# RTA (Business Consultants) Ltd v Bracewell

*Contract – Illegality – Enforceability of contract – Contract affected by statute – Claimant carrying on business as business transfer agents – Defendant and claimant entering into agreement – Dispute arising and claimant seeking to enforce agreement – Defendant contending agreement unenforceable for illegality – Whether agreement illegal – Whether agreement enforceable – Estate Agents Act 1979 – Money Laundering Regulations 2007, SI 07/2157*

[2015] EWHC 630 (QB), HQ13X03208, (Transcript)

**QUEEN'S BENCH DIVISION**

**JUDGE RICHARD SEYMOUR QC (sitting as a judge of the High Court)**

**24, 25, 26 FEBRUARY, 12 MARCH 2015**

**12 MARCH 2015**

M Spackman for the Claimant

W Hibbert for the Defendant

JCP Solicitors; Smithfield Partners Ltd

**JUDGE RICHARD SEYMOUR QC:**

*INTRODUCTION*

**[1]** The Claimant in this action, RTA (Business Consultants) Ltd ("RTA"), carries on business as business transfer agents: that is to say, it seeks on behalf of vendors of businesses purchasers for such businesses.

**[2]** Mr Peter Bracewell is the owner of the property known as and situate at Drymen Pottery, 9-11 Main Street, Drymen, Glasgow, Stirlingshire ("the Property"). In the Property the business ("the Business") of a cafe/restaurant and public house, with a small gift shop, has been carried on for many years. Mr Bracewell *him*self started to carry on the business in about 1990.

**[3]** At the beginning of 2010 Mr Bracewell was thinking of selling the Property and the Business. He made contact with RTA by telephone, it seems, on 28 January 2010. At least in a printout of an electronic document entitled "Business Details" produced by RTA the date of a telephone call on 28 January 2010 was recorded, with the note, "Spoke to V[endor] and in current climate if val[uation] was to expectations, he would sell". As a result of the call an appointment was made for a representative of RTA, Mr Philip Manners, to call at the Property. The case for RTA in this action was that in fact Mr Manners visited Mr Bracewell twice, first on 1 February 2010, and again on 22 February 2010. Mr Bracewell asserted that in fact there was only one visit by Mr Manners, on 22 February 2010. The case for RTA as to the number and date of the meetings was supported, and the assertion of Mr Bracewell rendered less likely, by an entry on the "Business Details" document with this comment "PM [Mr Manners] 1 February 2010: Vendor is considering selling the cafe and pub. Has meeting with bank manager this afternoon as they may foreclose. PM to CB [which Mr Manners explained in his cross-examination at the trial meant 'call back'] Thu 3/2."

**[4]** The "Business Details" document itself noted an appointment for Mr Manners to meet Mr Bracewell on 22 February 2010 at 7.30pm. In addition it recorded, as "Price Wanted" "WANT OUR OPINION", and, as "Reason for Sale" "CONSIDERING OPTIONS". RTA maintained an electronic diary for Mr Manners. That electronic diary, the relevant sheets of which were printed out and adduced in evidence at the trial, recorded Mr Manners visiting Mr Bracewell at 10.00am on 1 February 2010 and again at 7.30pm on 22 February 2010. I shall explain later in this judgment why it might matter whether there was one meeting or two between Mr Manners and Mr Bracewell.

**[5]** What was not in dispute, however, was that on 22 February 2010 Mr Maimers completed in manuscript an RTA document which recorded details of the Property and the Business, including a "SELLING PRICE" for the Property and the Business of "OFFERS OVER £940,000 + SA V [stock at valuation]", and that on the same date Mr Bracewell entered into a written agreement ("the Agreement") with RTA. The Agreement included the following provisions:

> "2 I/We hereby appoint RTA (BUSINESS CONSULTANTS) LTD. agents for the sale of the Property and/or Business and give you the sole selling rights for an irrevocable TWELVE MONTH period from this date subject to my/our option under Clauses 10 and 11 (overleaf). I/we agree that these sole selling rights shall remain in force after that date until terminated by me/us or alternatively by your Company. Termination, by either of us, must be delivered in writing by registered or recorded delivery post and provide 28 days advance notice.
>
> 3 I/We agree to pay you a commission of £40,000 plus VAT when a sale or one of the events hereinafter mentioned takes place. I/We understand that I/we will be liable to pay your agreed remuneration in addition to any other costs or charges agreed in each of the following circumstances:
>
> a) If unconditional contracts for the sale of the Business and/or the Property are concluded or exchanged during the period which you have Sole Selling Rights even if the Purchaser was not found by you but by another Agent or by any other person including me/us.
>
> b) If unconditional contracts for the sale of the Business and/or the Property are concluded or exchanged after the termination of the period in which you have Sole Selling Rights but to a Purchaser who was introduced to me/us during that period or with whom we had negotiations about the Business and/or Property during that period.
>
> c) . . .

> 4 I/We authorise you to accept any ['offers over' written in manuscript above what follows] offer for the said Property and/or Business on my/our behalf in the sum of £940,000 + SAV or such lower figure as I/we instruct you to accept and I/we agree that there is no necessity for you to inform me/us in writing or otherwise of any offers received below the sum of £ – unless you as Agents believe that such action would be in my/our interest.
>
> 5 Upon signing this agreement I/we agree to pay to you a registration fee of £9,000 plus VAT. I/we am/are fully aware that these monies are non-refundable and are totally independent from any commission charges payable.
>
> . . .
>
> 8 IT IS AGREED THE BALANCE OF THE REGISTRATION FEE (£8,000 + VAT) WILL BE PAID IN 8 INSTALMENTS OF £1,000 + VAT BY 22 March 2010, 22 April 2010, 22 May 2010, 22 June 2010, 22 July 2010, 22 August 2010, 22 September 2010, 22 October 2010.
>
> 9 For the purpose of this Agreement I/we accept that if I/we grant a lease of the property then I/we will be deemed to have sold the properly and the commission thereof agreed and stated overleaf will be due and payable. I/We further accept that in ascertaining your entitlement to commission there will be disregard for the fact that I/we might make to any prospective purchaser a private loan of monies and/or that a purchaser might have been known to me/us and negotiated with me/us before the date of this agreement.
>
> 10 Notwithstanding the foregoing provisions I/we agree that I/we shall have an option to revoke this agreement at any time within the initial 12 months Agency period and that if I/we shall exercise this option (and I/We agree that I/we will be deemed to have exercised the said option if I/we purport to cancel the said agreement within the said Agency period or if I/we prevent you from selling the said property and/or business) I/we will pay you in return for any work you have carried out on my/our behalf and/or in compensation for your loss of opportunity to earn your commission that I/we would have been obliged to pay you if the said Property and/or Business had been sold and the said commission above mentioned had become payable. I/We understand that I/we will not be entitled to exercise this option at a time when a person/s is expressing an interest or negotiating for the purchase even if such a purchaser is not in an immediate position to sign a contract.
>
> 11 If I/we cancel this agreement when a person/s is expressing an interest in the purchase of the said Property and/or Business or if at such time I/we prevent you from selling the Property and/or Business then I/we agree that the said commission shall be payable even if that prospective purchaser is not in an immediate position to purchase merely by virtue of the fact that any Finance arrangements, including the sale of other Property had not been finalised at the date of such cancellation."

**[6]** Between the date of the Agreement and 8 May 2010 no one seems to have expressed any interest, beyond requesting details of the Property and the Business, in purchasing the Property and the Business. In a letter dated 8 May 2010 to RTA Mr Bracewell wrote:

> "I telephoned you last week to discuss, terminating our attempts to sell the business until the market recovers as your estimated price seems to be unachievable at present.
>
> I am very upset to report that nobody has returned my telephone call, I look forward to hearing from you very soon and ask that you undertake no further sales expenses until you have spoken to me."

