

## THE LEGAL EFFECT OF ILLEGALITY OF A CONTRACT

**Catherine Hembadoon Abo**

Head, Administrative Department & Legal Officer,  
National Cereals Research Institute (NCRI) Badeggi, Bida,  
NIGERIA.

kateabo@yahoo.com, kateabo2014@gmail.com

### ABSTRACT

*An illegal contract is one expressly prohibited by a specific statute or at common law and the law would not only render it void but may visit its maker with sanctions such as imprisonment or forfeiture. The court will not enforce an illegal contract provided the illegality is brought to its notice. Contracts illegal by statute include: the express prohibition of certain types of contracts, the regulation of a particular trade, profession or the dealings in a particular commodity or resource, the protection of a class of a persons, the public or the promotion of an object of public policy and the raising of revenue. Contract illegal at common law are so declared because they are prejudicial to public policy, moral and economic interest of the society. Examples of such contracts include a contract to commit a crime, tort or fraud, contract prejudicial to the status of marriage, contract prejudicial to the public safety, contract prejudicial to the administration of justice, contracts tending to injure public service and contracts to defraud the revenue. The general rule is that an illegal contract is not enforceable in court. However, there are exceptions which come under the following heads: Where parties are not in pari delicto, grounds independent of illegality and where there is a fiduciary relationship. Other grounds include locus penitential, that is where the plaintiff repents before the contract is performed and where the statute is to protect one class of persons. By and large, the classification of contracts based on the legal effect is of two categories, void contracts which can be enforced by the court depending on the circumstances and illegal contracts which cannot be enforced by the court but which making could be visited with sanctions.*

**Keywords:** contract, locus penitential, illegal contract

### INTRODUCTION

#### Meaning of Illegal Contracts

When a promise or an act or consideration is embodied in an act that is wrong, either forbidden by statute or morally wrong or contrary to public policy, then such a contract therefore may be void for illegality. In this case invalidity is imposed by law and does not rest on the direction of the parties and no court of law or equity will enforce an illegal contract. Whereas all illegal contracts are void, not all void contracts are illegal.

Illegal contracts can thus, be defined as those contracts prohibited by statute or at common law, the making of which will in most cases be visited by some form of sanctions in the form of either imprisonment a fine or forfeiture or some right of property. There is usually a problem in differentiating between contracts illegal by statute and other contracts which are void at common law. Apart from the statutory illegality, it is often difficult to classify contracts illegal at common law.

It is however suggested that where the degree of the act is so bad as to affect public policy and good morals particularly where sanctions have been imposed then, such a contract will be illegal. The Supreme Court of Nigeria discussed illegality in its broad sense in the case of *Onyuike V. Okeke*<sup>1</sup>. In this case, the plaintiff/appellant claimed from the defendant/respondent the sum of 1,650 pounds being the value of 110 tons of palm oil sold and delivered to the defendant about the month of February 1969, for which the defendant refused and/or neglected to pay despite repeated demands. It was contended that the sum of 1,650 pound was to be paid in Biafra currency. The defendant denied liability, on the ground that the contract was illegal and unenforceable, since Biafra currency is an illegal by virtue of the Central Bank- currency conversion Decree No.48 of 1968, and the consideration for the contract being in Biafra currency was therefore illegal. The Supreme Court held the contract illegal on the following grounds; it is the law that a contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy, an illegal or contract is void and cannot be foundation of any legal right, the court cannot create a new contract for the parties by substituting a consideration in legal currency for a consideration in illegal currency with reference to which the parties entered into the contract. The illegality in this case had to do with the contravention of Decree No 48 of 1968 which made it an offense to possess or deal in Biafra currency.

In trying to distinguish between void contracts and illegal contracts the Court of Appeal looked at it from the view of sanctions in the case of *Thirwell V. Oyewumi*<sup>2</sup>.

