



Easter Term
[2022] UKPC 16
Privy Council Appeal No 0035 of 2020

JUDGMENT

**Energizer Supermarket Ltd (Appellant) v Holiday
Snacks Ltd (Respondent) (Trinidad and Tobago)**

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

**Lord Briggs
Lord Sales
Lord Leggatt
Lord Burrows
Lady Rose**

**JUDGMENT GIVEN ON
9 May 2022**

Heard on 15 March 2022

Appellant

Fyrd Hosein SC

Sasha Bridgemohansingh

Aadam Hosein

(Instructed by One Chancery Courtyard Chambers (Port of Spain))

Respondent

Christopher Sieuchand

Sonnel A David-Longe

(Instructed by Sinclair Gibson LLP (London))

LORD BURROWS:

1. Introduction

1. The legal issues raised by this case involve equitable easements and the defence of illegality (both statutory illegality and common law illegality). The facts concern a gas pipeline that runs under what is now the land of Energizer Supermarket Ltd (“Energizer”), which is the defendant and appellant. That gas pipeline is being used to supply gas to Holiday Snacks Ltd, which is the claimant and respondent. The existence of that gas pipeline has been stymying Energizer’s plans to construct a supermarket on its land.

2. The factual background

2. A written agreement was made on 3 March 1986 (“the March agreement”) between two neighbouring landowners, Kiss Baking Co Ltd (“Kiss”) and Sookram Boodhai (“Mr Boodhai”). Kiss was the owner of the land at Pole No A54, El Socorro Rd, San Juan and Mr Boodhai was the owner of the land (“the Land”) at Pole No 54 on the same road. Under the written agreement (which was not made by deed), Mr Boodhai agreed to allow Omega Fabricon Ltd (“Omega”), on behalf of Kiss, to lay a two-inch gas pipeline, with a length of about 400 feet, under the Land for the benefit of Kiss. Mr Boodhai also agreed to allow any approved agent of Kiss to carry out any necessary repairs to the pipeline in the future. It was agreed by Kiss that all safety features required by the National Gas Company of Trinidad and Tobago Ltd (“NGC”) would be adhered to. The price payable by Kiss to Mr Boodhai under the agreement was \$12,000 payable immediately on the completion of the laying of the pipeline. The agreement was signed on behalf of Kiss by its managing director, Mr Yip Choy.

3. By a written agreement dated 30 September 1986 between NGC and Kiss, NGC agreed to supply natural gas to Kiss (using the pipeline) subject to a number of conditions including that NGC would be the owner of the gas pipeline and metering facilities.

4. The gas pipeline was constructed under the Land by Omega who were paid to do so by Kiss. As provided for in the terms of the March agreement, Kiss paid the

agreed sum of \$12,000 to Mr Boodhai. The gas pipeline still runs under the Land. Its location is marked by yellow posts.

5. Although there is some ambiguity in the agreed statement of facts - and the Board has not been supplied with any relevant documents to resolve the ambiguity - it would appear, and shall be assumed, that in May 1992 Kiss transferred part of its business, including the relevant land and the rights and liabilities in respect of the pipeline, to its wholly owned subsidiary, Sweetheart (1989) Ltd. The name of that subsidiary was subsequently changed in April 1996 to Holiday Snacks Ltd ("Holiday Snacks"). Certainly, it has not been suggested by Energizer that, in so far as there is an equitable easement, it is Kiss, rather than Holiday Snacks, that is entitled to enforce that easement.

6. On 12 October 1993, under a deed of conveyance that was registered on 5 January 2004, Mr Boodhai sold the Land to Energizer. On 14 November 1994, Mr Boodhai informed Kiss by letter that he had sold the Land to Energizer and that the March agreement "is at an end". In or around October or November 1994, Energizer had a survey carried out in respect of the Land in which the existence of the gas pipeline was reported. On 13 December 1994, Mr Boodhai signed a note indicating that he had informed Jerome Boodhoo ("Mr Boodhoo"), Energizer's managing director, of the existence of the gas pipeline prior to the conveyance of the Land from Mr Boodhai to Energizer.

7. On 12 June 1996 Energizer, through its attorney-at-law, called upon Kiss to remove the gas pipeline from the Land.

8. On 29 October 1997, Energizer's outline application for planning permission for the construction of a supermarket was refused because of the existence of the gas pipeline on the Land.

