



## Précis Paper

### Illegality and breaches of public policy in Contract Law

A discussion of the recent decision in *REWo8 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269.

#### Discussion Includes

- Key facts
- Key issues on appeal
- How courts have historically dealt with contracts tainted by illegality
- Decision of Court of Appeal
- Takeaways from the case

## Précis Paper

### Illegality and breaches of public policy in Contract Law

1. In this edition of BenchTV, Justin Doyle (Barrister – Frederick Jordan Chambers, Sydney) and Ingrid King (Barrister – 10<sup>th</sup> Floor St James Hall Chambers, Sydney) discuss the recent decision of *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269.

#### Key facts

2. The Plaintiff invested \$250,000.00 purchasing a right to acquire a block of land.
3. Soon after the subdivision was registered, the property developer purported to terminate the contract and the Plaintiff sued for specific performance.
4. The Plaintiff was particularly concerned that the developer was taking advantage of the increase in Sydney land value and denying him of the profits.

#### Key issues on Appeal

5. The Court of Appeal was required to address the issue of whether the contract was void for being illegal or contrary to public policy.
6. The Appellant's (the developer) argument concerned two significant clauses contained in the contract.
7. One was a clause which contained a headline price of \$485,000.00, but had a special condition later in the contract which allowed for a discount to the amount of \$250,000.00 provided he did not breach any other term of the contract.
8. The second problematic special condition allowed for stamp duty to be deferred by an arrangement where the purchaser could terminate the contract and re-enter into the contract every 3 months (after which stamp duty would have become due and payable).
9. The Court accepted that the condition was an intent to defer stamp duty.
10. However, the Court found that the clause did not actually operate to defer stamp duty at all. This was because the agreement to purchase the property was still the original agreement and therefore the stamp duty was due 3 months after the original contract was signed.
11. As soon as the court proceedings started, the purchaser made a full disclosure to the Office of State Revenue and paid the stamp duty, all required interest on the stamp duty, and the penalties imposed by the Office of State Revenue.
12. The Court found that as the relevant statute provided its own regime to deal with these issues in regard to stamp duty, the Court did not need to exercise its role to achieve a fair and just result.
13. The Court had to consider the extent to which the objectives of legislation were traversed by the way in which the parties had entered into the contract. The relevant legislation which the

Court looked to was the *Duties Act 1997* (NSW) and the *Taxation Administration Act 1996* (NSW).

14. The other issue that the Court of Appeal had to look at was whether the purchaser had unclean hands in equity.
15. The Court ultimately found that the Plaintiff did not have unclean hands in equity or if he did, he had purged any issue by disclosing his actions to the Office of State Revenue.

#### How have courts historically dealt with Contracts tainted by illegality?

16. Historically, courts have declined to enforce contracts which:
  - a. were prohibited by statute;
  - b. by implication led to an action happening which was contrary to statute;
  - c. were contrary to public policy
17. Courts have generally been willing to grant relief in relation to a cause of action which was founded on an illegal action or immoral act, and will decline relief where the relief itself will be contrary to public policy.
18. The case of *Pearce v Brooks* (1866) LR 1 Ex 213 related to a woman's claim that she was stuck with the costs of repairing a broken carriage, which she had chartered from a gentleman.
19. The Court found that the carriage was chartered for use in relation to her business as a prostitute.
20. At that time, prostitution was seen as immoral in nature and therefore the Court declined to grant relief.
21. It is likely that had this case been decided today, it may have resulted in a different outcome. Courts today are concerned with enforcing the law as it stands, giving effect to statutes and the intentions of legislators, and do not concern themselves with issues of morality.
22. Another case relevant to the illegality of contracts is *Gnych v Polish Club Limited* [2015] HCA 23.
23. In this case, the Polish Club sub-licensed part of its premises to the Appellant, and the Club subsequently argued that it should be able to escape from the lease, as the relevant licensing laws stated that they could not sub-lease their premises.
24. The Court reviewed the relevant statutes and stated that licensing laws aren't concerned with leasing, but with the responsible service of alcohol.
25. The Court noted that when Parliament enacts a law about liquor licencing which contains certain remedies for breaches, if it does not say anything about voiding leases, it is probably not what the law is intended to achieve.
26. Therefore when the issue comes before the Court, the Court should limit its remedies to that intended by, and within the scope of, the legislation.

