E COURT OF APPEAL OF THE CAYMAN ISLANDS
'PEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
DIVISION

CICA (Civil) Appeal No. 0001 of 2023
(Grand Court Cause No. G 178 of 2018 (MRH))

BETWEEN

ROGELIO ANTONIO HAWKINS

APPELLANT

-and-

ABARBANEL LIMITED

RESPONDENT

Before: **The Rt. Hon. Sir John Goldring, President**
The Hon. John Martin KC, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Appearances: **Mr. Henry Orren Merren IV, attorney for the Appellant**
Mr. Tom Lowe KC instructed by Mr. Nicholas Dixey and Mr. Colm Flanagan of Nelsons for the Respondent

Heard: **8th September 2023**

Draft circulated: **18th December 2023**

Judgment delivered: **11th January 2024**

JUDGMENT

Beatson JA:

A. The dispute and the parties

1. This appeal concerns the enforceability of a loan agreement and the security provided to the lender for the loan in circumstances where the lender did not have the licences it was required to

have by the Local Companies Control Act (2007 Revision) (the "LCCA") and the Trade and Business Licensing Act (2007 Revision) (the "TBLA").

2. The Appellant, Mr Rogelio Antonio Hawkins, a Caymanian businessman, is the borrower. In March and April 2014, he borrowed a total of US $407,000 from the Respondent, Abarbanel Ltd, a company incorporated in June 2012 and registered under the law of the Cayman Islands as a resident company. Abarbanel was incorporated for the express purpose of making loans and holding the security given for them: see J [66(viii)] and §§ 17-18 of Dr David Barker's witness statement. Dr David Barker and Mr Kelvin Latta are its sole directors. At all material times they were not Caymanians but citizens of the United States of America. Abarbanel's sole shareholder is Bardi Financial Ltd. ("Bardi"), a Cayman exempted company owned by Dr David Barker and his brother James of Iowa, USA.

3. Mr Hawkins appeals against the Order dated 29 December 2022 of Ramsay-Hale CJ following a trial on 23 and 24 November 2021. The Judge dismissed his claim that Abarbanel's loan to him and the registered charge securing it were illegal, *void ab initio* and unenforceable because Abarbanel did not have the licenses companies carrying on a trade or business within these Islands are required to have by the TBLA and the LCCA unless exempt. The relevant provisions of those statutes are set out or summarised and discussed at [10] – [22] of this judgment.

4. The reasons for Ramsay-Hale CJ's decision are contained in her judgment delivered on 16 December 2022 and an Addendum dated 20 December 2022. The paragraphs in them are respectively referred to hereafter as [**] and A [**]. Her judgment contains several limbs. Early in it, on the basis of the facts summarised at [26] – [31] below, and more fully summarised by her at [16] – [21] of her judgment, she rejected Mr Hawkins's submission that the loan agreement was an unconscionable bargain: see [22] – [29] and [40]. There is no direct appeal against that conclusion, although Mr Merren's submissions relied at times on what might be called "statutory unconscionability".

5. Secondly, she rejected Abarbanel's contention that it was not carrying on business in these Islands and was therefore not required to be licensed. Abarbanel accepts the Judge's finding (at [66] to [68]) that the six secured loans it made to various people between June 2012 and the end of 2014 amounted to the carrying on of business in the Cayman Islands and that it did require licences. It is therefore not necessary to consider the statutory provisions and decisions discussed by her at [46] – [64]. This appeal concerns the consequences of Abarbanel carrying on business in the Islands without the licences and when prohibited from doing so.

6. In the third limb of her judgment the judge held that the licensing provisions of the LCCA and TBLA do not prohibit the loan contract and that the contract is not unenforceable as a matter of common law. The purpose of the LCCA was to control the local level of participation in businesses and that of the TBLA was primarily to raise revenue. Neither prohibited contracts made in breach of the statutory licensing provisions. Accordingly, the security given for the loan was enforceable: see [93] - [94]. As to what may be labelled common law illegality,[1] applying the approach of the UK Supreme Court in *Patel v Mirza* [2017] AC 467 at [120], the Judge stated that the purposes of the two statutes are not undermined by enforcing contracts made in breach of their licensing provisions: see [103] – [104]. These two questions are the primary focus of this appeal.

7. Mr Merren also raised a number of other matters on which he submitted the Judge erred. His submissions on those other matters were based on Abarbanel's lack of statutory capacity to make the loans, its contravention of section 3 of the Registered Land Act, 2018 Revision, (the "RLA") and the Judge's failure to take account of sections 75(a) and 164 of that Act, the Proceeds of Crime Act (the "PCA"), and the legislation governing Special Economic Zones. Mr Merren submitted that the failure to take account of such legislation meant that the Judge's analysis of the objectives behind the LCCA, the TBLA, and the RLA was flawed in not recognising what he stated is an established public policy in the Cayman Islands favouring a multi-faceted culture of compliance with local statutory requirements. He also submitted that Abarbanel had been unjustly enriched or would be by enforcing its rights under the loan agreement and the charge, and that it should have but did not file a counterclaim.

B. The structure of this judgment

8. In sections C – E of this judgment I set out or summarise the material provisions of the TBLA and the LCCA, the terms of the loan agreement, and the background to the transaction and what happened after the loan was made. Section F contains the Judge's reasoning on the matters that are under appeal, and section G the grounds of appeal.

9. Section H contains my discussion of the questions before this court. For the reasons given at [42] – [62] below, I have concluded that the Judge did not err in her conclusion that the legislation

[1] The labels "statutory illegality" and "common law illegality" are sometimes used (see e.g. *Okedina v Chikale* [2019] EWCA Civ. 1393) but, as noted by *Anson's Law of Contract* 31 ed., p 410 n. 32, these labels describe the effect of the illegality on contract enforceability (and consequent restitution) and not its source "which will usually be statutory".

does not expressly or impliedly prohibit contracts made in breach of the licensing provisions and at [72] – [73] that the loan agreement was not unenforceable as a matter of common law. Accordingly, I would dismiss the appeal on those grounds. I also reject the submissions based on lack of statutory capacity, the provisions of the RLA, the PCA, and the legislation governing Special Economic Zones, and unjust enrichment. I deal relatively briefly with those matters because the first was not pleaded and not properly before the judge and because the premise on which the other submissions were made was that the loan contract was not enforceable. Section I contains a summary of my conclusions.

C. The material provisions of the TBLA and LCCA[2]

10. The TBLA is concerned with those "*carrying on a trade or business mentioned in the Schedule*" and the LCCA with those carrying on "*business in the Islands*". Each covers all persons and companies so doing. The LCCA is concerned with companies which do not qualify as local companies because of insufficient control or ownership by Caymanians. As (see [5] above), it is now accepted by Abarbanel that it was at the material time carrying on a business in these Islands, it is not necessary to set out section 2(2) of the LCCA which provides a broad inclusionary definition but with eight excluded categories, notably carrying on business "*exterior to the Islands*" or the implications, if any, of the absence of a definition in the TBLA, a point noted by the Judge at [50].

11. I observe that, although now only of historical relevance, the 1971 precursors of the TBLA and the LCCA had memoranda of objects and reasons which indicated their original purposes. The TBL Law 1971's memorandum states that its main object "*was to protect existing businesses*" and that persons of Caymanian status who conform to its requirements *are automatically granted a … licence on application*". The LCC Law 1971's memorandum states that it sought to prevent the avoidance of the effect of the Work Permit Law by *requiring all companies doing business locally to be under the control of local people or to be licensed to carry on business here*".

