In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 387

BETWEEN:-

LYDIA CALETTI
(as sole Executrix and Trustee of the Estate of LORENZO CALETTI, deceased)

Plaintiff

-and-

RALPH DeSILVA

Defendant

-and-

WAKEFIELD QUIN LIMITED

Third Party

RULING

(In Chambers)

Application to set aside consent judgment – whether Court has jurisdiction to set aside consent judgment on application brought in same action – whether promissory note was illegal – whether setting aside justified on any of the grounds for which a contract could be set aside – whether any defences to Plaintiff's claim

Date of hearing: 23rd May 2017, 13th June 2017, 21st August 2017
Date of ruling: 27th September 2017

Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiff
Mr Michael Scott, Browne Scott, for the Defendant
Mr Richard Horseman, Wakefield Quin, for the Third Party

Introduction

1. The Defendant, Mr DeSilva, applies to set aside a consent judgment in favour of the late Lorenzo Caletti in the sum of $3,372,396.00 ("the Consent Judgment"). He says: (i) that the judgment was based on an illegal contract; and (ii) that it was obtained through misrepresentation or non-disclosure by Mr Caletti, or alternatively that he entered into it by mistake in that he did not appreciate that it could be enforced against his home.

2. The Plaintiff, Mrs Caletti, appears in her capacity as the executrix and trustee of the estate of her late husband, Mr Caletti. She resists the application to set aside, but applies under the slip rule at Order 20, rule 11 of the Rules of the Supreme Court ("RSC") to amend the judgment sum to a lesser sum to take into account a payment received from Mr DeSilva after the consent order was signed by the parties but before it was entered by the Court; the amount of a promissory note issued to Mr Caletti by the purchaser in relation to the sale of one of Mr DeSilva's properties; and an error in the calculation of judgment interest.

Chronology

3. Mr DeSilva, is a Bermudian businessman. He holds shares in a local company known as Great Things Limited, which carries on business trading as "Great Things". The business is based in premises on East Broadway in Pembroke which are owned by a company called Broadway Development Limited ("Broadway"). Mr DeSilva owns 50 per cent of the shares in both

companies ("the Companies") and his business partners Andrew and Carol Gracie ("Mr and Mrs Gracie") own the other 50 per cent. Mrs Gracie is his sister and Mr Gracie is his brother-in-law.

4. In July 2006 Mr Gracie introduced Mr DeSilva to the original Plaintiff, Mr Caletti. He was a Canadian national who lived in Bermuda on a residency permit. Mr Caletti and Mr DeSilva became friends. Mr Caletti loaned Mr DeSilva US$ 3 million which Mr DeSilva used to buy as his home a property known as "Virginia Cottage", 134 Somerset Main Road in Sandys Parish.

5. The loan was made pursuant to the terms of a promissory note dated 2nd October 2006 which was drawn up by Mr Caletti's lawyers and signed as a deed by Mr DeSilva ("the Promissory Note"). It included the following terms:

"*1) FOR VALUE RECEIVED (namely US$3,000,000.00)* ***RALPH DESILVA*** *of 134 Main Road, Sandy's ('the Borrower'),* ***HEREBY PROMISE*** *to pay* ***LORENZO CALETTI*** *('the Lender'), the principal sum of Three Million US Dollars (US$3,000,000.00) ('the Principal Sum') on or before five years from the date hereof with interest thereon at an annual rate of 9% (US$270,000.00) until repayment with an option of an additional five year period for repayment at the interest rate to be agreed. In order to exercise this option written notice must be given by the Borrower to the Lender 90 days prior to expiring of the first five year period (that is 2nd August 2011) of the intention to extend the Promissory Note for an additional five year period. If notice is not given then the principal amount of the Promissory Note is due payable on the 2nd October 2011.*

2) The interest will be paid in 60 equal monthly payments of US$22,500.00 for the duration of the life of this Note starting on the 2nd day of November 2006 and thereafter on the 2nd day of each month with the final payment due 2nd October 2011.

3) The Borrower shall NOT have the right to prepay the Principal Sum before expiry of 5 years from the date hereof in whole or in part without penalty or premium.

4) The Borrower undertakes that in the event of any default in the repayment of the Principal Sum or any interest payment thereon in accordance with the provisions hereof and at the request of the Lender and at the Borrower's own cost (subject nevertheless to

the consent as necessary of the holder of any prior encumbrance) to execute in favour of the Lender or the nominee of the Lender a valid legal mortgage of the property of the Borrower situate at 134 Main Road, Sandy's Parish, a valid legal mortgage of the property of the Borrower situate at 18 St. Anne's Road, Southampton Parish SN01; a valid legal charge over the Borrower's 50% (fifty per cent) ownership of Broadway Development Ltd and a valid legal charge over the Borrower's 50% (fifty per cent) ownership of Great Things Ltd in such form and with such provisions and powers of sale leasing and appointing a receiver may in the case of each security be required by the Lender subject nevertheless to all prior existing encumbrances in respect thereof AND the Borrower hereby irrevocably appoints the Lender (and his nominee) his lawful attorney in his name and on his behalf to execute any such legal mortgage or charge as aforesaid and in the event of any sale by the mortgagee of the property or charge of the shares (as the case may be) or any part thereof under the statutory power of sale on that behalf to execute a conveyance of the legal estate in the properties or transfer of the shares (as the case may be) to the purchaser thereof.

5) The Borrower shall not carry out any transaction of any such nature in connection with the above properties or shares without the specific consent of the Lender."

