SUPREME COURT OF QUEENSLAND

CITATION:	*Holdcroft & Anor v Market Garden Produce Pty Ltd & Ors* [2000] QCA 396
PARTIES:	**KENNETH JOHN HOLDCROFT** (plaintiff/respondent) **CARMEL RUBY HOLDCROFT** (plaintiff/respondent) **v** **MARKET GARDEN PRODUCE PTY LTD** ACN 010 687 715 (first defendant/first appellant) **KEVIN CAPRA** (second defendant/second appellant) **ERIC SYDNEY WHITEHOUSE** (third defendant/third appellant)
FILE NO/S:	Appeal No 11551 of 1999 DC No 259 of 1994 DC No 260 of 1994
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	29 September 2000
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2000
JUDGE:	Pincus and Thomas JJA, Ambrose J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed and judgment below set aside. Respondents ordered to repay to the appellants the sum of $121,146 with interest thereon from 19 January 2000 at eight per cent per annum. No order with respect to costs of the appeal or the proceedings below.**
CATCHWORDS:	CONTRACTS – ILLEGAL AND VOID CONTRACTS – CONTRACTS CONTRARY TO PUBLIC POLICY – GENERAL PRINCIPLES CONTRACTS – ILLEGAL AND VOID CONTRACTS – EFFECT OF ILLEGALITY OR INVALIDITY – ENFORCEMENT OF ILLEGAL TRANSACTIONS AND

CLAIMS ARISING – IN GENERAL - construction of provisions for termination payments in purported employment contracts – where employment a sham and true transactions was sale of shares – where purpose of sham was to defraud the revenue – principles determining whether court should of its own motion act upon perceived illegality – whether public policy required the court to withhold its assistance in enforcing the illegal contracts – whether monies paid in satisfaction of the judgment below should be repaid – restitution of monies paid in obedience to erroneous judgment

Knowles v Fuller (1947) 48 SR(NSW) 243, considered
National Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386, considered
National Mutual Life Association of Australasia v S R Hallas Pty Ltd [1992] 2 Qd R 531, distinguished
Staniland v Kentucky Homes Proprietary Limited NSWCA No 625 of 1986, 2 December 1987, considered
Yaroomba Beach Developments v Couer de Lion (1989) 18 NSWLR 398, considered

COUNSEL: M P Amerena for the appellants
D C Andrews for the respondents

SOLICITORS: MacDonnells for the appellants
Williams Graham & Carman for the respondents

[1] **PINCUS JA:** I have had the advantage of reading the reasons of Thomas JA. What the parties have done is to make agreements for the sale and purchase of shares in companies, but to draw them up as if there were employment contracts between one of the companies and the vendors. The purpose of doing so was to obtain revenue advantages. There was never any intention that the vendors of the shares (the respondents) would serve under the employment contracts and the payments made to them were, in reality, consideration for the shares transferred; the learned primary judge was asked by the respondents to, and did, so hold in the course of her Honour's careful reasons. The written agreements made were fakes.

[2] One of the purposes of courts is to provide proper remedies for the establishment and enforcement of obligations in the civil sphere. In the absence of a properly functioning court system, cruder methods of ensuring that people comply with their alleged obligations such as violence, or the threat of violence, might be used. Considerations such as these may make courts reluctant to refuse, except in cases where it is clearly necessary to do so, to enforce agreements infected by illegality. But, substantially for the reasons given by Thomas JA, I have been unable to conclude that the court should lend its aid to the enforcement of these written agreements, entered into to pretend that the payments made to the respondents were for services rendered when they were, in reality, payments for the purchase of shares.

[3] I should add that we have heard no submission, and I desire to say nothing, with respect to the parties' position under company law, in particular under Part 2J.3 of the *Corporations Law.*

[4] I agree with the orders proposed by Thomas JA.

[5] **THOMAS JA**: The plaintiffs Kenneth Holdcroft and Carmel Holdcroft brought actions against a company ("Market Garden Produce") for money due under an agreement, and against Mr Capra and Mr Whitehouse as guarantors of the company's obligations under that agreement. There was an alternative claim for rectification of the agreement, but the learned trial judge found the plaintiffs entitled to judgment on its proper construction without needing to consider the question of rectification. In the result judgment was given in favour of Kenneth Holdcroft for $56,680 with interest and costs, and for Carmel Holdcroft for $25,200 with interest and costs, against Market Garden Produce and the guarantors.

