaining the integrity of the legal system.

[48] In applying proportionality to that case, he found that it would be grossly disproportionate to deny enforcement of the contract. In arriving at this finding, Anderson JCCJ listed the relevant considerations as including, inter alia the fact that: none of the agreements was entered into with a criminal objective; the Government had the primary obligation to ensure compliance with the Constitution and legislation; the financial structure created by the agreements facilitated transparency and oversight for the Government; and the core of the contract involving the provision of services was not prohibited by the statute. He also posited that since BISL did not seek specific performance but rather damages for breach of contract, it can succeed in the relief sought.

[49] Given that outcome, he found it unnecessary to consider the other two propositions. It was these remaining two propositions which Anderson JCCJ observed at paragraph 134 had been "upended by the controversial ruling of the specially convened nine-judge coram of the UK Supreme Court in **Patel v Mirza**." In the same paragraph, he cautioned that "the **Patel v Mirza** decision to apply the 'range of factors test' to decide on enforceability of all aspects of claims tainted with illegality may have introduced significant and unnecessary uncertainty into an area of the law that requires clear rules." Like Wit JCCJ, he expressed the desirability of a full bench of the CCJ deciding whether to follow **Patel v Mirza** in respect of those two propositions.

[50] It is this Anderson approach which Ms. Matute urged me to follow. Mr. Lindo, on the other hand, urges the approach of Burgess JCCJ (with whom Jamadar JCCJ agreed).

[51] Burgess JCCJ agreed at paragraph 206 that "a range of factors test such as the one announced in **Patel v Mirza** is the correct test to be applied in Belize." To avoid any uncertainty and inconsistency, the modern approach in common law jurisdictions towards greater flexibility is to provide a coherent analytical structure as to how the illegality defence is to be applied to the facts and circumstances in individual cases. The **Patel v Mirza** "range of factors" approach is an example of such an approach applicable to both common law and statutory illegality. He stated at paragraph 241:

[241] Based on the review of the recent case law in common law jurisdictions, three steps are to be followed in assessing whether the integrity of the legal system would be harmed in enforcing a contract which is rendered illegal by a statute. These are what may be called (i) the interpretation step; (ii) the public policy analysis step, and (iii) the proportionality analysis step.

[52] The interpretative step is the ascertainment of the meaning and application of the law which is identified as giving rise to the illegality. Where that law concerned is legislation, this step refers to the exercise of statutory interpretation. An important point of departure for Burgess JCCJ was that there is no difference in the treatment of statutory and common law illegality and even if the interpretative step indicates that the contract is prohibited by the statue, questions of public policy and proportionality must still be considered to determine whether, notwithstanding the prohibition, it accords with public policy in maintaining the integrity of the justice system to allow the illegality to defeat the claimant's claim. He observed:

[202]…Lord Toulson's statement at para [109] of the judgment in *Patel v Mirza*. Lord Toulson in fact said there:

> The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it that way rather than whether the contract should be tainted by illegality, because the question is whether the relief claimed should be granted.

[203] Plainly, this statement is directed to the application of "the common law doctrine of illegality" and not to "common law illegality" as claimed by Andrew Phang Boon Leong JA. This conclusion is not only inescapable from the language of the statement, but also from the context of the case and the syntax of the paragraph in which the statement was made. *Patel v Mirza* concerned illegality based on a contravention of the Criminal Justice Act 1993. It would be strange, therefore, if Lord Toulson would adumbrate such a consequential limitation on his newly minted range of factors test en passant in a statement like that in para [109]. Perchance Lord Toulson in this statement intended that the range of factors test was not to apply in the context of statutory illegality, however, I would agree with Andrew Phang Boon Leong JA's observation at para [70] of his judgment that this would result "in a rather anomalous situation since, ex hypothesi, if a contract is prohibited, it ought not, in principle, to matter whether that prohibition is by way of statute or the common law".

[204] I wish to underline my understanding that the range of factors test adopted in *Patel v Mirza* applies, subject to the obligation on the court "to abide by the terms of any statute", to both statutory illegality and common law illegality. There is no reason in principle why a distinction should be drawn between common law illegality and statutory illegality for purposes of applying the range of factors test. Such a distinction was never drawn in the application of the reliance test.