### **Nature and Effect**

Public policy imposes certain limitations upon freedom of contract. Certain objects of contract are forbidden or discouraged by law, and though all other requisites for the formation of a contract are complied with, yet if these objects are in contemplation of the parties when they entered into the agreement the law will not permit them to enforce any right under it. Most cases of illegality are of this sort: the illegality lies in the purpose which one or both parties have in mind. In some instances the law strikes at the agreement itself and the contract is then considered illegal.

The subject of illegality is of great complexity and the effects are by no means uniform. The reason for this is not hard to find. The seriousness of the illegality is not the same in all cases. Illegal object may range from those which are tainted with gross moral turpitude, for example, murder, to those where the harm to be avoided is relatively small. It is not surprising therefore, that there are gradations in the degree with which the judges are prepared to assist a person who has an illegal object in view or is party to an illegal transaction.

The effects of illegality in a contract are not always identical in the varying degrees of impropriety associated with the word 'illegal'. In some cases, the law adopts a very severe attitude and refuses to assist a person implicated in the illegality in any way whatsoever. In others, public policy does not require that he should be so completely denied a remedy. Money paid or property transferred may be recoverable as in contracts in restraint of trade. It is only void contract that is capable of severance in certain cases. Also, in some cases the courts will refuse their aid only to a party who intends to break the law, and in others the

---

<sup>1</sup> (1976) SC 1 at 146

<sup>2</sup> (1990) 4 N.W.L.R. Part 114 page 384

contracts is unlawful per se. Thus, although general rules can be set out, each case must be examined empirically in order to discover the precise effect of the illegality.

The fundamental principles upon which the courts will act when they have to deal with an illegal contract were long ago explained by Lord MANSFIELD in *HOLMAN V. JOHNSON*<sup>3</sup> as follows:

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

No person who is aware of the illegal nature of a contract can enforce it, or recover money or property transferred under it. Illegality may arise by either or two ways, by statute or by virtue of the principles of common law.

### **Statutory Illegality**

Rendering a contract illegal statutorily can take various forms. These include: the express prohibition of certain types of contract, the regulation of a particular trade, profession, or the dealings in a particular commodity or resources, the protection of a class of persons, the public or the promotion of an object of public policy and the raising of revenue.

#### ***Express Prohibition of Certain Types of Contracts***

Any type of contract made which has been expressly prohibited by statute is illegal and void. For instance, a contract to import goods like champagne, lace materials, or readymade clothes into Nigeria would be illegal in view of the various statutes prohibiting the importation of these items. Thus, in *Nwasike Onwuamez’s case*,<sup>4</sup> the plaintiff brought a claim of 1,100 pound against the defendant being the purchase price of a car he had sold to the defendant in “Biafra” in 1969. The price of the car was 1,250 pounds and the defendant had paid 250 pounds. This was claim for the balance of 1,000 pounds. The defendant admitted these facts, but alleged that the transaction was entered into within Biafra during the civil war and that the car was to have been paid for in Biafra currency. He then pleaded that since the Biafra currency had ceased to be legal tender, the contract was frustrated and both parties was an illegal contract which could therefore not be enforced, because it was based on an illegal currency.

Similarly, in *Chief A.N. Onyuike III V.D.F. Okeke*<sup>5</sup> the plaintiff brought a claim for 1,650 pounds being the value of 110 tons of palm oil sold and delivered to the defendant in “Biafra” sometime in 1969. It was admitted by both parties that the transaction was in Biafra

---

<sup>3</sup> (1775) 1 Cowp 341 at 343

<sup>4</sup> (Unreported) High Court of Lagos, Adefarasin J. Suit No LD/612/70 delivered on November 26, 1970

<sup>5</sup> (Unreported) Supreme Court of Nigeria, Sir Darnley, delivered on May 5, 1976

currency. The defendant argued that the contract was illegal because of the currency in which it was expressed. It was held by the Supreme Court that the contract was illegal. It had contravened the provisions of decree No. 48 of 1968, making it an offense to possess or deal in Biafra currency.