9. No licence for the laying of the gas pipeline was obtained from the relevant Minister by Kiss or Mr Boodhai (or by Holiday Snacks or Energizer) although, as we shall see, this is a requirement under the Petroleum Act. There is also no evidence that Omega, who were paid by Kiss to construct the pipeline, had obtained a licence under the Act.

10. By its (amended) writ of summons and statement of claim, dated 21 December 2006, Holiday Snacks brought a claim against Energizer seeking, inter alia, a declaration that Holiday Snacks' ownership of the Land is subject to an equitable "way leave"

(which is a type of equitable easement so that we shall refer to it in this judgment as an equitable easement) in respect of the gas pipeline running through the Land; and an injunction to restrain Energizer from interfering with Holiday Snacks' use of the pipeline.

11. By its (amended) defence and counterclaim, dated 24 January 2007, Energizer seeks, inter alia, damages and a mandatory injunction for the removal of the gas pipeline on the basis that Holiday Snacks has no right to be using the Land for a pipeline because the March agreement was void for illegality, as contravening the Petroleum Act. Energizer also alleges that the agreement between Mr Boodhai and Kiss, even if valid, merely conferred a contractual licence on Kiss and, because that contractual licence was validly terminated by Mr Boodhai on 14 November 1994, neither Kiss nor Holiday Snacks, as the assignee of the contractual licence from Kiss, has any continuing right to use the pipeline.

3. Relevant statutory provisions

12. The relevant statutory provisions concern the conveyance of land and the regulation of petroleum operations, in particular the requirement for a licence.

13. Under the Conveyancing and Law of Property Act (Trinidad and Tobago):

“Conveyances to be by deed

10(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by Deed.

General words implied in conveyances

16(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed

or known as part or parcel of or appurtenant to the land or any part thereof.”

14. Under the Petroleum Act (Trinidad and Tobago):

“Interpretation

2(1) In this Act -

...

‘licence’ means a licence to engage in petroleum operations granted in accordance with this Act and of any Regulations;

‘natural gas’ means petroleum in the gaseous state;

...

‘petroleum operations’ means the operations related to the various phases of the petroleum industry, and includes natural gas processing, exploring for, producing, refining, transporting and marketing petroleum or petroleum products or both, and manufacturing and marketing of petrochemicals; ...

...

Licences

6(1) Subject to this Act, no person shall engage in petroleum operations on land ... unless he first obtains a licence as provided for in this Act or the Regulations.

(2) A person who contravenes this section is liable on summary conviction to a fine of five hundred thousand dollars and in the case of a continuing offence, to a further

fine of fifty thousand dollars for every day during which the offence continues.

Licensee to negotiate for ancillary rights

25 Where a licence is granted and ancillary rights are required by the licensee, he shall, in accordance with any other written law relating to landholding, negotiate with -

(a) in the case of State Lands ..., the Minister who is hereby authorised to act on behalf of the President for such purpose;

(b) in any other case, the person entitled to grant the rights for a grant of such rights.

Power to grant ancillary rights

26(1) Where any facility, right, or privilege is required in order that petroleum operations may be properly and conveniently carried out by a licensee, and the proper and efficient carrying out of petroleum operations is unduly hampered by the inability or failure of the licensee to obtain such right, facility, or privilege (in this Part referred to as an ancillary right), such ancillary right may, in the manner and subject to the provisions hereinafter appearing, be conferred on the licensee who is working or desirous of working them either by himself or through his lessees or assignees.

(2) In particular, but without prejudice to the generality of the foregoing provision, such ancillary rights include -

(a) a right to cut timber, rights of way and other easements ...

...

Limitation on power of granting rights

27(1) No ancillary right shall be granted or acquired by a compulsory purchase Order under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons:

- (a) that the persons with power to grant the right are numerous or have conflicting interests;
- (b) that the persons with power to grant the right, or any of them cannot be ascertained or cannot be found;
- (c) that the persons from whom the right must be obtained, or any of them, have not the necessary powers of disposition, whether by reason of defect in title, legal disability or otherwise;
- (d) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable.”

15. Under the Petroleum Regulations (Trinidad and Tobago):

“Licences for petroleum operations

3(1) ... the licences that may be issued to persons to engage in petroleum operations shall be:

...

- (f) a Pipeline Licence;

...

Form and contents of application for licences

6. Every application for a licence shall be made in writing addressed to the Minister, and shall contain the following particulars:

...