[6] The unsuccessful defendants now appeal to this court against those judgments. The agreements in question, dated 30 May 1989, purported to be employment contracts between Market Garden Produce and the respective plaintiffs. Kenneth Holdcroft was described as a Key Accounts Executive for wholesale fruit and vegetable sales and his various duties were described. His services were to be provided over five years and his remuneration was to be $1,207 per week. Carmel Holdcroft's duties were described as those of a Credit Control Officer and her remuneration over the same period (5 years) was $530.68 per week.

[7] The agreements provided for termination payments to be made to the plaintiffs in the event of the agreement being terminated prior to the end of the five year term. For present purposes it may be taken that the five year contracts, in the absence of earlier termination, were intended to terminate on 31 May 1994. The defendant company in fact exercised its right to give written notice of termination on 2 July 1993, that is to say approximately 11 months before the end of the five year period. It contended that on the proper construction of the agreement no termination payment became payable to either plaintiff, as the agreed formula only applied to periods of a whole year or more.

[8] On the face of things the point at issue was determination of the amount (if any) of the termination payments to which the plaintiffs were entitled under cl 8(i) of the agreements. However all was not as it seemed on the face of the agreements.

[9] It was contended at trial below that extrinsic evidence was admissible for the purpose of understanding the true nature of the contract. In particular it was contended that no employment contract was ever intended between the parties. The true nature of the transaction was a sale by the plaintiffs of their shares in Market Garden Produce and associated companies to the other shareholders. The plaintiffs' daughter, also a shareholder, was married to Mr Capra, and upon failure of that marriage an arrangement was devised to separate their interests, and provide payments to her over a period. The formula which was decided upon in relation to the buying out of the interests of the plaintiffs by the remaining shareholders was eventually based on that which had been worked out in favour of their daughter. Eventually the "service" agreements between the plaintiffs and Market Garden Produce took the same form and content as that made by their daughter with

another of the companies except for date of commencement, term and amount of remuneration.

[10] Despite the statement of duties and employment obligations in the contracts, plainly none of the parties ever intended that the plaintiffs should perform any further service for the company and they were never asked to do so. The learned trial judge held as follows:

> "It is quite clear from the evidence which was given before me and from the documents which were exchanged between the solicitors and copies of which were tendered on the plaintiffs' behalf, that the agreements entered into between the parties were putting into effect the sale of the plaintiffs' interests in various businesses to the defendants and that there was never any intention on the part of either of the parties that the plaintiffs would actually carry out their duties as "employees" pursuant to the agreements. Indeed, this is not challenged by evidence from the defendants."

The evidence demonstrates that the "employment" aspect of the contracts was a pure sham. The terms of that agreement however were intended to govern Market Garden Produce's obligations to the plaintiffs in respect of the shares that they transferred.

[11] In advancing this "true construction" of the contract no consideration seems to have been given to the inappropriateness of the company Market Garden Produce assuming liability for the purchase of its own shares from the plaintiff shareholders. The true purchasers were not sued as purchasers but as guarantors of the company. The evidence including letters between solicitors suggests that it was intended that Mr Capra and Mr E Whitehouse would purchase the plaintiffs' shares, and the company seems to have been treated throughout as the vehicle (or milch-cow) which would undertake whatever obligations needed to be undertaken and make any necessary payments in order to allow the share sale to proceed.

[12] Simultaneously with making the agreement the plaintiffs transferred their shares to the other shareholders for a nominal consideration of $1 each. These contemporaneous transfers purported to be discrete transfers for a consideration of $50 for Mr Holdcroft's shares and $50 for Mrs Holdcroft's shares. Whilst no specific valuation evidence was tendered, the contemporaneous documents suggest that all parties were of the view that the appropriate amount for effecting transfer of these shares was upwards of $350,000.

[13] The evidence shows the genesis of the arrangement in documents produced by Mr Whitehouse to Mr Holdcroft containing details of a proposal that Mr and Mrs Holdcroft and their daughter "sell shares … to Kevin and Eric to be paid over a period of five years". The document continues with the suggestion that "if contract drawn up setting sale price as per agreement capital gains tax is payable immediately. Whereas if payments were made in form of salary or similar tax paid as money is earned and tax rate on personal tax would be lower." In opening the case for the plaintiffs their counsel submitted that:

> "These employment agreements were in fact not employment agreements but were a method, for the convenience of both sides, of allowing the price of the shares to be paid so as to give a tax deduction to the parties that were paying, and to spread out the period of which the sale price might be paid to lessen the amount of finance that was required."

