PARTIES:	COLIN FITZGERALD
	v
	F J LEONHARDT PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	COURT OF APPEAL
FILE NO:	AP15 OF 1994
DELIVERED:	Thursday, 3 August 1995
HEARING DATES:	26 April 1995
JUDGMENT OF:	MARTIN CJ, ANGEL AND THOMAS JJ

CATCHWORDS:

Contracts - Illegal and Void Contracts - Statutory Illegality - Unauthorised drilling of bores prohibited - Criminal Penalty

Water Act (NT) ss.14, 56 and 57

Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd and Others (1978) 139 CLR 410, distiguished

Contracts - Illegal and Void Contracts - Statutory Illegality - Factors to be considered - Construction of the Legislation - Whether illegality goes to "core or essence" of the method or performance of the contract

St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, referred to
Anderson Limited v Daniel [1924] 1 KB 138, referred to

Statute - Interpretation - Legislature's intention

Water Act (NT) ss.9(1) and (2), 14, 16(2)(b), 20, 47, 48, 49, 55, 56, 57, 70 and 105
Water Regulations
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd and Others (1978) 139 CLR 410, referred to
Hayes v Cable [1962] SR (NSW) 1

John S Chappell Pty Ltd v D K Pett Pty Ltd (1971) 1 SASR 188, applied
Ross v Ratcliff (1988) 91 FLR 66, referred to

REPRESENTATION

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Appellant: Close and Carter
Respondent: Norman and Associates

Judgment category classification: C
Judgment ID Number: mar95017
Number of pages: 32

DISTRIBUTION: Local

mar95017

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 15 of 1995

BETWEEN:

COLIN FITZGERALD
Appellant

AND:

F J LEONHARDT PTY LTD
Respondent

CORAM: MARTIN CJ., ANGEL & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 3 August 1995)

MARTIN CJ:

This is an appeal from a decision of Kearney J. allowing an appeal from the Local Court and ordering that the appellant pay to the respondent the sum of $20,595 and costs.

The essential facts as found are that the appellant owned land in the Territory which he proposed to subdivide, and for that purpose it was necessary that fresh water be available. He contracted with the respondent, who was a licensed driller under the provisions of the *Water Act*. The contract was a simple one, in writing, and the respondent

proceeded to drill several bores on the land. Neither party had obtained an effective authority from the Controller of Water Resources pursuant to s57 of the *Act* to carry out the drilling as performed. It is a criminal offence for a person to suffer or permit a bore to be drilled unless authorised by or under the *Act*, and it was not contended that there was any other authorisation available for the benefit of either party (see for example s14). The penalty for a first offence is $5,000, and for a second or subsequent offences not less than $5,000 or more than $10,000, s56.

The learned Stipendiary Magistrate in the Local Court held that the claim made by the respondent upon the appellant for the contract price could not succeed because the drilling was illegal. On appeal, his Honour held that having regard to all the proper indicia, the respondent was able to enforce the contract against the appellant as the contract was not rendered void or unenforceable, either expressly or impliedly, by the *Act*.

There is relatively recent authority in the High Court touching upon the issue in this case. A provision of the *Bankruptcy Act* considered in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd and Others* (1978) 139 CLR 410, prohibited the defendant from carrying on any banking business in Australia unless it had an authority under the *Act* to do so. A penalty of $10,000 per day for each day during which the contravention continued was prescribed. Mortgages

and guarantees given to the defendant in the course of banking business were not held to be void or unenforceable, notwithstanding that it did not possess the required authority. The provision did not expressly prohibit the making or performance of contracts to lend money on mortgage supported by guarantee. However, it was contended that the making or performance of such contracts were impliedly prohibited upon a proper construction of that provision. The provision was not directed to any particular aspect of banking, but extended to banking business in general, including both the borrowing and the lending of money. That is not like this case where the prohibitions are quite explicit. At p416 Gibbs ACJ. gave a number of examples of cases in which a statute which imposes a penalty on an unlicensed or unqualified person for acting in a particular capacity have been held to prohibit, by implication, all contracts express or implied made by such a person to act in that capacity. That is not the case here either. Further, the respondent as a licensed driller could lawfully undertake the job the subject of the contract provided he had authority under the Act. The parties here did not contract to do anything prohibited by the statute, nor did they contract to do anything which was illegal.