(a) *The Trade and Business Licensing Act (2007 Revision)*

12. Section 12 of the TBLA requires persons carrying on a trade or business mentioned in the Schedule to the Act to take out an annual licence unless exempted by Section 3. The Schedule lists a large number of professions, trades and technical activities, and industry and agricultural

[2] The relevant revisions of the LCCA and TBLA for the purpose of these proceedings are the 2007 Revisions: see footnote 1 of para [8] of the judgment below. The bundle included the 2014, 2018, 2019 and 2021 Revisions, all of which came into force after the loan in this case, but only ss. 17 and 19(1)(a)(iii) and (c) of the 2021 Revision were referred to during the hearing.

activities, and "*any other business or trade not specified herein in which a service is offered for reward*". It also specifies the prescribed fees for each activity. The Judge stated at [45] that although moneylending was not a business activity mentioned in the Schedule it was "*swept up by the provision which stated that the Schedule applied to 'any other business or trade not specified'*". Section 3 exempts certain categories of trade or business from the TBLA, in particular "*those licensed to be carried on as such under any other law without reference to this law*".

13. By section 26(b) of the TBLA, whoever carries on or attempts to carry on a business which requires a licence under it without one is guilty of an offence and liable on conviction to a fine of $5,000 or to imprisonment for 12 months.

14. Section 4 of the TLBA establishes a Trade and Business Licensing Board ("the Board") to consider and grant or refuse all applications for licences, to respond to appeals against its decisions and to exercise any other functions conferred upon it by the TBLA or any other statute or regulation. Section 16(1) provides that, subject to certain exceptions, if the Board is satisfied that an application for a licence has been properly made and the correct fee tendered, it is required to grant the licence within 90 days of an application for a new licence and 30 days of an application for the renewal of a licence. The exceptions are listed in section 16(1)(a)-(e). They provide that the Board is not required to grant a licence where the applicant: (a) is a person of non-Caymanian status who does not hold a work permit; (b) is unable by reason of youth or infirmity to carry on the trade or business for which the licence is sought; (c) is disqualified from holding the licence, (d) is a person who the Chief Medical Officer has on public health grounds objected to the grant of a licence; or (e) is a company that requires a licence under the LCCA to carry on business on the Islands and is not the holder of such a licence. The Board is also the regulatory body for the LCCA, see the definition of "Board" in section 2(1) of the LCCA and [19] below.

(b) The Local Companies Control Act (2007 Revision)

15. By section 4 of the LCCA:

> "*(1) Subject to subsection (3), no company shall carry on business in the Islands unless it is so empowered by its Memorandum of Association and*
>
> *(a) it is a local company which, at the relevant time, is complying with section 5 or is a wholly owned subsidiary of such a company;*
> *(b) it is licensed under this Law and under the Trade and Business Licensing Law (2007 Revision) and, at the relevant time, is carrying*

on such business in accordance with the terms and conditions imposed in such licence and not otherwise;
(c) it is licensed under the Banks and Trust Companies Law (2007 Revision); or
(d) it is a company operating under a franchise granted by the Government."

"*(2) Any company which contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of two hundred dollars for each day the offence continues and on conviction on indictment to a fine of one thousand dollars for each day the offence continues.*"

"(3) The Governor in Cabinet may, in exceptional circumstances, having regard to the public interest, exempt any company from all or any of the provisions of this Law subject to such terms and conditions as the Governor in Cabinet may deem fit."

16. By section 5(1):

> *"For the purposes of section 4(1)(a) a local company is complying with this section if-*
> *(a) it is Caymanian controlled;*
> *(b) at least sixty per cent of its shares are beneficially owned by Caymanians; and*
> *(c) at least sixty per cent of its directors are Caymanians."*

17. Licensing is dealt with in Part II of the LCCA. I have stated that the regulatory body for the LCCA is the Trade and Business Licencing Board. By section 10, applications for a licence are to be made to it. They must be accompanied by a processing fee, a licence fee, a copy of the Memorandum and Articles of Association of the company, and a statement setting out the nature of the business the company is carrying on and proposes to carry on and such other information as the Board may require. By section 11(1):

> *"Subject to this Law, the Board may, in its discretion, grant a licence in respect of which application has been made under section 10, but, if the Board is of the opinion that it would not be in the public interest to grant a licence, it may refuse to grant one without giving any reason for so refusing and may, in its discretion, refund the licence fee tendered under section 10(2), or such part thereof as the Board may consider fit".*

18. Section 11(4) sets out the considerations that the Board may have regard to in considering applications for licences, subject to any general directions by the Governor. These are:

> *"(a) the economic situation of the Islands and the due protection of persons already engaged in business in the Islands;*

(b) the nature and previous conduct of the company and the persons having an interest in that company whether as directors, shareholders or otherwise;
(c) the advantage or disadvantage which may result from that company carrying on business in the Islands;
(d) the desirability of retaining in the control of Caymanians the economic resources of the Islands;
(e) the efforts made by the company to obtain Caymanian participation;
(f) the number of additional people from outside the Islands who would be required to reside in the Islands were the application to be granted;
(g) whether the company, its directors and employees have and are likely to continue to have the necessary professional, technical and other knowledge to carry on the business proposed by the company;
(h) the finances of the company and the economic feasibility of its plans;
(i) whether the true ownership and control of the company have been satisfactorily established; and
(j) the environmental and social consequences that could result from the carrying on of the business proposed to be carried on by the company."

Factors (f) to (j) were added to this provision by the 2007 revision. Many of the considerations listed in section 11(4) relate to Caymanian participation in the company, the previous conduct of the company and the persons having an interest in it, whether they and their employees have the professional, technical, and other knowledge required to carry on the business, and the company's finances and the economic feasibility of its plans,

19. Sections 3, 5, 7, and 10-11 of the LCCA set out the regulatory powers of the Board. It is required to be satisfied that a company is Caymanian controlled and what proportion of its shares are beneficially owned by a Caymanian, to receive returns of shareholdings, and to give or refuse consent to departures from the statutory requirements about the percentage of shareholdings by Caymanians. Section 11(5) sets out the grounds on which the Board may revoke a licence.

20. By section 16 of the LCCA:

> *"In any proceedings under this [Act] in which the right of any company to carry on business in the Islands is in issue, the onus of proving that the company had, at the relevant time, the right to carry on such business in the Islands, shall be on that company unless, at the relevant time, that company was licensed under this [Act]*."

21. Since this appeal is concerned with the consequences of Abarbanel not having the required licences, sections 23 and 24 are important. Section 23, relied on by the Judge and Abarbanel, provides:

> *"For the avoidance of doubt it is hereby declared that no business transaction shall be void or voidable by reason only that, at the relevant time, any party thereto is in breach of this Law."*

22. Section 24, relied on by Mr Hawkins, provides:

> "*Nothing in this Law or any licence shall confer on any company any power to do anything which it is not authorised to do by virtue of its Memorandum and Articles of Association or any other provision of law.*"

D. The terms of the loan agreement

23. The loan agreement, dated 19 February 2014, is in a document headed "*Commitment to Lend*". It provided for Abarbanel to lend Mr Hawkins US $357,000 for one year at an interest rate *to be calculated by adding the 10-year U.S. Treasury Constant Maturity Rate (DGS10) on the date of the agreement to the Borrower's Spread",* a rate that was to be reset every year based on any change in the DGS10 rate: clause 1.4. In the first year of the agreement the DGS10 rate was 2.73% and the Borrower's Spread before any discount was 15.27% making the total interest 18% per annum: clause 1.4. By clause 1.5 this was discounted to 16% provided that payments were made on or before the specified dates.

24. The agreement provided that U.S. $ 31,224, which was stated to correspond to the first six months interest on the full sum lent, was to be deducted from that sum on closing, i.e. was to be prepaid: see clause 1.14. It also provided that initiation, registration and legal fees, and stamp duties were to be paid by Mr. Hawkins: clause 1.2. By clause 1.6, the actual interest "*is inputted daily and compounded*", that is to say it is calculated on both the principal and the accumulated interest from previous periods. Clause 1.7 provided that the loan would be extended on a month-to-month basis as a revolving credit line if there are no monetary or non-monetary defaults and

that the maximum credit line amount available at any time is to be determined at the sole discretion of the Lender.

