



ANALYSIS

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1987, No.1

An Act to reform the law relating to illegal contracts.

(2 July 1987)

BE IT ENACTED by the Parliament of the Cook Islands in session assembled, and by the authority of the same, as follows:

1. Short Title - This Act may be cited as the Illegal Contracts Act 1987.

2. Interpretation - In this Act, unless the context otherwise requires:-

"Act" means any Act of the Parliament of the Cook Islands, and includes any Act of the General Assembly of New Zealand, of the Parliament of England, of the Parliament of Great Britain, or of the Parliament of the United Kingdom, which is in force in the Cook Islands;

"Court" means the High Court of the Cook Islands;

"Disposition" means:-

- (a) Any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity;
- (b) The creation of a trust;
- (c) The grant or creation of any lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over any property, whether at law or equity;
- (d) The release, discharge, surrender, forfeiture, or abandonment, at law or in equity, of any debt, contract, or thing in action, or of any right, power, estate, or interest in or over any property; and for this purpose a debt, or any other right, estate, or interest, shall be deemed to have

been released or surrendered when it has become irrecoverable or unenforceable by action through the lapse of time;

- (e) The exercise of a general power of appointment in favour of any person other than the donee of the power;
- (f) Any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own estate and to increase the value of the estate of any other person.

"Enactment" means any provision of any Act, Ordinance, regulation, rule, by-law, Order in Executive Council, or Proclamation; and includes any provision of any notice, consent, approval, or direction which is given by any person pursuant to a power conferred by any Act, Ordinance, or Regulation;

"Property" means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in the Cook Islands or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit; present or future, vested or contingent, arising out of or incidental to property.

3. "Illegal contract" defined - Subject to Section 4, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether the provision is severable or not.

4. Breach of enactment - A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

5. Illegal contracts to be of no effect - Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract; Provided that nothing in this Section shall invalidate -

- (a) Any disposition of property by a party to an illegal contract for valuable consideration; or
- (b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies -

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the

disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

6. Court may grant relief - (1) Notwithstanding the provisions of Section 5, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to -

- (a) Any party to an illegal contract; or
- (b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or,
- (c) Any person claiming through or under any such party -

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just

(2) An application under subsection (1) may be made by -

- (a) Any person to whom the Court may grant relief pursuant to subsection (1);
- (b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under sub-section (1), the Court shall have regard to -

- (a) The conduct of the parties; and,
- (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and,
- (c) Such other matters as it thinks proper; but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

(5) The Court may, by any order made under sub-section (1), vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under sub-section (1) or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

(7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

7. Restraints of trade - (1) Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may -

- (a) Delete the provision and give effect to the contract as so amended; or
- (b) So modify the provision that at the time the contract was entered into, the provision as modified would have been reasonable, and give effect to the contract as so modified; or
- (c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(2) The Court may modify a provision under paragraph (b) of subsection (1) notwithstanding that the modification cannot be effected by the deletion of words from the provision.

8. Application of Act - This Act shall apply to contracts whether made before or after the commencement of this Act;
Provided that nothing in section 5 shall apply to contracts made before the commencement of this Act.

9. Savings - (1) Except as provided in section 7, nothing in this Act shall affect the law relating to;

- (a) Contracts, or provisions of contracts, which are in restraint of trade; or
- (b) Contracts, or provisions of contracts which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of this Act or not.

(2) Nothing in this Act shall affect the rights of the parties under any judgement given in any Court before the commencement of this Act, or under any judgement given on appeal from any such judgement, whether the appeal is commenced before or after the commencement of this Act.

This Act is administered in the Department of Justice