



Void for illegality – a brief case study in judicial interpretation of contracts

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Some contracts can read like a brilliant novel, some like a highly theoretical thesis on astrophysics. It is important when drafting and interpreting contracts to ensure that one understands the operations of each contractual clause. We are reminded of this in *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269 (“the **REW08 Case**”). The decision, handed down in the New South Wales Court of Appeal on 23 October 2017, reinforces the legal principles in interpreting contracts argued to be void for illegality and highlights a broader approach to contractual interpretation.



Key Terms of the Contract and Facts

In the REW08 Case, the contract in question for sale of land stipulated that REW08 Projects Pty Ltd (“**REW08**”) was to sell a lot in a subdivision at Schofield, located in western Sydney, to the PNC Lifestyle Investments Pty Ltd (“**PNC**”). The price of the lot was \$485,000 with a deposit of \$250,000 to be paid. The main issues identified in the matter revolved around the two following special conditions:

1. The Purchaser [PNC] acknowledges that the Vendor [REW08] will allow him/her to Rescind this Contract and simultaneously enter into a new contract on identical terms with updated Plan documents quarterly until the Plan of subdivision is finalised; and
2. A price reduction of \$235,000.00 will be made at Settlement provided that the Purchaser has met all obligations under the contract.

It is important to note that prior to the contract of sale, a Loan Agreement between REW08 and PNC was entered into in respect of the same property as dealt with in the contract of sale between REW08 and PNC.

Termination

Termination for failure to pay deposit was a pivotal point in the life of this contract. It is this event that sparked the process of litigation. REW08 had terminated the contract on the grounds that PNC had failed to pay the deposit. In a narrowly read technical sense, the payment of deposit was not made directly for the purposes of the contract. However, the courts determined that the payment of moneys under the Loan Agreement constituted payment of deposits. Darke J postulated that the money paid by the purchaser to the vendor 'in respect of the property' meant the same property as the land in the Contract of Sale. His honour further analysed that even if it was not explicit that there was enough connection between the Loan Agreement and Contract of Sale as highlighted in his determination:

"The terms of the Loan Agreement indicate the existence of a relationship or association between the Principal Sum and the sale of the property. Clause 2 of the Loan Agreement states that enabling the sale of lots in the proposed sub-division is one of the purposes of the Principal Sum. Other provisions further suggest the existence of a relationship or association between the Principal Sum and the property."

I draw attention to this particular aspect of the case as it highlights the purposive interpretation of contractual terms by courts.

Void for illegality

Having established that the contract for sale was not terminated on grounds of failure to pay deposit the courts turned their attention to the issue of the contract being void for illegality. REW08 contended that the contract was unenforceable as it was "associated with or in the furtherance of illegal purposes" putting forward that the contract was rescinded and entered into again on same terms pursuant to special condition 1 (as above) for the purposes of avoiding stamp duty liability.

It was determined by Darke J that whilst the contract allowed for the deferment of stamp duty payment it was always in the interest of PNC to eventually pay the stamp duty rather than to avoid it all together and as such the contract was not 'in the furtherance of illegal purposes'. Resultantly and in conjunction with other factors the court determined that the contract should be specifically performed in the first instance.

On appeal REW08 stipulated that PNC, rather than avoiding the stamp duty, intended to delay stamp duty and that the contract should therefore be void for illegality. The court cited in principle that where a contract cannot be performed in any way other than illegally, it will be unenforceable. In these particular circumstances PNC could have paid stamp duty at any time in accordance with the *Duties Act 1997* (NSW). Therefore, as PNC could have performed the contract lawfully the contract was not unenforceable.

In the end, the court held that Darke J's determinations were correct in finding that PNC should not be denied an order for specific performance of the contract and subsequently dismissed the appeal.

Conclusion

This article has touched very briefly on a multitude of factors that go into the concept of voiding a contract for illegality. In particular, the matter between REW08 and PNC highlighted an interpretation of illegal purposes by encompassing the actual effect of the operation of contract clauses within its own bounds. The concept of performing a contract in any other way than illegally was further explored in REW08's appeal. The case differentiates a narrow reading of contractual terms as advanced by REW with the broader purposive reading as employed by Darke J and PNC.

This article is not to be considered advice. If you have any contractual issues, please do not hesitate to contact any of JHK's offices in Melbourne, Sydney, Brisbane and on the Sunshine Coast.