25. Clause 1.2 of the agreement provided that no funds were to be advanced to Mr Hawkins until a first charge in favour of Abarbanel over property owned by him by way of security for the loan had been registered.

E. The background to the transaction and what happened after the loan was made

26. This summary of the background to the transaction and what happened after the loan was made is largely taken from paragraphs [6] - [10], [15] - [23] and [32] - [37] of Ramsay-Hale CJ's judgment and a note on the background agreed for the hearing before us.

27. Mr Hawkins was in default of loans given to him by two commercial banks which were secured by charges against his home and a residential rental property consisting of several apartments but was unable to refinance the loans with a commercial bank. He was introduced to Mr Latta and told that Abarbanel made private loans. The loan terms were offered on a "*take it or leave it basis*" at what was a high rate of interest. Dr. Barker described the agreement as a mutually advantageous private arrangement. He considered that under it Mr Hawkins would receive funds which he needed and could not borrow from a commercial lender on a short-term basis, and Abarbanel would receive a favourable rate of return for a relatively short-term investment. Mr Orren Merren III, who had looked through draft copies of the charge documentation, described the interest as "*very high, the sort of interest rate you would pay for a credit card, but not for a normal commercial loan secured with local real estate*". He offered to try to negotiate better terms with Abarbanel, but Mr Hawkins refused his help, stating that the terms were non-negotiable and that he had to sign the charge documents to save his properties.

28. On 14 March 2014, Mr. Hawkins executed charges in favour of Abarbanel over his home and the residential rental property. Once those charges were registered, Abarbanel advanced the US $357,000 it had agreed to lend him but, as provided by clause 1.14 of the agreement, deducted US $31,324 of that sum as pre-payment of the first six months interest. On 1 April 2014 a further US $50,000 was advanced to Mr. Hawkins without further security, bringing his total indebtedness to Abarbanel to US $407,000. The sum lent was used to pay off what was due on the loans by the commercial banks.

29. Mr Hawkins fell into arrears and, on 26 January 2018, Abarbanel gave him notice of its intention to enforce the charges to recover the sum it claimed was due. At some stage it served him with an account claiming that, with accrued interest and other charges, he owed it over US $875,000. Mr Hawkins did not accept this and presented his own account. In mid-September 2018, while the parties were negotiating, Mr Merren III discovered that Abarbanel did not hold the licenses required by the LCCA and the TBLA for it to carry on business in the Cayman Islands. An offer to pay Abarbanel about US $415,500 to settle the matter was made on behalf of Mr Hawkins, failing which it was stated that proceedings would be commenced raising *inter alia* the illegality and unconscionability of the loan agreement.

30. This offer was rejected, and, on 18 September 2018, Mr Hawkins commenced these proceedings. Pursuant to a consent order dated 28 September 2018, in October 2018 he paid Abarbanel the US $376,036 advanced to him net of the interest reserved under the agreement[3] and paid US $40,504.73 into court as and for interest, and Abarbanel discharged its charge over his home. The charge over Mr Hawkins' rental properties remains.

31. I have noted that Mr Merren III had advised Mr Hawkins that the rate of interest on this loan was very high, that interest was calculated on a daily compounded basis, that in March and April 2014 US $407,000 was advanced to Mr Hawkins, who in 2018 was served with an account for over US $875,000. Dr Barker's Second Affidavit, sworn on 19 September 2023, states that he calculated that, as at 13 September 2023, Mr Hawkins owed US $1,109,910.13. The judge held at [23] ff. that since Mr Hawkins had taken legal advice before entering into the loan contract and turned down Mr Merren III's offer to try to renegotiate the terms, the "*high bar*"[4] for the vitiation of a transaction on the ground of unconscionable conduct was not met. As I have stated, there is no appeal against that conclusion.

32. I observe that it is significant that these Islands do not have any moneylending or usury legislation similar to the English Moneylending Act 1900[5] which was considered in a number of the English authorities relied on by Mr Merren. It was claimed on behalf of Mr Hawkins that the Jamaican Moneylending Law 1938, section 9 of which provides that any contract for the loan of money shall be illegal insofar as it provides for the payment of compound interest, applied in the Cayman Islands. In 2020 the question came before the Grand Court as a preliminary issue. After a careful review of the history of the applicability of the laws of Jamaica to the Cayman Islands, Williams J held that the Moneylending Law 1938 is not and has never been in force in the

[3] See the judgment below at [10]. In §7 of Dr Barker's Second Affidavit dated 19 September 2023 it is stated that the payment was of $375,931.
[4] Per Edelman J in *ASIC v Kobeld* (2019) 267 CLR 1 at 281.
[5] The 1900 Act was repealed by the Consumer Credit Act 1974.

Cayman Islands: see [2020] (2) CILR 293. There was no appeal against that decision. The question whether protection beyond equitable "unconscionability" should be available in Cayman is one for the legislature.

F. The Judge's reasoning on the matters under appeal

33. Since, as stated at [5] above, Abarbanel accepts the Judge's decision that, at the material time, it was carrying on business in the Cayman Islands and therefore required licences, it is not necessary to consider that part of her judgment.

34. The Judge dealt with whether the loan contract was prohibited by the statutory provisions at [69] – [94] of her judgment. At [70] – [74] she referred to two English decisions on the Moneylenders Act 1900 which identified the approach to be taken to ascertain whether a statute impliedly prohibits a contract as well as the proscribed conduct. [6] She applied the approach in those cases, stating at [73] that "*where the purpose [of the prohibition] is the protection of the revenue, no such prohibition will be implied"* and that *"as a further aid to construction, the Court may consider the nature of the penalty imposed by the statute for the breach".*

35. After noting that in *St John Shipping Corp. v Joseph Rank Ltd.* [1957] 1 QB 267 at 289 Devlin J stated that "*the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear*" the Judge turned to, considered in detail, and followed the decisions of the Grand Court and of this Court in *Jose's Ltd. (t/a Jose's Service Centre) v Esso Standard Oil SA* [1999] CILR 51, [2000] CILR 304.[7] That case (hereafter "*Jose's v Esso*") concerned the enforceability of a lease and sub-lease and dealership entered into on 23 August 1988. Jose's was a Cayman company. Esso was a Bahamian company which had sold and distributed petroleum products in these Islands for many years but which, when the agreement and the lease were made, did not have the licences required.

36. The Grand Court (Murphy J) and this Court (Georges JA, with whom Zacca P and Rowe JA agreed) considered that the LCCA neither expressly nor impliedly prohibited contracts made by a person without a valid licence, a conclusion supported by section 23 of the LCCA. This was because "*the purpose of the licensing regime was to control the level of participation in business by persons who were not Caymanian"*, and not "*to protect a particular section of the public who would be liable to exploitation unless some checks and balances were put in place ... or to*

[6] *Victorian Daylesford Syndicate Limited v. Dott* [1905] 2 Ch. 624 (a case of express prohibition) approved by the Court of Appeal in *Bonnard v Dott* [1906] 1 Ch. 740.

[7] In that case Esso had obtained a licence which took effect retrospectively which the court stated it was lawful to do. The consequences of this, to which the judgment below does not refer, are considered at [46] and [48] below.

protect the public generally …": see the Judge at [87] quoting Georges JA at [2000] CILR 304 at 314 and at [79] quoting Murphy J at [1999] CILR 51 at 97. The court held that it was lawful to issue a licence with retrospective effect. Accordingly, when the agreement between Esso and Jose's was made in 1988, Esso was to be treated as having a licence: see 1999 CILR 51 at 80 and 2000 CILR 304 at 318-319.