He continued:

> "One of the consequences was that it would mean that rather than making a capital payment the purchasers of the shares were able to now make deductible annual expenses. It had another consequence, that rather than making a capital payment all at once, and having to find finance for it, it also meant that you could pay over [a] time."

He then added:

> "But your Honour there's no submission that they were doing anything inappropriate … under the laws of the tax office."

In due course evidence was called from the solicitor for Mr and Mrs Holdcroft. That evidence included:

> "The reason that the agreement came into existence is perfectly plain from the documents. It was supposed to be a lump sum purchase of shares but the finance wasn't available so it was converted to a payment over a period of time and it was called a service agreement, employment agreement, whatever you like, so that the company could fund it and get a tax deduction for the wage. And it was explained to my client that he would receive a benefit as well, and that's in Exhibit 3 clause 2 the second alternative which says, 'As per agreement capital gains tax is payable immediately whereas if payments were made in the form of salary or similar tax' – 'or similar tax papers money is earned after' – 'is earned and tax rate and personal tax would be lower'".

[14] In fact the Australian Taxation Office did subsequently query the transaction, through accountants KPMG in 1996. This resulted in a response from the plaintiffs' solicitor of 17 January 1996 to those accountants containing the following assertions:

> "There was no other agreement whereby any compensation would be paid to the Holdcrofts in relation to their shares other than the return of the nominal value of those shares and (more importantly) the repayment of loan funds."

and

> "In the end, the best arrangement that could be made was for payment of the loan accounts (over a period of time) and for Ken and Carmel to remain with the companies as employees. At least this meant that they were no longer responsible for the companies financial position although, of course, their employment was also

> potentially in jeopardy at any time for any number of reasons but, of course, including insolvency on the part of their employers.
>
> The valuation of the company and the shares is, with respect, an illusory exercise. Ultimately, the value of our clients' shares is represented by the amount which a purchaser was prepared to pay.
>
> The employment agreement was not a substitute for consideration but it was an additional inducement for our clients to accept the agreement."

[15] In response to the question from the tax office whether any illness of Mr Holdcroft prevented him from carrying out his employment for Market Garden Produce, and "Was there any time period when Ken was paid for doing nothing …?" the solicitor replied:

> "Mr Holdcroft was not ill during the period following the sale of shares and was not at any time during the term of his employment … prevented from carrying out his duties."

In referring to this letter under cross-examination, the solicitor stated:

> "I don't think it's necessarily factually incorrect. I think the language is reasonably careful."

[16] I shall resist the temptation to comment on the solicitor's appraisal of his own conduct. Quite plainly this was a bogus agreement to disguise a share sale which was deliberately framed so that the vendors could avoid liability for capital gains tax and so that the purchasers' company would obtain taxation deductions to which the company had no entitlement whatsoever. The scheme also suggests that stamp duty would be wrongfully avoided through the false description in the agreement of the consideration for the sale. It is hardly surprising that the parties did not place specific evidence before the court of the actual claims that were respectively made and the declarations that were supplied to the respective revenue authorities in due course. However the evidence before the court, including, to put it mildly, the subsequent obfuscatory letter by the plaintiffs' solicitor, leads inexorably to the conclusion that the agreement was made in this form to defraud the revenue and that that intention was probably subsequently acted upon.

[17] This is an agreement which the parties have now asked the court to enforce, on its true construction. In my view the deception was integral to the structure of the agreement. It is not a matter which the court can overlook or in which the court can determine the case without digesting the illegality in the process. This is true of both trial and appeal.

Illegality of contract

[18] The subject of illegality of contract, and more particularly of the enforcement of a contract where the parties perform or intend to perform it in an illegal way, has

always presented difficulties.[1] In *Yaroomba Beach Development v Couer de Lion*[2], in a context somewhat similar to the present one, the authorities were, with respect, helpfully summarised by Giles J. Cases reviewed by his Honour which are of particular relevance in the context of arrangements designed to defraud the revenue include *Miller v Karlinski*[3], *Napier v National Business Agency Limited*[4], *Effie Holdings Properties Pty Ltd v 3A International Pty Ltd*[5], *Iannotti v Corsaro*[6], *Boulevarde Developments Proprietary Limited v Toorumba Proprietary Limited*[7] and *Gray v Pastorelli*[8].