So devastating is the effect of statute expressly prohibiting the formation of a particular type of contract that any claim based on a transaction which at any stage involved a breach of such a statute, will fail. Thus, in *madam Anna Chukwudifo V. Oguta Shawe*<sup>6</sup>, the plaintiffs handed over a sum of 515 pounds 5 shillings to the defendant, a sailor, in Ivory Coast (now Cote d'voire) with the instruction to bring it into Nigeria and hand it over to their nominee in Lagos. It appeared that the plaintiffs were attempting to beat the deadline for the exchange of old Nigerian currency notes, to the new ones, expressly introduced, to render useless the stock of Nigerian currency notes in Biafra. The defendant claimed that he was arrested by soldiers in Lagos Port and the money seized from him. The plaintiffs had good reason to suspect that he had converted the money to his own use, and so brought this action to recover it from him. Under Section 16 of the now repealed Exchange Control Act of 1962, the importation by any person into Nigeria for any notes which are or have at any time been legal tender in Nigeria was prohibited, unless the prior permission of the Federal Minister of Finance has been obtained. The suit was dismissed on the ground that the contract was an illegal one, since the parties intended to contravene the provisions of the Exchange Control Act.

And in *Alhaji Rabiw Busaei V. Olabisi Williams*<sup>7</sup>, the defendant who was the recipient of a Hackney carriage (taxi) license issued by the Lagos City Council, hired it to the plaintiff for the operation of the plaintiff's taxi for 600 pounds. This was in breach of the city council's bylaw which prohibited the transfer of carriage licenses, when as a result of a dispute between the parties; the defendant seized the license from the plaintiff, the latter brought an action to recover his 600 pounds. The action failed. It was held that court would not lend itself in any way to assist a person who has taken part in an illegal transaction.

Finally, in the most recent case of *SHODIPO V. LEMMIN KAINEN*<sup>8</sup>, the plaintiff claimed in a contract contrary to the provision of the Exchange Control Act 1962 regarding the foreign exchange transaction. The trial court ruled against the plaintiff but on appeal, it was held inter alia that by virtue of section 3(1) of the Exchange Control Act 1962, except with the permission of the Federal Minister of Finance in Nigeria, no person resident in Nigeria other than authorized deals can deal in foreign currency whether in Nigeria or outside. And that from the facts of the case, the transaction is in conflict with the provision of the Act and is therefore illegal.

### ***The Regulation in a Particular Trade, Profession or Dealings in a Particular Commodity or Resource***

Where there is a law forbidding some trade, progression, dealings in a particular or certain commodity or resource, only those who are qualified to carry on such trade or profession or are permitted to deal in a particular commodity can do so. Thus, it will be illegal to take part in such transaction without qualification or legal recognition. These types of transactions include enactments regulating the practice of professions like law, medicine, pharmacy, auctioneers, companies, and so on. It also covers laws and regulation concerning dealing in land. Thus, by Section 21 of the Land Use Act 2004, it is unlawful for any customary right of occupancy of land to be alienated by assignment, mortgage, and transfer of possession or

---

<sup>6</sup> (Unreported) High Court of Nigeria, Lagos, Kassim J. Suit No. LD/834/70 delivered on October 4, 1971.

<sup>7</sup> (1973) 3 E.C.S.L.R. 518

<sup>8</sup> (1986) 1 N.S.C. 76

sublease or otherwise, without the consent of the Governor of the State, or in some cases, without the consent of the relevant Local Government. This same rule also applies to a holder of a statutory right of occupancy, with the exception that the requirement of consent is limited to the Governor.

A distinction which has an important bearing upon the consequences of illegality is that the disregard of a statutory prohibition may render the contract either illegal as formed or illegal as performance. This principle was upheld in the judgment of DELVIN J. in the case of *ST. John Shipping Corporation V. Joseph Rank Limited*<sup>9</sup>. In this case, the plaintiffs chartered their ship *St. John* to charterers for the carriage of grain from the United States to England. In the course of this voyage they overloaded the ship contrary to the Merchant Shipping (Safety and Load line Conventions) Act 1932, and the master was prosecuted and fined for this offense. The defendants, consignees of part of the grains, withheld a proportion of the freight due, viz, a sum equivalent to the freight on the excess cargo carried. DELVIN J. held that they were not entitled to do so. The Act did not render unlawful the contract of carriage, but merely imposed a penalty in respect of its infringement. Thus, the contract in this case was not illegal as formed but illegal as performed.