37. The Judge rejected the submission that the analysis in *Jose's v Esso* of the policy underpinning the LCCA cannot now stand in the light of what Mr Merren described as the increasing move in the Cayman Islands towards a stricter and multi-faceted culture of compliance which included the public policy objectives enshrined in sections 11(1) and (4) of the LCAA. This he maintained was because six of the factors listed, section 11(4) (f) to (j), had been added to the statute by the 2007 Revision and thus postdated *Jose's v Esso*. Mr Merron submitted that the policy objectives enshrined in sections 11(1) and (4) went "*beyond merely controlling the level of participation in local businesses by persons who are not Caymanian and set forth much broader and more diversified public policy objectives.*" At [91], the Judge stated:

> "*The increased number of matters to which the Board should have regard does not lead to the conclusion that the law has any greater aim than that identified by Georges JA, which was to control the participation of non-Caymanians in business and to do so as Murphy J said by screening foreign applicants wishing to do business in the Cayman Islands. The focus of the criteria set out in section 11(4) remains, as stated by Murphy J, on the nature of the applicant and the needs of Caymanians and the Cayman Islands.*"

She applied the decision in *Jose's v Esso* to the facts of this case and concluded at [93] - [94] that:

> [93] "*… the provisions of the LCCA and the TBLA prohibit Abarbanel's conduct of carrying on business without a licence but do not prohibit the contract made between Abarbanel and Mr. Hawkins with the result that the Agreement is not illegal and void, and the security remains enforceable to recover any sums due to Abarbanel under it*. "
>
> and
>
> [94] *"Given the provisions of section 23 of the LCCA there is little to sustain the argument that a breach of section 4 renders the loan agreement void, and even less with respect to a breach of the TBLA, the only purpose of which is to raise revenue."*

38. As to common law illegality, the Judge considered that it was not necessary to rely on the reformulated approach to this in *Patel* v *Mirza* [2016] UKSC 42, [2017] AC 467. This was

because the court was bound to respect the express provision in section 23 that no business transaction shall be void or voidable by reason only that any party to it is in breach of the LCCA: see [96] – [98]. She nevertheless considered whether the contract would be enforceable as a matter of common law under the three-factor test in *Patel's* case at [99] – [102]. She accepted Mr Lowe KC's submission that in this case the issue is whether *"enhancing the regime for registering local businesses by invalidating contracts is inherently in contradiction with the public policy of promoting the validity of contracts"* at [103]. She concluded at [104] that the purpose of the licensing regime in the LCCA is not undermined by enforcing contracts made in breach of its provisions.

39. I have referred to the Addendum to the judgment. This dealt with Mr Merren's observation when the judgment was being handed down that the court had not dealt with his submission that Abarbanel was carrying on business *ultra vires* its Memorandum of Association and the effect of section 24 of the LCCA on the agreement. He submitted that as a result of this the agreement was void. The Judge stated at A [7] that there was no pleaded allegation that Abarbanel was acting outside the scope of its Objects clause, that no relief was sought on the ground that the transaction was *ultra vires,* and that after Mr Merren raised the matter in opening and Mr Lowe objected, "*the point was conceded*". The Judge stated that paragraphs 118 and 118A of the Statement of Claim and paragraph 1(ff) of the Prayer for Relief, made it plain that this concession was correct. The only issue in the pleaded case was whether the agreement was void for illegality because Abarbanel did not have the required licences. The absence of licences was the basis for the only plea of statutory incapacity and the court could not decide an issue not raised on the pleadings and on which it had not heard full argument including the effect of section 28 of the Companies Act.

G. The Grounds of Appeal

40. The Memorandum of Grounds of Appeal (hereafter "Grounds") presents the grounds in a diffuse but at times overlapping way. It starts with three pages of facts relied on and the procedural history. Doing the best that I can, the grounds can be summarised as maintaining that the Judge made the following errors:

(1) Holding that neither the LCCA nor the TBLA expressly or impliedly prohibited Abarbanel from entering into loan contracts secured with registered charges nor from enforcing them (Grounds §2.8) *inter alia*:

(a) without "*noting, ordering and/or declaring*" that the availability of a criminal prosecution for breach of the provisions of the LCCA and/or of the TBLA does not preclude civil proceedings to declare void *ab initio* and unenforceable illegal business transactions "carried on" in the Cayman Islands in breach thereof: Grounds §§2.2, 2.18.3, 2.18.4 and 2.21.1;

(b) failing to take account of the words "*by reason only*" and "*at the relevant time*" in section 23 of the LCCA and without taking into account that breach of the LCCA was not the only reason that the loan contracts should be declared void *ab initio* (Grounds §§2.18.3 and 2.21.3);

(c) failing to distinguish the relevant facts in this case from the very different relevant and material facts in *Jose's v Esso* (Grounds, § 2.22) and that the analysis in it cannot now stand in the light of an increasing move in the Cayman Islands toward a stricter culture of compliance and the policy objectives in later legislation, including the 2007 amendments to the LCCA: Grounds, § 2.23, Skeleton, §§ 9, 141.

(d) failing to find that the purposes and the public policy objectives behind the LCCA, the TBLA and the RLA are to protect the public in various ways so that they are *prima facie* entitled to recover property transferred: Grounds §§2.10. 2.17 and 2.23;

(e) finding that the TBLA is "*purely a revenue statute*" and not reflecting the established public policy in the Cayman Islands of advancing a culture of compliance reflected *inter alia* in the PCA and the Anti-Money Laundering Regulations: Grounds §§2.10. 2.21, and 2.23; and

(2) Failing to take into account that, although *ultra vires* was not specifically pleaded in relation to paragraphs 3 and 5 of Abarbanel's Memorandum of Association ("MoA"), illegality arising from breach of the express terms of section 4(1) of the LCCA was specifically pleaded (Grounds § 2.4), and that the consequences of such illegality are, *inter alia*, a lack of statutory power and authority and/or a statutory incapacity, which is expressly reinforced by section 24 of the LCCA: Grounds §§ 2.4.2, 2.18.7.

(3) Failing to take into account that it was illegal for Bardi (as a SEZ entity) to carry on any local business in the Islands by using Abarbanel, its wholly owned subsidiary, and for Mr. Latta, who held a SEZ Employment Certificate between 2013 and 2018 through Bardi, to work as Abarbanel's agent in negotiating and making secured loans: Grounds §2.7.

(4) Failing to take into account that once illegality is brought to the attention of the Court, it overrides all questions of pleadings; and it is the duty of the Court to take the point if the illegality of a contract and/or of security given appears from evidence brought before the Court: Grounds § 2.4.3.

(5) Primarily focusing on whether the contract was expressly prohibited by the TBLA and the LCCA without addressing vitiation of the remaining charge over Mr Hawkins's property (for illegality and/or for other relevant reasons), without considering the law on security and registration of charges, in particular sections 3 and 75(1), the proviso to section 77, and section 164 of the RLA, and thus without determining that the charge should be discharged: Grounds §§2.9, 2.14-15 and 2.20.

(6) Concluding that the principles of common law illegality identified in *Patel* v *Mirza* did not render the loan transaction void and unenforceable and not concluding that the statutory obligations breached were for the protection of the class of persons to which Mr Hawkins belongs: Grounds §§ 2.13.2, 2.17 and 2.20.4.

(7) Failing (a) to take account of the fact that, pursuant to the Consent Order dated 28th September 2018, the parties had partially unwound the illegal business transactions by Mr. Hawkins returning to Abarbanel USD $376,036, and (b) to order the complete unwinding of the illegal business transactions through discharge of the remaining charge: Grounds §§2.11 and 2.12.

(8) Failing to address Mr. Hawkins's unjust enrichment claim which was "*inextricably intertwined with provisions of the RLA, the LCCA and the TBLA"*; in particular, by failing to address his claim to reverse and/or to prevent Abarbanel's unjust enrichment by unwinding the loan and the charge: Grounds §§2.16 and 2.14 (in relation to the RLR).

(9) Failing to take account of the fact that Abarbanel had not filed a counterclaim so that it had no justiciable claim to interest under the contract or to enforce its security: Grounds §§ 2.3 and 2.18.3.2.