(i) in relation to applications for a Pipeline Licence for the installation and operation of a new trunk pipeline, the route, the length, the diameter and other particulars (to be shown on a map) of the proposed pipeline, its boundary lines, the names of the owners of the land over which it would pass, the location of pumping and terminal stations and their capacities, the estimated cost of construction and such other information as may be necessary in order to make clear the purpose and the nature and specifications of the pipeline.”

4. The decisions and reasoning of the courts below

16. In the High Court of Trinidad and Tobago, in a decision dated 28 March 2014, Harris J held that the March agreement between Kiss and Mr Boodhai had created an equitable easement not a mere contractual licence; and that the illegality involved in not obtaining a pipeline licence was not a defence to the enforcement of the easement against Energizer by Holiday Snacks. Harris J’s central reasoning was as follows:

(i) There are four essential requirements for an easement. These are that: first, there must be a dominant and servient tenement; secondly, the easement must accommodate the dominant tenement; thirdly, the dominant and servient owners must be different people; and, fourthly, the easement must be capable of forming the subject of a grant (see para 43 of Harris J’s judgment).

(ii) It was inconceivable that Kiss would operate its commercial enterprise with a gas supply based on merely a revocable contractual licence (see para 47).

(iii) Mr Boodhai must have been aware that Kiss might wish to convey its land to another and there was nothing to suggest that Mr Boodhai did not intend the benefit of the agreement to run with the land of Kiss (see para 47).

(iv) The March agreement could not have created a legal easement, as opposed to an equitable easement, because it had not been made by deed as required by section 10(1) of the Conveyancing and Law of Property Act (set out at para 13 above) (see para 45).

(v) Taking account of all the circumstances, the correct interpretation of the agreement was that it created an equitable easement because it satisfied the four essential requirements for an easement, with Kiss as the owner of the dominant tenement (see para 43), and was not a mere contractual licence. In the words of Harris J at para 48:

“When I put all the considerations together, not least of which are: the legal requirements for the creation of an easement, the character and user of the neighbourhood, the commercial nature of the agreement, the import of the agreement, the actual operations of Kiss and the commercial logic behind entering into such an agreement, the court is satisfied that upon proper construction of the agreement, an equitable easement was created by this agreement and by subsequent continuous usage of the easement or way leave.”

(vi) Although the equitable easement had not been registered (see para 45), Energizer was bound by it because it had actual notice of the pipeline. Although Harris J did not accept Mr Boodhai’s evidence that he had informed Mr Boodhoo, Energizer’s managing director, of the existence of the gas pipeline prior to the conveyance of the Land to Energizer, Harris J accepted the evidence of Mr Yip Choy (the managing director of Kiss and a director of Holiday Snacks) that he had told Mr Boodhoo, of the pipeline running across the Land prior to Energizer buying it (see paras 50-52).

(vii) It was a contravention of section 6(1) of the Petroleum Act for the gas pipeline to have been laid without obtaining a pipeline licence from the relevant

Minister. Breach of that subsection constituted a summary criminal offence. But that illegality did not create a private cause of action for breach of statutory duty and did not affect the civil law as regards the making of the agreement for the laying of the pipeline (see paras 24-33).

17. Harris J therefore made several declarations and orders. Most importantly, it was declared that Energizer held the Land subject to the equitable right of Holiday Snacks to a “way leave” of the gas pipeline running across the Land; and an injunction was ordered restraining Energizer from interfering with the pipeline.

18. The Court of Appeal (Archie CJ, Smith and Pemberton JJA) dismissed Energizer’s appeal. In an ex tempore judgment, given on behalf of the Court by Smith JA on 28 June 2019, the Court of Appeal held as follows:

(i) Harris J had been correct, or at least was not plainly wrong, that, given what is required by law for an easement and on its true construction, the March agreement had created an equitable easement.

(ii) Contrary to Harris J’s reasoning, there was no breach of section 6(1) of the Petroleum Act by Kiss or Mr Boodhai in not obtaining a licence because a licence was required under that sub-section only for those engaged in petroleum operations and neither Kiss nor Mr Boodhai was so engaged. And section 25 of the Act dealing with ancillary rights did not prohibit a private agreement for an easement that exists prior to the laying and operation of a pipeline. Alternatively, any criminal breach of the Act was insufficiently clear to render the easement unenforceable. Albeit for different reasons, Harris J was therefore correct that illegality was not a defence.