His Honour also referred to cases where the statute in question intended to forbid the subject activity unless conducted under specific conditions. That is the case here. As Mason J. put it commencing at the foot of p425:

> "It is one thing to imply a prohibition against particular contracts which are distinctive of a business from a prohibition against the carrying on of that business"

In so far as the decision in *Yango* depends upon the statute prohibiting the carrying on of a business generally, it is of no application to this case where the prohibition is against conducting particular activities which are part of a general business. However, it is instructive as to the approach which should be taken when examining the question of the effect arising from illegality attaching to the performance of a lawful contract, upon the contractual rights and obligations of the parties to it. The question on this appeal is whether the respondent, who engaged in the subject activity, without compliance with the specified statutory condition, is able to recover the consideration agreed to be paid by the appellant without regard to whether the specified condition was complied with or not. The answer to that question lies in the construction of the legislation as a whole.

There is nothing to suggest that the drilling of the bores was performed in a manner prohibited by the statute. The respondent did not adopt a method of drilling which is statutorily forbidden. The illegality here did not go to the core or essence of the method of performance of the contract (*St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267; *Anderson Limited v Daniel* [1924] 1 KB 138). Considerations such as that do not apply if the illegal act

does not, as a matter of construction, form part of the contemplated performance of the contract; the contract is then not illegal as performed *Archbolds (Freightage) Limited v S Spanglett Limited* [1961] 1 All ER 417.

However, there is the statutory prohibition upon performing the contract without authority. Is it the intention of the legislature that the violation should bar the respondent from his legal remedies? As the authors of Cheshire and Fifoot's Law of Contract, Fifth Australian Edition continued at par1011:

> "In other words, was the observance of the particular statutory provision concerned regarded as a necessary prerequisite of that party's right to enforce the contract?"

or, as Jacobs J. said in *Yango* at p434:

> "... it is proper ... to have regard primarily to the scope and purpose of the statutory provision, to consider whether the legislative purpose will be fulfilled without the courts regarding the contract as void and unenforceable."

The preamble to the Act states that it is "to provide for the investigation, use, control, protection, management and administration of water resources, and for related purposes". Relevantly, water resources include "ground water" meaning water "occurring or obtained from below the surface of the ground ....". All rights to the "use, flow and control of all water in the Territory" is vested in the Territory and those rights are exercisable by the Minister in

the name of and on behalf of the Territory (s9(1) and (2)). Apart from s57, there is authority for the owner or occupier of land to take ground water from beneath the land for certain domestic purposes, drinking water for grazing stock and irrigating a garden (all subject to certain qualifications), s14. It is plain, when this section is read with s70 that it contemplates the water being taken by means of a bore. The prohibitions in s56 would not appear to apply in those circumstances. It is a criminal offence to pollute ground water s16(2)(b).

The Administrator is enabled, upon recommendation by the Minister and by notice in the Gazette, to declare that a provision of Part 6 of the *Act*, relating to ground water, "does not apply to or in relation to a bore, or to drainage water or waste of a class or description specified in the notice and, accordingly, that provision does not apply" (s47). With a view to obtaining particulars of all bores within an area, the controller may by notice in the Gazette require owners or occupiers of land to provide information (s55). That provision along with the prohibition of particular activities relating to the drilling, construction etc. of bores, and the obtaining of permits to enable such work to be carried out, are contained in Division 3 of that Part of the *Act* (although the prescribed form is headed "Bore Construction Permit" it enables permission to be given for any of the types of work prohibited under s56 including drilling, constructing, alteration, plugging, backfilling and sealing

off bores). There is thus an executive discretion relating to the need to obtain permits under s57 to carry out the works referred to in s56.

Division 2 of Part 6 relates to "Drilling Licences" and in s48 it is provided that "a person shall not, unless he or she is the holder of the relevant licence under s49, or is acting under the supervision of the holder of such a licence - (a) drill or construct a bore ..." or carry out other specific activity referred to therein. The Controller may, under s49, grant to a person a drilling licence on being satisfied that the person has the prescribed qualifications. The licence may be subject to terms and conditions and is for a period not exceeding 5 years. Form 16 to the *Water Regulations* indicates that drilling licences fall into separate classes, dependent upon the different kinds of aquifer systems in which the drilling operations are to take place. It is an offence to breach the terms of a licence and there is an obligation upon the holder of a licence to provide to the Controller prescribed information and samples, failing which a penalty may be inflicted. The records and samples to be kept are prescribed by regulation 11.

The importance to the public of the proper use, control, protection and management of water resources is further recognised by the factors which are prescribed to be considered by the Controller in deciding whether to grant, amend or modify various permits, licences or consents

including permits under s57, if required to exercise the power. Those matters are detailed in s90 and include matters such as the availability of water, existing and likely future demands, any adverse effects likely to be created, the use to which the water is proposed to be put and all other matters the Controller considers relevant.