A contract is illegal as formed if its very creation is prohibited. In such a case it is void abolition. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not. A contract is illegal as performed if though lawful in its formation, it is performed by one of the parties in a manner prohibited by statute. In *Anderson Limited V. Daniels*<sup>10</sup>, a statute required that every seller of artificial fertilizer should give to the buyer an invoice stating the percentages of certain chemicals and substances contained in the goods. In the instant case, the sellers had delivered ten tons of artificial manure without complying with the statutory requirement. The sellers brought an action for the price of the goods. Their action failed because they had failed to comply with the provisions of the statute. In the Nigerian cases of *Sam Warri-Esu V. Mruku*<sup>11</sup>, *Herry V. Martins*<sup>12</sup>, and *Solanke V. Abed*<sup>13</sup>, the court failed to take these distinctions into consideration and thus, came to the conclusion in the above cases that the landlord in each of these cases, who willfully sublet the property, contrary to the appropriated law and his lease, could have successfully brought an action to enforce his right or obtain remedies under the agreement he had illegally performed. The courts approach in *Solanke* and *Marins* cases was a strenuous but unconvincing attempt to show that the illegal mode of performance had no effect on the contract and the parties. This as can be seen above is obviously incorrect.

However, the Supreme Court's decision in *Solanke V. Abed*<sup>14</sup> constitutes the law on this issue in Nigeria today even though the court failed to apply the correct principles of law in reaching its decision. In this case, the respondent who was the owner of a right of occupancy of premises under the Nigerian Land and Native Rights Ordinance of 1916 cap 105, laws of the Federation of Nigeria 1948, agreed to sublet it to the appellant in April 1959, in breach of Section 11 of the Ordinance which required the prior consent of the Governor before lands granted under the Act could be sublet. On realizing that he stood to forfeit his lease for this act, the respondent ejected the appellant from the premise. The appellant thereupon brought an action claiming damages for trespass. The court of first instance (the High Court of Northern Nigeria) held that by the effect of section 11 of the ordinance, the subletting, under

---

<sup>9</sup> (1957) 1 Q.B. 267 or (1953) All E.R. 822

<sup>10</sup> 1924) K.B. 138

<sup>11</sup> (1940) 15 NLR 116

<sup>12</sup> (1949) 19 NLR 4

<sup>13</sup> (1962) N.R.L.R. 92

<sup>14</sup> (1958) Cap. 152. L.F.N.



which the plaintiff claimed title against the owner of the premises- the defendant was null and void. The plaintiff then appealed to the Supreme Court. It was held that the appellant was entitled to the claim sought and that the contract was not illegal reversing the decision of the lower court.

There are however, statutes regulating the preparation of some professions, the breach of which stipulations do not affect the validity of the transaction. This is a matter of interpretation based purely on the aims and objectives of the statutes concerned. Thus in *Archbalds (Friehtage) Limited V. Spanglet*<sup>15</sup>, an English Act, the Road Traffic Act of 1933 provided that those involved in the road haulage business must obtain the following licenses, depending on the type of haulage they intended to engage in: 'A' license for hauling for profit and 'C' license for haulage of one's own good. The plaintiff agreed that the defendant should haul whiskey belonging to their (plaintiff's) clients. They were unaware that the plaintiffs had only 'C' licenses and the contract was contrary to the statute and therefore illegal. It was held that the aim of the Act was to ensure efficient transport of goods and to provide an orderly and comprehensive road transport service. The Act did not in terms strike at a contract to carry goods, but at the use of unlicensed vehicles on the road. The transport of the goods was therefore not illegal.

It also follows that where the act of illegality is a minor incident in the course of the performance of the contract, which does not affect the core of the contract, the minor incident will not make the contract illegal. Thus, in *St. John Shipping Corporation V. Joseph Rank Limited*<sup>16</sup> it was held that the act complained of was peripheral to the main contract for the carriage of goods by sea and that the validity of the latter was not affected by the captain's lapse.

