Trinity Term
[2023] UKPC 26
Privy Council Appeal No 0027 of 2021

JUDGMENT

Attorney General of Trinidad and Tobago (Appellant) *v* Trinsalvage Enterprises Ltd (Respondent) (Trinidad & Tobago)

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

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
18 July 2023

Heard on 3 May 2023

Appellant
Thomas Roe KC
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Ramesh Lawrence Maharaj SC
Anand Singh
Mandavi Tiwary
Vijaya Maharaj
Michael Rooplal
(Instructed by BDB Pitmans LLP (London))

LORD BURROWS (with whom Lord Kitchin, Lord Hamblen and Lady Rose agree):

1. Introduction

1. The central question in this case is whether a claim in the law of unjust enrichment for the reasonable value of services rendered and materials supplied (ie a quantum meruit) is defeated because to allow the claim would stultify (ie would undermine or contradict) the policy of the Central Tenders Board Act (Trinidad and Tobago). It is not in dispute that, subject to that Act, the claim in unjust enrichment would here succeed. It is also not in dispute that, in principle, a claim in unjust enrichment will be defeated where to allow it would stultify the policy (or, one might say, purpose) of a relevant statute. But what is in dispute is whether there is such a stultification of statutory policy in this case.

2. This is not a case on illegality. The Central Tenders Board Act (which for shorthand will sometimes be referred to as "the Act") lays down that, for contracts over a certain value, only the Central Tenders Board (the "CTB") has the authority or power to make contracts on behalf of the Government of Trinidad and Tobago. But it is not made a criminal offence to enter into such a purported contract without going through the CTB. We are therefore dealing with unjust enrichment in respect of a contract that is void for want of authority or void because ultra vires and not one that, by reason of illegality, is unenforceable or void.

2. Facts

3. At some time prior to August 2000, the Government through the Minister of Works and Transport ("the Minister") wanted work to be carried out, and materials to be supplied, in relation to what was referred to as the "San Fernando Harbour Development Project – Phase 1". After a tendering process, the offer made by Trinsalvage Enterprises Ltd ("Trinsalvage"), which is the claimant (and the respondent in this appeal), was accepted on behalf of the Minister. In August 2000, a written contract was purportedly entered into by Trinsalvage and the Permanent Secretary of the Ministry of Works and Transport ("the Ministry"), on behalf of the Minister and hence on behalf of the Government (and the State). The work agreed to be carried out by Trinsalvage involved coastal reclamation and the construction of a dock. The price agreed for the work and materials (which was the price in Trinsalvage's tender) was $6,740,894. (The currency referred to throughout this judgment is the Trinidad and Tobago dollar.)

4. The work was carried out by Trinsalvage. Various stages were certified as completed on 30 October 2000, 17 January 2001, 6 March 2001, 21 March 2001, and 17 October 2001. Extra work was carried out, and a large amount of extra materials were supplied, up until December 2004. Although the Board has not been provided with the precise figures, it would appear that the Ministry paid (at least) the original sum agreed under the (purported) contract. However, it refused to pay for (at least most of) the extra work and materials.

5. Under the agreement, the specified amount of landfill to be supplied by Trinsalvage was 46,000 cubic metres. Clause 51.2 of the agreement permitted Trinsalvage to make a variation to the quantities of landfill specified, and the consequent extra work required, without prior instruction from the engineer. It is an agreed fact that the extra amount of landfill supplied was 93,672 cubic metres. The extra sums claimed by Trinsalvage, in relation to which there were certificates of completion, and which have not been paid by the Ministry, amounted to $4,997,021.47 plus VAT.

6. Trinsalvage commenced a claim for that sum on 13 December 2004 with the statement of claim being filed on 24 November 2006 and amended on 20 July 2010. The defendant (and the appellant on this appeal) is the Attorney General of Trinidad and Tobago who is being sued as the representative of the Minister, and hence of the State, pursuant to section 19(2) of the State Liability and Proceedings Act. The defendant disputed that the Minister had any liability to pay the sum claimed and averred that the Permanent Secretary in the Ministry had no authority to enter into the alleged contract.