Beyond the regulating and permissive provisions, there lies a further regime designed to protect the water resources. For example, under s20 of the *Act* the Controller or an authorised officer may enter and remain on land, take such measures or construct, maintain, repair, alter or remove such works as he or she thinks fit for the investigation, use, control, protection or management of water, and the Controller may by notice in writing served on the owner or occupier of land require that person to do or not to do anything or to take such measures or construct or remove such works as, in the opinion of the Controller, are necessary or expedient for those purposes. If the owner or occupier refuses or fails to comply with the notice, the Controller may enter land and take those measures and the cost of so doing reasonably incurred is a debt due and payable by the owner or occupier to the Territory. Further, under s70 of the *Act,* and without limiting the generality of s20, where the Controller is satisfied that an act or omission by a person in relation to a bore may result, directly or indirectly, in the pollution or deterioration, inequitable distribution, loss, wastage or undue depletion of water, the Controller may, by notice served

on the owner or occupier of the land on which the bore is situated, direct that person, within the period specified in the notice, to do a variety of things to rectify the result that may arise from such an act or omission. He may, for instance, require that the supply of ground water be closed and shut off, and restrict or limit the amount of water taken from the bore, discontinue the use of the bore, disconnect pipes and drainage works, plug, seal off or backfill the bore and take steps in relation to waste. Failure to comply with the notice is sanctioned by a penalty of $2,000.

Contrary to the usual process involved in proceedings for an offence, s105 of the Act provides that proceedings for offences against the *Act* shall not be commenced without the consent in writing of the Controller. That may partly explain why those responsible for the administration of the *Act* adopt what was described as being a pragmatic approach to the question of permits for drilling. The evidence of one of the senior officers was, as his Honour put it, "...conveniently summarised by his Worship as follows:

> (i) The way the Authority has administered the Act to date is you don't need a permit to drill every bore before you drill it and the Authority has instructed drillers accordingly;
>
> (ii) From a commonsense point of view when a driller rings up and says "I've got a dud bore, can I drill another one on the same permit?", the Authority says "go for your life, we do not wish to stop you and wait until the landholder comes back to town and gets another permit that

eventually gets signed by our Controller and then next week he can drill the second bore. You're welcome to drill a new bore on the same permit";

(iii) The Authority has found it acceptable so far to allow a driller to drill more bores even if he's got one permit and register them all when he comes back;

(iv) The Authority has looked at a bore construction permit as meaning a "successful" bore;

(v) As the permit is actually called a "bore construction permit" the Authority has taken the attitude that if - - - a hole was drilled and there was no water, then there was no need to "construct" a bore".

The penal sanction in s57, if invoked by the Controller, is but one of numerous provisions in the *Act* designed to fulfil its purposes. If a permit is not obtained to drill a bore, where one is required, (and that is not so in all cases) the Controller may take steps to render the bore inoperative or to have it modified in order to achieve the objects of the *Act*. Further, if he sees fit, he may consent to those responsible being prosecuted. Prosecution is but one of many means by which the objects of the *Act* can be achieved. It would be unjust if the appellant could accept the benefit of the respondent's work (in this case designed to enable the appellant to obtain the benefit of a subdivision of land) without paying for it.

There is no justification to be found in the statute for depriving the respondent of his contract price and enabling it to remain in "the pockets of someone who is lucky

enough to pick up the windfall or astute enough to have contrived to get it." *Hayes v Cable* [1962] SR (NSW) 1 at p6.

I would dismiss the appeal with costs.

ANGEL J:

The respondent, a driller licensed under s49 of the Water Act (NT), agreed for reward to drill a number of bores for the appellant on land at Hingston Beach.

The document evidencing the contract, dated 9 October 1992 (exhibit P1) simply said:

> "Mobilisation $1000.00
> Drilling: minimum 3 bores at $1759.99 each for 35 metres
> Depth then $55.00 metre thereafter
> Casing to be supplied on site at clients cost
> Leonhardt drilling crew permitted to use house facilities at Hingston Beach payment on completion."

The respondent drilled seven bores, three of which were successful in that they struck ground water. The respondent cased and capped the successful bores. The respondent sued the appellant in the Local Court for monies owing on the contract for the work done. The appellant denied the claim saying that the contract was illegal and unenforceable because permits to drill the bores had not been obtained pursuant to s57 of the Water Act (NT).