[53] I do not think that this is an entirely accurate interpretation of the majority's decision in **Patel v Mirza** for several reasons. First Lord Toulson, in **paragraph 110** immediately following on Burgess JCCJ's quote from paragraph 109, stated:

I agree with the criticisms made in Nelson v Nelson and by academic commentators of the reliance rule as laid down in Bowmakers and Tinsley v Milligan, and I would hold that it should no longer be followed. **Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract**…There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question. [My emphasis]

Here Lord Toulson makes clear that in cases where the statute expressly or by implication forbids the contract, *ipso facto* rendering it void and unenforceable, it is unnecessary to have an enquiry into "whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed." The statute already shines the spotlight on where the public interest rests.

[54] Second, the substance and context of Lord Toulson's analysis suggest that there are cases of statutory illegality which are treated differently. At paragraph 41 in relation to the comments of the Law Commission (which found a central plank of the criticism of the reliance test) he stated that "if a contract involving prohibited conduct is not void as a matter of statutory construction, the Commission recommended that in deciding whether a claim arising from it should be disallowed by reason of illegality, the court should have regard to the policies that underlie the doctrine." Also, at paragraph 109 in reference to **Vita Food Products Inc v Unus Shipping Co Ltd (in liq)**[8] when explaining the proportionality aspect of the recommended treatment, Lord Toulson had

[8] [1939] 1 All ER 513

his eyes wide open to the distinction between cases where the contract is forbidden by statute and when it is not. Lord Wright at page 523 of **Vita Food Products Inc** stated:

> Illegality is a concept of so many varying and diverse applications that in each case it is necessary to scrutinise the particular circumstances with precision in order to determine if there is illegality, and, if so, what is its effect. As Lord Campbell LC, said in reference to statutory prohibitions in Liverpool Borough Bank v Turner, at pp 507, 508:
>
> > 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'
>
> In that case, the court, by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument, where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. On the other hand, cases can be cited where the contract was not avoided by some particular illegality, for example, Kearney v Whitehaven Colliery Co, where an illegality in a certain respect in an agreement of employment was held not to vitiate the whole contract. Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

There was no adverse comment in **Patel v Mirza** on this expression of the law.

[55] Finally, the English Law Lords had the opportunity to consider **Patel v Mirza** in the Privy Council case of **Energizer Supermarket Limited v Holiday Snacks Ltd**[9] from Trinidad and Tobago. In that case, the Privy Council confirmed that a line exists between the effects of an illegality arising from statute. The Board stated:

> 32. Mr Hosein primarily rests his case on illegality on what has been termed “statutory illegality” as opposed to “common law illegality”: see Okedina v Chikale [2019] EWCA Civ 1393; [2019] ICR 1635, para 12; Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43; [2021] AC 563, paras 74-75. This distinction is a reference not to the source of the illegality (which is plainly the statute) but rather to the

[9] [2022] UKPC 16

effects of the illegality. With statutory illegality, one is concerned with applying whatever the statute lays down, expressly or impliedly, as to the effects of the illegality. As Lord Toulson said in the leading case on common law illegality of Patel v Mirza [2016] UKSC 42; [2017] AC 467, at para 109: "The courts must obviously abide by the terms of any statute ..." This is determined by ordinary statutory interpretation. Common law illegality is applied where the effects of the illegality have not been laid down, expressly or impliedly, in the statute. With common law illegality, one is concerned to determine the effects of the illegality at common law and the correct approach is to apply the "policy-based" approach adopted in Patel v Mirza (which was accepted and applied in Trinidad and Tobago in First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corpn (Civ App No 11 of 2011 (unreported) 25 January 2017).

What Lord Toulson was describing as 'common law illegality' was not only breaches of conduct in breach of the common law but also the species of cases where the statute does not dictate what is the effect of non-compliance with its terms and those effects are left to be determined at common law.