6. From 2006 to early 2012 or thereabouts Mr DeSilva made regular monthly interest payments of $22,500 to Mr Caletti. But he fell into financial difficulties and the payments stopped. He sold a motor boat for $120,000 in April 2012, and his property known as "Portside" at 18 St Anne's Road for $1,000,299, and paid the net proceeds of sale to Mr Caletti in part satisfaction of the loan. He gave evidence that Mr Caletti was intimately involved with both sales. On 29th October 2012, prior to selling "Portside", Mr Caletti executed mortgage deeds on both that property and "Virginia Cottage" in favour of Mr Caletti.

7. Meanwhile, Mr DeSilva fell out with his business partners Mr and Mrs Gracie. In February 2013 he instructed Richard Horseman at the law firm Wakefield Quin Limited ("Wakefield Quin") to assist him with the dispute. Wakefield Quin is the Third Party to this action. Mr Horseman knew Mr DeSilva and did not think it necessary to prepare a letter of engagement or seek a retainer. After this hearing I doubt that he will take that course again. He has produced his file notes of his initial meeting with Mr DeSilva on 4th

February 2013. These record that Mr DeSilva had borrowed $3 million from Mr Caletti, signed a Promissory Note, and was paying interest only.

8. On 9th May 2013 Mr Horseman held a further meeting with Mr DeSilva. Mr DeSilva's wife and Mr Caletti were also present. Mr Caletti had become involved in the dispute, although it is not altogether clear to what extent he was seeking to help Mr DeSilva and to what extent he was seeking to further his own interests. Quite possibly he was seeking to do both. Mr Horseman's file note records that Mr DeSilva had been unable to make any payments on the loan since February 2013 and that the loan was secured by shares. Mr Caletti prepared and distributed a note of the meeting in which he styled himself as "Chairman of Board" of Great Things.

9. On 17th October 2013 at 11.43 am Mr Caletti sent Mr DeSilva an email ("the October Email"). It read:

"*RALPH*
TRIED TO REACH YOU BY PHONE
MAYBE BEST IF I PUT THIS IN WRITING

TO PROCEED WITH FORCING SALE OF GREAT THINGS AND BDWAY
AND TO PROTECT MY INTERSTS
WE ARE ISSUING

A WRIT OF SUMMONS

LORENZO CALETTI PLAINTIFF
RALPH DESILVA DEFENDANT

MY LAWYER BEN ADAMSON CDP
HAS CONTACTED HORSEMAN
TO SEE IF THIS CAN BE DONE BY CONSENT
THIS WOULD SAVE TIME AND MONEY

IF YOU AGREE
PLEASE CONTACT HORSEMAN BY PHONE AND GET HIM TO AGREE TO THE CONSENT

WE WILL THEN PROCEED TO TAKE YOUR SHARES IN THE COMPANY AND FORCE THE SALE
EITHER BY CONSENT OR THRU COURTS
HOPEFULLY WRIT WILL BE ISSUED NEXT WEEK

WILL KEEP YOU INFORMED AS THINGS PROCEED
HANG IN FOR A WHILE LONGER
I HOPE THAT THIS WILL BRING THIS LONG ORDEAL TO AN END

LORENZO".

10. Mr DeSilva understood from the email that the writ was a device to put Mr Caletti in a position where he could force the sale of the Companies. The intention being that Mr DeSilva's share of the proceeds of sale would be used to pay off, or at least go towards paying off, his outstanding debt to Mr Caletti.

11. At 3.05 pm on 17th October 2013 Mr Horseman emailed Ben Adamson, Mr Caletti's lawyer, to say:

"*I have spoken to RD and he will consent to judgment. Proceed to file when you are ready*".

I am satisfied from that email that a conversation in those terms between Mr Horseman and Mr DeSilva took place. However it is common ground that Mr DeSilva did not forward Mr Horseman a copy of the October Email.

12. Mr Caletti's attorneys, Conyers Dill & Pearman Limited, issued a specially endorsed writ that very day naming Mr Caletti as Plaintiff and Mr DeSilva as Defendant. The Statement of Claim read as follows:

"*1. The Defendant signed a promissory note dated 2nd October 2006 ('the Note') by which he borrowed US$3million ('the Principal') at an interest rate of 9%.*

2. The Defendant has fallen behind on the interest payments. In addition to the Principal, as of October 2nd 2013 the Defendant owes $374,927 interest which is accruing at 739.73 per day ('the Interest').

3. In the premises, the Defendant owes the Principal and the Interest as a debt due and owing.

AND THE PLAINTIF CLAIMS

1. *US$3,000,000 as the Principal*
2. *The Interest as aforesaid*
3. *Costs to be assessed.*"

13. On 24th October 2013 at 4.24 pm, Sandy Amott, Mr Horseman's secretary, emailed a copy of the writ to Mr DeSilva at the email address which he had supplied to Wakefield Quin. I was shown a copy of the covering email and I am satisfied that Mr DeSilva received it.

14. On 31st October 2013 Wakefield Quin wrote to the Court enclosing a memorandum of appearance, which the Court received the next day. Ms Amott emailed a copy of the memorandum to Mr DeSilva at 2.39 pm the same day. I was shown a copy of the covering email and I am satisfied that Mr DeSilva received it.

15. Meanwhile, Mr Horseman and Mr Adamson exchanged a number of emails regarding the logistics of getting a consent judgment signed. Mr Adamson proposed that once judgment was signed interest should accrue at the statutory rate of 7% rather than the contractual rate of 9%. Thus the sooner judgment was signed the sooner interest would start to accrue at the lower rate.

16. On 12th November 2013 at 8.09 am Mr Horseman emailed Mr DeSilva in the following terms:

"*Hi Ralph*

Please see below. Please confirm you wish me to consent to judgment.

