IN THE SUPREME COURT OF NAURU
AT YAREN (CIVIL JURISDICTION)

Civil Suit No. 43/2016

BETWEEN

Capelle & Partner Pacific Occidental of Ewa District

Plaintiffs

AND:

Darrel Tom and Gideon Bagaga of Ewa District and Aiwo District respectively as representative of the lessors

First Defendants

AND:

Proprietors and Lessors of Portion 13 Denigomodu District

Second Defendants

Before: Khan, J
Date of Hearing: 10 April 2019
Date of Judgement: 17 June 2019

Case may be cited as: Capelle & Partners v Darell Tom & 0thers

CATCHWORDS:

Where the plaintiff entered into a lease with 64% of the landowners – whether the lease was entered into by the majority of the landowners – what constitutes a majority – whether the lease was performed without the consent of the President as required by s.3(3) of the Lands Act 1976 – whether the lease was unlawful – whether the plaintiff was entitled to claim for loss of damages.

Held: 75% of the landowners constitute the majority – the consent of the President is required to the lease before it is performed – that the lease was unlawful and the plaintiff was not entitled to claim for any damages – and equity will not aid an illegal transaction.

APPEARANCES:

Counsel for the Plaintiffs: V Clodumar
Counsel for the First Defendants: D Aingimea
Counsel for the Second Defendants: K Tolenoa

JUDGEMENT

INTRODUCTION

Original Lease

1. On 15 May 2014 the plaintiff entered into a lease agreement (lease) with the landowners of Portion 13 Denigomodu District (the second defendants). Sean Oppenheimer signed the lease on behalf of the plaintiff as the managing director and affixed the Common Seal of Capelle and Partners Pacific and Occidental. Mr Ken Ageidu signed the lease on behalf of the landowners.

2. The purpose of the lease was:

   a) To enable the plaintiff to temporarily lay down, devanning and transit of sea/shipping containers; and

   b) For the parking of heavy equipment required for the operation on the site.

3. The lease stated that:

   > "I approve this land lease agreement
   > His Excellency, Hon Baron Waqa, M P
   > President"[1]

4. Clause 2 of the lease made provisions for extension of the lease wherein it is stated at Clause (a), (b) and (c) as follows:

   a) The initial term of the lease shall be for 18 months from May 2014, with the right to extend for a further 12 months subject to 2(c); and

   b) A payment arrangement for the lease of the land are set out in Schedule 3; and

   c) The lease shall be extended for another 12 months provided that mutual agreement for extension is obtained 1 month prior to the expiry of the initial term; and

   d) Where an expression of interest to enter into a new lease after an extended term Clause 2(c) above, the landlord shall in good faith accord the lessee the first preference.

5. Following the signing of the lease agreement, the parties also entered into a land management and service agreement.

6. The lease agreement expired on 15 November 2015 and the parties did not enter into an extension of the lease, however, the plaintiff continued to pay the rent to the second defendants.

New Lease

[1] Page 5 of the lease document

7. On 1 June 2016 the first defendants as the representatives of the landowners of Portion 13 entered into a land case agreement with EHCTS (JV) for a period of 5 years.

8. On or about 10 June 2016 the plaintiff's counsel, Mr Clodumar, attended a meeting with the landowners of Portion 13. He was told by the landowners that they have entered into a lease with EHCTS.

9. On or about 12 June 2016 the plaintiffs prepared an extension of the lease and submitted it to the second defendants for consideration.

10. On 10 June 2016 the plaintiffs received a letter from the first defendant, Darrel Tom, advising it that the landowners of Portion 13 had entered into a lease with EHCTS.

PROCEEDINGS

11. On 17 June 2016 the plaintiff filed an application for ex parte injunction against the first and second defendants. The application was heard by the Registrar, Mr F Jitoko (Registrar) and he made the following orders:

    1) The first and second defendants, their servants, agents, contracting partners or whatsoever be are hereby restrained and stopped from interfering or otherwise obstructing the plaintiff's peaceful enjoyment, use and/or occupation of the part of the land contained in Portion 13 in Denigomodu District until further determination of this action (Civil Action 43/3016) or as otherwise decided by the Court.

    2) That the plaintiff serves the writ and all supporting documents on the defendants;

    3) The matter is adjourned to 28 June before the Registrar.

