

FULLERTON NOMINEES PTY LTD V DARMAGO [2000] WASCA 4

Court of Appeal of WA – 21 January 2000

FACTS

Fullerton wanted to win a contract with an Indonesian company to construct and commission an abattoir in Indonesia.

Darmago was engaged by Fullerton to act as an agent to assist in obtaining the abattoir contract. The written contract between the parties provided that Fullerton was to pay Darmago “invisible costs” which were not to exceed 20% of the price paid to the Indonesian company. It was also understood by the parties but not expressly written that the “invisible costs” were moneys to be used bribing Indonesian officials to facilitate the progress of the contract. Fullerton only paid Darmago \$81,000.00 instead of the \$180,000 commission and \$360,000.00 invisible costs owing. Darmago sued for unpaid agency fees and Fullerton counter sued for the \$81,000.00 paid to Darmago.

ISSUES

Was the “invisible costs” clause in the contract illegal and therefore unenforceable?

If the “invisible costs” clause was illegal, could the clause be severed from the agency contract with the rest of the contract being enforceable?

Could Fullerton recover the \$81,000.00 it had paid to Darmago?

FINDING

The “invisible costs” clause was an agreement for Fullerton to reimburse Darmago for paying bribes. The clause was proof of an agreement to act illegally and public policy required that the agreement not be enforceable. The bribing of officials was an important part of the agency contract and the illegal nature of the contract could not be changed by severing the illegal clause.

As the entire contract was illegal it was against the public policy for Fullerton to recover the \$81,000.00 it had paid to Darmago.

QUOTE

Ipp J said:

“Generally, if the performance of a contract depends wholly or substantially upon an illegal consideration, the contract as a whole will be unenforceable. The illegality then infects the whole of the contract. ...

In my opinion, applying these tests, the provisions in the agency contract concerning invisible costs cannot be severed from the contract as a whole.

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I have already pointed to the fact that the commission payable by the appellant was for services to be rendered by the respondent that included the bribing of officials. This means that the performance of the agency contract depended substantially upon an illegal consideration.”

IMPACT

A contract which includes an agreement to conduct illegal acts will not be enforced by the Courts.

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