The interest calculations seem to be in your favour as 7% on 3m per annum = $210,000.00 so we should likely agree to this figure. Let me if you want to have a call on this.

Richard".

Below this message, and as part of the same email, were set out all the emails in the exchange between Mr Horseman and Mr Adamson, including Mr Horseman's said email to Mr Adamson of 17th October 2013.

17. Mr DeSilva did not take up Mr Horseman's offer of a call. On 12th November 2013 at 1.32 pm he emailed Mr Horseman to say:

"*Yes. I will consent*".

18. Mr DeSilva gave affidavit evidence that:

"*At no time was I ever made aware by Mr. Horseman of the Specially endorsed Writ of Summons in this matter nor did I or have I given instructions to Mr. Horseman in the Civil Action 2013 No 387 to either enter an appearance to the Writ or to Consent to Judgment in the amount of the Judgment.*"

As demonstrated by the facts set out above, none of the statements in that paragraph was correct.

19. On 13th November 2013 at 4.27 pm Ms Amott emailed a copy of a Final Order signed by Wakefield Quin to Mr DeSilva. I was shown a copy of the covering email and I am satisfied that Mr DeSilva received it. The Consent Judgment was in the following terms:

"*BY CONSENT IT IS ORDERED THAT*

1. *Judgment be entered for the Plaintiff in the amount of $3,372,396.*
2. *There shall be no order as to costs.*"

20. The Final Order became effective on 20th November 2013, when it was signed by the Chief Justice. On 25th November 2013 the Registrar signed a Judgment that, pursuant to the Final Order, Mr DeSilva pay Mr Caletti $3,372,396.00 (although this was not strictly necessary, a Final Order having already been made).

21. In December 2014 Mr Caletti died. On 8th June 2016 the Court made an order that his wife, as sole executrix and trustee of his estate, be made a party to the proceedings and substituted as the Plaintiff. On 13th June 2016 Mrs Caletti issued a notice of intention to proceed and on 29th August 2016 she issued a writ of *fieri facias*.

22. On 6th January 2017 the Bailiff, Christopher Terry, emailed Mr DeSilva to say that, pursuant to the writ of *fieri facias*, he required access to "Virginia Cottage" to have the property valued by two realtors, and that thereafter access would be required for viewing purposes. Mr DeSilva gave evidence, which I accept on this point, that it was not until the Provost Marshall visited him at the premises to serve the writ and explained that it could be enforced against "Virginia Cottage" that he realised that, as a result of the Consent Judgment, he stood to lose his home.

23. Mr DeSilva promptly instructed the law firm Browne Scott to represent him and on 3rd February 2017 they issued an application to set aside the writ of *fieri facias* and what was erroneously referred to as a default judgment. At a directions hearing on 9th February 2017 I gave directions for the service of an application to set aside the Consent Judgment, if that was what Mr DeSilva intended; gave leave to Wakefield Quin to be joined as a Third Party if they so wished, and stayed the writ of *fieri facias* until further order.

24. On 28th March 2017 Mr DeSilva issued an application to set aside the Consent Judgment and for discovery and leave to issue interrogatories against Wakefield Quin. On 17th February 2017 Wakefield Quin entered a memorandum of appearance. On 6th April 2017 the Registrar made a further order for directions. These included that Mr Horseman and Mr DeSilva should attend to be orally examined at the substantive hearing of the application to set aside. On 18th May 2017 Mrs Caletti issued her application to amend the judgment sum. On 18th May 2017 Mr DeSilva issued a further summons for discovery and leave to issue interrogatories against Wakefield Quin.

25. On 23rd May 2017 the matter came on for hearing before me. I gave an *ex tempore* judgment dismissing Mr DeSilva's applications for discovery and interrogatories. Mr Scott, who appeared for Mr De Silva, cross-examined Mr Horseman. At the adjourned hearing on 13th June 2017 Mr Horseman cross-examined Mr DeSilva. However the case turns on the contemporaneous documents and I found the oral evidence of limited assistance.

Jurisdiction

26. Mr DeSilva has brought an application to set aside the Consent Judgment in the action in which the Consent Judgment was made rather than in a separate action. Mr Adamson has taken the preliminary point that this is the wrong procedure and that the Court therefore has no jurisdiction to make the order sought. He referred me to the commentary at para 20/11/07 of the 1999 Edition of the White Book:

> "*... the Court has no power under any application in the action to alter or vary a judgment after it has been entered, or an order after it is drawn up, except so far as is necessary to correct errors in expressing the intention of the Court (see ... Re St. Nazaire Co. (1879) 12 Ch.D 88; Kelsey v. Doune [1912] 2 K.B. 482; Hipkiss v. Fellows (1909) 101 L.T. 701; Hession v. Jones [1914] 2 K.B. 421). This rule is subject to the following observations:*
>
> > *(1) An order which is a nullity owing to failure to comply with an essential provision, such as service of process, can be set aside by the Court which made the order (Craig v. Kanssen [1943] K.B. 256, CA). If there has been a mere irregularity, semble it must be attacked by appeal, with leave if necessary if after that time.*
> >
> > . . . . .
> >
> > *... Consent orders, though they cannot be carried ['carried' in this context appears to mean set aside in the action in which they were made] without the consent of all parties (Ainsworth v. Wilding [1896] 1 Ch 673; cf. Kemp-Welch v. Kemp-Welch [1912] P. 82) may be set aside wholly or in part in a fresh action upon such grounds as would enable the Court to set aside or rectify an agreement, as, for instance, fraud, or mutual mistake (Huddersfield Banking Co. v. Hy. Lister & Sons [1895] 2 Ch. 271; Wilding v. Sanderson [1897] 2 Ch. 534). ...*"