12. The first and second defendants through their pleader, K Tolenoa filed a reply to the plaintiff's writ of summons and an affidavit on 23 June 2016 and stated therein inter alia:

    1) That the lease agreement was not in compliance with s.3(3) of Nauru Lands Act 2011 (perhaps referring to s.3(3) of the Lands Act 1976) and thus was null and void;

    2) That Ken Ageidu did not have the authority of all the landowners of Portion 13;

    3) That the monies were received by the first and second defendants and they are willing to refund that.

13. On 29 June 2016 EHCTS filed a Motion through its solicitor, Mr Aingimea for leave to be included as a third party to the proceedings.

14. On 4 August 2106 the Registrar heard the application for dissolution of interim injunction orders made on 17 June 2016 and the application for joining of EHCTS as a third party and made an order for the dissolution of the interim injunction and allowed EHCTS to be joined as a third party. In his ruling dated 10 August 2016 the Registrar stated as follows:

"While the lease and renewal could have been challenged by the defendants much earlier there is no argument of existence of a legal right of occupation of the plaintiff through the tenancy at will that operated from November 2015. Common law will recognize and protect the rights of the plaintiff, as the legal tenant to Portion 13 so long as it continues to pay rent and the rent in turn is received by someone who has some proprietary right to Portion 13."

On 1 June 2016, Portion 13 landowners entered into a 'land use agreement' with Eigigu Holdings Corporations (EHC) Subsidiary Eigigu Holdings Cargo and Transport Services Inc. (EHCTS) for the use by EHCTS of Portion 13 as a container depot or 'lay down' area. The agreement was signed some landowners but according to the first defendants counsel represented a majority of the members. The term of the agreement is for 5 years and may be terminated by four months' notice from either party.

The legal consequence of the written agreement is that, it asserts priority rights over the plaintiff's tenancy at will rights to occupy the same land. As between the landowners and EHCTS, the agreement is a valid instrument of tenancy, but as between the plaintiff and the landowners, the issue of TAW may still be extant. However, insofar as the priority of the rights of Portion 13, the rights of EHCTS must take first place over the plaintiffs."

PRE-TRIAL CONFERENCE

15. The parties had a pre-trial conference on 9 April 2019 and agreed to the following facts and issues for determination:

Agreed facts

1) That the plaintiffs at all material times are duly registered entities and carrying on business in Ewa District;

2) The first defendants are citizens of Nauru living in Ewa and Aiwo Districts respectively. They held out to be the representatives of the lessors of Portion 13 Denigomodu District, and as such they are being sued in their capacity as representatives of the landowners (lessors);

3) The second defendants are being sued in their capacity as landowners of Portoin 13 in Denigomodu District;

4) The plaintiffs and the second defendants but excluding the first defendant entered into an agreement to lease part of the land known as Portion 13 in Denigomodu District in May 2014 for 18 months;

5) The second defendants who signed the consent form nominated Ken Ageidu as their representative;

6) A land management and service agreement were entered into between the plaintiffs and second defendants on or about the same time as the lease agreement;

7) On 7 November 2014, the plaintiff entered into an agreement with 2 representatives of the landowners allowing the remaining portion of Portion 13 to be used by the plaintiff;

8) The plaintiff had fulfilled their obligation by paying rent promptly and keeping in good order and said condition the land and any goods parked thereon;

9) The initial agreement expired on November 2015. Clause 2(a) of the agreement allowed for 12 months extension;

10) In any case, the parties continued to fulfill their obligations;

11) The land use agreement was signed by EHCTS (third party) and the defendant on 1 June 2016;

12) There was a family agreement on or about 10 June 2016 where the counsel for the plaintiff attended on behalf of the plaintiff. At that meeting, the counsel learned that the first defendant had entered into a lease agreement with joint venture company EHCTS;

13) That on or about 12 June 2016, a draft extension of the lease was prepared and submitted to the second defendants for consideration;

14) A Notice was received by the plaintiff on or about 14 June 2016 from the first defendants;

15) On or about 17 June 2016, the plaintiffs filed a suit against the first defendants and second defendants for breach of agreement;

16) On 17 June 2016, the Court granted an interim injunction to the plaintiff.

17) On or about 24 June 2016, the defendants filed their defence against a claim of the plaintiffs, in their submissions they claim that the lease agreement between the plaintiff and the second defendant was null and void;

18) On or about 29 June 2016, EHCTS filed an application to be joined as a third party;

19) On 10August 2016, the Registrar granted EHCTS its application to be joined as a third party after dismissing the objection of the plaintiff;

20) That on 4 August 2016, a hearing was conducted by the Registrar re the interim injunction. On 16 August 2016, the Registrar ordered the dissolution of the interim injunction granted on 17 June 2016.