**[7]** What seems to have prompted the writing of the letter was that Mr Bracewell was already thinking not of selling the Property and the Business, but of letting them to a lady called Carly Bannerman, who was a friend, on a somewhat informal basis, but involving payment of a rent of £40,000 per annum. By the date of the letter Mr Bracewell had only paid three of the monthly instalments of £1,000 plus Value Added Tax for which cl 8 of the Agreement provided. He has never paid the outstanding balance of £6,000 plus Value Added Tax.

**[8]** Mr Bracewell's letter dated 8 May 2010 seems not to have been received by RTA. Mr Bracewell sent a copy of it to RTA under copy of a letter dated 10 June 2010. In response to the latter letter Mr Paul O'Reilly,

chief executive of RTA, wrote a letter dated 21 June 2010 in which he pointed out that RTA could only accept an early termination if Mr Bracewell exercised the option for which the Agreement provided, and that in any event Mr Bracewell owed the balance unpaid of the registration fee, plus Value Added Tax.

**[9]** So far as the documents copied and adduced in evidence went, there was then a gap in correspondence, which ended with a letter dated 10 September 2010 which Mr Bracewell wrote to RTA "Surprised and disappointed by your last letter, the business has not been sold or leased."

**[10]** Although the letter to which that was a reply was not adduced in evidence, plainly it was contended on behalf of RTA in the missing letter that the arrangement between Mr Bracewell and Carly Bannerman amounted to a disposal of the Property and the Business entitling RTA to payment of its commission under cl 3 or cl 9 of the Agreement. In a letter dated 13 September 2010 to Mr Bracewell Mr O'Reilly asserted, inter alia, "With respect, it is you that informed us you had agreed a lease to a Mrs Bannimen [sic]". Further correspondence between the parties took place, to the detail of which it is not necessary to refer, but, at least in Mr Bracewell's letters dated 10 June 2010, 10 September 2010 and 9 November 2010 he used as his address his private address, rather than the address of the Property, and Mr O'Reilly's letters to Mr Bracewell dated 21 June 2010, 13 September 2010, 29 September 2010 and 3 November 2010 were all addressed to Mr Bracewell at his private address. However, in his letter to Mr O'Reilly dated 10 November 2010, written using the letterhead of the Property, Mr Bracewell included this paragraph:

> "I am very honoured to have a letter dated 3 November from you as I note that you are the Chief Executive of RTA. However, once again your company writes to my home address rather than my business address, which is a basic mistake as either your company is incompetent in terms of reading the address that I write from or one part of it does not communicate with the other. Furthermore, I am advised that in writing to me personally rather than my company you are reinforcing my position as a consumer. If you truly believe that the RTA contract is a business contract, in future please use my business address as detailed at the top of this letter."

**[11]** I shall return to the significance of what Mr Bracewell wrote in his letters dated 10 September 2010 and 10 November 2010.

**[12]** This action was commenced by a claim form issued on 18 October 2010. In it RTA claimed against Mr Bracewell payment of the sum of £47,000, being £40,000 plus Value Added Tax at the then prevailing rate of 17.5%, said to be due pursuant to the terms of the Agreement as a result of the transaction between Mr Bracewell and Carly Bannerman; alternatively, payment of the sum of £7,050, being £6,000, the unpaid balance of the registration fee for which the Agreement provided, together with Value Added Tax at the rate then applicable. The claim form was accompanied by Particulars of Claim.

**[13]** Mr Bracewell, acting in person, served a Defence on 27 October 2010. Subsequently the Defence was amended and a counterclaim added. The Defence and Counterclaim was re-amended on 25 July 2014. The action had been supposed to come on for trial on 28 July 2014, but by order of Haddon-Cave J made on 24 July 2014 permission to re-amend the Defence and Counterclaim was granted and the original trial date vacated. Consequently the action came on for trial effectively on 24 February 2015. The counterclaim raised by Mr Bracewell sought repayment, in effect, of the sum of £3,000 plus Value Added Tax paid on account of the registration fee pursuant to the terms of the Agreement.

**[14]** The defences raised by Mr Bracewell, and the matters relied upon in support of the counterclaim, evolved over time. However, it is necessary in this judgment to deal with most of the points raised on behalf of Mr Bracewell, whenever they first surfaced. Logically the first of the matters requiring consideration is the contention that the Agreement is unenforceable by reason of illegality.

*ILLEGALITY*

**[15]** By Estate Agents Act 1979 s 1(1) it is provided that:

> "This Act applies, subject to subsections (2) to (4) below, to any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (in this section referred to as 'the client') who wishes to dispose of or acquire an interest in land –
>
> (a) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, to dispose of such an interest; and
>
> (b) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be the acquisition of that interest;
>
> and in this Act the expression 'estate agency work' refers to things done as mentioned above to which this Act applies."

**[16]** It was common ground before me that in relation to those cases, like that of Mr Bracewell, in which RTA sought to find a buyer for a business the assets of which included an interest in land, the activities of RTA fell within the definition of the expression "estate agency work" in Estate Agents Act 1979 s l(l). The relevance of that is the reference to "estate agents" in Money Laundering Regulations 2007, SI 2007 No 2157 ("the 2007 Regulations").

**[17]** The 2007 Regulations were made to implement in part Directive 2005/60/EC in relation to money laundering.

**[18]** By reg 24(1) of the 2007 Regulations it is provided that "A supervisory authority must effectively monitor the relevant persons for whom it is the supervisory authority and take necessary measures for the purpose of securing compliance by such persons with the requirements of these Regulations."

**[19]** By reg 23(1)(b) of the 2007 Regulations the Office of Fair Trading ("OFT") was designated "the supervisory authority" in relation to "estate agents".

**[20]** For the purposes of the 2007 Regulations the expression "relevant persons" was defined in reg 3(1) as including "(f) estate agents". At reg 3(11) of the 2007 Regulations the expression "estate agent" is defined as meaning:

> "(a) a firm; or
>
> (b) sole practitioner who or whose employees carry out estate agency work within the meaning of s 1 of the Estate Agents Act 1979 (estate agency work) when in the course of carrying out such work."

**[21]** Regulation 2(1) of the 2007 Regulations defined the expression "firm" as meaning, "any entity, whether or not a legal person, that is not an individual and includes a body corporate and a partnership or other unincorporated association".

**[22]** Consequently the 2007 Regulations applied to RTA insofar as its business included "estate agency work", which it did in relation to the services agreed to be performed for Mr Bracewell under the Agreement.

**[23]** Regulation 32 of the 2007 Regulations is in these terms, so far as presently material:

> "(1) The supervisory authorities mentioned in paragraph (2), (3) or (4) may, in order to fulfil their duties under regulation 24, maintain a register under this regulation.

(2) . . .

(3) The OFT may maintain registers of –

(a) . . .

(b) estate agents.

(5) Where a supervisory authority decides to maintain a register under this regulation, it must take reasonable steps to bring its decision to the attention of those relevant persons in respect of whom the register is to be established.

(6) A supervisory authority may keep a register under this regulation in any form it thinks fit.

(7) . . ."

**[24]** By reg 33 of the 2007 Regulations it is provided that:

"Where a supervisory authority decides to maintain a register under Regulation 32 in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may not carry on the business or profession in question for a period of more than six months beginning on the date on which the supervisory authority establishes the register unless he is included in the register."

**[25]** OFT determined to establish a register of "estate agents" on 1 July 2009.

**[26]** It was common ground before me that RTA did not apply to OFT for registration under the 2007 Regulations until 12 October 2012. OFT notified RTA on 2 November 2012 that it had been registered pursuant to the 2007 Regulations.

**[27]** Thus at the date of the making of the Agreement RTA was not registered with OFT for the purposes of the 2007 Regulations, and it should have been.