27. The general rule, then, is that once the Court has entered judgment or drawn up an order the trial judge is *functus officio* and, in his capacity as trial judge, has no further power to consider or vary his decisions. See R v Cripps, Ex p Muldoon [1984] 1 QB 686 EWCA *per* Sir John Donaldson MR at 695 A – B. As Lord Wilson JSC stated in a judgment with which all seven members of the Court joined in Gohil v Gohil [2016] AC 849 UKSC at para 18(c), in the case of a final judgment or order:

> "*A substantive order will bring the existence of ordinary civil proceedings to an end and will therefore require any attempt to set it aside to be made within a fresh action.*"

28. However there are circumstances in which the judgment or order may be set aside by the court which made it. Eg where an essential procedural provision has not been complied with. Thus in White v Weston [1968] 2 QB 647 EWCA the County Court set aside judgment because the defendant had not been served with the proceedings. The application to set aside was made in the action in which judgment had been given. When setting aside judgment the judge ordered that the costs of the hearing which resulted in the judgment should be costs in the cause. The defendant appealed on the ground that as he had never been served he was entitled to have the judgment set aside with no order as to costs. The Court of Appeal agreed. Russell LJ stated at 659 B:

> "*I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this 'irregular' or 'a nullity.' The defect is in my judgment so fundamental as to entitle the defendant as of right ex debito justitiae to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment, 'in accordance with settled practice, the court can only exercise its discretion in one way, namely by granting the order sought,' to quote Upjohn L.J. in In re Pritchard, decd.*".

29. Russell LJ's reasoning was approved by the Privy Counsel in Apollon Metaxides v Swart [2015] UKPC 32. See the judgment of the Board, given by Lord Toulson, at para 22. Unsurprisingly, the Board held that the fact that an originating summons had named the defendant as "*Silver Point Limited*" rather than, as it should have done, "*Silver Point Condominium*

Apartments", when the true identity of the intended defendant was obvious from the originating summons and other court documents, was not a fundamental defect.

30. The accepted practice is that, where it is sought to set aside a consent judgment on grounds that would justify the setting aside of a contract, the application should be brought by a separate action. Indeed the authorities cited above in the White Book held that this is a rule of law. However a consent judgment founded upon the premise that there was an underlying contract when in fact there was none could fairly be described as suffering from a fundamental defect. As Byrne J stated in Wilding v. Sanderson [1897] 2 Ch. 534 at 544, when setting aside a consent judgment which had been entered into under a mistake: "*If there was no agreement there was no consent upon which judgment could be founded*". So, too, could any consent judgment based on an underlying contract which is voidable but which a court would be bound to set aside if asked to do so. Eg a contract obtained by a fraudulent misrepresentation. For the right to set aside such a contract, see Kennedy v Panama etc Royal Mail Co (1867) LR 2 QB 580, Court of Queen's Bench, *per* Blackburn J at 587.

31. Where a consent judgment or order is fundamentally defective for reasons which would justify a court setting aside or rectifying a contract, there is in my judgment no reason in principle why the Court should not set it aside on an application brought in the action in which it was made. It would do so in its inherent jurisdiction and not pursuant to the RSC. This is by parity of reasoning with White v Weston, which, if any were needed, provides a precedent for the exercise of this jurisdiction. The point is not whether the defect is procedural or substantive – which could lead to much sterile debate – but whether it is fundamental. My conclusion is therefore that if Mr DeSilva can demonstrate that the Consent Judgment suffers from a fundamental defect then I have jurisdiction to set it aside notwithstanding that the application is brought in the same action as that in which judgment was given.

32. This conclusion is tentative because the point was only touched upon in oral argument. I have not invited further, fuller submissions, other than written submissions specifically addressing Apollon Metaxides v Swart, because I am anxious to avoid incurring further costs unnecessarily. If I set aside the Consent Judgment but am overturned on appeal because Mr DeSilva should have sought to set it aside in a fresh action, then he can bring a fresh action to set aside which, the merits not having changed, would be bound to succeed. If I do not set aside the Consent Judgment, then the point is moot. In the circumstances, my decision on this point should not be regarded as setting a precedent and litigants applying to set aside consent judgments should continue to do so by way of fresh actions.

33. Different considerations apply to applications to set aside default judgments and summary judgments, where the RSC give the Court a broad discretion. See RSC Order 13, rule 9 (judgment in default of appearance to writ); Order 14, rule 11 (summary judgment); and Order 19, rule 9 (judgment in default of pleadings). But the Court's jurisdiction under those rules is not relevant to the present application.

The Promissory Note

34. Mr Scott, who fought his corner with persistence and ingenuity, submitted that the Promissory Note was an illegal contract. His submission centred on the requirement in para 4 of the Note that in the event of default Mr DeSilva would, if requested by Mr Caletti, execute a valid legal mortgage over his two properties in favour of Mr Caletti or his nominee.

35. As at 2nd October 2006, the date of the Promissory Note, that requirement presented no legal difficulties. Section 80 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act") contained restrictions on the acquisition of land by "*restricted persons*". Section 72 of the 1956 Act provides that "*restricted person*" means, in the case of an individual, a person who does not possess Bermudian status. Mr Caletti fell into that

category. Specifically, section 80(1) provided that it was unlawful for a restricted person to acquire any land in Bermuda unless granted a licence to do so by the Governor. However section 80(3)(c) contained a qualification that, except in certain circumstances that did not apply in the instant case, the grant of a licence was not required in respect of the acquisition of any land by way of mortgage.