The learned Magistrate who heard the case at first instance found, inter alia:

(1) The contract was for the drilling of a minimum of 3 bores, for the consideration set out in Exhibit P1.

(2) On 9 October the appellant applied under s57(1) of the Act for a bore construction permit; a permit for the "construction of a bore" issued on 13 October and two similar permits on 27 October.

(3) With the knowledge and approval of the appellant, and pursuant to the contract, the respondent drilled seven (7) bores between 15 and 28 October 1992.

(4) The respondent provided casing and capping to bores Nos. 1/92, 4/92 and 5/92 which were drilled on 15 October, 18-19 October, and 21-23 October respectively. These were the only bores which were successful, in that they struck water.

(5) The respondent was not required as part of the contract to perform any non-drilling work in addition to that on bores 1/92, 4/92 and 5/92.

The learned Magistrate concluded that subject to any question of illegality, he would have allowed the respondent's claim in the amount of $22,315. He held, however, that the

permits issued under s57(1) of the Water Act were for the "construction" of a bore and that no permits were ever issued for any of the seven bores to be "drilled". He held that the respondent's drilling was never authorised by s57(1), and that both the contract and its performance were expressly or impliedly prohibited by s56(1)(a). He gave judgment for the respondent in the sum of $1,720, being the "mobilisation" costs of $1,000 referred to in exhibit P1 and $720 as permitted construction costs on bore 1/92.

The respondent appealed. On appeal, Kearney J held that the contract was not expressly or impliedly prohibited by the Water Act (NT) and that the performance of the contract was not expressly or impliedly prohibited by the operation of ss56(1) and 57 of the Water Act. He allowed the appeal and entered judgment for the respondent for $20,595, the sum outstanding under the contract. In reaching his conclusion, Kearney J followed *Ross v Ratcliff* (1988) 91 FLR 66, which he described as "a highly persuasive decision".

The respondent has not challenged the learned Magistrate's conclusion that the permits issued under s57(1) did not authorise the drilling of the bores. It was common ground in this court that both parties had contravened s56(1). The respondent does not allege that as between the parties the appellant is estopped from asserting illegality.

In its terms, the contract between the parties was not unlawful. In its terms it was to drill bores, not to drill bores without a necessary permit. The contract as made did not oblige either party to commit an offence against s56(1)(a) of the Water Act. The statutory provisions in question neither expressly nor impliedly address executory contracts. The statutory prohibition - not to drill without a necessary permit - relates to conduct not contracts. It applies to land-holders and contractors not contracts. The contract could have been performed lawfully; it was to do a thing which could be performed without violation of the law. The contract was not entered into with the intention of drilling without a permit, ie, there was no intention to perform the contract in an illegal manner. However, the performance of the contract - the drilling of the bores without a permit - was contrary to the statutory prohibition and an admitted contravention of s56(1)(a). It was conceded that neither party had a defence under s56(2). The drilling operation having been done without a permit, each party is also guilty of an offence. The respondent was compelled, in order to make out its case in contract, to disclose the prohibited conduct. The unlawful performance is the consideration for which the respondent sues and the illegality can not be said to be incidental to the contract or to the performance thereof, cf *Neal v Ayers* (1940) 63 CLR 524. Section 56(1)(a) is not merely directory: cf *Australian Broadcasting Commission v Redmore Pty Ltd* (1988-89) 166 CLR 454 at 456, 457, 458-459.

In these circumstances the respondent's contractual claim must fail. However because this conclusion is contrary to the decision of the learned Judge and that of Miles CJ in *Ross v Ratcliff*, supra, which is indistinguishable from this case on the facts, it is perhaps desirable that I venture a little in to the thicket of the case-law.

The case involves the unlawful performance of a contract lawful at the time it was entered into. There is some difficulty reconciling the authorities as to the legal principles applicable to such circumstances. In *Anderson Ltd v Daniel* [1924] 1 KB 138 at 149, Atkin LJ said:

> "The question of illegality in a contract generally arises in connexion with its formation, but it may also arise, as it does here, in connexion with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner."

Having referred to that passage, Devlin J, in his celebrated judgment known to all contract law students in *St John Shipping Corporation v Joseph Rank Ltd* [1957] QB 267, said (at 284):

> "But whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract as made or as performed, a contract that is prohibited by statute? ...

> ... On a superficial reading of *Anderson Ltd v Daniel* and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract is itself legal, if something illegal is done under it. But that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute."