7. The parties agreed by a consent order dated 21 January 2013 to split the issues of liability and quantum. Under that consent order:

> "in relation to the issue of quantum the parties have agreed to appoint a joint independent expert to determine or ascertain the value of the works in ascertaining the quantum if necessary and that parties agree to be bound by the valuation of the joint independent expert."

3. The relevant statutory framework

(1) The Central Tenders Board Act

8. The Act was first enacted in 1961 and has undergone numerous amendments since then (and, as referred to at the end of this judgment, it was very recently repealed and replaced by a new Act but with non-retrospective effect). As can be seen in the extracts below, which were applicable at the relevant time for the purposes of this case, the Act sets up the CTB and explains its role and composition in sections 4 and 5. It explains the required process of inviting tenders in section 20, the requirement for certificates to show that the person tendering is up to date with payments of tax in section 23A, the need for the CTB to accept the best offer and what that means in section 24, and the requirement for a formal contract in section 26. Section 35 empowers the President of the Republic of Trinidad and Tobago to make certain regulations.

> "**4. Establishment of Board**
>
> (1) There is hereby established a Central Tenders Board which save as is provided in section 20A and in section 35 of this Act shall have the sole and exclusive authority in accordance with this Act—
>
> *(a)* to act for, in the name and on behalf of the Government and the statutory bodies to which this Act applies, in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services in connection therewith, necessary for carrying out the functions of the Government or any of the statutory bodies;
>
> *(b)* to dispose of surplus or unserviceable articles belonging to the Government or any of the statutory bodies.
>
> (2) The Board shall have such other functions and duties as the President may by order prescribe from time to time.
>
> **5. Composition of Board**
>
> (1) The Board shall be composed of eight members consisting of—

(a) at least five public officers appointed by the President, and

(b) such other members at large to be appointed by the President as may be necessary to fill up the membership of the Board.

(2) The President shall appoint two of the *ex officio* members of the Board, other than the Treasury Solicitor, to hold the offices of Director of Contracts and Deputy Director of Contracts respectively.

(3) The Director of Contracts shall be the Chairman and the Deputy Director of Contracts shall be the Deputy Chairman of the Board.

…

20. Request for invitation of offers to be in writing

(1) …, whenever articles or works or any services in connection therewith are required to be supplied to or undertaken on behalf of the Government or a statutory body to which this Act applies, the Government or such statutory body shall make written request to the Board to invite on its behalf offers for the supply of those articles or for the undertaking of the works or services in connection therewith.

(2) The request referred to in subsection (1) shall contain a sufficient description of the articles, works or services to be supplied or undertaken.

(3) On the receipt of any such request, the Board shall either —

(a) invite members of the public in general to make offers for the supply of such articles or for the undertaking of such

works or services, as the case may be, by Notice published in the *Gazette* and in local or overseas newspapers, or

(b) subject to the approval of the Minister, invite such bodies or persons as may be selected by the Board to make offers for the supply of such articles or for the undertaking of such works or services, as the case may be, whenever the Board considers it expedient or desirable so to do.

...

20A. Government may act on its own behalf

(1) Notwithstanding the provisions of section 20(1), the Government may act on its own behalf where—

(a) as a result of an agreement for technical or other co-operation between it and the Government of a foreign State, the latter designates a company to supply the articles or to undertake the works or any services in connection therewith;

(b) the articles or works or any services in connection therewith are to be supplied or undertaken by a company which is wholly owned or controlled by a foreign State;

(c) it enters into a contract with the National Insurance Property Development Company Limited or a company which is wholly owned by the State, for the supply of articles or for the undertaking of works or services in connection therewith;

(d) it enters into a contract with a company for the purchase of books for official purposes;

(e) as a result of the occurrence or anticipation of flooding, hurricane, landslide, earthquake or other natural disasters, the Minister is of the opinion that an emergency situation has arisen in any part of Trinidad and Tobago, the abatement, prevention or alleviation of which necessitates the obtaining

of articles or the undertaking of immediate works or services by the Government; or

(f) items and services listed in the Third Schedule are approved by the Minister as being required for the purposes of the Trinidad and Tobago Defence Force or for the protective services.