36. However, with effect from 22 June 2007 section 80 was repealed and replaced by a new section 80. This read in material part:

> "*(1) No restricted person … shall, without the prior approval of the Minister, accept or take, directly or indirectly, any mortgage or charge on land in Bermuda, whether legal or equitable.*"

Section 102G provides that contravention of section 80(1) is an indictable offence which upon conviction attracts a maximum penalty of a $1 million fine, or five years imprisonment, or both.

37. The mortgage deeds with respect to "Virginia Cottage" and "Portside" were both executed without the prior (or indeed subsequent) approval of the Minister and were therefore in breach of the criminal law. This was sufficient, Mr Scott submitted, to render the entire Promissory Note illegal and therefore, as a matter of law, unenforceable. Had the Court known that the Promissory Note was illegal, he submitted, it would never have signed the Consent Judgment.

38. Mr Scott relied upon the oft quoted dictum of Lord Mansfield CJ in Holman v Johnson 1 Cowp 341 at 343 that: "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*". The principle that a court will not enforce an illegal contract is expressed by the Latin maxim: "*ex turpi causa non oritur actio*".[1] The explication of that principle has proven, in the words of Sir Robin Jacob in ParkingEye Ltd v Somerfield

[1] Translated by Jowitt's Dictionary of English Law, Fourth Edition 2015, as: *"no disgraceful matter can ground an action*", and by Osborn's Concise Law Dictionary, Twelfth Edition 2013, as: "*an action does not arise from a base cause*".

Stores Ltd [2013] QB 840 at para 28: "*notoriously knotty territory*". However, the House of Lords and UK Supreme Court consistently held that its application was a rule of law and not a matter of discretion. As Lord Sumption JSC, giving the judgment of the plurality, stated in Les Laboratoires Servier v Apotex Inc [2015] AC 430 SC(E) at para 23:

"*The ex turpi causa principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.*"

39. That changed with Patel v Mirza [2017] AC 467 UKSC. As summarised in the headnote to the report, the claimant paid a large sum of money to the defendant pursuant to an agreement that he would use it to bet on the movement of shares on the basis of inside information. The agreement contravened the prohibition on insider dealing in section 52 of the Criminal Justice Act 1993. The agreement could not be carried out because the expected insider information was not forthcoming. The claimant sued the defendant for recovery of his money. He failed at first instance but succeeded both in the Court of Appeal and before a nine judge panel of the UK Supreme Court. Although the Supreme Court decided the case on the basis of unjust enrichment rather than contract, the justices took the opportunity to examine the common law doctrine of illegality as a defence to a civil claim.

40. The majority, departing from the position taken previously by the House of Lords and the UK Supreme Court, held that when considering a defence of illegality the Court should consider whether on the particular facts of the case public policy required that the claim be disallowed. Lord Toulson JSC, giving judgment for a plurality of five justices, and with whom a sixth agreed, summarised the position at para 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 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 by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

41. In the present case, the underlying purpose of the prohibition which has been transgressed is the policy summarised in the heading of Part VI of the 1956 Act as "*Protecting Land in Bermuda for Bermudians*". Another relevant public policy on which the denial of the claim may have an impact is that where a lender contracts with a borrower to lend money then, absent illegality, the courts will enforce the terms of the contract. In the present case, the illegality does not lie in the terms of the Promissory Note. It was not illegal for Mr Caletti to lend Mr DeSilva $3 million. Neither was it illegal for him to charge a rate of interest higher than the judgment debt rate: a point I will deal with further below. Nor was it illegal for the parties to the Promissory Note to execute a valid legal mortgage, ie having first obtained the prior approval of the Minister. The illegality complained of is the manner in which Mr Caletti sought to enforce payment of the judgment debt, ie that he and Mr DeSilva executed mortgages over Mr DeSilva's properties without first obtaining ministerial approval.

42. In my judgment, denial of Mr Caletti's claim would not be a proportionate response to this illegality. The illegality relates not to the terms of the Promissory Note, none of which are illegal on their face, but the manner in which it was sought to enforce them. Even if the term requiring Mr DeSilva to execute a valid legal mortgage over his properties was illegal, which it was not, it was severable from the obligation to repay the loan monies. As

Ground CJ stated in E&C Well Drilling Services Ltd v Hayward [2011] Bda LR 1 at para 17: "*The personal obligation to pay is severable from the security, and survives it*". Thus the personal obligation to pay, which is unobjectionable, would remain if para 4 of the Promissory Note, which deals with enforcement, was struck out altogether. The upshot is that illegality provides no basis for the Court to set aside the Consent Judgment.

43. Mr Scott made several further submissions in relation to the Promissory Note. If the Court set aside the Consent Judgment then, if well founded, these submissions would provide Mr DeSilva with a defence to some or all of the claim for interest on the principal sum.

44. The first submission depends upon the construction of the Promissory Note. In approaching this question, I am guided by the approach of Lord Clarke JSC, giving the judgment of the Court, in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 UKSC at para 21:

> "*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*"

45. For ease of reference, I shall set out para 1 of the Promissory Note again and divide it into three sections:

> "*[i] FOR VALUE RECEIVED (namely US$3,000,000.00)* ***RALPH DESILVA*** *... ('the Borrower'),* ***HEREBY PROMISE*** *to pay* ***LORENZO CALETTI*** *('the Lender'), the principal sum of Three Million US Dollars (US$3,000,000.00) ('the Principal Sum') on or before five years from the date hereof with interest thereon at an annual rate of 9% (US$270,000.00) until repayment*

[ii] with an option of an additional five year period for repayment at the interest rate to be agreed. In order to exercise this option written notice must be given by the Borrower to the Lender 90 days prior to expiring of the first five year period (that is 2nd August 2011) of the intention to extend the Promissory Note for an additional five year period.