After further citation Devlin J said: "... the question always is whether the statute meant to prohibit the contract which is sued upon." This approach, ie whether as a matter of statutory construction, the way in which a legal contract was unlawfully performed turned it into a sort of contract that was prohibited by statute, has been referred to with approval in subsequent cases, see eg *Hayes v Cable* [1961] NSWR 610 at 616 and *Doug Rea Enterprises Pty Ltd v Hymix Australia Pty Ltd* [1987] 2 QR 495 at 502-503. As Gibbs ACJ put the matter in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 417:

> "The performance of a contract may turn it into the sort of contract that is prohibited by statute, and the test is whether the contract, as such or as performed, is a contract that is prohibited by statute."

The answer to that question is one of statutory interpretation. Whether the parties knew of the statutory prohibition is irrelevant.

There are other authorities, however, which suggest that the knowledge of the parties is relevant and that if the

parties had no knowledge of the illegality of the performance of a lawful contract at the time, as here, the contract may not be illegal even though the contract is performed in a way intended and notwithstanding that the law is infringed by the performance of the contract, see eg *Fire and All Risks Insurance Co. Ltd. v. Powell* [1966] VR 513 at 520, 525, 527-8, *Frank Davies Pty Ltd v Container Haulage Group Pty Ltd (No 1)* (1989) 98 FLR 289 at 307 per Hodgson J, *Corumo Holdings Ltd & Ors v C Itoh Ltd & Ors* (1990) 3 ACSR 438 at 449-451 per Rogers CJ Comm D, affirmed (1991) 24 NSWLR 370, and *PT Ltd and Another v Maradona Pty Ltd and Others* (1991-1992) 25 NSWLR 643 at 649-653 per Giles J.

In such cases, the question whether the contract is expressly or impliedly prohibited by statute is not answered by reference to the contract as performed but by reference to the contract as made, and if (so considered) it is not prohibited, the question then is whether the contract as performed is contrary to public policy. When a contract is not expressly or impliedly prohibited by statute, it may still be contrary to public policy.

In *Frank Davies Pty Ltd v Container Haulage Group Pty Ltd*, supra, Hodgson J put the matter thus:

> "In my view, the contract is not illegal or unenforceable. In my view, the regulations do not impliedly prohibit the making of any such contract. It can be said that the purpose of the contract was the provision and use of a machine in ways which were in breach of the regulations. The question then is, whether as a matter of public policy, the

contract should be considered as illegal and unenforceable."

In *Yango*, supra, at 423, Mason J, with whom Aickin J concurred, said:

"The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.

The first question is: Does s. 8 expressly prohibit the making of the loan? The question must, I think, be answered in the negative. The section makes no reference to contracts or transactions.",

and at 424:

"The next question is whether by implication, that is by way of necessary inference, such a prohibition can be discovered in the section."

Having answered that question in the negative, at 427, Mason J said:

"The question therefore remains whether the court will allow the plaintiff to enforce the contract. The suggestion is that the court will not do so and that its refusal so to do is dictated by the principle ex turpi causa non oritur actio or by the more specific rule that the court will not enforce

> the contract at the suit of a party who has entered into a contract with the object of committing an illegal act."

Mason J thus appears to have answered the question whether the loan was expressly or impliedly prohibited by statute by reference to the contract as made, and, having answered that question in the negative, proceeded to deal with the question of enforcement as a matter of public policy. He did not expressly advert to a distinction between a contract as made and a contract as performed.

In the same case, Jacobs J took a similar approach. At 432 he said (omitting references):

> "... the prohibition against carrying on a business may not be able to be construed as either an express or implied prohibition against the making of a particular contract. Nevertheless in such a case the courts may not enforce such a contract but, if they do not, it is not because the contract itself is directly contrary to the provisions of the statute by reason of an express or implied prohibition in the statute itself but because it is a contract associated with or in the furtherance of illegal purposes, for instance, the purposes of a business being carried on illegally: *McCarthy Bros. Pty Ltd. v. Dairy Farmers' Co-operative Milk Co. Ltd.* One then enters the field of contracts not themselves unlawful but made for an illegal purpose. Of these the classic case is *Pearce v. Brooks*. The refusal of the courts to regard such contracts as enforceable stems not from a legislative prohibition but from the policy of the law, commonly called public policy. It is of these contracts that Lord Wright said in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*:
>
> > '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.'
>
> I would take the reference to "expressly forbidden" to comprehend the case of a prohibition implied as a matter of construction of the statute itself.
>
> In *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* the Court of Appeal approached the question before them in the manner which I have indicated. Pearce L.J. examined whether the contract was expressly forbidden by the statute, then whether it was impliedly forbidden by the statute and lastly whether, if the contract was neither expressly or impliedly forbidden, nevertheless on grounds of public policy the courts would not enforce it if it could only be performed in contravention of a statute or was intended to be performed illegally or for an illegal purpose."