19. It followed that the declarations and order of Harris J were affirmed (subject to the deletion of one of the declarations which was thought unnecessary and depended on Harris J’s interpretation of the Petroleum Act).

5. Did the March agreement create an equitable easement in respect of the gas pipeline and, if so, does that easement bind Energizer?

20. The principal submission of Fyard Hosein SC, counsel for Energizer, focuses on illegality. But his alternative submission, which it is convenient to consider first, is that,

irrespective of illegality, the March agreement did not create an equitable easement. Rather it merely created a contractual licence and, because a contractual licence confers only personal and not proprietary rights (as clarified in *Ashburn Anstalt v Arnold* [1989] Ch 1), it could not bind Energizer; and, in any event, it was validly terminated by Mr Boodhai on 14 November 1994.

21. The classic case on the requirements for an easement is *In re Ellenborough Park* [1956] Ch 131. It was there decided that the shared recreational use of a communal private garden could be conferred upon the owners of townhouses built around and near it by means of easements. In a well-known passage, Danckwerts J at first instance, at p 140, affirmed by the Court of Appeal [1956] Ch 131 especially at p 163, said:

“The essential qualities of an easement are (1) there must be a dominant and a servient tenement; (2) an easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (3) the dominant and servient owners must be different persons; and (4) the right claimed must be capable of forming the subject-matter of a grant ...”

22. More recently, in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] AC 553, the Supreme Court of the United Kingdom confirmed those four requirements for an easement and *In re Ellenborough Park* was approved and applied in deciding that timeshare owners were entitled, by way of easement, to the free use of sporting or recreational rights within a leisure complex.

23. The Board agrees with the lower courts that the above four requirements for an easement were satisfied by the March agreement. First, the agreement sufficiently identified, and there existed, both a servient tenement (the Land owned by Mr Boodhai which was the land to which the burden of the easement attached) and a dominant tenement (Kiss’s land which was the land to which the benefit of the easement attached). Secondly, the right to lay (and use) a gas pipeline under the servient tenement accommodated the dominant tenement in the sense that it served the needs of, and thereby benefited, the business operations of Kiss on the dominant land. Thirdly, the two properties plainly had different owners (Mr Boodhai and Kiss). Fourthly, the right conferred by Mr Boodhai on Kiss was clearly capable of forming the subject matter of a grant. In other words, the grant could have been made by deed. Had that been so, the easement would have been a legal easement (applying section 10(1) of the Conveyancing and Law of Property Act). As it was, because it was made by a written agreement (and supported by valuable consideration) but not by deed, it was an equitable easement.

24. The Board also agrees with the lower courts that, on its true construction, the March agreement created an equitable easement and not a contractual licence. As Harris J said, it is inconceivable that Kiss would operate its commercial enterprise with the supply of gas resting on merely a revocable contractual licence; and there was nothing to suggest that Mr Boodhai did not intend the benefit of the agreement to run with the land of Kiss.

25. As there has been no registration of the equitable easement (see Harris J at para 45) the question as to whether Energizer is bound by the equitable easement turns on whether it had notice of the easement. If Energizer did not have notice, it would be a bona fide purchaser for value of the land from Mr Boodhai without notice and would take free of the equitable easement. In the Board's view, Harris J was entitled to find that Energizer had actual notice of the equitable easement because he was entitled to accept the evidence of Mr Yip Choy that he had told Mr Boodhoo about the pipeline running across the Land prior to Energizer buying it (see para 16(vi) above).

26. Although it would appear that this is not in dispute between the parties, it is worth clarifying for completeness that the benefit of an equitable easement passes with the transfer of the dominant tenement so that Holiday Snacks has the benefit of the easement. This is because of the statutory "general words" provision in section 16(1) of the Conveyancing and Law of Property Act (see para 13 above). See generally Gray and Gray, *Elements of Land Law*, 5th ed (2009), para 5.3.11; DG Barnsley, "Equitable easements - sixty years on" (1999) 115 LQR 89, 112.

27. The conclusion, therefore, is that (subject to the defence of illegality that we are about to consider) the March agreement created a valid equitable easement in respect of the gas pipeline and that easement binds Energizer.

6. Is illegality a defence to enforcement of the equitable easement by Holiday

Snacks against Energizer?