H. Discussion and conclusions on the questions before this court

41. Did the Judge err in concluding that the loan contract was not expressly or impliedly forbidden by the LCCA or the TBLA? Mr Merren submitted that to hold, as she did at [93], that the provisions of the LCCA and the TBLA prohibit Abarbanel's conduct of carrying on business without a licence but do not prohibit the contract between Abarbanel and Mr Hawkins "*amounted to a statutory construction that produced an absurd result, which was unlikely to have been intended by the legislature*": skeleton §36. He relied *inter alia* on the statement of Justice Sir Anthony Smellie in *Premier Assurance Group SPC Ltd. v Providence Company II* FSD 229 of 2021 at [73] that courts "*will lean against a result which is anomalous or illogical*".

42. The submission that the Judge erred in concluding that the loan contract was not expressly forbidden by the LCCA or the TBLA because Abarbanel was not licensed is simply unarguable. Neither statute expressly prohibits contract-making by those who do not have the licences the statutes require them to have. Indeed, the words in LCCA, section 23 declare "*that no business transaction shall be void or voidable by reason only that, at the relevant time, any party thereto is in breach of this law*". That amounts to an express statement that transactions by those who do not have a licence are not void or voidable. But even if, contrary to my view, it does not, it is at least a strong indication that breach of the requirements of the LCCA, including the licensing requirement do not render transactions void or voidable. In *Jose's v Esso* referred to at [35] – [36] above, both Murphy J and this Court rejected the argument that the LCCA and TBLA expressly prohibited contracts summarily and with little discussion. Their judgments focussed on whether they impliedly prohibited contracts by unlicensed persons. Murphy J's conclusion on express prohibition is contained in a single sentence on p 93, reiterated on p 99. Georges JA at pp 313 stated that he found nothing in the LCCA "*which would require any prohibition of specific contracts to be read into that Law".* He stated that "*[i]ndeed there are indications to the contrary". "Read into*" is the language of implication, with which the remainder of this part of his judgment was principally concerned.

43. The five limbs of the argument on behalf of Mr Hawkins that the statutes impliedly forbade and thus prohibited contracts made by persons who did not have the licences required are summarised at [40(1)] above. The first limb is misconceived. The importance the Judge attached to the purpose of and the policy underlying the statutes, and the nature of the criminal penalty imposed by them shows that she recognised that the fact that a breach of a licensing requirement is a criminal offence does not preclude a transaction being void, unenforceable or illegal. So does her

reliance on the judgments in *Jose's v Esso,* in particular the principles Murphy J identified from the authorities which she set out at [77] and her summary at [86] and [87] of the way Georges JA agreed with Murphy J. This can be illustrated by the distinction they made, and she approved, between situations in which the criminal penalty is imposed each time a contract is made in breach of the statute and that in which (as in LCCA, section 4(2)) the penalty is imposed for every day a business is carried on without a licence. In *Jose's v Esso* Georges JA stated (at 314) that the law was enacted "*to empower a statutory board to control the level of participation in businesses by persons who are not Caymanian …*" and that there was "*no apparent intention to protect a particular section of the public who would be liable to exploitation unless some checks and balances were put in place … or to protect the public generally by ensuring that professionals offering specialised services are duly qualified".*

44. The next limb of this part of the appellant's case is that the Judge failed to take into account the words "*by reason only"* and "*at the relevant time*" in section 23 of the LCCA. It was argued that, on a plain reading of the statute as a whole and taking account of the wider context, the saving provision in section 23 was qualified and not absolute and that in this case there were other reasons for finding the loan to Mr Hawkins to be void or voidable. Reliance was placed on the fact that Abarbanel did not seek to cure its breaches by applying for a licence with retroactive effect, as had happened in *Jose's v Esso*, and that it had failed to show that it had the right to carry on business in the Cayman Islands: Skeleton § 75. But, as Martin JA observed during the hearing, section 23 is a provision which deals with the consequences of failing to show that a company has the right to carry on business in these Islands. I have stated that the language of section 23 contains an express statement that transactions by those who are in breach of the LCCA, for example by not having a licence, are not void or voidable, but that, if I am wrong and it does not, it contains at least a strong indication that breach of the statutory requirements, including the licensing requirement, do not have that effect. To be able to rely on failure to show a right to carry on business in these Islands or failure to cure breaches of the LCCA as another "*reason*" rather than "*by reason only that*" a party is in breach of the statute so as to justify finding that a transaction is void or voidable would denude section 23 of much, if not all, of its effect. The position where the "*other reason*" is failure to comply with another statute is discussed at [71] below.

45. The third, fourth and fifth limbs of this part of the appellant's case are connected. They are that the Judge erred in failing to find that the policy and purposes of the LCCA and TBLA were to protect the public and in rejecting the submission that the analysis in *Jose's v Esso* of the policy

objectives underpinning the legislation cannot now stand. Mr Merren relied on what he stated was an *"increasing move in the Cayman Islands toward a stricter and multi-faceted culture of compliance"* and the policy objectives in later legislation, such as the 2007 amendments to the LCCA. He also submitted that the facts of *Jose's v Esso* materially differed and that it should have been distinguished.

46. I first consider the submissions that *Jose's v Esso* should have been distinguished. The first is that Esso, as an existing supplier of petroleum products before the 1971 legislation introducing a licensing regime was enacted, "*was grandfathered in"* and "*entitled, upon application, to an LCC licence*": skeleton § 44. The second is that Esso had been granted a licence by the Caymanian Protection Board (the predecessor to the Trade and Business Licensing Board), whereas Abarbanel had never applied for a licence under either the TBLA or the LCCA: skeleton § 49. The third is that Esso's licence was granted retrospectively on two occasions so that its breach was cured: skeleton §§49-50. The fourth is that the issue of whether Esso had not complied with its Memorandum of Association was not raised, and so LCCA section 24 was not considered in that case: skeleton §§46-48.

47. I do not consider that these differences justify the conclusion for which Mr Merren argued. A distinction based on the argument that in *Jose's v Esso* the issue of non-compliance with Esso's Memorandum of Association did not arise depends on whether such non-compliance is properly before the court in these proceedings. For the reasons I give at [63] – [67] below I do not consider that it is. Secondly, any grandfathering effect in *Jose's v Esso* ceased on 1 January 1975, the date on which the legislation required companies in Esso's position to hold licences, but 6 years before Esso first applied for a licence in 1981: see 2000 CILR 304 at 317-318.

48. Thirdly, although the court held that it was lawful to issue a licence with retrospective effect, the licence granted to Esso in 1981 was only backdated to 1975. It thus expired on 31 December 1986, almost two years before the August 1988 agreements: see 317-318. The position of the further licence applied for and approved in 1989, though not issued until 1992, differs. That licence was issued with effect from 1 January 1987 and had an expiry date of 31 December 1998. Therefore, when the agreement between Esso and Jose's was made in August 1988, Esso was to be treated as having a licence: see 1999 CILR 51 at 80 and 2000 CILR 304 at 318-319. Accordingly, the analysis in *Jose's v Esso* of the position of an agreement made by a person without a licence was not necessary for the decisions of the Grand Court and this court.

49. It is, however, significant that the judgments of Murphy J and Georges JA on the point were fully reasoned and took account of the approach taken in the authorities. They contained a detailed analysis of the LCCA and referred, albeit more briefly to the TBLA and the policy objectives underpinning those statutes when determining their effect on an agreement made by a person without the licences required by them. Georges JA (at 314-315) also considered whether, applying the common law maxim "*ex turpi causa non oritur actio",* a contract by an unlicensed person would be unenforceable at common law. As noted by Ramsay-Hale CJ at [99] – [100], Georges JA concluded that enforcement would not be barred at common law. Although, in the light of the facts, neither analysis strictly qualifies as the *ratio* of *Jose's v Esso*, unless the argument that it cannot now stand in the light of a stricter and multi-faceted culture of compliance and the policy objectives in later legislation is accepted, it is of strong persuasive authority.