**[28]** It was submitted on behalf of Mr Bracewell that the consequence of RTA not having been registered under the 2007 Regulations at the date of the Agreement was that the Agreement was unenforceable by reason of illegality.

**[29]** Although it was accepted on behalf of RTA that, at the date of the making of the Agreement, RTA should have been, but was not, registered pursuant to the provisions of the 2007 Regulations, it was contended that the consequences of not having been registered did not include that the Agreement was unenforceable by reason of illegality.

**[30]** I observe that the potential consequences of failure to comply with the requirements of reg 33 of the 2007 Regulations for which the 2007 Regulations themselves provide are these:

"42(1) A designated authority [which, by Regulation 36 included OFT] may impose a penalty of such amount as it considers appropriate on a relevant person who fails to comply with any requirement in regulation . . . 33 . . . .

(2) The designated authority must not impose a penalty under paragraph (1) where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

> 45(1) A person who fails to comply with any requirement in regulation . . . 33 . . . is guilty of an offence and liable –
>
> (a) on summary conviction, to a fine not exceeding the statutory maximum;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.
>
> (2) . . .
>
> (3) . . .
>
> (4) A person is not guilty of an offence under this regulation if he took all reasonable steps and exercised all due diligence to avoid committing the offence."

**[31]** However, it was not contended before me that it was necessary or relevant for me to consider whether, had such been sought against it, on the facts of its case RTA would have been liable to a civil penalty or had committed a criminal offence. The position was, as I accept, that RTA was unaware of the requirement to register under the 2007 Regulations until the matter was brought to its attention by a letter dated 11 October 2012 written to it by OFT. Although, during the trial, it was suggested on behalf of Mr Bracewell that RTA had been at fault in failing to acquaint itself with the requirements of the 2007 Regulations as applied to "estate agents" by decision of OFT, registration was simply an administrative matter. OFT had, under reg 34(3) of the 2007 Regulations, only a very limited discretion, based on an Applicant not providing, or not providing correctly, the information required to be provided on registration, or not paying the prescribed fee, not to register anyone who sought registration as an "estate agent". Although a fee was payable upon making an application for registration, it was comparatively modest – £160.

**[32]** Mr Mark Spackman, who appeared on behalf of RTA, pointed out that the scheme of the 2007 Regulations was relatively relaxed. OFT had a power, but not a duty, to establish a register of "estate agents". If it decided to exercise that power, as it did, it was under a duty to take reasonable steps to bring that decision to the attention of those affected. The register could be kept in any form. There was six months after the decision to establish a register in which persons affected could seek registration. If they did not they might be liable to pay a civil penalty, or commit a criminal offence, but only if the person sought to be proceeded against did not take all reasonable steps and exercise all due diligence to comply. The suggestion was, I think, that the requirement to register with which RTA failed to comply was in the nature of a comparatively trivial administrative regulation, and certainly not anything involving what might be described as dishonesty or "turpitude".

**[33]** I accept that, on the material put before me, the failure of RTA to comply with the requirement to register with OFT earlier than it did, did not indicate dishonesty or "turpitude". OFT plainly took the same view, as it did not seek to impose any civil penalty on RTA or to prosecute it.

**[34]** However, Mr William Hibbert, who appeared on behalf of Mr Bracewell, submitted that it was immaterial to the question whether the Agreement was unenforceable by reason of illegality that RTA may not have been exposed to a civil penalty or to prosecution. Mr Hibbert reminded me of the well-known passage in the judgment of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341, 343, 98 ER 1120, [1775-1802] All ER Rep 98:

> "The objection, that a contract is immoral or illegal as between the 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 is 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 De-

> fendant, but because they will not lend their aid to such a Plaintiff. So if the Plaintiff and the Defendant were to change sides, and the Defendant was to bring his action against the Plaintiff, the latter would have the advantage of it; for where both are equally in default, potior est conditio defendentis."

**[35]** Mr Hibbert submitted that reg 33 of the 2007 Regulations in terms prohibited, after OFT had made its decision to require registration of "estate agents", the carrying on of any business involving "estate agency work" by anyone who had failed to register within six months of the decision of OFT. Implicitly, contended Mr Hibbert, that meant that any contract made by someone who should have been, but had failed to become, registered was unlawful because it was the mechanism by which the prohibited business was undertaken.

**[36]** I was reminded of other, well-known, explanations of the approach of the court to circumstances in which a contract has been made which it appeared might have been unlawful as in breach of some statutory provision.

**[37]** In *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683, [1956] 3 WLR 870 Devlin J expressed these views, at p 288:

> "A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference', as Parke B put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which prohibits an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case – perhaps of such triviality that no authority would have felt it worth while to prosecute – a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it . . . ."

**[38]** The important point which emerges from that passage is it is a matter of construction of the relevant statutory provision in each case whether breach of that provision has the consequence that a particular contract is illegal. Although the court should be cautious in reaching the conclusion that, as a matter of construction, breach of a statutory provision should result in a contract being illegal, if, on proper construction, that is its consequence, the court must give effect to that conclusion.

**[39]** My attention was drawn to a number of authorities in which the issue was whether breach of a statutory provision had the consequence that a particular contract was unenforceable by reason of illegality.

**[40]** As long ago as 1836 Parke B, in *Cope v Rowlands* [1957] 1 QB 267, [1956] 3 All ER 683, [1956] 3 WLR 870, said, at p 157, in a case about a statute of Queen *Anne*:

> "It is perfectly settled, that where the contract which the Plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies prohibition . . . . And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statute means to prohibit the contract?"

**[41]** However, in *Smith v Mawhood* (1845) 15 LJ Ex 149, 14 M & W 452, 153 ER 552 Parke B concluded that a breach of Excise License Act 1836 did not have the consequence that a contract was rendered illegal and unenforceable.

**[42]** Other cases to which my attention was drawn included *Cornelius v Phillips* [1918] AC 199, 87 LJKB 246, [1916-17] All ER Rep 685, in which breach of a provision of Moneylenders Act 1900, was held to render a moneylending contract illegal; *Re an arbitration between Mahmoud and Ispahani* [1921] 2 KB 716, 90 LJKB 821, 26 Com Cas 215, in which the same conclusion was reached in a case involving a breach of Seeds, Oils and Fats Order 1919, even though the innocent Plaintiff had enquired of the Defendant whether he possessed the requisite licence, and had been told that he had; and *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, [1939] 1 All ER 513, 108 LJPC 40, in which breach of a Newfoundland statute, Carriage of Goods by Sea Act 1932, was held not to render the contract in question illegal.

**[43]** The question of the impact of "turpitude" on a claim or a defence may arise in circumstances other than one in which the issue is the enforceability of a contract said to have been made in breach of a statutory provision. I was referred to a number of cases in this category, including *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, [1994] 2 FCR 65; *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] AC 1391, [2009] 4 All ER 431, and *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] 1 All ER 671, [2014] 3 WLR 1257. Although Mr Spackman submitted that assistance was to be derived from these authorities as to the modem approach to illegality, the other cases which I have so far mentioned being of some age, it was plain, in my judgment, that that was not so. The position remains, so far as enforceability of a contract said to have been made in contravention of a statutory provision is concerned, that what is determinative, as it has always been since at least 1836, is the proper construction of the relevant statutory provision. The leading judgment in *Les Laboratoires Servier v Apotex Ltd* with which Lord Neuberger of Abbotsbury JSC and Lord Clarke of Stone-cum-Ebony JSC agreed, was that of Lord Sumption JSC. It is plain from the following passage, in my judgment, that, whatever the relevance of "turpitude" in other classes of case, it is not relevant to "the rather special case of contracts prohibited by law, which can give rise to no enforceable rights":

> "22 However, it does not follow that the courts should be insensitive to the draconian consequences which the ex turpi causa principle can have if it is applied too widely. The starting point in any review of the modern law must be that we are concerned with a principle based on the application of general rules of law and not on fact-based evaluations of the effect of applying them in each individual case. However, the content of the rules must recognise that within the vast and disparate category of cases where a party in some sense founds his claim on an immoral or illegal act there are important differences of principle. The application of the ex turpi causa principle commonly raises three questions: (i) what acts constitute turpitude for the purposes of the defence? (ii) what relationship must the turpitude have to the claim? (iii) on what principles should the turpitude of an agent be attributed to his principal, especially when the principal is a corporation? Each of these questions requires a principled distinction to be made between different kinds of immoral or illegal act and different ways in which they may give rise to claims. For present purposes, we are concerned only with the question what constitutes turpitude for the purposes of the defence. The question what relationship it must have to the claim arises only if that question is answered in favour of Servier, and no question of attribution arises in this case at all."