#### ***Protection of a Class, the Public or the Promotion of an Object of Public Policy***

Where a statute is enacted specifically for the protection of a class citizen or the public or the promotion of an object of public policy, any contract in breach of such a statute would be illegal and void although in certain cases, the party for whose protection the contract was enacted may be allowed to enforce the contract. An example of such prohibitions by statute may be found in the following provisions.

#### ***Contracts Affected by the Illiterates Protection Act 1958 cap. 83, Laws of the Federation of Nigeria***

Section 3 of the above act as was applicable provides that any contracts with an illiterate must state that the contents of the written contract were read and explained to the illiterates and the illiterates thumbing, must be attested by the person explaining the contents. The Act requires strict compliance with this procedure to ensure protection for an illiterate or the contract would be illegal. Thus in *U.A.C. V. Edems And Ajayi*<sup>17</sup> the defendant was the guarantor of a debt owed to the plaintiff company by one of their customers. When he was sued on the guarantee he sought refuge under the illiterates protection Act, claiming the guarantee was void because the contents of the guarantee were not read over to him before he affixed his thumb on it. It was also established in the course of the evidence that the plaintiff's clerk who filled in the guarantor form before the defendant put his thumb mark on it, to enter his name and address in the document. It was held that the plaintiffs had failed to comply with the requirements of the Act and the contract of guarantee was therefore null and void.

---

<sup>15</sup> (1961) 1 Q.B. 267 or (1953) All E.R. 822

<sup>16</sup> (1957) 1 Q.B. 267 Or (1953) All E.R. 822

<sup>17</sup> (1958) N.R.L.R. 3

Also in *Osefor V. Uwania*<sup>18</sup> a contract with an illiterate person who refused to pay a small sum of money he owed the plaintiff was held illegal for failure to contain the name and address of the writer who assisted him with the contents of the contract. The plaintiff's action was thereby dismissed for non-compliance with the statute.

*Contract Subject to the Money Lenders Act 1958 and Similar State Laws*

Cap. 124, of the Money Lenders Act of the Federation of Nigeria as was applicable provides strict rules on procedures to be adopted by money lenders relating to obtaining licenses, keeping records of every loan and terms thereof, so as to protect vulnerable debtors and non-compliance with these rules may render a money lending contract illegal. Thus in the famous case of *Kasumu V. Baba-Egbe*<sup>19</sup>, where the borrower subsequent to the loan contract mortgaged his property to the lender as security for the loan, it was held by the privy council that the mortgage transaction, not having been recorded in a book as required by section 19 of the Act, was therefore unenforceable. The court therefore ordered for cancellation of mortgage and the delivery of the cancelled deeds and the title deeds to the administrators of the borrower's estate.

Once it has been established that the lenders has failed to comply with the requirements of the statute, he cannot escape the consequences of illegality by bringing an action to recover the bare capital without interest and by claiming that the transaction was not a loan under the money lenders Act, but friendly loan. In *Akin Ola V. Ogbesedanunsi*<sup>20</sup> the plaintiff claimed 2,400 thousand pounds from the defendants as money had and received for the plaintiffs use. He had paid the money to the defendant as loan under western Nigeria money lenders law at a rate of 45 percent per annum. But on realizing that he did not have a valid license to practice as a money lender, he brought this action to recover the loan without any interest. It was held by Coker J. that the contract was illegal and he therefore cannot sue the borrower for payment. Where a contract has been declared unenforceable by the express provision of a statute, there could be no appeal to the equitable jurisdiction of the court. So, in *ABESIN V. IYA-EGBE*<sup>21</sup> where the defects in a loan contract include failure to sign the document by the money lender and also that the rate of interest charged was higher than that authorized by law, the lender could not recover even the loan capital without interest since this was an illegal and unenforceable contract.