[56] In this context, I understand both Anderson and Burgess JJCCJ to be saying that except where statute, either expressly or by implication, forbids the contract, a public policy/proportionality analysis is not avoided simply because some elements of the contract are contrary to statute. The distinction is not between statute and common law but between statutes which prohibit the contract simpliciter and those which performance or purpose may be contrary to the statute. Where the contract is so tainted for want of compliance with a statute, it is no different a position to cases where the contract runs counter to a principle of the common law. In these cases, the same public policy/proportionality analysis applies to both categories of illegality (statute or common law).

[57] Burgess JCCJ's public policy analysis and proportionality steps are in lockstep with the substance and tenor of the approach of Lord Toulson in **Patel v Mirza.**

[58] When viewed at arms-length, Anderson and Burgess JJCCJ are not very far apart in their approaches to the illegality defence. The two approaches may not necessarily lead to different conclusions as demonstrated by the **BISL** case itself. However, the Anderson approach is undoubtedly more predictable than the Burgess method since

the focus of Anderson JCCJ is on proportionality as opposed to a broad-based qualitative evaluation of where the public interest is located in the circumstances of a given case as a pre-requisite to the proportionality analysis.

[59] Jamadar JCCJ agreed entirely with the decision of his brother Burgess JCCJ. However, he enunciated an alternative constitution-centric approach. He lent support to the resuscitation of the basic structure doctrine as a major plank of his analysis. I make no further comment on that doctrine except to say that it does not arise in this case and the Court of Appeal (by which I am bound) have rejected that basic structure doctrine as inapplicable in Belize.[10]

[60] However, Jamadar JCCJ identified as part of that basic structure analysis principles of fairness, good faith, reasonableness, and accountability which can formulate lenses to evaluate State actions. In assessing the accountability of the State in that case, he placed the Government's actions against the backdrop of the rule of law standards demanded. The first step of assessment applied the principles of sovereignty and supremacy. In his view, State actions inconsistent with the basic structures were void to the extent of their inconsistencies. Therefore, he found there was an intersection of public constitutional law and private contract law in that case, where the State had a special duty to act fairly, reasonably and in good faith with its contracting parties.

[61] As a court sitting at first instance, I am bound by the decision of the majority of the CCJ that **Patel v Mirza** does not form part of the law in Belize. The question then is what is the law in this country insofar as the illegality defence is concerned? While there was a majority on the inapplicability of **Patel v Mirza**, there was no clear majority on the proper approach to construing the defence of illegality in contract law. Consequently, I am bound to apply the law as it existed prior to **Patel v Mirza** as distilled by Anderson JCCJ. There was no dispute among the Justices in **BISL** that Anderson JCCJ's opinion accords with the contemporary law in Belize.

[10] Attorney-General of Belize v The British Caribbean Bank Limited and Attorney General v Dean Boyce Civil Appeal No. 30 of 2012.

[62] To resolve this case in line with that state of the law, I will first consider whether the contract was prohibited by the National Lands Act. This is a question of statutory interpretation which at its conclusion may reveal that the agreement was forbidden by the National Lands Act (in which case the agreement is void ab initio) or merely tainted by illegality. An outcome can also be that it carries no illegality at all. If the agreement was not forbidden but contains elements of illegality, I must consider whether it is proportionate to refuse its enforcement. Where the contract is prohibited, the ancillary question of whether the agreement can be unwound, as distinct from being enforced, must be considered since the restitution of moneys or other benefits transferred is not prevented. This restitution is subject to the proviso that it should not result in the stultification of the law prohibiting the contract.

Application of the Law

Statutory construction

[63] The modern approach to statutory interpretation is that the language of a provision, in the context of the enactment, reveals the meaning intended by Parliament. External aids can be used to understand the background or wider context in which the enactment is made but they cannot displace the meaning (which does not lead to an absurdity) conveyed by the language of the provision in the context of the Act as a whole.[11]

[64] Section 5(1) of the National Lands Act provides that "national lands shall not, save as is excepted by section 6, be dealt with or disposed of, except in the manner hereinafter provided." Section 13(1) empowers the Minister to sell national lands "at such prices and on such terms and conditions as to improvements and otherwise as the Minister may prescribe on the advice of the Advisory Committee." However, section 6 sets out the following exception:

> 6. (1) Nothing contained in this Act shall prevent the Minister from excepting from sale in the ordinary manner and reserving to the Government of Belize the right of disposing

[11] Jeffery Sersland MD v St Matthews University School of Medicine [2022] CCJ 16 (AJ).

of in a manner as for the public interests may seem best, such lands as may be required as reserves, public roads or other internal communications, or commons, or as the sites of public buildings, or as places for the interment of the dead, or places for the education, recreation and amusement of the inhabitants of any town or village, or as the sites of public quays, wharves or landing places on the sea coast or shores of streams, or for the construction of tram or railways or railway stations, or canals, or for the purpose of sinking shafts and digging for minerals, or for any purposes of public defence, safety, utility, convenience or enjoyment, or for otherwise facilitating the improvement and settlement of Belize, or for special purposes.

(2) The Minister shall also have power to alter, vary or add to the ordinary terms and stipulations upon which any grant, lease or licence is made, should it be considered expedient to do so in any special instance.

(3) All reserves shall be notified in three successive issues of the Gazette and in one issue of a local newspaper and set forth on plans in the office of the Commissioner.

(4) All dereservations of reserves shall be notified in three consecutive issues of the Gazette and in one issue of a local newspaper.

[65] The plain meaning of section 6(1) is that in addition to his power of sale under section 13(1), the Minister also has the power to 'except' certain lands for sale in the ordinary manner contained in section 13(1) and to retain for the Government the right to dispose of such lands other than by sale for any of the variety of public purposes listed in the section. One such public purpose is for use of the land as 'reserves.'

[66] Subsection 2 allows the Minister to alter, vary or add to the ordinary terms and stipulations upon which any grant, lease or licence is made as special circumstances may require. This subsection does nothing to the power of the Minister to except some national lands from sale and the effect of such exception.

[67] Subsection 3, however, is triggered where the public purpose for which the Minister excepted a portion of land for sale is for use as a 'reserve'. In that eventuality, the reserve is required to be published in the Gazette and a local newspaper for the stipulated period and recorded on plans. Subsection 4 sets out the period of time for the publication in the Gazette and a local newspaper of any de-reservations. While not saying so expressly, the Act takes for granted that as a corollary of the power to retain lands for the establishment of reserves the Minister also has the power to liquidate any

reserve. The purpose of the latter two subsections is to notify the public that a reserve has been established or closed.

[68] The operative subsection is 6(1). This is the provision which sets out in plain language that the effect of the invocation of section 6 by the Minister is to **except** "from sale in the ordinary manner and reserving to the Government of Belize the right of disposing of in a manner as for the public interests may seem best, such lands as may be required as reserves…" The meaning is clear and the language does not lend itself to more than one construction. Clear evidence of the exercise of the power conferred on the Minister by that section is the publication in the Gazette and a local newspaper for the stipulated frequency a notice that a portion of national lands shall be used as a reserve together with the lands now comprising the reserve being set forth on plans held by the Commissioner of Lands and Surveys. When that is done, the lands comprising the reserve are no longer available for sale in the ordinary manner set out in section 13. Unless the lands comprising the reserve are 'dereserved', the Minister does not have the power to sell the same. The section speaks for itself. To put it differently, the implication of section 6(1) of the National Lands Act is to forbid the sale of national lands which the Minister has excepted from sale for use by the Government in the establishment of a reserve. To enforce a contract for the sale of that which cannot be sold is absurd and makes a mockery of the legislative scheme devised by the legislature.

[69] There is no room for Mr. Lindo's assertion that the section 6(4) notification does not 'magically' amount to a de-reservation, and it is in the Minister's absolute discretion to dereserve when he deems fit in the sense that if the Minister sells a portion of reserved land he can be deemed to have exercised his discretion to dereserve notwithstanding a failure to comply with the section 6(4) notification requirement. That submission is a misunderstanding of the effect of section 6 as a whole. Mr. Lindo trains his lens on the wrong provision. The power to except from sale is reposed in subsection 6(1) not subsections 3 and 4. The latter subsections are but evidence of the decision to except lands from sale for use as a reserve and the vacation of that exception.