What is "turpitude"?:

> "23 The paradigm case of an illegal act engaging the defence is a criminal offence. So much so, that much modern judicial analysis deals with the question as if nothing else was relevant. Yet in his famous statement of principle in *Holman v Johnson* 1 Cowp 341 Lord Mansfield CJ spoke not only of criminal acts but of 'immoral or illegal' ones. What did he mean by this? I think that what he meant is clear from the characteristics of the rule as he described it, and as judges have always applied it. He meant acts which engage the interests of the state or, as we would put it today, the public interest. The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation. In some contexts, notably the invalidity of contracts prohibited by law, the ex turpi causa principle can be analysed as part of the substantive law governing the parties' rights. The contract is void, and any right derived from it is non-existent. But in general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the status quo ante, in the same way as on the rescission of a contract) the courts withhold judicial remedies, leaving the loss to lie where it falls. This is so even in a contractual context, when the court is invited to determine the financial consequence of a contract's voidness for illegality. The ex turpi causa principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.

> 24 In Lord Mansfield CJ's day, and for some time thereafter, this rule of abstention was sometimes expressed as a principle protecting the innocence or dignity of the court against defilement. In the notorious 'Highwaymen's Case', *Everet v Williams* (1725) (unreported); but noted at (1893) 9 LQR 197, in which the court was invited to take an account between two highwaymen, it not only dismissed the claim as 'scandalous and impertinent' but ordered the arrest of the Plaintiffs solicitor and fined him. Two centuries later, in *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1, 13, Lush J said of a contract to procure an honour, that 'no court could try such an action and allow such damages to be awarded with any propriety or decency.' Today, the same concept would be expressed in less self-indulgent terms as a principle of consistency. This was the point made by McLachlin J in her much-admired judgment in *Hall v Hebert* (1993) 101 DLR (4th) 129, 165:
>
> 'to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to 'create an intolerable fissure in the law's conceptually seamless web' . . . We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.'
>
> 25 The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as 'quasi-criminal' because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in *Safeway Stores Ltd v Twigger* [2010] Bus LR 974”

**[44]** So I come back to the question whether, on proper construction, the effect of a breach of reg 33 of the 2007 Regulations by someone carrying on business in the undertaking of “estate agency work” is that any contract made for the purposes of providing “estate agency work” is illegal. In my judgment that is, indeed, the proper construction of reg 33. A person required to be registered, but who is not registered, is prohibited from (“may not”) “carry[ing] on the business or profession in question for more than six months beginning on the date on which the supervisory authority establishes the register”. In order to carry on the business of providing “estate agency work” it is necessary for an “estate agent” to enter into contracts with those wishing to sell property, and perhaps also with those wishing to buy property. Without such contracts there is no business. On the face of reg 33, therefore, what the 2007 Regulations were trying to achieve, so far as is presently material, was to prevent unregistered persons acting as “estate agents”, and that could only be achieved by prohibiting them from entering into contracts to provide services of “estate agency work”. It is not for the court to consider whether the sanction of rendering illegal the contracts of unregistered “estate agents” is disproportionate. Proportionality was a matter for Parliament in deciding how to implement Directive 2005/60/EC. Seeking to prevent the use of the financial system for the purposes of money laundering or financing terrorism is a matter in which there is a manifest public interest. There is obviously also a public interest in seeking to ensure that businesses potentially handling significant amounts of money comply with their own obligations under the 2007 Regulations by subjecting them to supervision by relevant authorities. That some incentive should be thought necessary to induce businesses to subject themselves to supervision is unsurprising. What that incentive should be was, as I say, a matter for Parliament. A prohibition on carrying on business unless registered clearly provides a more powerful incentive than a civil penalty or a fine, in the case of a limited liability company. What is plain, however, is that the purpose of making provision for civil penalties or prosecution was not simply, as Parke B found was the case in *Smith v Mawhood*, raising revenue.

**[45]** In the result, the Agreement was illegal and is consequently unenforceable. It follows that this action is dismissed, as is the counterclaim insofar as it relies upon alleged breach of a term said to have been implied into the Agreement.

*CANCELLATION OF CONTRACTS MADE IN A CONSUMER'S HOME OR PLACE OF WORK ETC. REGULATIONS 2008*

**[46]** If I had not concluded that the Agreement was illegal and unenforceable, it would have been necessary to consider the possible application in the circumstances of the present case of Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008, SI 2008 No 1816 ("the 2008 Regulations"). By reg 7(2) of the 2008 Regulations it is provided, so far as is presently material, that, in a case to which the 2008 Regulations apply "The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made . . . ."

**[47]** It was accepted before me that RTA was a "trader" for the purposes of the 2008 Regulations, if they applied, and that the notice specified in reg 7(2) had not been given. It was also accepted that, if the 2008 Regulations applied, the consequence of RTA not having given the notice required by reg 7(2) was that provided for in reg 7(6) "A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation."

**[48]** In other words, if the Agreement was in principle enforceable, and the 2008 Regulations applied, the Agreement was unenforceable against Mr Bracewell for breach of reg 7(2) of the 2008 Regulations.

**[49]** By the end of the trial it was common ground that the issue whether the 2008 Regulations applied in the present case fell to be determined by the answer to the question whether, in entering into the Agreement, Mr Bracewell was a "consumer".

**[50]** The expression "consumer" is defined in reg 2(1) of the 2008 Regulations as meaning "a natural person who in making a contract to which these Regulations apply is acting for purposes which can be regarded as outside his trade or profession".

**[51]** In entering into the Agreement Mr Bracewell was seeking to turn to account his interest in the Property and the Business by engaging RTA to seek a buyer. Simply in the light of the definition of the expression "consumer" in reg 2(1) of the 2008 Regulations, construed as ordinary English words, it seems to me that Mr Bracewell was not a "consumer" in entering into the Agreement, so that the 2008 Regulations did not apply. In the light of submissions made to me by Mr Hibbert it is, perhaps, important to emphasise that, in order to be a "consumer" for the purposes of the 2008 Regulations, it is not enough that a person should merely not be acting in the course of his business, so that, if his business did not consist in selling businesses, he was not acting in the course of his business in seeking to sell it. The important thing was whether he was "acting for purposes which can be regarded as outside his trade or profession". Seeking to exploit his trade by selling his business to realise a capital asset is, in my judgment, not acting for purposes outside his trade, but seeking to achieve one of the purposes of having a trade, namely to realise, at an appropriate time, its capital value. A step preliminary to selling a business, such as advertising it for sale, or engaging an agent to seek purchasers, is equally, in my judgment, not outside the relevant trade or profession.