[19] Clearly enough there is nothing illegal on the face of the agreement that was drawn in the present case. The illegality lies in its intended use by the parties to avoid revenue obligations. In such cases, although courts are well aware of the difficulty of acting upon perceptions of public policy, that is the criterion upon which they ultimately decide whether they will lend their aid to the enforcement of a particular contract.[9] In doing so the courts are conscious of the conflict between the principle that contracts should be performed and the principle that courts should not aid illegal arrangements[10]. The law has developed on a case by case basis and the decisions that have emerged in this area enable a reasonably clear determination to be made.

Issue raised by the court

[20] The parties in this case have not sought to raise any question of illegality and indeed have submitted that the court should simply decide the legal question that they have raised namely the proper construction of cl 8(ii) of the contract. The question of illegality was not raised by the trial judge below, and the question is whether this court should now of its own motion act upon the perceived illegality of the parties. That a court may do so in appropriate circumstances is beyond question[11]. However the court does not do so on mere speculation or possibility[12]. The instances in which the court of its own motion will raise illegality were summarised by Jordan CJ in *Knowles v Fuller*[13] as those where contracts are on their face illegal, where the plaintiff cannot prove the case without proving illegality, or where an incurable illegality comes to light during the trial.[14]

[21] In the present case the court expressed its concerns to counsel during the hearing of the appeal, and an opportunity was given for further consideration of the position of

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1 See Kirby J's reference to sources acknowledging such difficulties in *Fitzgerald v F J Leonhardt Pty* Ltd (1997) 189 CLR 215, 231-232.
2 (1989) 18 NSWLR 398, 412-418.
3 (1945) 62 TLR 85.
4 [1951] 2 All ER 264.
5 [1984] NSW Conv R para 55-174.
6 [1984] 36 SASR 127.
7 [1984] 2 Qd R 371.
8 [1987] WAR 174.
9 *Alexander v Raysun* [1936] 1 KB 169; *Brooks v Burns Philp Trustee Co Limited* (1968-1969) 121 CLR 432; *A v Hayden (No 2)* (1984) 156 CLR 532.
10 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 428 per Mason J.
11 *Neal v Ayers* (1940) 63 CLR 524; *Rowthorn v Queensland Newspapers Limited* [1962] QWN 48.
12 *Cohen v Cohen* (1929) 42 CLR 91, 95.
13 (1947) 48 SR (NSW) 243.
14 Ibid 245.

the parties, and for further submissions to be made. In the event both parties submitted that the court would not be sufficiently satisfied of illegal intent or illegal action on the part of either the appellants or the respondents. Counsel referred to the need, emphasised by Jordan CJ in *Knowles* for an "inevitable" conclusion that the relevant activity was "necessarily illegal".[15] Reliance was also placed upon the statement in *Knowles* that "it is important that the court be satisfied that it has before it the whole of the facts relating to the transaction which could throw any light on its legality or illegality". It is true that only limited evidence was presented on the use which the respective parties intended to make of the contract drawn in this form and of their dealings with the various revenue authorities. Indeed, in the nature of things it is most unlikely that parties would present the full story on such matters to the court. There is therefore nothing surprising in the court not having before it all the evidence which would enable a fuller picture to be obtained. It is perhaps at least partly in recognition of the fact that a full picture is unlikely to be obtained in litigation where the parties do not deliberately bring forward such an issue themselves, that a court will not unilaterally decline relief unless its conclusion of illegality is "inevitable" or "irretrievable".[16] Cases where the court itself takes the initiative are exceptional for the reasons which were stated by Kirby P in strong terms in *Staniland v Kentucky Homes*[17]:

> "The right of judges to step in to defend a public interest in the due enforcement of the criminal law is, as Jordan CJ stressed in *Knowles*, exceptional. It should be confined to cases where the whole of the facts make plain the illegality which the parties do not allege and which the documents, on their face, do not reveal. Were it otherwise judges would be assuming a more vigorous role in the detection and prosecution of criminal conduct than the law of this State presently assigns to them."