ISSUES

16. The following issues are to be determined by the Court:

1) Was the initial agreement entered into between the parties in 2015, a legally binding agreement?;

2) Is the lease automatically extended under Clause 2(a) of the initial agreement subject to Clause 2(c)?;

3) Are the defendants in breach of Clause 2(d) of the agreement by not giving the plaintiffs the first right of refusal to enter into new a new agreement?;

4) Whether the plaintiff became a tenant at will from November 2015 until a signing of the extension of the lease or termination as the case maybe?;

5) If the finding in paragraph (4) is 'yes', were the defendants obligated under the common law to give notice to the plaintiff to cease occupation of the property at a specific time?;

6) Were the defendants required to comply with Clause 7(a) of the agreement?;

7) If the answer to paragraph (3) and (4) are in the affirmative, is the plaintiff entitled to damages?.

17. Following the pre-trial conference, the plaintiff amended its statement of claim and included a claim for special damages in the sum of $141,510.00 for the period of 6 months between June 2016 to November 2016 at the rate of $23,585 per month.

18. The first defendants also amended their statement of defence and also added a counterclaim. In their defence, the first defendants pleaded inter alia that:

Firstly, the lease agreement was signed by Ken Ageidu as their representative and that he should be sued rather than them as the defendants; and

Secondly, pleaded that the lease did not have 75% consent of the landowners of Portion 13 and was therefore not properly executed;

Lastly, they relied on s.3(3) and (4) of the Lands Act 1976 (Lands Act) in that the lease was not consented to by the President and therefore was void and of no effect.

19. The second defendant also amended their statement of defence and also pleaded s.3(3) of the Lands Act.

20. Although the first defendant included a counterclaim claiming loss because of the injunction issued in favour of the plaintiff but they did not pursue their counterclaim at the hearing.

SUBMISSIONS

21. All counsels filed their written submissions and also made oral submissions which was very helpful to the Court.

CONSIDERATION

22. This case involves the determination in regard to the leasing under s.3(3) and (4) of the Lands Act. S.3(3) and (4) provides as follows:

> (3) Any person who, without the consent in writing of the President, transfers, sells or leases, or grants an estate or interest in any land in Nauru, or enters into any contract or agreement for the transfer, sale or lease of or for the granting of any estate or interest in, any land in Nauru, is guilty of an offence and is liable to a fine of $200.
>
> (4) Any transfer, sale, lease, grant of an estate or interest, contract or agreement made or entered into in contravention of the preceding subsection shall be absolute void and of no effect.

WAS THE INITIAL AGREEMENT (LEASE) ENTERED LAWFULLY?

23. For a lease to be legally binding I am required to consider inter alia the following:

1) What is a 'lease'?

2) Whether the lease was entered into by the requisite number of landowners?

3) Whether the lease needed to be consented to by the President in accordance with s.3(3) of the Lands Act?

4) What is the consequences of the failure to obtain the consent of the President?

WHAT IS A LEASE?

24. 'A lease is a conveyance by which a person, having an estate in land, transfers a portion of his interest therein to another, usually in consideration of certain periodic rent or other recompense'[2].

25. For a lease to be properly executed 'a person, having an estate in land ... transfers a portion of his interest'. This applies to land held under Torrens system where the land is owned by one or more people as freehold owners; and in that context for a lease to be properly entered it has to be signed by all the owners. The land in Nauru is co-owned by various families as multiple owners and their shares depend on the numbers in the respective families. For the families to enter into a legally binding agreement or lease as in this case the practice is to obtain approval/consent of the majority landowners.

[2] Torrens titled in Australasia Volume 1 by EA Francis pages 264 and 265

WHAT IS A MAJORITY APPROVAL/CONSENT?

26. S.6 of the Lands Act provides that three-fourths (75 %) of the landowners) must give their approval or consent for a leasing of land for public purposes. Except for this provision in s.6 of the Lands Act there is no other statutory provision as to percentage of landowners who should grant their approval for a lease to be properly entered and become binding on all landowners. To be able to answer this question, I shall discuss the case authorities which dealt with the issue of landowner's consent.

a) In *Hiram v Solomon*[3] Eames CJ stated as follows at [4], [14] and [33]:

[4] Clay Solomon said his wife took steps to ensure that all the landowners agreed to her owning the house. She approached each landowner with a document, provided by the Lands and Survey department, seeking their signature. Of all the landowners only 3 did not sign their consent; all of the others agreed to what the plaintiff had announced.