**[52]** Mr Hibbert sought to persuade me that, in English law, the word "consumer" did not so much mean whatever it was defined in any particular statutory provision as meaning, but rather was almost a status people having which should be protected. That may be slightly over-stating Mr Hibbert's submission, but it is difficult to understand why he referred me to the decision in *Davies v Sumner* [1984] 3 All ER 831, 83 LGR 123, [1984] 1 WLR 1301, in which the issue was whether a false trade description was applied "in the course of a trade or business", and the decision in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847, [1988] RTR 134, [1988] 1 WLR 321, in which the issue was whether the purchase of a motor car was on terms excluding the provisions of Sale of Goods Act 1979 s 14(3) or whether exclusion of that provision was negated by Unfair Contract Terms Act 1977 s 12(1), unless I was being invited to accept some submission along those lines.

**[53]** I have indicated my view of the proper construction of the definition of the expression “consumer” in reg 2(1) of the 2008 Regulations simply as a matter of interpretation of the English words used in the definition. However, actually it is not appropriate, in construing the relevant words, simply to look at the definition in reg 2(1). The 2008 Regulations were a re-implementation in English law of Council Directive 85/577/EEC. The English language text of that Directive also included a definition of the expression “consumer”, actually in exactly the same words as the definition in reg 2(1). Thus it is obvious that the intention of Parliament in enacting the 2008 Regulations was to apply the same definition of “consumer” as had been used in the English language text of Council Directive 85/577/EEC.

**[54]** The First Chamber of the European Court of Justice had to consider the impact of the French language text of the definition of “consumer” in Council Directive 85/577/EEC in *France v Di Pinto* [1991] ECR I-1189, [1993] 1 CMLR 399, a case with some similarities to the present. In the course of its judgment the court said:

> “14 In its first question, the Cour d'Appel de Paris seeks in substance to ascertain whether a trader who is canvassed for the purpose of concluding an advertising contract concerning the sale of his business must be regarded as a consumer entitled to protection under the directive.
>
> 15 It is necessary on this point to refer to Article 2 of the directive. It follows from that provision that the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he is canvassed lies outside his trade or profession. Article 2, which is drafted in general terms, does not make it possible, with regard to acts performed in the context of such a trade or profession, to draw a distinction between normal acts and those which are exceptional in nature.
>
> 16 Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader.”

**[55]** Essentially the same form of words as the definition of the expression “consumer” in the English language text of Council Directive 85/577/EEC appeared in the English language text of art 13 of Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (“the Brussels Convention 'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession . . .'.”

**[56]** In *Benincasa v Dentalkit Srl* [1997] ECR I-3767, [1998] All ER (EC) 135 the Sixth Chamber of the European Court of Justice had to consider the effect of the German language equivalent of those words. It said:

> “15 As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).
>
> 16 It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate-General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.
>
> 17 Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.”

**[57]** The European Court of Justice revisited the qualities of a "consumer" for the purposes of art 13 of the Brussels Convention in *Gruber v BayWa AG* [2006] QB 204, [2005] ECR I-439, [2006] 2 WLR 205:

> "36 In paras 16 – 18 of the judgment in *Benincasa* [1997] ECR I-3767, 3795-3796, the court stated in that respect that the concept of 'consumer' for the purposes of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others. The court held that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the Convention to protect the consumer as the party deemed to be the weaker party. Such protection is unwarranted in the case of contracts for the purpose of trade or professional activity.
>
> 37 It follows that the special rules of jurisdiction in Articles 13 – 15 of the Brussels Convention apply, in principle, only where the contract is concluded between the parties for the purpose of a use other than a trade or professional one of the relevant goods or services.
>
> 38 It is in the light of those principles that it is appropriate to examine whether and to what extent a contract such as that at issue in the main proceedings, which relates to activities of a partly professional and partly private nature, may be covered by the special rules of jurisdiction laid down in Articles 13 – 15.
>
> 39 In that regard, it is already clearly apparent from the purpose of Articles 13 – 15, namely, properly to protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly made outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.
>
> 40 As the Advocate-General stated in paras 40 and 41 of his opinion, in as much as a contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the Brussels Convention for consumers is not justified in such a case.
>
> 41 That is in no way altered by the fact that the contract at issue also has a private purpose, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use is predominant, as long as the proportion of the professional usage is not negligible.
>
> 42 Accordingly, where a contract has a dual purpose, it is not necessary that the purpose of the goods or services for professional purposes be predominant for Articles 13 – 15 of the Convention not to be applicable."

**[58]** The significance of the expressions of view of the European Court of Justice which I have set out is explained in the judgment of the Sixth Chamber in *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305, [1993] BCC 421:

> "7 However, it is apparent from the documents before the court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
>
> 8 In order to reply to that question, it should be observed that, as the court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

**[59]** In other words, in the circumstances of this case, in construing the definition of the expression "consumer" in reg 2(1) of the 2008 Regulations, this court should interpret it consistently with the objective of Council Directive 85/577/EEC as construed and explained by the European Court of Justice, at least insofar as that is possible under English law.

**[60]** Happily, the interpretation of the definition of "consumer" in reg 2(1) of the 2008 Regulations which commended itself to me without reference to the European jurisprudence is simply confirmed by that jurisprudence. Consequently, had it been necessary, I should have found that the 2008 Regulations did not apply to the making of the Agreement, and there was no obligation on RTA to provide the notice referred to in reg 7(2).

*UNFAIR CONTRACT TERMS*

**[61]** At the commencement of the trial it appeared that there existed a further point which might necessitate consideration, namely whether particular terms of the Agreement thought to be being relied upon on behalf of RTA satisfied the requirements of Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083 ("the 1999 Regulations"). The 1999 Regulations only applied if Mr Bracewell was acting as a "consumer" in entering into the Agreement. The definition of the expression "consumer" in reg 3(1) of the 1999 Regulations was very similar, but not identical, to that in the 2008 Regulations "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession".

**[62]** The 1999 Regulations re-implemented in this country Council Directive 93/113/EEC. That Directive had a definition of "consumer" in art 2 which was in identical terms to the definition in reg 3(1) of the 1999 Regulations. For the reasons which I have explained, the definition of "consumer" in reg 3(1) of the 1999 Regulations fell to be construed in accordance with the European jurisprudence to which I have referred. Consequently it was accepted at the end of the trial that, if Mr Bracewell was not able to satisfy me that he was a "consumer" for the purposes of the 2008 Regulations in entering into the Agreement, he would not be able to satisfy that he was a "consumer" nonetheless for the purposes of the 1999 Regulations.

**[63]** It is, perhaps, helpful, despite the fact that the 1999 Regulations in the end were not of any real significance in this action, to explain that the effect of a term in a contract being found to be unfair is explained in reg 8 of the 1999 Regulations:

> "(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
>
> (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."

**[64]** The only term of the Agreement which was relied upon by RTA in support of its claim for £47,000, and thus relevant on any view to be considered under the 1999 Regulations, was cl 9. Had it been necessary to reach a conclusion as to whether cl 9 was an unfair term for the purposes of the 1999 Regulations, it would have been necessary to construe it, applying the usual principles explained by Lord Hoffmann in his speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896 at pp 912-913, namely:

> "The principles may be summarised as follows.

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion which flouts business commonsense, it must be made to yield to business commonsense'."

**[65]** A focus of attention would have been the words "grant a lease of the property". In my judgment those words would have to have been construed in the context that the "grant [of] a lease of the property" was to mean that Mr Bracewell was "deemed to have sold the property" – in other words, the grant of a lease was to be treated as equivalent to a sale. It must follow, it seems to me, that it could not have been intended that the creation of a minor leasehold interest in the property, such as a periodic tenancy, was to have that effect. The words in cl 9 "grant a lease of the property" must, I think, mean, first, a formal grant of a lease in writing, and, secondly, a lease of such duration as to be equivalent to an outright sale. Thus, had it been necessary to reach a conclusion on the point, I should not have decided that the arrangements made between Mr Bracewell and Carly Bannerman for her to occupy the Property and to carry on the Business amounted to Mr Bracewell "grant[ing] a lease of the property".