50. I therefore turn to consider whether the Judge erred in her assessment of the purposes and policies underlying the TBLA and LCCA and whether the analysis in *Jose's v Esso*, which she followed, was either wrong or cannot stand in the light of legislative and regulatory developments since 2000. The reasons the Grand Court in 1999 and this Court in 2000 decided that the LCCA did not impliedly prohibit contracts by unlicensed companies were that its purpose was to control the level of participation in business on the islands by non-Caymanians and not to protect a particular section of the public or the public generally, or to ensure the effective control of resources: see Murphy J at 97 and Georges JA at 314 which Ramsay-Hale CJ set out at [[79] and [87] of her judgment and are summarised at [36] above.

51. As well as the *St. John Shipping* case (see [35] above), Murphy J considered *Sidmay Ltd v Wehttam Inv. Ltd* [1967] 1 OR 508, 512, 525, aff'd. [1968] SCR 828; *Yango Pastoral Co. Pty. Ltd. v First Chicago Australia Ltd.* (1978) 139 CLR 410; and *Nelson v Nelson* (1995] 184 CLR 338 in which the Ontario Court of Appeal and the High Court of Australia strained to avoid holding that a statutory licensing requirement as a condition for doing business impliedly precluded a person without a licence from enforcing a contract. Murphy J adopted the principles set out by Gibbs ACJ in *Yango Pastoral.* Gibbs ACJ stated:

> *"(a) the principal issue is whether, on a proper construction, the legislature intended to prohibit the making or performance of the contract,*
> *(b) a contract expressly or impliedly prohibited by statute is void and unenforceable,*
> *(c) the question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes,*

> *(d) whether the statute is passed for the protection of the public is only one test of whether it was intended to vitiate the contract,*
> *(e) another test is whether the statute already contains a penalty. If the penalty is a pecuniary sum for each day of violation, irrespective of the number of contracts the corporation may make in a day, that is an indication that the legislature did not intend to prohibit each contract made in the course of the business, but only to penalize the carrying on of the business without authority,*
> *(f) courts must consider whether the avoidance of the contract would cause grave inconvenience to innocent members of the public without furthering the object of the statute."*

52. Murphy J also referred to McHugh J's observation in *Nelson v Nelson:*

> "*Parliament almost invariably provides mechanisms for dealing with breaches of its laws. Those mechanisms sometimes include a provision that makes unlawful and unenforceable an agreement that defeats or evades the operation of the relevant law. If a particular enactment does not contain such a provision, the prime facie conclusion to be drawn is that parliament regarded the sanctions and remedies contained in the enactment as sufficient to deter illegal conduct and saw no need to take the drastic step of making unenforceable an agreement or trust that defeats the purpose of the enactment.*"

53. Murphy J stated that his view that the LCCA did not impliedly prohibit any contract by an unlicensed company was supported by "*the lack of any express provision, the fact that contravention gives rise to a daily fine, suggesting that business might continue; the fact that the [statute] carries its own scheme of enforcement , including revocation; and the general public policy concern expressed in the authorities that vitiating contracts might well harm the public interest*": see 1999 CILR at 99. In this court, at 313-314 Georges JA adopted the same approach to the LCCA.

54. Not much was said in either court in *Jose's v Esso* about the TBLA. Murphy J stated (at 100) that his observations about the LCCA applied to the TBLA, which was purely a revenue statute. In her judgment, Ramsay-Hale CJ set out TBLA section 12 and summarised section 26 at [43] – [45], and referred to the TBLA at [84] and [93] – [94], in effect agreeing with Murphy J.

55. Mr Merren submitted that she erred and that the TBLA was more than a revenue raising statute, and that it contained public protection and regulation of business aspects. He referred in particular to section 16(1)(c) which prohibits granting a licence if the applicant was disqualified under any other Act from holding the licence sought: Reply Skeleton, §33. He argued that this was a "protection of the public" element. He also argued that, in view of section 16(1)(e), Abarbanel's failure to apply for an LCCA licence precluded it from obtaining a TBLA licence. I reject that argument. First, section 16(1)(e) provides only that the Board is not required to issue a TBLA

licence to a company that requires a licence under the LCCA and is not the holder of such a licence. It does not state that the Board is precluded from doing so. Moreover, as Mr Lowe observed, to say that Abarbanel was disqualified from getting a TBLA licence because it had not applied for and obtained an LCCA licence has an element of circularity in that the effect of non-compliance with the LCCA's licensing requirement is dealt with by the LCCA, in particular by sections 4(2) and 23.

56. Like the LCCA, section 26 of the TBLA provides that contravention or attempted contravention of the licensing requirement in section 12 is a criminal offence. Unlike the LCCA, the penalty under the TBLA can be imprisonment as well as a fine, although the fine is not stated to be a daily fine, and it contains no provision similar to LCCA, section 23. But, like the LCCA, the focus of the TBLA is on the collection of fees and not on contracts made by unlicensed persons. Its Schedule sets out the different fees for licences for 32 categories of business activity organised under headings of "*professional, trades and technical, commerce, industry, agriculture and primary activities, and miscellaneous*". This last category includes "*any other business or trade not specified … in which a service is offered for reward*", which, as the judge stated at [45], see [11] above, "*swept up"* moneylending.

57. Courts have been reluctant to hold that non-compliance with statutory requirements impliedly render contracts made by a party in breach void or unenforceable: see the statement of Devlin J in *St John Shipping Corp. v Joseph Rank Ltd.* set out at [35] above that they "*should do so only when the implication is quite clear*". Devlin J stated that the reason for this is that "*so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent"*: [1957] 1 QB 267 at 288. They have been particularly reluctant to do so where the non-compliance is with a licensing requirement, especially where the statute contains sanctions and remedies for contravention, in part because of the wide consequences of doing so: see *Yango Pastoral* and the other authorities referred to at [51] above and Saville LJ in *Hughes v Asset Managers Ltd.* [1994] EWCA Civ. 14, [1994] CLC 556 at 559 referred to at [60] below. There is nothing in the TBLA qualifying as a "*clear implication*" that it prohibits contracts made by unlicensed members of the very large number of professions and businesses covered by it.

58. This approach is supported by the recent decision in *Premier Assurance Group SPC Ltd. v Providence Company II* FSD 229 of 2021 handed down on 17 May 2023, that is since the Judge's decision in the present case. One of the issues before the Court in that case was the consequences of non-compliance with the requirement in section 31 of the Insurance Act (2008 Revision) that the transfer of any part of long-term insurance business to another insurer "*shall only be effected*

in accordance with the approval of the Cayman Islands Monetary Authority". In considering this, Justice Sir Anthony Smellie contrasted section 31 with the licensing requirement in section 3(1) of the Insurance Act. He stated that the fact that Parliament did not explain the consequences of a breach of section 31 or expressly state that non-compliance with section 31 is the invalidity of the transaction or transfer is "*just one factor to be taken into account in the Court's construction*": see [93] and [116]. He held that, in the light of the purposes of the Insurance Act 2010 to regulate the market and to protect policy holders and the express provision that transfers "*shall only be effected in accordance with"* the regulator's approval, failure to obtain such approval rendered the transfer void *ab initio*: see [63] and [93].

59. Sir Anthony stated that the consequences of non-compliance with the licensing requirement in section 3(1) differed. This was because of the provision in section 5 about the validity of transactions by persons who do not have a licence as required by section 3(1) which is in very similar terms to LCCA, section 23. Section 5 provides that "*an insurance contract, transaction, obligation or instrument … shall not be rendered void or unenforceable merely because it was entered into in connection with insurance business carried on by a person in contravention of section 3(1)*". He referred to Ramsay-Hale CJ's judgment in this case, and stated that, to the extent that it is based upon the saving provision of section 23 of the LCCA, it "*recognises the same public policy considerations as in Section 5(2) of the [Insurance] Act, in not rendering void or unenforceable private contracts freely entered into at arm's length between parties having capacity to contract, simply on the basis that one party is not licensed for the purposes"* see [107].