[70] I do not accept that there can be a constructive de-reservation of the type advocated for by Mr. Lindo. In **BCB Holdings**, Saunders JCCJ pointed out that where a Minister is endowed with statutory power and the statute imposes even weak safeguards, a failure by the Minister to comply would "impugn and automatically render void the exercise of the power." The Minister in this case did not publish any notification de-reserving the disputed lands so it cannot be said that he validly or at all exercised his statutory power to do so.

[71] In this case, it is incontrovertible that the disputed lands fall within the Dolphin Park Reserve and that there was no de-reservation of the whole or part of that Reserve. When the Minister entered into the contract, created by the Land Purchase Approval Form No. BZC-54/2019 and dated 27th January 2020, with the claimant to sell the disputed lands which were a portion of the lands comprising the Dolphin Park Reserve he had no power to do so. It matters not that both the **Minister** and the claimant were subjectively unaware of either or both the reservation of those lands to the Government for use as a reserve or the effect of such reservation. They both ought to have been aware of the reservation. The purpose of publication of a notification in the Gazette and the local newspapers is to fix knowledge of the notification on individuals and the government alike. Illegality is a question of law and the defence does not rise or fall according to the knowledge of the parties.

[72] While I have found that the Minister had no power to contract for the sale of the disputed lands, the question remains whether the National Lands Act means to prohibit contracts for the sale of lands exempted for sale and whether the impugned contract in this case falls within that category. See **John Shipping Corporation v Joseph Rank Ltd.**[12] In my judgment, it follows naturally from the finding that the disputed lands are exempted from sale that the contract for such a sale is also prohibited. The contract is the vehicle that brings about the sale of land in Belize. It is a necessary implication of section 6 that contracts for the sale of exempted lands are prohibited. The contract in this case falls within that description and is accordingly prohibited.

[12] [1957] 1 QB 267.

Chawla's Case

[73] While I have undertaken my own analysis, the same conclusion was reached by Conteh CJ in **Chawla** which considered the same issue. In that case, Jitendra Chawla and Leena Chawla in 2009 each purchased from the Government one of two parcels of national lands together amounting to some nine acres. Those nine acres formed part of the Krooman Reserve, Belize City which comprised some 57 acres in total ("the Krooman Reserve"). The Krooman Reserve was established by the Minister pursuant to section 6 of the National Lands Act. When news broke that a portion of the Krooman Reserve was sold to the Chawlas, the Government immediately took steps to resolve the imbroglio which climaxed ultimately in the purported revocation of the sales. The Chawlas sought judicial review of those decisions to revoke and included a prayer for relief which included an order for mandamus to compel the Minister to register them as the proprietors of the land. The Government resisted the claim on the basis that the Minister had no power to sell reserved lands to the Chawlas. This was in essence an illegality defence although not pleaded as such. The case was also not pleaded in the private law of contract but instead in administrative law.

[74] The then Chief Justice held:

> 47. …From a close study of the provisions of section 6, I am persuaded that a reserve of national lands takes the land in the reserve from out of the stock of lands available for sale by the Minister. The lands in the reserve are set aside to be disposed of by the Government of Belize for the public interest for any one or more of the purposes stated in section 6(1), including for "special purposes."
>
> 48. However, national lands declared a reserve, may be dereserved. This would then bring such dereserved lands into the stock of lands which the Minister may, pursuant to sections 5, 7 and 13 dispose of by way of a lease or sale. The process of dereserving national lands is simply and clearly stated in subsection (4) of section 6.
>
> 49. Therefore, absent the dereservation of national lands constituting a reserve, there can be no warrant for the Minister to sell.
>
> While he dismissed the administrative orders sought, Conteh CJ ordered the refund of the costs of acquiring the parcels of land and the costs of the developments on the

land. He also ordered the Government to pay damages in the sum of twenty-five thousand dollars ($25,000.00) to the Chawlas for the sale of portions of the reserve.