…

23A. Tax Clearance Certificate…

The Board shall not accept any tender unless it is accompanied by a Tax Clearance Certificate and a Clearance Certificate issued under the Income Tax Act and the Value Added Tax Act, respectively and obtained from the Board of Inland Revenue.

24. Board to accept best offer

(1) After the offers have been opened the Board or a Committee shall, at such time or times as may be deemed necessary or expedient, consider the offers so received and, except for good reason, the sufficiency whereof is in the discretion of the Board or the Committee, shall accept the lowest offer which represents the best value.

(2) The Board is not bound to accept the lowest or any offer.

…

26. Formal contract to be entered into

(1) Where an offer has been accepted by the Board or a committee acting for and on behalf of the Board, the Government or the statutory body at whose request the invitation to offer was issued and the person whose offer has

been accepted shall enter into a formal contract for the supply of the articles or the undertaking of the works or services, as the case may be.

(2) A formal contract shall be in such form, and contain such terms, conditions and provisions, as the Board may determine.

(3) The Board shall publish in the *Gazette* the name of the person or body to whom the contract is awarded, the amount of the tender and the date on which the award was made.

35. Regulations

(1) The President may make such Regulations as may appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Act and, without limiting the generality of the foregoing, may make Regulations—

...

(e) prescribing the financial limits within which contracts may be awarded by public officers and officers of statutory bodies and the limit of the value of articles which may be purchased by such officers without inviting tenders;

...

(h) prohibiting the entering into of contracts for the supply of articles or the undertaking of works or any services connected therewith with members of statutory bodies to which this Act applies or any officers thereof or with such other persons as may be specified in the Regulations.

(2) Regulations made under subsection (1) may provide, for the contravention thereof or non-compliance therewith, a

penalty on summary conviction of a fine of five hundred dollars, or imprisonment for six months or both such fine and such imprisonment."

(2) The Central Tenders Board Regulations

9. Made pursuant to the powers conferred by section 35 of the Central Tenders Board Act, the Central Tenders Board Regulations include regulations 12 and 16. Regulation 12 sets the financial limits of contracts which the Permanent Secretary of a Ministry can enter into on behalf of the Government without going through the CTB. At the time relevant to this case, the limit was $25,000. Regulation 16 makes it a criminal offence for a public officer or employee of the Government, or a spouse or child of such a person, to enter into a contract with the Government to supply it with goods or services.

"**12. Powers of Permanent Secretaries etc**

(1) A Permanent Secretary, the Chief Administrator of the Tobago House of Assembly or an officer of a statutory body (other than a Municipal Council) appointed for that purpose by such statutory body may act for the Board where the total value of the articles to be supplied or the works and services to be undertaken does not exceed in the case of—

(a) a Permanent Secretary or the Chief Administrator of the Tobago House of Assembly one million dollars; or

(b) an officer appointed under this subregulation, twenty-five thousand dollars,

but he shall not for the purpose of giving himself authority to act under this regulation subdivide the quantity of articles to be supplied or works and services to be undertaken into two or more portions so that the value of each portion places such portion within his jurisdiction.

16. Contracts with officers and employees, effect of

> (1) A public officer or an employee of the Government, or a member or employee of a Statutory Body or the spouse or any child of such person shall not enter into any contract for the supply of articles to, or the undertaking of any works or services for the Government or such statutory body, as the case may be, and where a person becomes a public officer or employee of the Government or a member or employee of a Statutory Board, after he or his spouse or any child has entered into such contract, the contract with such person or his spouse or any child shall thereupon be treated as terminated upon such terms as the Board considers appropriate.
>
> (2) Any person specified in subregulation (1) who contravenes the provisions thereof is guilty of an offence and liable on summary conviction to a fine of five hundred dollars or to imprisonment for six months or to both such fine and such imprisonment."

