IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION, HELD IN ACCRA ON THE 12TH DAY OF DECEMBER 2022, BEFORE HIS LORDSHIP JUSTICE JUSTIN KOFI DORGU

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SUIT NO: CM/RPC/0850/2021

DATABANK ASSET MANAGEMENT SERVICE LTD } PLAINTIFF

VRS

ACORN PROPERTIES LTD } DEFENDANT

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PARTIES: **PLAINTIFF REPRESENTED BY DORCAS ANDOH**

COUNSEL: **AARON GOLIGHTLY HOLDING BRIEF FOR RODNEY HEWARD MILLS FOR THE DEFENDANT/APPLICANT - PRESENT**

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RULING:

To me, the contract engaged in by both Parties is to deal in real estate development and market. This is not illegal activities as strongly submitted by Counsel for the Defendant/Applicant. This type of contract ought to be distinguished from contracts founded on illegal acts such as drug supply, prostitution, smuggling, cybercrime or any other crime. It may well be true that the Parties have contravened Section 3 of the Foreign Exchange Act, 2006 (Act 723) particularly Section 3 (4) (b) which deals with the "receipt or payment of foreign currency". But as stated earlier on, the contract was not the selling or buying of foreign exchange. The statement of defence of the Defendant who is the Applicant herein throws more light on the nature of the transactions per their paragraphs 4 and 5 thus;-

"4. In answer to paragraphs 3 to 5 of the Statement of Claim whilst admitting paragraph 4 of the Statement, the Defendant says that the investments by the Plaintiff were for a period of 9th July, 2010 t0 30th September, 2011 and were equity investments and consequently were not subject to interest neither were they time limited for 5 years as averred at all

5. Further, the value of the investments was varied, dependent upon the performance of the Defendant financially; which was, inter alia, subject to property market forces".

What this means to me is that the contract was basically about shares or investment instruments geared towards the capitalization of the Defendant's estate project. This in itself cannot and is not an illegal contract. Perhaps, the illegality is about the currency of the transaction which is the dollar. There is no doubt that the US Dollar and for that matter any other foreign currency is not the legal tender in the country. The fact remains however that it is an open secret that transactions are carried out in the country in the full glare of the Bank of Ghana in especially U.S dollars without question.

To me it is about time that we as a country wake up to the realities of our situation and stop burying our heads in the sand like the proverbial ostrich.

This is a Court of Law as well equity. One need not recount the evolution of the Rules of Equity and what necessitated them. It is essentially to ameliorate the harshness of the strict application of law that was often occasioning injustice and hardship on Parties. And this is a crystal clear example of such situations. How is a Defendant who advertised services and expressed the consideration in dollars, the Plaintiff accepted the offer and paid due consideration in the manner the Defendant offered, a contract came into effect whereupon the Defendant now Applicant, took the benefits of the contract albeit in foreign currency now cry foul? The question is, at what point in time did the Defendant notice that it was engaging or had engaged in an illegality. Is it after

taking the benefits and profiting there from and when it was time for him to also perform his side of the bargain? Equity will not indulge such a party to profit from its own wrong doing. On this, I fail to accept the position that both Parties are 'in pari delecto'. If anybody was at fault it is the Defendant who is now crying wolf and illegalities. The instant case to me is distinguishable from the decision in the case of OLATIBOYE V. CAPTAN [1968] GLR 146 where the Court held as follows;-

"It was not every infringement of a statutory provision that made a contract illegal and therefore unenforceable. Where an act contemplated was prohibited by statute but was subject to a penalty which was merely for the benefit of the revenue, the contract could be enforced. Where the provision of a statute indicated the intention of the legislature to prohibit the contract itself, then even though the penalty imposed for a breach inadvertently benefited the revenue the contract would nevertheless be illegal and unenforceable".

This is so to me because as I have already indicated, the contract itself is not an illegal contract and the illegality does not form the basis of the contract as expressed by Amissah J.A (as he then was) and concurred by Sowah and Kingsly Nyinah JJA (as they then were) in the case of SCHANDORF V. ZEINI & ANOR [1976] 2 GLR 418 where the Court held as follows;-

"If the Plaintiff in order to recover under a contract must rely upon his own illegal act, even though at the time of making the contract he had no intent to breach the law and at the time of performance he did not know that what he was doing was illegal, the courts would not assist him. To be material and deprive the Plaintiff of the Court's assurance, the illegality must form the basis of the Plaintiff's claim for relief. In other words, the cause should be founded on the illegal act. Founding a case on an illegality or immorality meant that without reliance on that illegality or immorality, the Plaintiff could not succeed in his action".

In the instant case however, it is my view that the Plaintiff could prove his contract and then be paid in the Ghana Cedis equivalent as endorsed on his Writ of Summons.

It is my considered opinion also that our Courts have become aware of schemes by Parties using such clauses of illegality in statutes to avoid their contractual obligations although they have benefitted from same. Thus in the case of SULLEY DOLLEY V. MESSRS FND INVESTMENT (GH) LTD & ADE COKER [2021] DLSC10692, The Supreme Court per Tanko JSC affirming the decision in the MENSAH & ORS V. AHENFIE CLOTH SELLERS ASSOCIATION SCGLR 680 states inter alia thus;-

"….A contract may be in violation of a statute and yet it may be enforceable. Such a contract may be described as voidable. It is not void but may be enforced on satisfaction of certain conditions".

Yet again, the Supreme Court brought to bear the equitable principles when it considered the balance to be considered when it comes to the need to avoid unjust enrichment in the case of ACCRA METROPOLITAN ASSEMBLY V. CITY & COUNTRY WASTE LTD [2008-2009] 1 GLR 553 per Date-Bah JSC when it held as follows;-

"On the facts of the present case, balancing the need to deny enforceability to the contract sued on by the Plaintiff against the need to prevent the unjust enrichment of the Defendant, and considering that in relation to the Defendant's non-compliance with the statutory provisions binding on its, the Plaintiff was not in pari delecto in a broad sense, we have come to the conclusion that the Plaintiff must be paid a reasonable compensation for the services if rendered to the Defendant."

Now, in the light of the above considerations and the deposition in paragraph 19 of the Affidavit in Support of the Defendant/Applicant's Motion which I quote thus:-

"19. That the Applicant contends that despite the illegality, they nevertheless intend to settle their otherwise recognized indebtedness and share proceeds

from liquidation of the company amicably out of Court through collection of receivable and disposal of property".

And in view of the fact that this is a Commercial Court that has an in-built ADR system in its procedure at the pre-trial stage, the case should as well remain in Court for the Defendant/Applicant, in as much as he is ready to compromise on the alleged illegality charge, take advantage of the settlement scheme open to the Parties.

In the circumstances of the case, I hold that this is not a proper case to dismiss the suit as the contract itself was valid and legal.

The motion is accordingly dismissed.

(SGD)

JUSTICE JUSTIN KOFI DORGU

(JUSTICE OF THE HIGH COURT)