[14] The plaintiff recognizes that if the landowner's consent is valid then her contention that her daughter was leasing the property on the plaintiff's behalf rather than on Blueneldi's own behalf, would have no substance. If the document truly represents their wishes, as expressed by the plaintiff and most landowners, it is not in dispute that she could not revoke the agreement, and to demand the property back.

[33] I'm satisfied, therefore, that not only had all the interest in MQ 29 had been handed over on a permanent basis to Blueneldi by her mother but also that the mother had confirmed her agreement to get by signing the authority documents with other landowners."

b) In *Koroa v Landowners of Portion 15*[4] Eames CJ stated as follows at [11], [12], [13],
[14], [15] and [17]:

[11] In fact none of the landowners were asked in 2016 to sign that agreement, or to approve that agreement. The signatures from 2000 (or rather a photocopy of the signatures from 2000) was simply attached to the agreement with Ausaid in 2006.

[12] Ausaid remained in the property and Mrs Koroa moved to Soloman Islands where her husband was a native. In 2008 she returned to Nauru, intending to advise Ausaid that she did not want to lease the property out again, and that she would simply reside on the property herself. Ausaid, however said, that they would not deal with her on her own but would negotiate with the landowners. Having told her that, she then effectively cut off from the negotiations which took place.

[13] As a result of those negotiations, the Republic became the lessee of the premises. Thereafter Ausaid suggested to landowners that a meeting of the

[3] [2011] NRSC 25 (28 November 2011)
[4] [2011] NRSC 22 (22November 2011)

Nauru Lands Committee be held. More than 75% of the landowners, as is required under the Lands Act, then gave approval to the land being leased. It was first leased to the Republic and the Republic, in turn, subleased it to the Commonwealth of Australia, as one of its agencies.

[14] This claim, in effect, is for the loss of profit which had derived from the lease in the above circumstances. Whereas the profits from the lease had been entirely going to Mrs Koroa, they now, by virtue of the decision of 75% of the landowners, were being shared amongst all landowners (including Mrs Koroa).

[15] So the question is, whether having been given possession of the property in 2000 in the circumstances in which she was, Mrs Koroa had an interest which allowed her to lease the property and to stop the landowners from, in turn, purporting to lease out the property themselves. It was put by Mr Aingimea, that it is a matter of customary law and if possession is given in the circumstances that it was given here, it is not merely a temporary arrangement but it is one which cannot be changed by landowners, in which carries with its full rights for Mrs Koroa to make full use of the property, including by way of rental, as occurred here.

[17] In circumstances where the property here was no longer occupied by Mrs Koroa and had been leased out, then I am not persuaded, on that evidence, that there is a customary tradition that would prohibit the landowners from exercising their rights as landowners, save to themselves lease out the property. In the circumstances here it seems to me that whatever might have been, in some circumstances the broad ambit of customary law, in this case what has been proved is that there is no agreement for occupancy of the house was expressly and specifically confined by the landowners in a way that it could not have encompassed the right of Mrs Koroa to lease the premises as she did.

c) In *Deireragea v Kun*[5] the issue of landowner's consent was involved and Crulci J stated at [13] in (vi), [47], [49] and [50] as follows:

[13] in (vi) under the heading 'Agreed Facts'

Interestingly Mr V Clodumar was the counsel for the plaintiff and at [13](vi) it was stated as:

[13](vi)That the consent was less than the precedent threshold of 75% of the landowners and it did not involve the Samson family who are 50% owners of the land Atomo Portion 84 in Yaren District.

[47] In considering what would constitute the requisite proportional permission of the landowners, both plaintiff and respondents counsel have referred to 'the majority'.

[5] [2017] NRSC 35; Civil Suit 53/2016 (14 June 2017)

[49] I consider that the Lands Act 1976 where section 6 refers to a requirement of *'not less than three-fourths of the landowners of the land'* needing to give their permission in respect of granting of a lease or other license, as the basis for consolidating the legal requirement that three-fourths or 75% of the landowners need to agree to the land

[50] Therefore Rev. Roger Mwarewo cannot of his own volition permit the defendants to use, build upon, conduct a business or otherwise exercise rights over Portion 84 unless he speaks for 75% of the landowners of the land.

d) In *Adumur v Dongabir*[6] the land was owned by all the parties and the issue was whether the plaintiff being a co-owner had unfettered right to build on commonly owned land. It was held by Jitoko CJ at page 5 as follows:

'In the end, the Court finds that the plaintiffs, in wishing to construct a new building on land Portion 129 and 130 Denigomodu District will require the approval of the defendants and/or the three-quarter majority of the landowners.'

e) In *Ramanmada Kamoriki v Sharon Sio Kamorika and others*[7] by Vaai J in dealing with a dispute between a mother and her daughter stated at [15] and [16] as follows:

[15] The Court was of the view that 75% of all the landowners did not sign the form. So did the parties in the written agreed facts signed and given to the court.