*MISREPRESENTATION*

**[66]** The Re-Amended Defence and Counterclaim included these pleas:

> "4 The contract was entered into at the Drymen Pottery's premises at a meeting between Mr Phil Manners of the Claimant and the Defendant and in the presence of Ms Margaret Colvin. At the meeting Mr Manners stated:
>
> a. he valued the business at £900,000 and stated that it would not be sold for less;
>
> b. the asking price should be £940,000;
>
> c. commission would be approximately 5%;

d. there would be a 1% fee (ie £9,000) payable in advance but this would be set off against commission and the fee could be paid at a rate of £1,000 plus VAT per month (unless and until an offer was made).

. . .

14 Further or in the alternative, the contract was governed by Scottish law.

a. In making the statements set out in paragraph 6 [sic – it was common ground before me that '4' was meant] (a) and (b) above the Claimant impliedly represented to the Defendant the fact that equivalent business[es] were selling for prices of about £900,000. The Defendant relied on the said representation and was induced thereby to enter into the contract with the Claimant. In fact the representation was false as prices for similar properties were in fact much less than £900,000 and were about £500,000 – £600,000.

b. In the premises

i. the Claimant was negligent in making the representation, which went to an essential matter in the contract;

ii. in consequence the contract was void alternatively the Defendant is entitled to reduction (rescission) of the contract;

iii. alternatively the Claimant made an innocent misrepresentation and the Defendant is entitled to reduction (rescission) of the contract.

c. Further or in the alternative, there was an implied term of the contract that the Claimant would exercise reasonable skill and care in the provision of his services as a selling agent. In placing a sale value of at least £900,000 plus VAT on the property with an asking price of at least £940,000 and/or marketing it at that price (if, which is not admitted, the Claimant in fact carried out any marketing activity at all), the Claimant failed to exercise reasonable skill and care in and about the service it provided. The advice that the property should be marketed at the price suggested and the marketing at that price was a fundamental breach of contract by the Claimant, entitling the Defendant to rescind the contract, which he did by his letter of 8 May 2010."

**[67]** These pleas gave rise to a number of difficulties. Before coming to other problems, it is convenient to notice the factual disputes between the parties. The Amended Reply to Re-Amended Defence and Defence to Counterclaim included these assertions:

"2.5 Mr Manners visited the Defendant at the Drymen Pottery on two occasions, the first occasion being on or about 1 February 2010 and the second occasion being on 22 February 2010, the day when the contract was signed by the Claimant;

2.3 [sic] On the first occasion, the only persons present were Mr Manners and the Defendant. On the second occasion there was a woman present whom the Defendant identified as his wife. This may be the person referred to as Ms Margaret Colvin in the Amended Defence;

2.5 During the first meeting on 1 February 2010, Mr Manners:

(i) confirmed the ownership of the business and that the Defendant was a sole trader;

(ii) ascertained from the Defendant that he was thinking of selling the business within three months and that the Defendant was under pressure from his secured lender to sell;

(iii) asked the Defendant what price the Defendant wished to obtain for the business and the Defendant told Mr Manners that he wanted around £850,000 – £900,000 for the business, broken down as £150,000 – £170,000 for the business stock and goodwill and £700,000 – £750,000 for the property, Drymen Pottery;

(iv) told the Defendant that there would be commission payable in the event of the sale of the business and that an 'up front' registration fee would be required but did not discuss how much either of these amounts would be or how they were calculated;

(v) was not provided with any accounts for the business and provided no advice to the Defendant as to the value of the business or the property.

2.6 During the second visit:

(i) the Defendant told Mr Manners he wanted to put the business on the market;

(ii) the Defendant did not provide Mr Manners with any annual (or any other) accounts for the business but provided Mr Manners estimates of the turnover of the cafe and of the public house which were incorporated in the contract;

(iii) the Defendant provided authority to the Claimant through Mr Manners to accept any offers for the business in excess of £940,000 without any necessity for the Claimant to inform the Defendant of any offers for the business below that price;

(iv) the Defendant again provided no accounts for the business to Mr Manners;

(v) Mr Manners and the Defendant agreed that the commission was to be £40,000 and the registration fee was to be £9,000 payable in eight monthly instalments from the date of the contract;

(vi) the amount of the registration fee was determined by the amount of work which the Claimant would have to do to market the business and the commission was based on the expected sale price of the business;

(vii) Mr Manners provided the Defendant with the contract and invited him to read it and the Defendant read the contract and then signed the contract."

**[68]** In a witness statement dated 25 January 2014 Mr Manners, who was called to give evidence at the trial on behalf of RTA, gave a detailed account of his two meetings, as he contended them to have been, with Mr Bracewell:

"8 To the best of my recollection, my first meeting with the Defendant at the Drymen Pottery was with him alone and there were no other parties present when we were discussing matters concerning his intention to market his business for sale. I met him at the Drymen Pottery on the morning of 1 February 2010

9 After initial introductions and general pleasantries, I went through some routine questions with him. I checked that he was the owner of the business and that he was the decision maker and enquired whether he was a sole trader, partner in a business, or director of a limited company. The Defendant confirmed to me that he owned and operated the business as a sole trader and that he was therefore the decision maker.

10 I also asked the Defendant how soon he would be looking to sell the business. I cannot recall his exact response however I believe that he was looking to sell within the next three months. We then had a general conversation about how the business was going for the Defendant. During that conversation, the Defendant gave me an indication of his average annual turnover in respect of the different elements of the business and I recall that he also mentioned that he was under some pressure from a secured lender who was looking to enforce its security against the business premises in the near future.

11 During this first meeting, I did not discuss figures in respect of our commission or registration fees with the Defendant. I endeavour not to discuss such matters on first appointments with clients as the purpose of that appointment is purely to gauge their interest in actually selling their business. I of course made the Defendant aware that we do charge commission for our services together with a registration fee which is payable up front. However, I did not indicate any amounts to him at this stage as we did not have any idea at this stage what the asking price for the business would be.

12 I then gave the Defendant a short presentation on the Claimant's business, relating to what we do, how long the company has been in existence, our marketing practices, and the general basis of how our fees are charged as discussed below.

13 I then asked the Defendant to show me around the business premises. I recall that he took me to see the cafe, the kitchen, a gift shop area, the restaurant and the pub which is located on the first floor.

14 Following the tour of the business premises, we then sat down together and discussed his business in depth. The Defendant explained what type of business it was, namely a cafe/restaur ant and pub, and gave me an estimate of his average annual turnover. I do not recall him providing me with detailed trading accounts at that meeting.

15 When discussing the asking price for a business with potential clients, I always explain to them that I would like them to provide me with the price they would wish to obtain if a buyer were to enter the premises tomorrow and ask to purchase the business from them. Once the client has provided me with their estimate of what they think the business and premises is worth I then ask to see their trading accounts and take detailed information as to turnover which is often provided at a second visit. I asked the Defendant to give me his desired sale price for the business, taking into account the personal value of the business to him.

16 I recall that the Defendant said that he would like to obtain £850,000 to £900,000 for the sale of his business, including the business premises.

17 I have never suggested a sale price to the Defendant for his business . . . .

19 As previously stated, I do not believe that the Defendant had accounts available at this first meeting. In such circumstances, I will simply ask clients to give me a global figure for the entire business including any property. I asked this of the Defendant and I recall that he said that his preferred global figure would be £850,000 to £900,000. I then asked if he has had a recent valuation of the business property. I cannot recall whether or not the Defendant had received a recent valuation of his property. However, in cases where no such valuation exists, I simply ask the clients to provide me with a rough estimate of their own valuation as they will be more familiar than me with values of properties of their specific nature in the locality. I recall that the Defendant estimated the value of the business premises at approximately £700,000 to £750,000. On that basis, with no trading accounts from which to ask the Defendant to provide a valuation of the business aspect, the valuation of the business element of the global asking price would simply have been ascertained by deducting the Defendant's estimated valuation of the property from the global asking price of £850,000 to £900,000.