However, where the words of the statute are merely 'directory' and not 'mandatory', failure to comply will not render the contract illegal as was decided in *Nwosu V. Ekezie*<sup>22</sup>. In this case, the money-lender complied with all the provisions of the Act, but failed to comply with a recent amendment of the Act, which required the additional information of the name and address of the bank in which money lender has an account with which he operates his business to be included in the form in which he applies for licence to be appointed a money lender. It was held by NAGEON DE LESTANG C.J. that the extra requirement which the lender innocently failed to comply with in filling his application form was merely directory and not mandatory.

*Contract with Infants for Supply of Non Necessaries*

Under the infants Relief Act 1874, contracts with infants for the supply of non-necessaries and for repayment of loans used for non-necessaries are illegal and absolutely void.

---

<sup>18</sup> (1971) A.L.R. 421

<sup>19</sup> (1956) A.C. 539

<sup>20</sup> (Unreported) High Court of Western State (Ondo) Coker J. Suit No. AK/21/66 delivered on March 21, 1974.

<sup>21</sup> (1958) W.R.N. L.R. 67

<sup>22</sup> 1963) L.L.R. 53

### *Contracts Prejudicial To Statutes of Marriage*

A contract whereby an already married woman or man concludes a statutory marriage with another man or woman respectively, contrary to the specific provisions of the Marriage Act (sections 47 and 48) and the Nigeria Criminal Code (Section 370), is illegal.

### *Wagering Contracts*

Wagering may be briefly defined as the staking of money or money's worth upon the determining of an uncertain event. Section 18 of the Gaming Act, 1845 provides:

“All contracts or agreements, whether by parole or in writing, by way of gaining or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wages shall have been made”.

In *Kent V. Bird*<sup>23</sup>, it was held that the taking up of an insurance for safe arrival of a ship on which the insured has no good amounted to a wager. And in *Brodgen V. Marriot*<sup>24</sup>, D contracts for sale of a horse where the price depended on the trotted speed of the horse was held to be a wager.

In *Diggie V. Higgs*<sup>25</sup>, D and S agreed together to compete in a walking match. They both deposited 200 pounds with a third party H, each betting on himself to win. S was adjudged the winner, but D claimed to recover his stake from H. it was held that he could do so, the money having not yet been paid over. This case was decided based on the proviso to section 18 which allowed prizes in any lawful and genuine competition to be recovered.

### *Revenue Raising Statutes*

Revenue raising statutes unlike the previous ones do not make a contract illegal as a result of non-compliance with them. Their only effect is to impose a penalty for the purpose of the state revenue.

Thus in *Smith V. Manhood*<sup>26</sup>, a tobacco nit failed to take out a license, and did not have his name painted on his business premises as required by law. Although this omission attracted a penalty of 200 pounds under the law, he was nevertheless allowed to recover the price of tobacco delivered by him to the defendant. It was held by PARKER B, that there was nothing in the statute which prohibited a contract of sale by dealers who did not comply with it. Its only effect was to impose a penalty for the purpose of the revenue on the carrying on of the trade without compliance with the Act.

Nigerian Statutes like the Registration of Business Names Laws which require all owners of businesses to register them for a fee come within this category. It cannot be said that a purchaser of goods from a store whose name on the ground that the owner of the goods had failed to comply with the statute. The statute does not prohibit the contracts concluded by the proprietor on the business, it merely makes them liable to a penalty of 10 pounds/its equivalent for every day during which the default continues.

A similar type of legislation is the Purchase Tax Law which was introduced by many states in Nigeria with the principal aim of rising revenue.. The intention of these statutes is to raise money for the states, not to invalidate agreements that fail to comply with their provisions.

---

<sup>23</sup> (1977) 2 cowp. 583

<sup>24</sup> (1837) 3 Bing N.C. 88

<sup>25</sup> (1877) 2 EXD 422

<sup>26</sup> (1845) 14 M & W. 452



## **CONCLUSION**

While all illegal contracts are void, not all void contracts are illegal. It is important for both parties in a contractual agreement to understand and agree on the terms of contract before signing the contractual document in order to avoid misunderstanding and litigations. Also, where the need arises, it is mandatory to comply with the Illiterate Protection Act by interpreting to the illiterate party in the desired language.