[75] Mr. Lindo contends before me that the **Chawla** decision was reached *per incurium* since Conteh CJ failed to take into account the effect of the Land Reserves (other than Indian and Carib reserves) Regulations. I disagree that those regulations were relevant. By regulation 3, the Land Reserves (other than Indian and Carib reserves) Regulations expresses itself to "apply to all Reserves enumerated in the Schedule hereto and to any Reserve added thereto by virtue of an Order made by the Minister." Neither the Dolphin Park Reserve nor the Krooman Reserve in **Chawla's** case appear in the Schedule to the regulations. I have found no Order adding either reserve to the Schedule nor did Mr. Lindo point me to one. Therefore, its contents did not apply to **Chawla's** case or to this one.

[76] In the round, section 6 of the National Lands Act forbade the contract for the sale of the disputed lands with the result that that contract was void ab initio. That conclusion makes it unnecessary to consider any issues of proportionality. However, I must explore whether the moneys transferred on the contract should be returned. Conteh CJ ordered restitution of both the costs of the land and the development in addition to damages to the Chawlas. I have my own reservations about the reasonableness and the lawfulness of that award of damages essentially for breach of contract in an administrative law claim in circumstances where the underlying contract was itself unlawful. Additionally, it was not the Minister's fault alone that restricted land was purported to be sold. The purchaser also has an equal duty to ensure that the vendor (in this case the Government) had a valid title to pass. But this is not an appeal of the **Chawla** decision, and it is sufficient for me to say that that case is not the instant proceedings.

[77] Mr. Lindo submitted that if I find the contract illegal, the claimant should be awarded damages being the market value of the disputed lands at the time it is transferred back to the Government. The basis of this submission is that the claimant enjoys an indefeasible title pursuant to the RLA and the defendants have not counterclaimed for a rectification of the Register.

[78] The registered land argument can be dealt with summarily. Section 3 of the RLA states:

> Except as otherwise provided in this Act, but subject to section 38 of National Lands Act, Cap. 191, no law, practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act,
>
> Provided that except where a contrary intention appears nothing contained in this Act shall be construed as permitting any dealing which is forbidden by express provisions of any other law or as over-riding any provision of any other law requiring the consent or approval of any authority to any dealing.
>
> Section 38 of the National Lands Act:
>
> In the event of any conflict in regard to any matter between the provisions of this Act and those of the Registered Land Act, the provisions of this Act shall prevail.

[79] I have already found the contract for the sale of the disputed lands is forbidden by section 6 of the National Lands Act. Insofar as that **finding** conflicts with the provisions of the RLA in relation to the indefeasibility of title held by the proprietors in possession of a land certificate, that title must give way to the provisions of the National Lands Act, which makes it unlawful for the claimant to hold the disputed lands. In any event, the contract for the sale of the disputed lands was void ab initio so even without reference to the aforementioned sections, no title would have been conferred on the claimant. The Land Certificate LRS - 202005476 was superfluous and void and cannot now be relied upon by the claimant.

[80] Unlike **Chawla's** case, the instant claim was not an action for an administrative order and damages. It is a private law action for breach of contract. Indeed, damages cannot flow from an unenforceable contract and any submission otherwise is rejected. Where a contract is void for illegality, the court is concerned with restitution. This does not involve the enforcement of the contract but the unwinding of the same. Even unwinding the contract must be approached with stealth to avoid the stultification of the law which prohibited the contract in the first place.

[81] Significantly, if no valid contract existed (which is the effect of the contract being a nullity) then it follows that there can be no breach of contract. Damages cannot be

awarded in this case for breach of contract. What is available to the claimant, however, is the restitution of the purchase price for the land which was paid to the Government of Belize. The return of that sum ensures that the Government is not unjustly enriched by the nullified transaction and the restitution cannot be said to be enforcing the contract so no question of stultification of the law arises.

[82] There was a claim for special damages for the cost of building plans but that was obviously dependent on a breach of contract having occurred. There being no breach in this case, no special damages are payable.

Disposition

[83] It is hereby declared that the contract for the sale of the disputed land is void ab initio.

[84] It is ordered that:

1. The claimant is to be repaid the purchase price for the disputed land.
2. The claim is dismissed.
3. I will hear the parties on costs on a date to be notified.

Martha Lynette Alexander
High Court Judge