20 Once we had discussed the matter of the asking price, I provided the Defendant with some of the Claimant's standard literature and agreed a date by which to telephone him to discuss further. I recall that the Defendant said he was going to meet with his bank manager that afternoon to discuss his business liabilities as he believed that his secured lender was shortly going to seek possession of his business premises. As a result he suggested that I call him back on 3 February 2010. I left the premises, having been therefor at least one hour.

. . .

22 I recall that I attended the Drymen Pottery sometime after 4pm on 22 February 2010 as it was my last call of the day and it was dark at the time I arrived. I believe that the Defendant's wife was at the time a dental surgeon in a practice near the Drymen Pottery building.

23 Upon arrival at the Drymen Pottery, I was asked to proceed to the dental surgery to meet the Defendant. I met the Defendant in the waiting area of the dental practice together with his wife where we sat down to discuss the marketing of his business. The Defendant's wife was present throughout this meeting.

24 After general introductions and pleasantries, I asked the Defendant whether he was prepared to put his business on the market. The Defendant confirmed that he was. I then went through some standard details such as the details of the business address, and contact details for the Defendant.

25 I recall that the Defendant did not have a set of accounts to hand at this meeting. If he had, then I would have entered very specific figures in relation to annual turnover in the final agreement and other documents filled in by me at the meeting. However, I note that I only included approximate figures of £150,000 and £250,000 relating to turnover in

the final agreement. The figures in respect of turnover for the business were provided verbally by the Defendant after I asked him to confirm the turnover figures as previously discussed at our meeting on 1 February 2010.

26 I then took further information to confirm my previous conversation with the Defendant such as the tenure of the property, the number of staff, opening hours and more in depth information regarding the pub and the restaurant aspects of the business. The additional information regarding the day-to-day aspects of the business were recorded on a Business Information Sheet and Licensed Premises Sheet [copies of which were adduced in evidence at the trial].

27 I then asked the Defendant to confirm the asking price at which he would like his business to be placed on the market. The Defendant confirmed that he wanted the asking price to be set at £900,000.

28 I then handed a copy of the sole agency agreement to the Defendant, once I had filled in the relevant business details.

29 I explained that our commission is added to the sale price and asked The [sic] Defendant if he would be prepared to provide me with a figure above which the Claimant would be authorised to accept offers to purchase the business without seeking his prior approval. The Defendant confirmed that he was willing to do so and stated that the Claimant could accept offers of £940,000 plus the value of any stock without seeking his approval on the basis that this was his desired asking price together with the Claimant's commission exclusive of VAT. That figure was then inserted into clause 4 of the agreement.

30 In relation to the registration fee, I reiterated to the Defendant as per our first meeting that we do require a registration fee payable upfront. There is no set figure for that registration fee and it is not based on any percentage of the sale price. Business Consultants [that is, representatives like Mr Manners] have some discretion as to the registration fee and I tend to base the registration fee on the approximate value of the amount of work required to market the business, the total value of the business together with other considerations such as affordability to the client.

31 I stated that the registration fee would be £9,000 plus VAT and the Defendant said he would not be able to afford to pay that in one instalment. He offered to pay £1,000 plus VAT immediately and would pay eight further payments of £1,000 plus VAT per month for the next eight months. I agreed that this was acceptable and the Agreement was amended to reflect that.

32 I do not as a matter of course go through every paragraph of the contract with clients. If they ask me to, I of course will. I do discuss every aspect of the contract which I need to annotate in manuscript, such as the commission and registration fees, however once I have been through those aspects I hand the agreement to the client, and I did so with the Defendant, and state that they should only sign the agreement once they are happy with it. The Defendant read through the contract with his wife present and signed to show his acceptance. The Defendant also initialled every clause which had been completed or amended in manuscript to signify his acceptance . . . .

33 The Defendant then wrote out a cheque in the sum of £1,175 in respect of his first instalment of the registration fee and handed the same to me . . . .

34 The Defendant did not raise any queries in relation to the other terms of the agreement such as the ability to terminate the agreement and the trigger events for payment of commission. The duration of the second visit was at least one hour though I cannot recall the exact length of time I was present at the Defendant's premises."

**[69]** Mr Bracewell and Ms Colvin were both called to give evidence at the trial on behalf of Mr Bracewell. Each prepared a witness statement describing the events of the one meeting which they contended had taken place with Mr Manners, on 22 February 2010. Their witness statements dealt with the meeting considerably more briefly than Mr Manners. What Mr Bracewell said, in a witness statement dated 18 February 2014, was:

"21 I recall that Phil Manners arrived pretty much on time. It was dark and the meeting took place in my partner's dental practice, as we did not want any of the staff who were working to become aware of the proposed sale. Margaret was at the meeting.

22 At the meeting Phil Manners told us once again that the Claimant had buyers waiting to acquire the business and we were informed by him that it could obtain £900,000 for us and that the asking price should be £940,000. I was very pleased not only because the offers which Phil Manners said they could provide were from potential buyers that they already had, but also the asking price exceeded any expectations that I had at the time. I relied on what Phil Manners told me and it was because of what he said that I entered into the contract with the Claimant.

23 We were informed by Phil Manners that the Claimant could organise funding for the potential purchasers and that I could expect the sale to complete by August 2010 which was also good news.

24 It was mentioned at this meeting for the first time that the Claimant would require a 1% arrangement fee which Phil Manners calculated to be £9,000. We considered this to be a lot of money, but Phil Manners confirmed that I could make the payments in instalments of £1,000 per month with the first payment being due that day (22 February 2010). I considered the position with Margaret and we decided that although it was expensive, if the Claimant had buyers and given the valuation they had put on the business, there was little risk in agreeing to their terms.

25 Phil Manners took some details from me about the business which I think he may have written down. The information which appears in the marketing sheet dated 22 February 2010 . . . appears to reflect that information. It is worth noting that a number of restrictions were placed on the advertising of the business . . . .

28 In the event, Phil Manners did not even enter the business premises. He asked me for photos of the business so that they could be used to incorporated [sic] into the sale particulars and/or marketing material . . . .

29 Phil Manners produced a contract and made some amendments to it . . . . He asked me to sign it. I wanted some time to consider the terms and asked for a copy. He refused to give me a copy and became upset. In the end I signed the contract and also initialled the amendments as he requested. He did not let me have a copy for my records even though I requested it.

30 Phil Manners also produced an invoice . . . I believe he did leave a copy of this invoice with me. I gave him a cheque in the sum of £1175.00 which represented the first instalment of the registration fee . . . at the meeting. The cheque was drawn from my account with Bank of Scotland. The meeting concluded shortly thereafter."

**[70]** The account of Ms Colvin in her witness statement dated 18 February 2014 was even more laconic:

"6 I do recall Peter and I met a representative of RTA at my dental practice which is next door to the bar and restaurant. I was present throughout that meeting which I believe took place on 22 February 2010. The reason the meeting took place in the dental practice was because we did not want the staff to know that the bar and restaurant might be sold. We had to be discreet.

7 I understand that the person we met on 22 February 2010 is called Phil Manners. Peter and I were interested in learning what price the business could be sold for and what sum RTA valued the business at. Mr Manners confirmed that RTA had buyers waiting to purchase the business. I understood from Peter that he had been told this prior to the meeting by RTA agents. During the course of the meeting Mr Manners said that RTA could obtain about £900,000 for the business if it was sold through them. I recall that Peter was also pleased with the news that RTA were confident the sale could be completed by August 2010. It is my recollection that this information was provided by Mr Manners.