60. Sir Anthony also referred to *Hughes v Asset Managers Ltd.* [1994] EWCA Civ. 14, [1994] CLC 556 in which there was a similar reluctance to hold that a transaction was void or unenforceable where one party to it was unlicensed. Saville LJ, with whom Hirst and Nourse LJJ agreed, stated at 559, that this was so even where the purpose of the statute was to protect the public by imposing sanctions on those who engage in a business (in that case dealing in securities) without being duly licensed. Saville LJ stated that the language used by Parliament did not "*at its lowest, clearly indicate that the statute meant to prohibit (that is to say, make void) contracts made by unlicensed representatives".* The language indicated that "*Parliament was not seeking to render unlicensed dealings a nullity, but instead was confining itself to imposing criminal sanctions on those who engaged in such activities".* He also stated that he saw "*no basis in either the words the legislature has used or the type of prohibition under discussion, or in considerations of public policy … for the assertion that Parliament must be taken to have intended that such protection*

required (over and above criminal sanctions) that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective".

61. I consider that the detailed analysis in *Jose's v Esso* by Murphy J of the provisions of the LCCA and its policy and purpose and what he said about the TBLA, with which Georges JA substantially agreed, was correct at the time they decided *Jose's v Esso*. Because of the retrospectivity of the licence approved in 1989 (see [47] above), Ramsay-Hale CJ was not strictly bound to follow *Jose's v Esso.* But unless legislative and regulatory developments since 2000 mean that its analysis is no longer valid, it is of strong persuasive authority, and she was, and this Court is, entitled to follow it.

62. As to the developments since 2000, I agree with the Judge that the 2007 amendments to section 11 of the LCCA did not change its purpose or policy. As she stated at [91], the focus of the criteria set out in section 11(4) (set out at [18] above) remained the nature of the applicant and the needs of Caymanians and the Cayman Islands. The considerations introduced by the 2007 amendments to section 11(4) are:

> (f) the number of additional people from outside the Islands who would be required to reside in the Islands if the application is granted,
>
> (g) whether the applicant company, its directors, and employees have and are likely to continue to have the necessary professional, technical and other knowledge to carry on the business proposed by it,
>
> (h) the finances of the applicant, and the economic feasibility of its plans,
>
> (i) whether the true ownership and control of the applicant company have been satisfactorily established, and
>
> (j) the environmental and social consequences that could result from the carrying on of the business proposed to be carried on by the company.

Save for the reference to "*environmental and social consequences"* in section 11(4)(j), it can be seen that the considerations added by the new provisions reflect a continuing concern with the nature of the applicant company, its finances, the economic feasibility of its plans, and the advantage or disadvantage which may result from it carrying on business in the Islands rather than the protection of the person dealing with it. I do not consider that the reference to

"environmental and social consequences" in itself suffices to give the LCCA a greater and more protective aim than that identified in *Jose's v Esso* and by Ramsay-Hale CJ.

63. In relation to reasons apart from the breach of the licensing requirements of the LCCA and the TBLA themselves, Mr Merren relied on the matters set out at §§ [40(2) – (5)] above. The first is what he described as statutory incapacity as a consequence of breaches of sections 4(1) and 24. Section 4(1), set out at [15] above, provides that the LCCA or any licence do not give a company power to do anything not authorised by its Memorandum of Association. Section 24, set out at [22] above, provides that nothing in the statute or any licence confers on any company any power to do anything which it is not authorised to do by virtue of its Memorandum of Association or any other provision of law. After an objection was made to Mr Merren raising the point in his opening submissions, it was conceded that a claim that the transaction was *ultra vires* based on paragraphs 3-5 of the Memorandum was not pleaded: see A [7] and Grounds, §2.4. In the light of the contents of §§ 118, 118A and 140A of the Re-Amended Statement of Claim filed on 17 September 2019 and §1(ff) of the Prayer for Relief, that was an appropriate concession. The Judge did not err in stating at A [10] that the only issue raised on the pleaded case was whether the agreement was void for illegality because Abarbanel did not have the requisite licenses.

64. It was submitted on behalf of Mr Hawkins that, even if the point was not pleaded, the court was required to take it of its own motion. But, as the Judge stated (A [12]), it was not a fact that the transaction was *ultra vires*. A lack of capacity did not appear from the evidence. If the issue had been properly raised, the proper construction of Abarbanel's Memorandum of Association and the effect of section 28 of the Companies Act on the validity of the transaction would have been advanced for the court's consideration. These are not straightforward matters. They would have been determined after hearing the parties' competing submissions. Moreover, reading section 24 together with what I have described as an express statement or at least a strong indication in section 23, the position is that transactions by those who are in breach of the LCCA, for example by not having a licence, are not void or voidable.

65. As to the construction of Abarbanel's Memorandum of Association, Mr Merren relied on paragraphs 3 and 5. They state:

> "3. *The OBJECTS for which the Company is established are* ***NOT*** *restricted but, without limiting the generality of the foregoing, the Company shall have full power and authority to do and carry out any and all acts exercisable by a natural person or body corporate or any other legal entity in any part of the world in any capacity*

> *whatsoever… and the Company shall have full power and authority to carry out any object not prohibited by the Companies Law (2011 Revision) or any other law of the Cayman Islands …*".
>
> …
>
> "5. *Nothing in the preceding sections hereof shall be deemed to permit the Company to carry on such business as requires a licence under applicable Cayman Islands law…*"

Bearing in mind what Browne-Wilkinson LJ in *Rolled Steel Products* v *British Steel Corporation* [1986] Ch. 246 at 304 stated was a critical distinction, it would be necessary to determine whether the effect of those paragraphs is that entering into the loan transaction is in excess of the capacity of Abarbanel and *ultra vires* or is only in excess or abuse of Abarbanel's powers. Where a company abuses its powers, it may be liable to legal sanctions, but the question of *ultra vires* does not arise. Browne-Wilkinson LJ stated that he used "*the words "ultra vires" as covering only those transactions which the company has no capacity to carry out, i.e., those things the company cannot do at all as opposed to those things it cannot properly do*".

66. The wording of section 28 of the Companies Act, however, makes the question of the construction of paragraph 5 academic. That is because it provides that no act of a Company and no disposal of real or personal property to or by a company "*shall be invalid by reason only of the fact that the company was without capacity or power to perform the act or to dispose of or receive the property*" save that lack of capacity or power may be asserted in proceedings by a member or director against the company or in proceeding by the company against present or former officers or directors. In this court Mr Merren submitted that section 28 pertains only to private law situations and the common law, and not to situations in which statute, here LCCA sections 4(1) and 24, puts the lack of capacity on a statutory basis. As indicated by the discussion above, the licensing regime in the LCCA neither validates nor invalidates transactions by unlicensed companies. Mr Merren did not give any reasons for his submission that sections 4(1) and 24 had the effect of ousting or restricting the operation of section 28 in this way. The reference in section 24 to the Memorandum and Articles and in section 4(1) to the Memorandum do not turn a question of corporate capacity and power into one of statutory power. Those provisions do not, in my judgement, impose more draconian consequences on an act by a Company which does not have the licence required by the LCCA than the consequences specified by Section 28.

67. For these reasons, in the circumstances of this case the court was not required to take the unpleaded lack of capacity point of its own motion.

68. I also do not consider that Mr Merren can invoke the other statutes he relied on, in particular the Special Economic Zone Act (the "SEZ Act") and the PCA, in support of his appeal. The later statutes reflect their own policies and have their own purposes. I do not consider that it is possible to infer from them an intention to change the policies underlying the TBLA and the LCCA. Moreover, the way they were said to do so was put in a somewhat vague way. The PCA is mentioned in Grounds, § 2.21 and Skeleton, §§ 88 and 143 but all that is relied on is the fact that the 2021 Revision of the TBLA contains express provisions that relate to the PCA and the Anti-Money Laundering regulations and that the PCA "*appears to have been breached".* That is insufficient to establish that there was such a breach, or, if there was, that it rendered the loan to Mr Hawkins void or voidable whether because of the words "*by reason only"* in LCCA, section 23 or in some other way. It certainly does not show that the statutory policies and purposes identified in *Jose's v Esso* and applied by Ramsay-Hale CJ no longer stand.