Somewhat significantly, in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* [1961] 1 QB 374 at 393 Devlin LJ agreed with "the broad ground which Pearce LJ has adopted...". Devlin LJ also said (at 391):

> "It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally."

This, it seems to me, with respect, is somewhat at odds with the passage from his Lordship's judgment in *St John Shipping*, earlier cited.

Devlin LJ did also observe (at 393): "There are many pitfalls in this branch of the law."

There have been a number of cases where contracts lawfully entered into were performed without a necessary licence or permit. The cases are not readily reconcilable.

In *Fire & All Risks Insce. Co. v. Powell* [1966] VR 513, Smith J adverted to one area of difficulty addressed in the cases. He said, at 527:

> "... notwithstanding the unqualified statements of the rule that are to be found in some of the cases, it is not correct to say that there is an inflexible rule preventing the enforcement of all claims the title to which arises from the claimant's own crime.
>
> [Outside crimes of the gravest sort] ... it would seem that the basis on which the rule rests requires that its application should depend upon a weighing, with reference to the public interest, of all the relevant circumstances. And these, I consider, must include the gravity of the class of crime; the offender's knowledge of facts or law making his conduct a crime; the degree of likelihood that if enforcement were allowed the commission of similar crimes would be promoted; the degree of likelihood that enforceability would promote the interests of the victims; and the public interest in the observance of contracts: ..."

On the present state of the more recent authorities the question whether a contract is expressly or impliedly prohibited by statute would appear to be answerable according to whether the statutory prohibition, as a matter of statutory interpretation, prohibits the contract as made, irrespective of its mode of performance, lawful or unlawful. If the performance is unlawful, and the contract as made is not prohibited, the question then is whether as a matter of public policy the contract should nevertheless be enforced.

Whichever approach is adopted in the present case, the result, it seems to me, is the same. If the relevant question is whether the contract as made or as performed is prohibited by statute, the answer is plainly yes - the

contract as performed - drilling without a permit - is expressly prohibited by s56(1)(a) of the Water Act which relevantly provides:

> "A person shall not, unless authorised by or under this Act cause, suffer or permit ... a bore to be drilled ..."

If, on the other hand, the relevant question is whether the contract as made is prohibited by statute, the answer is equally plainly no, for the reasons discussed above. However, the performance of the contract is expressly prohibited by the statute and it is therefore, ipso facto, contrary to public policy and the respondent can not sue in respect of it. "The public policy of this state, when the legislature acts", said Cardozo J in *Messersmith v American Fidelity Co* (1921) 19 Am.L.R. (Ann.) 876 at 877, "is what the legislature says it shall be." And see per Smith J in *Fire and All Risks Insurance Co. Ltd. v. Powell*, supra, at 526-527.

That the conduct of the respondent in drilling the bores without a permit is also an offence is not, as I view the matter, really relevant to the issue of public policy, given the express statutory prohibition. If this is correct it follows the indicia referred to by Mason J in *Yango*, supra, at 428, 429, are not relevant to any issue of public policy in this appeal.

If it is relevant, the offence created by s56(1)(a) can not be said to be a minor statutory offence which does not

involve obloquy: cf *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799 at 810; the Water Act (NT) is legislation enacted, inter alia, to preserve, protect, and regulate the use of water resources for the benefit and protection of the public and the respondent was a licensed driller and ought to have known of its responsibilities.

The respondent's contractual claim against the appellant must fail.

If the reasons I have given for coming to that conclusion are correct it follows that the decision in *Ross v Ratcliff* (1988) 91 FLR 66 can not be supported. I note the correctness of that decision is queried in Halsbury's Laws of Australia Vol 6 paragraph 110-7055 note 4.

Somewhat curiously, in this court the respondent did not pursue its claim in restitution.

I would allow the appeal, set aside the orders of Kearney J and direct that the appeal from the Local Court be dismissed.

The appellant should have his costs of the appeal in this court and before Kearney J.

THOMAS J:

This is an appeal from the orders made by Kearney J on 23 September 1994. His Honour allowed an appeal from a decision of the Local Court and ordered judgment for the appellant being the respondent in these proceedings in the sum of $20,595. This amount was awarded in addition to the $1,720 awarded in the Local Court. Consequently, the respondent company in effect received an award of $22,315.