8 Phil Manners was keen to enter into a contract immediately and I recall that he wanted Peter to sign a contract straight away. We learned for the first time at that meeting that RTA would be seeking about £9,000 plus VAT for their services. I remember discussing this with Peter because it seemed like quite a lot of money. In the end we concluded that despite the upfront cost there was little risk as RTA had buyers already interested in purchasing the business.

9 The meeting concluded after Peter had signed the contract and paid a cheque to Mr Manners for part of what I understand is a registration fee."

**[71]** It has to be said that the accounts of both Mr Bracewell and Ms Colvin concerning what happened on 22 February 2010 seemed rather odd, given that Mr Bracewell's case was that Mr Manners had valued the Property and the Business at £900,000, and that Mr Bracewell had relied on that valuation in entering into

the Agreement. One might have expected that Mr Bracewell and Ms Colvin would say, in their respective witness statements, something along the lines, “Mr Bracewell asked Mr Manners what he thought the business was worth, and Mr Manners said about £900,000”. However, what one found was rather more circumspect. Mr Bracewell did not suggest that he had asked Mr Manners for a valuation, rather that Mr Manners volunteered, not an opinion as to value, but an assertion as to how much RTA could obtain. Ms Colvin expressed herself in very similar terms on this point.

**[72]** Mr Manners, Mr Bracewell and Ms Colvin were each cross-examined at the trial.

**[73]** I regret to say that I was unimpressed by Mr Bracewell as a witness. As I have already pointed out, his evidence as to there only having been one meeting, on 22 February 2010, was contradicted by the contemporaneous documentary evidence that there had also been a meeting on 1 February 2010. Mr Bracewell was asked in cross-examination about the terms of his letter dated 10 September 2010 to RTA. He told me that he considered that an informal agreement with a friend did not amount to the Business having been “leased”. That tendentious assertion might have been more plausible if Mr Bracewell had not deliberately, and dishonestly, sought by the terms of his letter dated 10 November 2010 to RTA to create the false impression that he was still operating the Business, at that time firmly in the hands of Carly Bannerman. Notwithstanding the vehement assertion in his witness statement of 18 February 2014 that he was not given a copy of the Agreement, in cross-examination Mr Bracewell accepted that he was either given a copy by Mr Manners on 22 February 2010, or one was sent to him through the post very shortly thereafter. In cross-examination Mr Bracewell affected to be unfamiliar with what I have described in this judgment as the “Business Details” document. In paras 9, 11 and 13 of his witness statement dated 18 February 2014 Mr Bracewell commented in detail upon various of the entries in that document. I came to the conclusion that, as Mr Spackman submitted in closing, Mr Bracewell simply gave, from time to time, whatever account of the events of his involvement with RTA he thought suited him.

**[74]** The evidence of Ms Colvin was not so obviously unsatisfactory on its face as that of Mr Bracewell, but, unhappily, I reached the conclusion that her evidence of the meeting with Mr Manners on 22 February 2010 was no more reliable than that of Mr Bracewell.

**[75]** By contrast, I was impressed by Mr Manners as a witness. He seemed to me to be taking care in his evidence to be accurate, so far as his recollection went, and to be balanced in what he told me. Where his evidence could be evaluated against the background of contemporaneous documents, the documents supported it. Although Mr Manners accepted that he had made many calls since his meetings with Mr Bracewell, he said that he recalled the meetings because the town of Drymen is particularly attractive and he was pleased to have the opportunity of visiting it.

**[76]** In the result, the misrepresentation allegations against RTA fail on the facts. I find that Mr Manners did not express any opinion to Mr Bracewell that the Property and the Business were worth about £900,000, or any figure. What Mr Manners did do was to ask Mr Bracewell how much he would be prepared to sell for, and the figure of £940,000 which was fixed as the asking price for the Property and the Business was the result of Mr Bracewell's answer to that question, with the commission of RTA added.

**[77]** If I had found the facts in relation to the misrepresentation allegations to be as was contended for on behalf of Mr Bracewell, it would have been necessary to consider other aspects of the pleas in para 14 of the Re-Amended Defence and Counterclaim.

**[78]** Despite the plea that the Agreement was governed by the law of Scotland, no evidence as to the law of Scotland was adduced at the trial, and so I could only have proceeded on the traditional basis, that the law of Scotland, or any other non-English system of law, was to be taken to be precisely identical to the law of England in the absence of evidence to the contrary.

**[79]** If Mr Manners had expressed the view that the value of the Property and the Business was £900,000, that would have been an expression of opinion, not a representation of existing fact, and thus could not found any claim in misrepresentation. It was sought to grapple with that problem, at para 14 of the Re-Amended Defence and Counterclaim, by contending that the expression of opinion alleged involved an implied representation of existing fact, namely that "equivalent business[es] were selling for prices of about £900,000". However, in my judgment the expression of opinion alleged did not have implicit within it that representation of existing fact. No doubt any expression of opinion involves, implicitly, the representation of the fact that the opinion expressed was the genuine opinion of the person expressing it. However, at least in the ordinary case, no other representation of existing fact is implicit, and in particular not a representation that the person expressing the opinion has good grounds for that opinion, or has undertaken research which objectively justifies that opinion. Although no doubt fervently held by those holding such views, many opinions on political or religious matters are not based upon deep reflection or factual investigation, and are simply incapable of rational justification.

**[80]** In the result, the allegations of misrepresentation would have failed to lead to any relief, even if I had accepted the evidence of Mr Bracewell and that of Ms Colvin as to what was said to have happened at the meeting with Mr Manners on 22 February 2010.

**[81]** Mr Hibbert told me that the reference to negligence in para 14 of the Re-Amended Defence and Counterclaim reflected the law of Scotland concerning misrepresentation. Maybe so. However, for the avoidance of doubt, any allegation to the effect that Mr Manners was negligent in valuing the Property and the Business at £900,000 would have failed in any event for want of proof that no reasonably competent valuer could have assessed the value of the Property and the Business at £900,000. Mr Manners told me, and I accept, that he had, and has, no qualifications as a valuer, but in order to support an allegation of negligence against Mr Manners it was necessary for Mr Bracewell to adduce some evidence to the effect that no reasonably competent person expressing an opinion about value of the Property and the Business could possibly have valued it at £900,000, and to formulate the requirement as "no reasonably competent person who was not a valuer could possibly have valued the Property and the Business at £900,000" would be bordering on the absurd.

**[82]** I have already explained why Mr Bracewell is no better able to rely in this action upon the Agreement than RTA. However, had it been necessary to do so, I should have found that, in order to make good the allegation of breach of an implied term of skill and care, it was necessary to adduce the same sort of evidence as would have been necessary to support a claim in negligence. Moreover, insofar as it might have mattered, the contention that Mr Bracewell sought to rescind the Agreement by his letter dated 8 May 2010 was not, in my judgment, well-founded. By the letter Mr Bracewell was not seeking to terminate the Agreement on any ground, merely to discuss the possibility of termination.

*CONCLUSIONS AS TO LIABILITY*

**[83]** In the result, both the claims in this action and the claims in the counterclaim fail and are dismissed.

*COSTS*

**[84]** I have not been addressed by Counsel in relation to costs, dependent upon the outcome of the action and the counterclaim. However, in order to focus submissions when I am addressed, I think that it would be helpful to express my preliminary view that, the claims in the action having failed by reason of the fact that the Agreement was illegal, and so unenforceable; and the ordinary principle in a case of a contract being unenforceable by reason of illegality being that the loss sustained by each party should lie where it falls, the appropriate order as to costs should be no order.

*Judgment accordingly.*