[22] Bearing all this in mind it is still impossible to conclude from the material actually before the court otherwise then that the plaintiffs and the company agreed to enter into the contract in its present form for an illegal purpose namely to defraud the revenue.

[23] In this area, in cases where there is room for doubt as to the intention of relevant parties in making the contract, the cases show that courts are prepared to make charitable interpretations. But the evidence in the present case does not reveal mere collateral illegality. It reveals a contract drawn in a particular and misleading way, for which the only reasonable explanation is that it was done for the purpose of defrauding the revenue. Submissions were made urging the court to disregard the learned trial judge's finding that there was never any intention that the plaintiffs would perform any duties as "employees" pursuant to the agreement. However the evidence as a whole, including evidence as to what happened before the making of the agreements and what happened afterwards, not only support the finding, they make it the only reasonable conclusion in the circumstances.

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15 *Knowles v Fuller* above at p 245.

16 *Knowles* above; *Staniland v Kentucky Homes Proprietary Limited* NSWCA No 625 of 1986, 2 December 1987, BC 8700903 at p 10-11 per Kirby P. Compare *National Mutual Life Association of Australasia Limited v S H Hallas Pty Ltd* [1992] 2 Qd R 531 where it was recognised that the court should have a clear satisfaction as to the illegal purpose.

17 Ibid at p 12.

[24] Among the submissions was the claim that Mr Capra has "not been heard" on this issue. It is true that he was not called as a witness at trial, but he was at all times represented. The submission proceeds that if Mr Capra had been called he would have given evidence that he was not personally involved in the negotiations; that these were mainly conducted by Mr Whitehouse and by a named solicitor who was then working as in-house solicitor for the group of companies that included Market Garden Produce; that the group was in financial trouble; that at no time was Mr Capra aware that the plaintiffs were not expected to work pursuant to the agreements; that when he became aware that they were not working for the company, he thought that the company was "caught by the terms of the agreement" and that there was no point in terminating it because that would make it immediately liable for the lump sum; and that when the company claimed periodical payments by way of alleged salary to the plaintiffs and of the employment agreement as tax deductions, Mr Capra honestly believed that the company was entitled to do so.

[25] Why those particular submissions should induce the court to overlook the illegality is not immediately obvious. Mr Capra was sued only as guarantor. Had he chosen to do so he could have pleaded such matters, namely the illegality of the other parties' intent in relation to the principal contract, and his innocence and ignorance of the illegality, as a defence to the claim on the guarantee. Even if his hypothetical evidence is accepted as true, he is hardly disadvantaged if the court notices the illegality of the other parties and sets aside the judgment below. In fact he will be in much the same position as if he had successfully raised such issues himself. I do not think that he (let alone the other implicated parties) can be heard to complain that if he had raised the matter below he would probably have obtained an order for costs. The simple fact is that he did not choose to raise such a matter below.

Contracts intended to be used to defraud revenue

[26] Leaving aside for the moment questions of proportion and public policy that might induce a court to enforce a contract notwithstanding illegality in its performance[18], the following statements of principle express the prima facie approach to be taken in cases where a contracting party knowingly makes a contract intending to use it to defraud the revenue. Those statements are based upon what might be called a minimal view of the ratio of *Alexander v Rayson*:

> "A party who executes a document with the intention of using it for the fraudulent purpose of deceiving and thereby defrauding the revenue authorities is disentitled from relying on that document in subsequent proceedings in a court of law to enforce rights conferred under that document…
>
> At the same time it must also be said that the principle involved in that decision has no application unless there was in law some exigible revenue of which the Crown or other relevant authority was in danger of being defrauded by the use of the document by the party having the requisite intention. In that regard, I accept as correct the

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18 *Nelson v Nelson* (1995) 184 CLR 538, 596, 612-3; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 229-230, 250.

> decision of the Full Court of Western Australia in *Gray v Pastorelli* [1987] W.A.R. 174 holding that, where the document impugned could not have served the purpose of perpetrating a fraud on the revenue, the rule in *Alexander v Rayson* has no application."[19]

[27] All the positive requirements for disentitlement are present in this case. The case is not like *The National Mutual Life Association v Hallas* where the trial judge was not satisfied that either party had intended to present a false declaration, and where the Full Court was not prepared to reach a different conclusion. Similarly in the *Yaroomba Beach* case Giles J considered that it was not proved that the vendor was aware that a false declaration concerning liability for stamp duty would be made in due course even though the vendor's agents acted in a questionable manner on that issue subsequently. A number of factors were also present in that case that would suggest serious injustice if the remedy had been withheld. The apparent lack of intention by the vendor to facilitate avoidance of stamp duty at the time of formation of the agreement seems to have been central to his Honour's conclusion.