### Decision of the Court of Appeal

27. If the contract in *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269 had been struck down, the vendor would have been able to sell the property for much more.
28. The Court of Appeal noted that they would give effect to what the contracting parties had intended when they signed the original contract.
29. In particular, the Court of Appeal identified 5 principles by which it concluded that the facts in this case did not justify the relief which the Appellant sought to strike down the contract.
30. Firstly, the stamp duty legislation did not contain any provision which indicates that the intention of the act is to defeat contractual rights
31. Secondly, the particular offensive conduct was not intentional in relation to the purchaser in this instance.
32. Thirdly, the illegal action which was the deferral of the payment of stamp duty was peripheral to the transaction which was about the purchase of land.
33. Fourthly, the illegal purpose was not to pay stamp duty, and that was not carried into effect as the Purchaser paid it before the matter came to trial.
34. Fifthly, to strike down the contract and deny the purchaser the profit would be disproportionate to the relevant issue of not paying the stamp duty.
35. The Court emphasised the decision in *Fitzgerald v F J Leonhardt Pty Ltd* [1997] 189 CLR 215 where it was noted that where a contracting party is guided by lawyers and doesn't know what they are doing is wrong, the Court is less inclined to impose an adverse decision.
36. In regard to the issue of whether the purchaser came to equity with unclean hands, the Court of Appeal noted that as the purchaser did not know what he was doing, and further, had paid the stamp duty to the relevant authorities prior to the trial's commencement, he could not be coming before the equitable court with unclean hands.

### Takeaways from case

37. When one confronts the law in regard to illegality and contracts contrary to public policy, it would be incredibly beneficial to make a full disclosure to the regulatory authorities.
38. Further, when the issue of illegal contracts arises, the Court will firstly look at what the relevant statutes set out to achieve.
39. It is important to look at the facts of the case and whether the relief the Court can grant is appropriate and proportionate.
40. The Court will consider the actions of the parties before the matter comes to trial.
41. It must be remembered that if a contract is illegal, the Court can strike it down. However, in cases of illegality, the motive is usually to escape the contract and often the facts have very little to with the illegality complained of.

42. The Court will consider whether the remedy of setting aside a contractual right is appropriate when one considers what the relevant statute is trying to achieve and the facts.
43. Cases where a contract will be struck down for illegality are to be closely confined and the issue of proportionality of the illegality and the consequence of striking down the contract are important factors.
44. Further, public policy considerations would be unlikely to warrant a common law remedy being denied unless it was found that the consequence of the breach was proportionate to the seriousness of the illegality and not incongruous with the statutory scheme.

## **BIOGRAPHY**

### Justin Doyle

Barrister, Frederick Jordan Chambers, Sydney

Justin has been a barrister at Frederick Jordan Chambers since 2005. Previously, he was Senior Associate at Cowley Hearne Lawyers and a Solicitor with Eakin McCaffrey Cox. Justin is also the Chairman of the Sutherland IHAP Panel. He graduated from Macquarie University with a Bachelor of Arts and Bachelor of Laws (Honours).

### Ingrid King

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Ingrid was admitted to the Bar in 2012 and is a barrister at 10<sup>th</sup> Floor St James Hall Chambers. Previously, Ingrid had experience as the Associate-General Counsel and Head of Compliance of Och-Ziff Capital Management Hong Kong and as a Senior Associate of PricewaterhouseCoopers Legal. She also coordinates and lectures in a Securities Regulation course at the University of Technology Sydney.

## **BIBLIOGRAPHY**

### Focus Case

*REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269.

### Cases

*Pearce v Brooks* [1866] LR 1 Ex 213

*Gnych v Polish Club Limited* [2015] HCA 23

*Fitzgerald v F J Leonhardt Pty Ltd* [1997] 189 CLR 215

### Legislation

*Duties Act 1997* (NSW)

*Taxation Administration Act 1996* (NSW)