4. The decisions in the courts below

(1) Seepersad J

10. In the High Court, Seepersad J, in a judgment dated 7 January 2014 (CV No 2011-04593), held that Trinsalvage had no valid claim in contract but did have a valid claim for a quantum meruit in the law of unjust enrichment. His essential reasoning was as follows:

(i) The purported contract was not binding so that Trinsalvage had no contractual claim. This was because, applying the Central Tenders Board Act and Regulations, the Permanent Secretary of the Ministry had no authority to enter into the contract and the contract was made ultra vires. The limit of the Permanent Secretary's authority and power to contract was $25,000 and the value of the work under this contract exceeded that sum. That the contract was not binding was in accordance with the policy of the Act. That policy was to ensure procedural fairness and transparency in the awarding of Government contracts; to ensure that contracts were not awarded on an arbitrary or self-serving basis by Ministers; and to avoid kickbacks and financial impropriety. It is helpful to quote the precise words used by Seepersad J at pp 20-21 of his judgment:

> "The contract entered into in the instant matter was not binding on the state [;] the Permanent Secretary had no apparent or ostensible authority to enter into same and acted ultra vires of the provisions of the Central Tenders Board Act and Regulations. The Court wishes to point out that Parliament enacted the Act so as to ensure that proper procedure characterized by transparency and fairness is adopted and adhered to in the procurement process. The effect of the Act, is to regulate the conduct of officers of the state and to ensure that contracts are not awarded on an arbitrary or self serving basis by persons such as Ministers who were entitled to contract on behalf of the state at common law. If the spirit and tenor is rigorously followed many of the unfortunate allegations of kickbacks and financial impropriety that have been levied against successive Governments would be curtailed."

(ii) Nevertheless, Trinsalvage had a valid claim for a quantum meruit in unjust enrichment. Although the defendant submitted that there had been no proper pleading of a claim in unjust enrichment, Seepersad J rejected that submission and pointed out that the reply to the defence had made clear that the alternative claim for a quantum meruit was based on unjust enrichment. He referred to *Halsbury's Laws of England* (5th ed, Vol 8) paras 410, 414 and 415 to clarify that the claimant must satisfy the court of three elements to succeed in a restitutionary claim for unjust enrichment (subject to any defence): first, that the defendant has been enriched; secondly, that the enrichment was at the expense of the claimant; and thirdly, that the enrichment was unjust. As regards the enrichment element, he appeared to focus on "free acceptance", as explained in para 415 of the extract from *Halsbury's*, and said, at p 26, that it was agreed between the parties that the Permanent Secretary of the Ministry "was aware of and accepted the Claimant's services". Seepersad J summarised his views as follows at pp 26-27:

> "In the view of this Court, it cannot be rational to conclude that although substantial work is undertaken which ultimately benefited the public and people of Trinidad and Tobago and therefore the Defendant, that the cost associated with the said work is not to be addressed. It was clear that the Claimant did not agree to undertake same free of charge and the value that can be attached to same is significant.

> Although the Permanent Secretary acted ultra vires the provisions of the Central Tenders Board Act in entering into a contract with the Claimant, the work that was subsequently effected over an extended 4 year period [was] in a public place which would have been under the control and charge of the State of Trinidad and Tobago. In so far as the work was done on property belonging to the State, the State derived a benefit from the said work that was conducted in relation to the San Fernando Harbour Project. This Court therefore holds that the [S]tate has been unjustly enriched and the Claimant is therefore entitled to recompense."

(iii) Seepersad J did not directly address the defendant's submission that the unjust enrichment claim must fail because to allow it would stultify the policy of the Central Tenders Board Act. But by allowing the unjust enrichment claim it is implicit that he was rejecting that submission.