(1) Introduction

28. The principal submission of Mr Hosein is that, even if there would otherwise have been a valid equitable easement in respect of the pipeline (which Energizer disputes), it could not be enforced by Kiss and cannot be enforced by Holiday Snacks

because there has been illegality in failing to obtain the necessary pipeline licence for the laying of the pipeline. Such a licence was required under section 6 of the Petroleum Act (and regulation 3(1)(f) of the Petroleum Regulations). The failure to obtain the necessary licence, he submits, renders the March agreement void for illegality and therefore incapable of creating a valid easement.

29. As we have seen, the lower courts both rejected this submission but for different reasons. The Court of Appeal took the view that there was no breach of the Petroleum Act by Kiss or Mr Boodhai in not obtaining a licence because, primarily, a licence was required only for those engaged in petroleum operations and neither Kiss nor Mr Boodhai was so engaged. In contrast, Harris J thought that, although a licence was required, so that a criminal offence had been committed by the failure to obtain such a licence, that illegality did not render the March agreement void or unenforceable.

30. The Board agrees with Harris J, and disagrees with the Court of Appeal, that, according to the Petroleum Act, a licence was required for the laying of the gas pipeline. Kiss, whether by itself or through Omega, which was acting on Kiss's behalf in constructing the pipeline, was engaged in petroleum operations under the Petroleum Act. The definition of "petroleum operations" in section 2 of the Petroleum Act includes "transporting" petroleum products (see para 14 above) and that is what the gas pipeline was concerned to do. It is also clear from regulation 3(1)(f) (see para 15 above) that one of the specific types of licence issued under the Petroleum Act is a pipeline licence.

31. But it is also the Board's view, in line with the essence of Harris J's reasoning, that the failure of Kiss (or Mr Boodhai or Omega or Holiday Snacks or Energizer) to obtain the necessary licence for the laying of the pipeline so that, on the face of it, a summary criminal offence was committed, at least by Kiss, did not render void or unenforceable the agreement creating the equitable easement and therefore does not affect the validity of the equitable easement. In other words, illegality is not here a defence for Energizer against the enforcement of the easement by Holiday Snacks. The paragraphs that follow explain our reasoning in reaching that view.

32. Mr Hosein primarily rests his case on illegality on what has been termed "statutory illegality" as opposed to "common law illegality": see *Okedina v Chikale* [2019] EWCA Civ 1393; [2019] ICR 1635, para 12; *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, paras 74-75. This distinction is a reference not to the source of the illegality (which is plainly the statute) but rather to the effects of the illegality. With statutory illegality, one is concerned with applying whatever the statute lays down, expressly or impliedly, as to the effects

of the illegality. As Lord Toulson said in the leading case on common law illegality of *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, at para 109: “The courts must obviously abide by the terms of any statute ...” This is determined by ordinary statutory interpretation. Common law illegality is applied where the effects of the illegality have not been laid down, expressly or impliedly, in the statute. With common law illegality, one is concerned to determine the effects of the illegality at common law and the correct approach is to apply the “policy-based” approach adopted in *Patel v Mirza* (which was accepted and applied in Trinidad and Tobago in *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corpn* (Civ App No 11 of 2011 (unreported) 25 January 2017).

(2) Statutory illegality

33. Mr Hosein submits that the agreement and hence the equitable easement were impliedly prohibited by the Petroleum Act. As the Act required a licence to be obtained for the laying of the gas pipeline, it was implicit in the Act that the agreement for the laying of a gas pipeline and the easement for such a pipeline were prohibited, and were therefore unenforceable, unless such a licence was obtained.

34. The main authority relied on by Mr Hosein is the leading case on a contract entered into in breach of a statutory licensing requirement, *Mahmoud v Ispahani* [1921] 2 KB 716. In that case, a wartime order, made by secondary legislation, prohibited the purchase or sale of linseed oil without a licence from the Food Controller. The claimant, who had a licence, contracted to sell linseed oil to the defendant, who did not have a licence, although the claimant was told by the defendant that he did have such a licence. The defendant refused to accept delivery of the oil but the claimant’s action for damages for breach of contract failed because, as held by the Court of Appeal, the contract was impliedly prohibited by the legislation and was therefore unenforceable by either party. In the words of Scrutton LJ at p 729:

“[I]n this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality.”