[iii] If notice is not given then the principal amount of the Promissory Note is due payable on the 2nd October 2011."

46. Mr Scott submitted that as notice was not given in accordance with para [ii], with the result that no further five year period at an agreed rate of interest was agreed, interest ceased to accrue at the end of the first five year period. I am satisfied that this submission is not correct. As Mr Adamson rightly submitted, para [i] provides that interest at 9 per cent runs until repayment unless an alternative rate is agreed pursuant to para [ii]. If notice is not given, the consequence is not that interest at 9 per cent ceases to accrue: it is merely, as provided by para [iii], that the Promissory Note becomes payable. This construction of the Promissory Note accords both with its language and with business common sense.

47. In his written submissions, Mr Scott appeared to argue that Mr Caletti, by not acting promptly to enforce the loan when repayment became due, made a binding representation by conduct to Mr DeSilva that he would not seek to recover the balance of the loan monies. I am satisfied that there was no such representation, or, for the avoidance of doubt, any verbal representation to like effect, and that Mr DeSilva knew all along that he was required to comply with his contractual obligation to repay the loan. I have set out above the steps which he took to do so. The reason he did not take further steps was not, as Mr Scott appeared to submit, because he thought he did not have to, but because he was not in a position to do so.

48. I find support for this conclusion in the affidavit evidence of Mrs Caletti, although I would have reached the same conclusion even without her evidence. Mrs Caletti stated that on no fewer than two separate occasions she had conversations with Mr DeSilva in which they discussed him paying the sums owed under the promissory note, and that prior to her husband's

death she was present at numerous meetings where Mr DeSilva discussed with Mr Caletti repayment of the sums owed. No application was made to cross-examine Mrs Caletti on her affidavit, and her evidence on this point, which I accept, was therefore unchallenged.

49. Assuming, for the sake of argument, that contrary to my findings Mr Caletti did make the representation alleged, then, as Mr Adamson submitted, it would not have been binding at common law because Mr DeSilva gave no consideration for it, and in equity its effect, if any, would have been merely suspensive. See the discussion in Chitty on Contracts, Thirty-Second Edition ("Chitty") at paras 4-117 following. By issuing a writ, Mr Caletti brought any such suspensive effect to an end.

50. Mr Scott initially submitted that the interest rate of 9 per cent was unlawful as it exceeded the judgment debt rate of 7 per cent under the Interest and Credit Charges (Regulation) Act 1975 ("the 1975 Act"). However, as Mr Adamson pointed out, section 2 of the 1975 Act provides:

> "*Except where otherwise provided by this or any other statutory provision any person may stipulate for, allow and exact on any contract, any rate of interest that is agreed upon.*"

As Mr Scott later accepted, there was no statutory provision which prohibited the 9 per cent rate of interest stipulated in the Promissory Note.

The October Email

51. Mr Scott submitted that the October Email contained an express representation by Mr Caletti that he would only seek to enforce judgment against the shares in the Companies and that it was in reliance upon this representation that Mr DeSilva agreed to enter into the Consent Judgment. In fact, Mr Scott submitted, Mr Caletti, unbeknownst to Mr DeSilva, intended to keep open the possibility of enforcing the Consent Judgment

against "Virginia Cottage". Thus the October Email contained a misrepresentation as to his future intentions.

52. It is trite law that a misrepresentation must be one of fact. See the judgment of Hamblen J in Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] 1 CLC 701 HC at para 215, which I followed in Pitt & Co Ltd v White [2014] Bda LR 16 at para 43. However a statement by a person that his intentions were one thing when in fact they were another may be a misstatement of fact. Eg a representation by a man ordering goods that he intended to pay for them when that was not in fact his intention. See the judgment of Mellish LJ in Ex p Whittaker. In re Shackleton (1874 – 75) LR 10 Ch App 446 at 449 – 450 and the other cases cited in Chitty at para 7-012.

53. Mr Scott submitted that the Court should set aside the Consent Judgment for misrepresentation as the misrepresentation would justify the Court in setting aside the contract to enter into the Consent Judgment. The misrepresentation was as to future intention: ie that Mr Caletti would not in future seek to enforce the Consent Judgment against "Virginia Cottage". Mr DeSilva did not allege that the misrepresentation was fraudulent, although as David Richards J said in Abbar v Saudi Economic & Development Co [2013] EWHC 1414 Ch at para 197, read in conjunction with para 207, it is difficult (though not impossible) to see how a party could negligently, as opposed to fraudulently, misrepresent his own intentions. See Chitty para 7-012 at ftnt 48. However, for present purposes, nothing turns on that. It is true that, as fraud was not alleged, if the matter went to trial the Court would have a discretion under section 3(2) of the Misrepresentation Act 1977 to award damages in lieu of rescission. But as Longmore LJ stated when giving the leading judgment in Salt v Stratstone Specialist Ltd [2015] 2 CLC 269; [2015] EWCA Civ 745 at para 24, the normal remedy for misrepresentation is rescission, and the court should award it if possible.

54. The fundamental problem with Mr Scott's submission is that the October Email will not bear the interpretation which he invites the Court to put on it.