(2) The Court of Appeal

11. The Attorney General appealed against the decision on unjust enrichment. The judgment of the Court of Appeal, dated 21 December 2018 (Civil Appeal No P 009 of 2014), was given by Bereaux JA, with whom Moosai JA and Jones JA agreed. His central reasoning, in dismissing the appeal, was as follows:

(i) The judge had been correct to decide that the contract was void because, by reason of the Central Tenders Board Act, the Permanent Secretary had no authority, and was acting ultra vires, in concluding that contract.

(ii) Counsel for the Attorney General (Mr Harnanan) had "graciously" (para 14) not pursued the point that there had been inadequate pleading of the claim in unjust enrichment. It was observed that there had been full argument on unjust enrichment at least before the Court of Appeal.

(iii) The essential legal question, as shown by, eg, *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* ("*Haugesund Kommune*") [2010] EWCA Civ 579, [2012] QB 549, was whether to allow the quantum meruit claim in unjust enrichment would stultify the policy of the Central Tenders Board Act.

(iv) Bereaux JA put to one side the decision of the House of Lords in *H Young & Co v Mayor and Corpn of Royal Leamington Spa* (1883) 8 App Cas 517, which had not been considered by Seepersad J but was now being relied on by the defendant (and which is examined in more detail at para 45 below). That was because it was an old case which had not applied the correct modern approach of considering whether allowing the claim for the value of the work, comprising the beneficial performance, would stultify the policy of the relevant Act. Bereaux JA said, at para 16, that "had such an approach been taken in *Young*, the result would have been different."

(v) The Court of Appeal had earlier examined the policy of the Central Tenders Board Act in some detail in *Attorney General of Trinidad and Tobago v Mootilal Ramhit and Sons Contracting Ltd* (Civil Appeal No P 031 of 2018) and had explained that the Act was aiming for transparency, and minimising the possibility of collusion or favouritism, in the awarding of State contracts. Bereaux JA pointed out that that case had been concerned with whether the Act applied to render invalid a contract between the State and a company that was owned by the State; and that, having decided that the Act did apply to render that contract void, there had been no consideration of the law of unjust enrichment. Bereaux JA went on to say – rather oddly given his full citation from the *Mootilal Ramhit* case as to the policy of the Act – that he regarded the limitations placed on the Permanent Secretary's power to contract as appearing "at best to be for purely administrative convenience". (para 23)

(vi) Bereaux JA was of the view that to allow the claim for a restitutionary quantum meruit in unjust enrichment would not stultify the policy of the Central Tenders Board Act. A claim in unjust enrichment was neither expressly nor impliedly barred by the Act. This case was therefore analogous to the *Haugesund Kommune* case (which is examined in more detail at para 24 below) where the lender under a contract that was void because ultra vires was held entitled to restitution of the money lent, subject to the defence of change of position. Just as restitution of the unjust enrichment did not stultify the policy of the relevant statute in that case, so it did not do so on the facts of this case. Bereaux JA pointed out that the principal sum under the contract had been paid to Trinsalvage without any objection being made; and that there was no suggestion either that Trinsalvage knew of the lack of authority of the Permanent Secretary of the Ministry or that there was any collusion between Trinsalvage and the Permanent Secretary to circumvent the provisions of the Act.

5. The contract is void for lack of authority and/or because ultra vires and not because of illegality

12. On this appeal, it has been common ground between the parties that the contract between Trinsalvage and the Permanent Secretary of the Ministry is void. It is important to clarify why that is so. There are three potential invalidating factors mentioned in the courts below and which are not always easy to disentangle. These are lack of authority; lack of power; and illegality. Each may render a contract void (or, in respect of illegality, unenforceable). Each has a different focus and the law applicable to each is not the same: see, eg, *SR Projects Ltd v Rampersad* [2022] UKPC 24, especially at paras 23-24.

13. Lack of authority is a concept within the law of agency and, in respect of contracts, means that a purported contract with a principal will be void if it is entered into by an agent of the principal who does not have authority to bind the principal. The necessary authority may be actual or apparent or it may be retrospectively conferred by the principal's ratification.