35. Mr Hosein submits that, as in that case so in this case, the contract with an unlicensed party (that is, Kiss) with respect to the grant of rights relating to a gas pipeline was “altogether prohibited” and therefore void for illegality.

36. He further submits that the purpose of the licensing provisions of the Petroleum Act and Regulations is to promote the protection and welfare of the public. The regulatory licensing regime is designed to ensure the safety and efficiency of petroleum operations including the transportation of natural gas. To enforce private agreements for the laying of gas pipelines that are unlicensed would undermine the purpose of the legislation.

37. Mr Hosein also prays in aid section 25 of the Petroleum Act dealing with ancillary rights (see para 14 above). He submits that this section shows that relevant proprietary rights over another’s land (including easements) to lay gas pipelines can be acquired either by private agreement with landowners or by a form of state compulsory purchase. But his submission emphasises that that regime of ancillary rights is precisely labelled “ancillary” because it applies only where a person has already acquired a licence. Hence the heading to section 25 which reads, “Licensee to negotiate for ancillary rights”; and the opening words of section 25 which read, “Where a licence is granted and ancillary rights are required by the licensee ...”.

38. The Board rejects those submissions for the following reasons:

(i) One can and should separate out, on the one hand, the contractual and proprietary rights that were agreed between Kiss and Mr Boodhai as to the laying of a gas pipeline and, on the other hand, the licensing regime for the laying of a gas pipeline. The fact that neither Kiss nor Mr Boodhai obtained the necessary licence is an independent matter from the validity of the agreement and the rights conferred under it. The separation of the two is shown by the fact that it was perfectly possible that, once it had acquired the easement, Kiss would go ahead and obtain the necessary licence.

(ii) *Mahmoud v Ispahani* is distinguishable from the facts of this case because there the making of the contract without the required licences was prohibited. That is not so here and the agreement was capable of lawful performance (by subsequently obtaining a licence). The agreement was therefore not “absolutely prohibited” by the Petroleum Act.

(iii) The agreement was not one that required Mr Boodhai to construct the pipeline. Rather it was one to allow a pipeline to be constructed and maintained over Mr Boodhai's land. There was no question therefore of enforcing an obligation to lay a gas pipeline against a party who was unlicensed to do so.

(iv) The fact that the Act provides for the acquisition of ancillary rights once a licence has been obtained in no sense precludes contractual and proprietary rights being agreed privately before any licences are sought. Say, for example, instead of agreeing an easement, Kiss had entered into a contract to buy the Land with the intention of having a gas pipeline running across it. Plainly the contract of sale and the conveyance of the Land would not be invalidated by Kiss not having a licence to lay the pipeline. What applies to the transfer of title to the Land applies in the same way to the conferral of rights over the Land by an easement.

(v) The important safety and efficiency purposes of the Act are not undermined in any way by upholding a gas pipeline easement. Hence, on the facts of this case, the upholding of the easement does not contradict the purpose of the licencing regime. Linked to this is a further point, adverted to in his written submissions by Christopher Sieuchand, counsel for Holiday Snacks, which is that, if one is thinking about the safety and "good order" purpose of the statute, it seems relevant that at all material times the owner of the pipeline was NGC (see para 3 above) which was the state-owned utility service provider responsible for producing and supplying gas to commercial entities nationwide. Furthermore, Kiss agreed in the March agreement that all safety features required by NGC would be adhered to (see para 2 above).

(vi) The words, context and purpose of the Petroleum Act are consistent with the licensing regime being enforced through the criminal law leaving contractual and proprietary rights concerning easements to be enforced in the normal way, and according to the normal rules, through the civil law.

39. It follows from the above reasoning that the correct interpretation of the Petroleum Act, contrary to the submissions of Mr Hosein, is that the Act does not impliedly prohibit the March agreement and the granting of the easement in this case. Put another way, there is no statutory illegality defence to the enforcement of the easement by Holiday Snacks against Energizer.

(3) Common law illegality

40. As the legislation has not expressly or impliedly prohibited the enforcement of the easement (ie there is no statutory illegality defence), it remains to consider whether the enforcement of the easement may be denied for common law illegality (although, as we shall see, some of the same considerations apply in respect of both statutory and common law illegality). Although this was barely mentioned by Mr Hosein, perhaps because, if he succeeded on statutory illegality, common law illegality would not arise, *Patel v Mirza* was considered in the written submissions of Mr Sieuchand.