The dispute related to a contract between the appellant in these proceedings, Colin Fitzgerald, and the respondent, F.J. Leonhardt Pty Ltd. The appellant owned land at Hingston Beach in the Northern Territory which he proposed to subdivide. For this purpose fresh water had to be available to the new blocks. The appellant contracted with the respondent a driller licensed under s49 of the *Water Act* to drill several bores on the land to obtain a supply of ground water.

The appellant appeals from the whole of the judgment of his Honour Justice Kearney on the following grounds:

> "1. His Honour erred in law in finding that the *Water Act* did not expressly or impliedly prohibit the performance of the contract so as to make it enforceable where no permit has been obtained pursuant to s.57 of the Act.
>
> 2. His Honour erred in law in finding that it was relevant that the transgression was minor.

3. His Honour erred in law in finding that the settled administrative practice of the responsible authority was a relevant consideration."

The *Water Act* governs the statutory regime for access to water in the Northern Territory. The purpose of the Act as stated in the preamble is as follows:

"to provide for the investigation, use, control, protection, management and administration of water resources, and for related purposes"

Part 5 and Part 6 set out the preconditions for access to both surface and ground water. Section 48 of the *Water Act* prohibits the drilling or construction of a bore except by a person who is the holder of a licence granted pursuant to s49 of the *Water Act*. Section 48 provides penalties for breach of the section. The controller of water resources appointed under s18 of the *Water Act* may grant a permit in the prescribed form to a person to carry out an operation referred to in s56(1). Section 56(1) provides as follows:

"(1) A person shall not, unless authorised by or under this Act, cause, suffer or permit -

(a) a bore to be drilled, constructed, altered, plugged, backfilled or sealed off;

(b) the casing, lining or screen of a bore to be removed, replaced, altered, slotted or repaired;

(c) a bore (whether in the course of construction or not) to be deepened; or

(d) work to be carried out in relation to a bore in respect of which the Administrator has, by notice under section 47, declared that a

provision of this Part does not apply, if the work will result in the provision then applying to the bore.

Penalty: For a first offence - $5,000.

For a second or subsequent offence - not less than $5,000 or more than $10,000."

Section 58 provides penalties for a breach of the terms or conditions of a permit granted under s57(1).

The essence of the breach relates to the respondent's drilling a total of seven bores without the authority required under the provisions of the *Water Act*.

The respondent accepts that the drilling work under the contract was unauthorised under s57(1) and therefore carried out in breach of s56(1)(a). The respondent concedes that as the drilling of the seven bores was illegal under s56(1)(a) the respondent was in breach of s56(1)(a) and exposed to the penalty provisions of that section. The respondent asserts the appellant was also in breach of s56(1)(a). The appellant makes no such concession as to his liability.

The respondent's concession above raises a fundamental question, that is, what is the effect of the respondent's breach of s56(1)(a) on the respondent's right to recover under the contract. The appellant argues that such a breach goes to the very core of what is required for valid contracts. It is the appellant's submission the objects of

the legislation cannot be achieved when those who circumvent the proscriptive provisions of the Act are able to receive the benefit of their illegal conduct.

The appellant further submits that in this case the contract which is performed is prohibited by statute. The appellant asserts there is no way that drilling can be performed without the grant of a bore permit without breaching the statute. On the appellant's argument any contract to perform any of the operations in s56 must comply with the statute.

The appellant concedes the subject contract was not "illegal as formed". It is common ground between the parties that "neither party intended to commit any illegal act". His Honour accordingly accepted (Appeal Book p39) that there was no "fraudulent or immoral purpose" on the appellant's part, i.e. the respondent before this court. His Honour also noted (Appeal Book p39) that pursuant to s57(1) of the Act, Regulation 7 of the Water Regulations and Form 9, the respondent (appellant in this Court) bore the statutory obligation to apply for the permits. With respect I agree with his Honour on both aspects.

The principle of law to be applied is set out in *Yango Pastoral Company Pty Limited & Ors v First Chicago Australia Limited and Ors* (1978) 139 CLR 410 Gibbs ACJ at 413:

> " There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits."

I also apply the observation of Sangster J in *John S. Chappell Pty Ltd v D.K. Pett Pty Ltd* (1971) 1 SASR 188 at 197:

> "In considering implied prohibitions 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."

With respect I agree with his Honour's conclusion as set out on p45 of the Appeal Book:

> " In my opinion, having regard to all the proper indicia, the appellant is able to enforce the contract against the respondent in this case as their contract is not rendered void or unenforceable, either expressly or impliedly, by the Act."