[16] But alas! During his final submissions counsel for the defendant told the Court only 69% of the landowners signed the form.

27. As can be seen from the cases discussed above that 75% or more of the landowners need to give their approval/consent to constitute the majority and once 75% give their consent/approval then it has the effect of binding the remaining 25%. This has been the practice in this country and that practice has to be followed to provide certainty and continuity, unless of course that practice is changed by legislature.

28. In this matter, according to Mr Clodumar's calculation 64.20% of the landowners gave their consent/approval to Ken Ageidu to enter into the lease with the plaintiff; whereas according to the defendants' calculations only 56.84% of the landowners gave their consent. Even if the plaintiff's calculation is correct, that 64.20% of the landowners gave their consent that will still fall short of the 75% threshold.

WHETHER THE LEASE NEEDED THE CONSENT OF THE PRESIDENT IN ACCORDANCE WITH S.3(3) AND (4) OF THE LANDS ACT?

29. The defendants pleaded s.3(3) of the Lands Act in that the consent of the President was not obtained and their submission is that the lease was 'void and of no effect' as provided for in s.3(4) of the Lands Act.

[6] [2018] NRSC 40; Civil Suit 47/2015 (13 July 2018)
[7] Civil Suit 2/2017

30. Mr Clodumar submits that the Lands Act is not applicable to the lease. He submitted that the preamble to this Act related to the land which was used for the purposes of phosphate industry. It is correct that this Act and the Land Ordinance 1921/1968 before that related to the land used for phosphate industry. Mr Clodumar relies on *Hedman v Roland*[8] in which Thomson CJ considered the meaning of 'transfer' as contained in s.3 of the Lands Act and it was stated at page 2 as follows:

> 'Mr Aroi has asked this Court to have regard to the apparent intention of the Ordinance as a whole in order to construe section 3. He has suggested that the intention of the Ordinance is to protect the Nauruans from the risk of being, cheated into transferring their lands to non-Nauruans and so losing their heritage. I agree, that in order to construe one part of a statute, it is – usually necessary, to examine that part in the context of the whole statute. But having done so in this case, I am unable to accept Mr Aroi's suggestion regarding the intention of the Ordinance was obviously intended in 1921 to facilitate the operation of the phosphate industry by the British Phosphate Commission. If section 3 did incidentally afford protection to the Nauruans, that was not its main purpose...
>
> In section 3 of the Lands Ordinance it is used as one of the series of expressions relating to disposition of land, ie 'transfers, sales or leases, or enters into contract for the sale, or lease of, or for granting of any estate or interest in any land'. Those other the expressions all relate to inter vivos transactions. If the section had been intended to cover disposition by will, I should have expected the word 'devise' to be used. In my view, having regard to the context of section 3 in the whole Ordinance, it is proper to employ the ejusdem generis rule to decide the proper meaning of 'transfer' in that section. Having done so, I am satisfied that its meaning is limited to transfer inter vivos and does not extend to disposition by will."

31. On a plain reading of s.3(3) of the Lands Act, it is abundantly clear that the consent of the President was required to the lease. I must say that I am surprised that Mr Clodumar, is attempting to argue against those contentions when the actual lease documents which I have referred to earlier provided at page 5 as follows:

> **"I approve this land lease agreement**
> **His Excellency, Hon Baron Waqa, MP**
> **President"**

WHAT ARE THE CONSEQUENCES OF THE FAILURE TO OBTAIN THE CONSENT OF THE PRESIDENT?