[28] The following short summary in the *Yaroomba Beach* case concerning the withholding of a curial remedy in cases involving defrauding the revenue is worthy of quotation:

> "The decisions to which I have referred in which public policy was held to call for the withholding of the court's assistance all involved an intention on the part of the party relying on the document that it would be used to defraud the revenue: either a direct intention (*Alexander; Miller; Effie Holdings Properties Pty Ltd*) or a purpose in common with the other party: *Iannotti;* see also *Elder v Auerbach* [1950] 1 KB 359 at 369 and *T P Rich Investments Pty Ltd v Calderon* [1964] NSWR 709 at 716, referring to intention by one party that the other use the subject matter of the contract illegally. Absent that intention, the result was otherwise (*Boulevarde Holdings Pty Ltd*), and even where there was that intention but it was not capable of being given effect the party with the intention may not suffer: *Gray,* cf *Effie Holdings Properties Pty Ltd.*"[20]

[29] As earlier noted, the court does not lightly raise such issues or deny its aid to a litigant who has made a contract. But in the present case the very purpose of the agreement being drawn in a particular form was to enable the parties to present a false picture to the Commissioner of Taxation and, inferentially, the Commissioner for Stamp Duties. The original scheme seems to have been devised by the defendants or their advisers, but its unlawful objective was disclosed and must have been understood by the plaintiffs and their advisers. The subsequent activity of the plaintiffs' solicitor suggests that all parties took advantage of the opportunity and that the solicitor was prepared to make highly questionable statements to preserve the advantage for them. Even if the plaintiffs' intention was limited to preparation and presentation of the contract as a vehicle of tax evasion by the defendants, that would reveal sufficient involvement in the illegal purpose to call for the

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19 Per McPherson J (with whom the other members of the court agreed) in *The National Mutual Life Association of Australasia Limited v S H Hallas Pty Ltd* [1992] 2 Qd R 531 and 535.

20 *Yaroomba Beach* case above at 418.

withholding of the court's assistance.[21] However it is inescapable that an illegal purpose existed on the part of both parties, even if the intended gain by the plaintiffs was thought to be less than that of the defendants.

[30] Whilst the borderlines marking the area where the court is not prepared to be party to such enforcement are not always easy to discern, I have no real doubt as to the side of the line on which the present case falls. Plainly the plaintiffs and the company intended that a misleading statement of their bargain should be prepared so that payment of tax would be avoided. The agreement was intended to be a vehicle, not of lawful tax minimisation, but of deception and actual tax evasion. In inviting the court to enforce such a contract in those circumstances the parties are asking the court to carry forward the plan to its final conclusion by enforcing it as the true agreement of the parties.

[31] In determining whether public policy requires the Court to refuse to enforce an agreement, the court will take into account many factors. These may include, where appropriate, the degree to which each party is involved in intended illegality, the expected level of benefit of each, the seriousness of the illegality, the consequences to other citizens or institutions, public morality, whether the court can bring about a just result without undermining respect for the law, and many others.

[32] The consequence of leaving the loss to lie where it falls in this particular case is not particularly disturbing. By the time the appellants terminated the arrangement the respondents had been paid (in combination) over $1,700 per week for a little over four years (probably in excess of $360,000) and the appellants would have claimed the same amount as tax deductible expenses. In short, on any view of the contract the respondents had been paid more than 80 per cent of their full entitlement under the contract before the dispute arose. The case is very different from a case such as *Yaroomba Beach* where a gross windfall would have resulted to a guilty party and where a plaintiff would have entirely lost the benefit of very great effort and investment had the court refused relief.

[33] One factor that deserves particular notice is that citizens and their advisers are more likely to withstand pressure from another party to become involved in an illegal contract if there is a serious risk that it will not be enforced by the courts. Had the plaintiffs in this case declined to co-operate with the defendants in the proposed scheme, it is highly likely that they would have had to negotiate a less favourable bargain. That is precisely what they should have been prepared to do. Instead a higher consideration was obtained at intended public expense. If the court were to turn a blind eye to conduct of this kind citizens and their professional advisers would be encouraged to proliferate such bogus arrangements at immense cost to the public.