The appellant argued that the decision of Miles CJ in *Ross v Ratcliff* (1988) 91 FLR 66, was both wrong in law and distinguishable from this case. I do not accept that submission. Miles CJ in *Ross v Ratcliff* (supra) took into account a number of matters which included:

(1) The defendant was not a person who is one of a group for whose protection the provisions of the *Water Act* is intended.

(2) The case was not one in which the plaintiff and the defendant have put their head together in order to try to evade the consequences of legislative attempts to conserve a natural resource.

(3) There was no fraudulent or immoral purpose within the terms of the Yango Pastoral case.

(4) The effect of s112(1) of the *Water Act* is that the plaintiff, like the defendant, is subject to a penalty, but it does not render the contract between them unenforceable.

I agree with the submission of counsel for the respondent that the decision of *Ross v Ratcliff* (supra) is a persuasive precedent. For these reasons I would dismiss the Ground 1 of the appeal.

Ground 2: His Honour erred in law in finding that it was relevant that the transgression was minor.

In his Honour's reasons for decision Appeal Book p39 his Honour stated:

> "In my opinion, it is also relevant to keep in mind that the transgression was "minor", in light of the evidence Mr Van der Velde gave before his Worship; the appellant was following the settled administrative practice of the responsible Authority."

With the consent of the parties this Court was also provided with a copy of the reasons for decision delivered by the learned stipendiary magistrate in the Local Court on 10 December 1993.

In his reasons for decision, the learned stipendiary magistrate summarises the evidence of Mr Van der Velde who is a senior advisory officer with the Rural Water Advisory Services of the Water Resources Division of the Power and Water Authority.

In his reasons for decision at page 10 the learned stipendiary magistrate states:

> "This evidence displays that a pragmatic approach has been adopted by the Authority. Having regard to the size of the Northern Territory and the practical difficulties which can and must arise from time to time in relation to these type of operations this approach is understandable. However, the question is whether the interpretation of the Authority is in fact permitted by the Act.
>
> From the evidence of Mr Van der Velde I find that the plaintiff has acted in accordance with the directions of the Authority (being the Authority responsible for administering the Act) and has acted to the satisfaction of the Authority in relation to each of the 7 bores the subject of this claim."

As I understand it, this finding is not under challenge and with respect I agree with his Honour's

conclusion that the fact that it was a minor transgression was a relevant consideration.

I would dismiss this ground of appeal.

Ground 3: His Honour erred in law in finding that the settled administrative practice of the responsible authority was a relevant consideration.

In his Honour's reasons for decision Appeal Book p15 his Honour stated:

> " There is no reason in my opinion why a permit under s57(1) should be limited to the drilling etc of a single bore. Though both "bore" and "operation" in ss56(1)(a) and 57(1) are, as usual in statutes, expressed in the singular form, in general such words include the plural; see s24(b) of the Interpretation Act. And so it is here. Appropriate terms and conditions under s57(2) may be imposed. So, for example, a single permit could have been granted to embrace the whole of the work contemplated by the contract. I consider that the Authority's perceptions of the requirements of the Act and its approach to practical problems in light of those perceptions at (i)-(v) on p9 are understandable; but the perceptions are inaccurate and the approach is not in accordance with what the Act requires."

Further in his reasons for decision Appeal Book p18 his Honour stated:

> " When assessing the nature and quality of the breach of s56(1)(a) in this case, the perception of the Act's requirements by the Authority administering it assumes importance. It is clear, as his Worship found, that the appellant acted in accordance with what the Authority required of him, indeed, in accordance with its instructions (see (i)

on p9). His breach of s56(1)(a) was wholly unwitting, inadvertent and morally excusable; it stemmed from the system instituted by the Authority for the administration of the Act. In those circumstances the observation of Devlin J in *St. John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at p289 is very apt:-

> "Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice - - - "

In this case the parties clearly did not contemplate that their contract would be performed in a manner which would be illegal; that is to say, they did not contemplate that the drilling of the bores in Exhibit P1 would not be authorized as required by s57(1)."

His Honour clearly indicated the administrative practice of the responsible authority did not comply with the relevant provisions of the *Water Act* and noted that the respondent had acted in accordance with the requirements of the Authority. I consider this was a relevant finding to his Honour's conclusion that the breach of s56(1)(a) was wholly unwitting, inadvertent and morally excusable and to his Honour's finding that there was no fraudulent or immoral purpose.

I do not consider this ground of appeal has been made out.

For the reasons stated above, I would dismiss the appeal with costs.

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