32. The parties can enter into a lease but before the lease is activated or performed the consent of the President has to be obtained. If the parties were to perform the lease without the President's consent then the leasing would be ***'absolutely void and of no effect'.***

[8] [1974] NRSC 2; [1969 – 1982] NLR (B112) (22 July 1974)

33. S.3(3) and (4) is very similar to s.12 of the Native Land Trust Ordinance (NLTB) of Fiji which was considered in the case of *Chalmers v Pardoe*[9]. In that case P was the tenant of NLTB and allow C to build a house without the consent of NLTB and subsequently they had differences and P refused to apply for consent of the NLTB. The Privy Council stated at page 2 as follows:

"At this stage it will be convenient to set out section 12 of Native Land Trust Ordinance, Chapter 104:
'12.(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in this lease or any part thereof, whether by sale, transfer or sub-lease or in any manner whatsoever without the consent of the Board as lessor or head-lessor first had and obtained. The granting or withholding of the consent shall be in the absolute discretion of the Board, and any sale, transfer, sub-lease or otherwise unlawful alienation or dealing effected without such consent shall be null and void ..."

The Privy Council on appeal stated as follows:

"But even treating the matter simply as one where a license to occupy coupled with possession was given, or for the purpose, as Mr Chalmers and Mr Pardoe well knew, of erecting a dwelling house and accessory buildings, it seems to their Lordships that, when this purpose was carried into effect, a 'dealing' with the land took place. On this point their Lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained it follows that under the terms of section 12 of the Ordinance No. 104 this dealing with the land was unlawful. ...

Their Lordships after full and anxious consideration of the whole matter have reached the same conclusion as the Court of Appeal namely that a dealing in the land took place without the prior consent of the Board as required by section 12 of the Ordinance: that the dealing was accordingly unlawful: and in these circumstances Equity cannot lend its aid to Mr Chalmers."

34. Section 12 of the Native Land Trust Act was considered by the Fiji Court of Appeal in *Damodar& Ratanji Ltd v Redwood Investment Ltd*[10] where it was held:

'The following observations of the Fiji Court of Appeal made in *Murray Cockburn and Native Land Trust v Bilo Limited and others* in Consolidated Civil Appeal Nos. 13 and 22 of 84 at page 26 the judgement are apposite –

"The provisions of section 12(1) are drastic and very widely expressed. They have been considered and applied in a number of cases, perhaps a leading on being *Chalmers v Pardoe* (1963) All ER 552 where the judicial committee accepted that there must necessarily be some prior agreement, so that the mere fact of its existence is not of itself a breach of the section. In *Jai Kissun v Sumintra* (1970) 16 FLR 165, 160 Gould V.P, said a signed agreement held inoperative and inchoate while consent is being sought is not caught by section 12. The problem lies in determining what acts done in relation to that agreement constitute it a "dealing" with the land rendering it illegal. The consensus of the majority in that case suggests that this would occur once it is acted

[9] [1963] FJUKPC1; [1963] UKPC 14 (21 May 2963); 1963 1 WLR 677
[10] [1988] FJ Law Rp 10; [1988] 34 FLR 30 (1 July 1988)

upon as a valid agreement for sale (Tompkins J.A.) or implemented in any way touching the land (Gould V.P.)....."

> "The principle on which courts act in cases involving illegal contracts was enunciated by MacKinon L.J. in his judgement in *Harry Parker v Mason* (1940) 2KB 590. At page 601 he said – 'The rule *ex turps causa non oritur actio* is of course not a matter by way of defence. One of the earliest and clearest enunciation of it is that of Lord Mansfield, in *Holman v Johnson* (1775) 1 Cowp 343. The objection that a contract is immoral or illegal as between plaintiff and defendants sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed; but it is found on general principles of policy which the defendant has the advantage of contrary to the real justice, as between him and the plaintiff by accident, if I may so say. The principle of public policy is: *ex dolo malo non oritu ractio*. No Court will lead its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to be *ex turpi causa* or the transgression of a positive law of this country, there the courts say he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff the latter will then have the advantage of it for where both are equally in fault p*otior est conditio defendentis.*

The appeal is allowed to the extent that the learned Judge's judgement is varied by deletion or cancellation of the false declaration. The appellant has succeeded in part but substantially and is entitled to costs of this appeal which are to be paid by the first respondent."

CONCLUSION

35. The leasing was 'absolutely void and of no effect'. The entire transaction was unlawful and therefore the plaintiff did not acquire any status as a tenant and consequently the plaintiff is not entitled to claim $141,510.00 by way of special damages as equity cannot 'lend its aid' to an unlawful transaction. The claim is dismissed.

36. The first defendants were not a party to the lease and being successful parties are entitled to the costs of this proceeding which is summarily assessed in the sum of $3,000.00 against the plaintiff. And likewise, the second defendants have been successful and are also entitled to costs again assessed in the sum of $3,000.00 against the plaintiff.

DATED this 17 day of JUNE 2019

Mohammed Shafiullah Khan
Judge