69. As to the SEZ Act, it was submitted that when Mr Latta conducted unlicensed moneylending business in the Islands, that amounted to Bardi, as Abarbanel's parent company, unlawfully carrying on local business and circumventing the statutory prohibition on a Special Economic Zone enterprise doing so except as ancillary to business carried on outside the Islands: SEZ Act section 18. This it was said was because Bardi was Mr Latta's employer and through which he held a SEZ Employment Certificate at the material times.

70. Although §2.7 of the Grounds refer to Bardi as an SEZ entity and §§110-111 of Mr Hawkins' Skeleton refer to section 18 of the SEZ Act, this point was not pleaded and not mentioned in the Prayer for relief. Mr Merren stated that the reason the point was not pleaded was that he only became aware of it from Dr. Barker's statement dated 26 July 2021. That, however, was almost four months before the trial, and an application could have been made to amend the pleading. It was, moreover, not a fact that Mr Latta acted as an employee of Bardi. He was a director of Abarbanel, and whether he acted as an employee of Bardi would have been a matter to be determined after considering the evidence and hearing competing submissions. Finally, it was not argued that the corporate veil between Abarbanel and Bardi should be pierced. Indeed (albeit in the context of his submissions based on the Registered Land Act) in his oral submissions Mr Merren accepted that this was not a ground of appeal. But without piercing the corporate veil between the two companies, there was no way of maintaining that the SEZ Act was relevant.

71. There is also another problem in relying on breaches of the requirements of other statutes to show that a contract falls outside the saving provision in section 23 of the LCCA on the ground that it

would not be invalidated "*by reason only*" of the LCCA. If the other statute expressly or impliedly provides that breach of its requirements invalidates the contract, to hold that the contract is avoided both by the other statute and by implication by the LCCA because it would not be invalidated "*by reason only*" of the LCCA requires a construction of section 23 which is unnecessary. If the contract is avoided by the other statute no purpose would be served by also avoiding it for lack of the licence required by the LCCA. If the contract is not avoided by the other statute, to avoid it for lack of the LCCA licence would undermine the provisions of both the other statute and of LCCA section 23.

72. Standing back from the detail, having concluded for the reasons set out above that the loan transaction between Mr Hawkins and Abarbanel was neither expressly nor impliedly rendered unenforceable by statute, here the TBLA and the LCCA, I turn to whether it was unenforceable as a matter of common law. I can deal with this briefly. The submissions on behalf of Mr Hawkins essentially proceeded on the assumption that, as a borrower from an unlicensed lender, Mr Hawkins was a member of a protected class, and that public policy precluded Abarbanel enforcing the loan agreement. §9 of Attachment A to Mr Merren's Reply Skeleton stated that Mr Hawkins took substantial issue with the judge's conclusion at [103] – [104] that, applying the test set out by Lord Toulson in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, the purpose of the licensing regime in the LCCA was not undermined by enforcing contracts made in breach of the licensing requirements. I agree with the judge and reject that submission for the reasons below.

73. The judge referred to the statement of Lord Hamblen in *Henderson v Dorset Healthcare Foundation Trust* [2020] UKSC 43, [2021] AC 563 at [74] – [75) that where the effects of illegality are dealt with by statute, then the statute must be applied. As far as the LCCA is concerned, the express provision in section 23 that no business transaction shall be void or voidable by reason only that any party to it is in breach of the LCCA appears to preclude the loan being unenforceable at common law.

74. In the absence of a similar provision in the TBLA, the position differs and in principle there may be more scope for unenforceability at common law. I, however, noted the reluctance of courts to invalidate contracts made by parties who do not have the licence required by the TBLA and the LCCA when considering whether there is an implied statutory prohibition of such contracts at [57] – [61] above. The factors I considered in that context included the purpose of the statute in question, relevant policies, and whether invalidating contracts would have wide consequences. Those factors are very similar to Lord Toulson's "*trio of necessary considerations*" in determining what may be labelled as common law illegality in *Patel v Mirza*. He stated at [101]

that, given that the matter is in the area of public policy, the necessary considerations are "(a) ... *the underlying purpose of the prohibition which has been transgressed", "*(b) … *any other relevant public policies which may be rendered ineffective, or less effective by denial of the claim",* and *"*(c) … *the possibility of overkill unless the law is applied with a due sense of proportionality".* Although *Patel's* case concerned whether an illegal transaction should be unwound by ordering restitution, the majority in that case considered that they were laying down a new approach to illegality across civil law. I consider that the *"trio of necessary considerations"* have a similar relevance in determining the enforceability of a contract at common law and that applying them to the loan contract produces the same result.

75. I can also deal briefly with the submissions that the judge erred in not addressing the law on security and registration of charges in the RLA and in then not discharging the charge over Mr Hawkins' rental properties. One limb of this was that the charge contravenes section 3 of the RLA which does not permit dealings prohibited by other legislation. In view of my conclusion that the loan agreement is not prohibited by the TBLA or the LCCA and is enforceable, the submission based on RLA, section 3 is misplaced.

76. The submission based on the requirement in RLA, section 75(1) that *"a chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor*" is also misplaced. Section 75(1) was described in *Cayman National Bank Ltd. v Smith* [1992-93] CILR 235 at 238-240 as a paternalistic provision giving the court a supervisory role over sales to protect chargors from unscrupulous and unconscionable chargees. Importantly, in the context of this case the provision assumes the grant of a valid charge and concerns the remedies of a chargee when enforcing his security. It does not invalidate a charge which is otherwise valid. As Martin JA observed during the hearing, section 75(1) cannot be read as providing that the Court has to have regard to the conduct of the chargee throughout, including at the time of the inception of the charge.

77. Reliance was also placed on RLA, section 164. That requires that any matter not provided concerning *inter alia* charges "*shall be decided in accordance with the principles of justice, equity and good conscience".* It was submitted (Skeleton, § 139) that because Mr Hawkins has repaid the net sum he received from Abarbanel in accordance with the principles in section 164, Abarbanel should be declared under a statutory incapacity to enforce the charge over the rental properties which should be discharged. This again is a submission premised on the loan agreement not being enforceable, a premise which, for the reasons I have given, is mistaken.

78. The submissions that Abarbanel would be unjustly enriched by enforcing its contractual rights and that Abarbanel should have but did not file a counterclaim are also misconceived. Both are in substance also premised on the loan agreement not being enforceable. The issue of the validity of the contract and the charge was before the court which was in a position to make declarations about their legality.

I. Conclusion

79. In summary, for the reasons given in section H of this judgment, I have concluded that:

(a) the Trade and Business Licensing Act and the Local Companies Control Act do not expressly or impliedly prohibit contracts made in breach of their licensing requirements: see [42] – [62].
(b) the loan agreement between the appellant borrower and the respondent lender is not unenforceable as a matter of common law: see [72] – [74].
(c) the appellant's case is not assisted by the other statutes relied on by him, in particular the Special Economic Zone Act and the Proceeds of Crime Act (see [68] – [71]), sections 3, 75(1) and 164 of the Registered Land Act (see [75] – [77]), or his submissions based on unjust enrichment and the failure of Abarbanel to file a counterclaim (see [78]).
(d) the submissions on behalf of the appellant based on Abarbanel's lack of statutory capacity and sections 4 and 24 of the Local Companies Control Act should be rejected: see [63] – [67].

Accordingly, I would dismiss this appeal.

Martin JA:

80. I agree.

Goldring JA (President):

81. I also agree.