In the email, Mr Caletti informed Mr DeSilva that he was issuing a writ. He stated that the reason for this was: (i) to force the sale of Great Things and Broadway, and (ii) to protect his interests. The language of reason (ii) is broader than the language of reason (i) and is broad enough to include enforcing judgment against Mr DeSilva's other assets, including "Virginia Cottage". Particularly as the context in which the email falls to be construed includes the terms of the Promissory Note, which expressly contemplate enforcement against "Virginia Cottage". Mr Caletti further stated that once he had obtained judgment he would proceed to take Mr DeSilva's shares in the Companies and force the Companies' sale. He did not state that he would not seek to enforce judgment in any other way. The October Email is therefore consistent both with the terms of the Consent Judgment and with Mr Caletti enforcing it against "Virginia Cottage". It did not contain any misrepresentations.

55. If, on the other hand, I am wrong, and the October Email did contain the express representation alleged by Mr Scott, there is no basis upon which I could properly conclude that that representation was not made in good faith. Particularly as the decision to bring an action to enforce the Consent Judgment against "Virgina Cottage" was made not by Mr Caletti but by Mrs Caletti after his death. As stated in Chitty at para 7-023: "*It is an obvious requirement of misrepresentation that the statement relied on be false*". If Mr Caletti intended to honour the express representation when he made it, then the statement was not false and there was no misrepresentation.

56. Further or alternatively, Mr Scott submitted that the Consent Judgment should be set aside on grounds of material non-disclosure, presumably on the ground that in the October Email Mr Caletti did not disclose his intention to reserve the right to enforce the Consent Judgment against Mr DeSilva if he was unable to recover the full amount of the judgment debt from the Companies. There are at least two fatal difficulties with that submission. First, the October Email contains nothing which would lead a reasonable person to conclude that Mr Caletti did intend to fetter his options for enforcing judgment. There was therefore no non-disclosure.

57. Secondly, Mr Caletti did not owe a duty of disclosure to Mr DeSilva. It is true that under certain types of contract there is a duty of disclosure, eg the duty of an insured to an insurer under a contract of insurance. However there is no duty of disclosure under contracts in general. There was none owed by Mr Caletti to Mr DeSilva. The authorities on which Mr Scott relied as giving rise to one concerned situations where the duty arose not under the law of contract but by reason of statute or the fiduciary relationship between the parties. Eg S v S (duty in family law to provide full and frank disclosure in ancillary relief proceedings) and Ting v Borrelli (as liquidator of Akai Holdings Ltd) 2007 Bda LR 73 SC (director's or former director's fiduciary duty to disclose to a company any breaches or wrongdoing committed while a director of that company). They are not applicable to the present case.

58. Although the point was not argued before me, I have considered whether the Consent Judgment should be set aside on the basis that Mr DeSilva agreed to it in the mistaken belief, which I accept that he held, that it could not be enforced against any assets other than his shares in the Companies. However for me to set aside the Consent Judgment on that ground I would have to be satisfied that the mistaken belief was reasonable. As stated in Chitty at para 3-019:

> "*If a reasonable person in the defendant's position would have understood the contract in a certain sense but the defendant 'mistakenly' understood it in another, then, despite his mistake, the court will hold that the defendant is bound by the meaning that the reasonable person would have understood. Scott v Littledale (1858) 8 E. & B. 815; Wood v Scarth (1855) 1 F. & F. 293; Smith v Hughes (1971) L.R. 6 Q.B. 597.*"

59. For the reasons given earlier in this judgment, I am satisfied that Mr DeSilva's mistaken belief was not reasonable. Therefore mistake does not provide a ground for setting aside the default judgment.

Negligent or conflicted legal advice

60. Although Mr Scott stated that he was not alleging professional negligence, the gist of his case against Mr Horseman, however it was phrased, alleged just that, namely that Mr Horseman had negligently failed to inform Mr DeSilva that the Consent Judgment could be enforced against "Virginia Cottage" or advise him as to possible defences. Further or alternatively, it was alleged that Mr Horseman failed to advise Mr DeSilva that he, ie Mr Horseman, was conflicted, and that Mr DeSilva should seek advice from another lawyer. The result of these alleged failings, it was said, was to vitiate Mr DeSilva's consent to the Consent Judgment. Mr Scott cross-examined Mr Horseman at some length along these lines but did not emphasise these points when making his closing submissions. He was wise not to do so.

61. First, in his 12th November 2013 email, Mr Horseman suggested that Mr DeSilva should likely agree to judgment in the sum, inclusive of interest, proposed by Mr Caletti as Mr Caletti had agreed that, once judgment was entered, interest would accrue at the judgment debt rate of 7 per cent rather than the contractual rate of 9 per cent. Mr Horseman gave evidence, which I accept, that when he gave that advice he understood that the judgment debt was not disputed. His evidence on this point is corroborated by his file note of 4th February 2013. He also gave unchallenged evidence that Mr De Silva had not forwarded the October Email to him. He added that in his opinion there was no defence to Mr Caletti's claim, an opinion which was in my judgment both reasonable and correct.

62. Nonetheless, in the 12th November 2013 email Mr Horseman offered to discuss the proposed Consent Judgment with Mr DeSilva: "*Let me [know] if you want to have a call on this*". That was sufficient to discharge his professional obligation to his client. If Mr DeSilva wished to pay for legal advice as to whether to contest a claim for what was at that stage an undisputed debt, it was open to him to do so. His attorney was not obliged to force unsolicited advice, for which he would be charged, upon him.

63. Even if Mr Horseman had acted negligently, which he did not, that would not have vitiated Mr DeSilva's consent to the Consent Judgment or otherwise justified the Court in setting it aside. Bad or negligent legal advice is not generally a ground for setting aside a consent order, although in exceptional cases it may be: see Tibbs v Dick [1998] 2 FLR 1118 EWCA and Harris v Manahan [1997] 1 FLR 205 EWCA. Both decisions concerned consent orders made approving financial arrangements in matrimonial proceedings, where the courts' approach to setting aside consent orders is certainly no more rigid than in mainstream civil litigation. This is not an exceptional case. The remedy, had there been one, would have lain in an action against the attorneys.