[34] The present case in my view is a clear example of one in which the illegal intention of the parties so permeates the plaintiffs' cause of action that the court should of its own motion decline to lend its aid to the enforcement of the contract.

[35] It follows that the judgment below which gives effect to the contract should not be allowed to stand. The appeal should be allowed and the judgment below set aside.

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21 *Alexander, Miller, Effie Holdings* above.

A consequential matter

[36] A point of some difficulty arises from the fact that pending the hearing of the appeal the appellants paid the amount of the judgment, the total of which, including interest, came to $121,146. Such payment was made on 19 January 2000. In their supplementary submissions the appellants sought restitution of that sum in the event that this court allowed the appeal by reason of illegality.

[37] The usual consequence of a court declining to enforce a claim because of illegality is to leave the loss lie where it falls. However special considerations may arise when such a determination is made upon appeal. When a party satisfies a judgment in whole or in part prior to that judgment being set aside on appeal it is well established that restitution should be made. Such an order may be made by the Court of Appeal, or, if necessary, by a court with jurisdiction to grant a restitutionary remedy. The general principle was expressed in Brooking J in *National Australia Bank Ltd v Bond Brewing Holdings Ltd*[22], after an extensive survey of the authorities as follows:

> "This survey shows that the principle on which the courts have for centuries acted is that when an erroneous judgment or order is overturned, whether by means of appeal or by any other procedure, the court will achieve a just result by requiring anything that has been taken from him by the other party by virtue of the wrong decision to be restored. Interest is for this purpose treated as the fruit of money and he who has had the use of money will not be heard to say that there were no fruits."

Among the authorities referred to by Brooking J is the United States' case of *Arkadelphia Milling Co v St Louis Southwestern Railway Co*[23] where it was said to be –

> "… long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby".

[38] Counsel for the respondents submitted that repayment of the money would not achieve a just result, and that the public policy that requires a court to decline to enforce a contract should equally require a court to decline the appellants' claim for restitution of money paid in satisfaction of the judgment. He submitted that the Appeal Court and trial court alike should "let the cards lie where they have fallen". He drew attention to the substantial benefits obtained by the appellants from the scheme in the form of tax deductions of about $360,000 over four years. Counsel for the appellants submitted that that figure was erroneous and that it brought to account payments made to the respondents' daughter, but did not make any submission as to the correct figure. On my calculations the total payments made by the company to the respondents under the guise of wages between 1 June 1989 and 2 July 1993 would have exceeded $360,000 without bringing into account additional payments of a similar kind to the respondents' daughter. Counsel for the

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22 [1991] 1 VR 386 at 597.

23 (1919) 249 US 134m 144-145.

appellants countered with the submission that the respondents would have received far less by way of consideration for their shares unless it were contemplated that the appellants would claim the benefit of the deductions. He further submitted that the respondents' submission ignores capital gains tax benefits apparently received by the respondents. This ungainly contest as to who is the more to blame as author of the scheme or who received the greatest benefit from it merely serves to underline the illegality and the undesirability of the court doing otherwise than applying the usual rule applicable to money paid pursuant to an erroneous primary judgment.

[39] In my view the illegality in this case should have been noticed by the learned trial judge, and relief should have been withheld at first instance. There should have been no judgment of the court under which a party was ordered to make a payment under the contract. It may be noted that slightly over one-third of the judgment was in respect of interest, which was awarded by the court independently of any term in the contract, but on the assumption that other payments were due under the contract. Had the appellants made additional payments under the contract as such, they would not have been recoverable. But the payment in question was undoubtedly made in obedience to the court order and was a payment made pursuant to an erroneous judgment. In my opinion the ordinary principle applicable on appeals to the correction of wrong decisions should be applied.

[40] Interest should be allowed, consistently with the above statement of Brooking J. It would be appropriate to allow interest in favour of the appellants at the same rate as the learned trial judge originally assessed interest against them, namely eight per cent per annum.

Orders

[41] The appeal is allowed and the judgment below set aside. It is ordered that the respondents repay to the appellants the sum of $121,146 with interest thereon from 19 January 2000 at eight per cent per annum. There should be no order with respect to costs of the appeal or the proceedings below.

[42] **AMBROSE J:** I agree.