

CONTRACT ILLEGAL, NOT MERELY UNENFORCEABLE, BUT PARALLEL REMEDY IN RESTITUTION IS AVAILABLE

Ali Mohamed v Alaga & Co (A Firm) [1999] EWCA 2855; [2000] 1 WLR 1815; [1999] 3 All ER 699 Lord Chief Justice Bingham and Lord Justices Otton and Walker

Ron Craig

Department of Civil and Building Engineering

Loughborough University, UK

ACLN issue #70 'Contract: Illegal or Unenforceable' (p49) carried a brief note on the first instance decision by the High Court (England and Wales) in *Mohamed v Alaga & Co*, The Times 2 April 1998; [1998] 2 All ER 720. Mohamed's contractual claim against Alaga & Co (a firm of solicitors) failed because the alleged oral contract between the parties was illegal, not merely unenforceable as in the case of *Pavey v Mathews* (1987) 162 CLR 221. That was a distinction, said the trial judge, which was fatal to M's parallel claim in restitution of a reasonable sum for work carried out at the solicitors' request.

M subsequently appealed on the grounds that the Law Society (<http://www.lawsoc.org.uk>) had no powers to prevent non-solicitors from making fee-sharing agreements and that therefore any such agreement was enforceable by a non-solicitor against a solicitor; and secondly, that M was entitled to pursue a claim against the solicitors in restitution or quasi contract, despite the solicitors' defence that this claim was merely an attempt to recover partial consideration under an illegal and unenforceable contract.

(1) Is the agreement on which M relies illegal and unenforceable?

Yes. The relevant legislation prohibits not only the act, i.e. a solicitor sharing fees, but also the contract to perform the act of a solicitor sharing fees. The Court of Appeal (England and Wales) dismissed M's appeal [1999] EWCA 2855, [2000] 1 WLR 1815, [1999] 3 All ER 699 on the first point.

Although the prohibition on fee sharing could only be imposed on solicitors, the rule exists to protect the public interest and this protection disappears if a non-solicitor obtains the court's assistance to enforce the very agreement that a solicitor is prevented from making.

Although the prohibition on fee sharing could only be imposed on solicitors, the rule exists to protect the public interest and this protection disappears if a non-solicitor obtains the court's assistance to enforce the very agreement that a solicitor is prevented from making.

(2) If the agreement on which M relied is illegal and unenforceable, is the alternative claim in restitution maintainable?

Yes. M's appeal on the second point had merit. M's claim in restitution is for a reasonable sum in return for services rendered, not a claim for consideration under a failed contract. That was an essential distinction to the success of M's claim in restitution, but it was also necessary to consider the circumstances in which the assumed but illegal agreement to share fees had been made. It was relevant to look at the comparative degree of blameworthiness of the two parties. M was less blameworthy than the solicitors who probably acted in flagrant disregard of well-known and binding rules that prohibited fee sharing. M could be taken to be ignorant of such rules binding only on solicitors. M should therefore be allowed to pursue a claim in restitution against the solicitors and accordingly the judgment (noted at ACLN #70 p49) was reversed in part.

COMMENT

There are important points here in substantive law and for drafters of pleadings and claims. M's initial claim sought to enforce an alleged agreement that entitled M to 50% of fees received by A. In the alternative, M sought restitution of a sum equal to 50% of fees received by A, in other words, the same sum that would have been recovered in contract had the contract not been illegal or unenforceable. With some assistance from CA, M accepted that a claim in restitution could not equal the sum claimed by reference to a contract that the court held was illegal and unenforceable. M's claim in restitution properly made no reference to the alleged agreement but merely sought recovery of a reasonable sum for professional

services of interpretation and translation rendered by M to A on behalf of A's clients, in circumstances where it was quite clear that these services were not rendered gratuitously. It was important that M's pleadings and statement of claim enabled the court to come to the 'preferable view' (Lord Bingham's words) that M was not seeking to recover consideration under an unlawful contract, but reasonable reward for services rendered.

In this case the differential in 'blameworthiness' was also important to M's claim in restitution. Lord Bingham readily assumed that a solicitor would be fully aware of the rules against fee sharing agreements, and, if the alleged agreement had been made, very probably acted in defiance of known binding professional rules. On the other hand, his Lordship had no difficulty in accepting that M would have been ignorant of any reason preventing A from making a fee sharing agreement that is commonplace in other unregulated commercial activities.

It was relevant to look at the comparative degree of blameworthiness of the two parties. M was less blameworthy than the solicitors who probably acted in flagrant disregard of well-known and binding rules that prohibited fee sharing. M could be taken to be ignorant of such rules binding only on solicitors.

Dr Ron Craig is a Lecturer in the Quantity Surveying Group, Department of Civil and Building Engineering, Loughborough University, UK.