64. As to the allegation of conflict, Mr Scott relied upon an email from Mr Horseman to Mr DeSilva dated 21st June 2013 which read:

> "*This is a real mess. I was concerned about acting for you and Mr. Caletti in any event as it possibly being a conflict of interest but based on our discussions, it seems clear that you have resigned yourself that your shareholding in Great Things and Broadway belongs to Caletti.*"

65. Mr Horseman swore an affidavit in which he stated that although he had never opened a file in Mr Caletti's name, Mr Caletti was attending the meetings with Mr DeSilva with Mr DeSilva's consent; was involved in all the communications; and was sending out communications ostensibly on behalf of Mr DeSilva and himself. As Mr Caletti was not a client of Mr Horseman, and as the meetings which he attended related to the dispute between Mr DeSilva and Mr and Mrs Gracie over the Companies and not to Mr Caletti's loan to Mr DeSilva, the 21st June 2013 email does not support Mr Scott's allegation of conflict of interest.

66. Mr Scott also relied upon the fact, evidenced by notices in The Royal Gazette, that Mr Horseman's firm, Wakefield Quin, acted for Mr and Mrs Caletti in the acquisition of some land in 2012; and for Mrs Caletti in relation to the probate of her late husband's estate in 2015, well after the Consent Judgment had been entered. Neither of these non-contentious

matters gave rise to a conflict of interest in relation to Mr Horseman's representation of Mr DeSilva in relation to the Consent Judgment. If they did, then Mr DeSilva's remedy would lie in an action against the attorneys concerned.

Arguable defences

67. Mr Scott put forward misrepresentation and non-disclosure as grounds for setting aside the Consent Judgment, not as providing defences to the Promissory Note. By parity of reasoning, mistake would have the same effect were the Consent Judgment to be set aside on that ground. However, as Sir Christopher Staughton, giving the judgment of the Court, stated in Faircharm Investments Ltd v Citibank International plc [1988] Lloyd's Rep Bank 127 EWCA, it would be pointless to set aside judgment if the defendant would be bound to lose on an application for summary judgment. I applied that principle in Canale v Holloway [2014] Bda LR 57 at para 41. I have considered all the potential defences put forward by Mr Scott and I am satisfied that none of them are properly arguable. Mr DeSilva will have to repay the money that he borrowed.

Plaintiff's application

68. Mr Adamson invited the Court to reduce the amount of the Consent Judgment under the slip rule at Order 20, rule 11. This provides that:

> "*Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar.*"

69. The adjustment is sought in relation to three specific matters. First, on 18th November 2013 the Consent Judgment was sent to the Court for signature. The same day, Mr Caletti's estate received payment from Mr DeSilva of $1,002,799, being the net proceeds of sale of "Portside". The Court should have been notified promptly of the payment, but was not. Consequently, on

20th November 2013 the Chief Justice signed the Consent Judgment as submitted. Mr Adamson invited the Court to amend the Consent Judgment to take account of the $1,002,799. I shall do so. Had the Consent Judgment not been amended, this sum would have been treated instead as a credit towards repayment of the judgment sum.

70. Secondly, upon the sale of "Portside" the purchasers were short of funds by $47,000. Instead of cash they provided a promissory note for that sum ("the note"). At Mr Caletti's insistence, the note was given to him rather than to Mr DeSilva. The note was discharged on 5th August 2014 by a payment of principal and interest in the sum of $49,288. Mr Adamson invited the Court to amend the Consent Judgment to take account of the amount of the note. However, it is not clear that to me that by accepting the note Mr Caletti agreed to forego the right to recover the $47,000 from Mr DeSilva if it proved irrecoverable from the purchasers. On reflection, therefore, I decline to amend the Consent Judgment to take account of the note. As was Mrs Caletti's initial view, the monies received in satisfaction of the note should instead be treated as a credit towards repayment of the judgment sum.

71. Thirdly, Mr Scott expressed concern as to the accuracy of the interest calculations in Mr Caletti's spreadsheets which were used to calculate the interest payable under the Consent Judgment. Mrs Caletti therefore instructed an accountant, Robert Baldwin of Baldwin & Associates LLC, to carry out an analysis. It emerged that Mr Caletti had been compounding interest whereas under the Promissory Note only simple interest was payable. Mr Adamson invited the Court to amend the Consent Judgment accordingly, which involves a reduction in the interest payable under the Consent Judgment of $17,470. I shall do so.

72. The Consent Judgment, which was entered in the sum of $3,372,396, is therefore reduced by $1,002,799 (the net proceeds of sale of "Portside") and $17,470 (the overcharged interest), giving a figure of $2,352,127.

Summary and conclusion

73. I am satisfied that I have jurisdiction to set aside the Consent Judgment on Mr DeSilva's application, notwithstanding that the application has been brought in the same action as that in which the Consent Judgment was given.

74. Mr DeSilva's application to set aside the Consent Judgment is dismissed.

75. Mrs Caletti's application to reduce the amount of the Consent Judgment is allowed to the extent given above.

76. I shall hear the parties as to costs.

77. I see no good reason why the stay of the writ of *fieri facias* should not be lifted, but if Mr Scott is instructed to persuade me otherwise I will hear him on the point when I deal with costs.

DATED this 27th day of September, 2017

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Hellman J