41. The Supreme Court of the United Kingdom in *Patel v Mirza* departed from the traditional approach to illegality at common law which involved the application of unsatisfactory rules (such as the “reliance rule” under which illegality was determined by whether, or not, the claimant had to rely on the illegality to establish its cause of action). Instead, a more flexible and transparent approach is now to be applied which requires the courts to look at the underlying policies and also permits account to be taken of the proportionality of denying enforcement because of the illegality. Lord Toulson, giving the leading judgment, laid down, at para 101, that the defence of illegality should be examined through a “trio of necessary considerations”. He summarised the correct approach in the following way at para 120:

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system ... In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.”

42. The Supreme Court of the United Kingdom in *Grondona v Stoffel & Co* [2020] UKSC 42; [2021] AC 540 (“*Stoffel*”), and *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563 (“*Henderson*”), has subsequently provided further guidance on the application of that trio of necessary considerations. While it is important not to treat the exercise in a mechanistic way, this has included

making clear that the first two stages are best viewed as dealing respectively with the policies for and against illegality being a defence; and that it may be unnecessary to go on to the third stage of assessing proportionality (looking, for example, at the seriousness of the wrongdoing and the centrality of the conduct to the transaction) if it is clear from the consideration of the policies that illegality should not be a defence. See *Stoffel* at para 26 and *Henderson* at para 123. A further point explicitly made by the Supreme Court in *Henderson*, at para 76, is that the approach in *Patel v Mirza* is not confined to illegality in the context of contract and unjust enrichment (which is what the facts of that case were concerned with). Rather it extends to all areas of civil law including torts or, as on the facts of this case, the law of property.

43. Turning to the underlying policies in this case, while denying the enforcement of the easement might be said to offer some general support to the licensing regime, it is the Board's view that the more significant policies favour upholding the easement (ie denying the defence of illegality) and that enforcement of the easement would not be "harmful to the integrity of the legal system" (using the words of Lord Toulson set out at para 41 above). Upholding the easement recognises the merits of the certainty given by applying normal property law principles; and there is no inconsistency between enforcement of the easement and the licensing regime because the two are separate and one is not here enforcing an obligation to lay a gas pipeline against a party who was unlicensed to do so. We have also already explained that the safety and efficiency purposes of the licensing regime under the Petroleum Act are not undermined in any way by upholding parties' agreements for gas pipeline easements. Moreover, there is nothing to indicate that, over and above the criminal sanctions laid down, denying the enforcement of the easement will serve to deter others from not obtaining the necessary licence; and although under section 6(2) of the Petroleum Act the criminal offence is a summary only offence, the sanctions are potentially severe with the maximum fine being a very significant sum which, if the offence is continuing, may be increased on a daily basis. It is also a relevant policy consideration that, as we have already pointed out, the owner of the pipeline was NGC, a state-owned utility service provider: the illegality of failing to comply with a state licensing scheme may be said to be mitigated to some extent when the State itself owns the pipeline in question. We therefore conclude that the policies clearly favour denying an illegality defence.

44. Even if the Board were to move on to consider proportionality, it would in our view be a disproportionate response to the illegality to deny enforcement of the easement in this case for at least three reasons. First, the conduct in failing to obtain a licence is separate from, and certainly not central to, the transaction. Secondly, although the potential fines are significant, the offence is summary only and one is not here dealing with serious criminal wrongdoing. Thirdly, the easement has proved important to the businesses supplied with gas. In this respect, we note the written

submission of Mr Sieuchand that “non-compliance [with the licensing regime] can hardly justify the removal of a clearly essential and useful gas-line which has now been in consistent and uninterrupted use for over 30 years by the respondent and other third parties.”

45. Our conclusion is that, applying *Patel v Mirza*, common law illegality is not a defence to the enforcement of the easement in this case.

7. Overall conclusion

46. The Board therefore concludes that:

(i) The March agreement created an equitable easement in respect of the gas pipeline which binds Energizer.

(ii) There is no defence of illegality, whether statutory illegality or common law illegality, to the enforcement of the equitable easement by Holiday Snacks against Energizer.

47. For the above reasons, the appeal is dismissed. Lest there be any doubt, the declarations and orders made by the Court of Appeal are upheld.

48. Although the Board did not need to hear from Mr Sieuchand, we would like to thank him for his written case. We would also like to thank Mr Hosein for his written case, his oral submissions and his clear responses to our questioning.