14. Lack of power (or, as it is sometimes termed, "institutional incapacity") refers to where a public authority (including a Minister) is acting outside the powers conferred on it by legislation or a company is acting outside the powers conferred on it by the company's memorandum. In respect of contracts, it applies where the public authority or company had no power to make the contract in question so that the contract is ultra vires and void.

15. Illegality in the law of contract refers to where the formation, purpose or performance of a contract involves conduct that is illegal. The illegality is almost always a crime. However, it may also comprise a tort or other civil wrong (other than the mere breach of the contract in question) provided, it would seem, dishonesty is an essential element: *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430, para 28. Illegality may render the contract void or unenforceable by one or either party. Whether it does so will normally involve an enquiry looking at both the provisions of the relevant statute (assuming the offence is created by statute) and the common law of illegality as restated in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 (see the Board's judgment, on appeal from the Court of Appeal of Trinidad and Tobago, in *Energizer Supermarket Ltd v Holiday Snacks Ltd* [2022] UKPC 16).

16. In this case, although there was some ambiguity in the submissions to the Board made by Ramesh Lawrence Maharaj SC on behalf of Trinsalvage, it is clear that the contract is not unenforceable or void by reason of illegality. This was accepted by

Thomas Roe KC, counsel for the Attorney General, in his admirably succinct and pellucid submissions. It is also consistent with the reasoning of the lower courts. In entering into the contract without going through the CTB, neither of the parties was committing a criminal offence (or a relevant civil wrong). Rather what was objectionable was that the Permanent Secretary at the Ministry had no authority to bind the Minister, and hence the Government, to the contract purportedly made. Furthermore, the contract was ultra vires as being outside the powers of the Minister. The contract was therefore void for lack of authority and/or because ultra vires. But it was not void or unenforceable for illegality.

17. The Central Tenders Board Act does not expressly provide that the contract is void for lack of authority or because ultra vires. How then does one know that the contract is void for those reasons? The answer is that, while lack of authority and lack of power are common law concepts, it is the implied (indeed, one might here say, inevitable) effect of the Act that governs; that implication is ascertained through ordinary principles of statutory interpretation. It would contradict the Act's words, read in their context, and its purpose if contracts with Ministers were valid in a situation where the parties had not gone through the CTB as required by the Act.

6. The prima facie unjust enrichment claim

18. Consistently with the judgment of Seepersad J at first instance (see para 10(ii) above), it is well-established (see, eg, *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, para 10; *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29, [2018] AC 275, paras 24, 39-42; *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33, [2021] 2 All ER 1105, para 18; *Barton v Morris* [2023] UKSC 3, [2023] AC 684, paras 77, 228) that a restitutionary claim in the law of unjust enrichment has three central elements which the claimant must prove. These elements are that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust (ie that there was an "unjust factor"). If those three elements are established by the claimant, the claim succeeds unless the defendant can establish a defence, such as change of position.

19. Although nothing now turns on this, the pleading of unjust enrichment in this case was inadequate. The words "unjust enrichment" were not referred to until the reply to the defence and no attempt was made to clarify the three required elements. In particular, the unjust factor was not specified and, although it would appear that Trinsalvage, at first instance, was relying on "free acceptance" in establishing the enrichment of the defendant, that was also not mentioned in the pleadings. As was said by the Board in the *Samsoondar* case at para 18 (after referring to the three required elements):

> "The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words 'unjust enrichment' are used but the claimant must identify sufficient facts to show how those three elements are satisfied: see Goff and Jones, *The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-38) [Now 10th ed (2022) paras 1-40 – 1-41]. The important purpose of a statement of case is to ensure, as a matter of fairness, that the defendant knows the case it has to meet."

20. As has been mentioned in para 11(ii) above, counsel for the Attorney General in the Court of Appeal decided not to take any pleading point on unjust enrichment. It follows, as Mr Roe accepted, that it was not open to the Attorney General to take such a pleading point on this appeal.

21. Mr Roe also did not seek to dispute that the three essential elements for an unjust enrichment claim could here be made out by Trinsalvage. The Board therefore did not have the benefit of any submissions on whether, subject to the stultification principle, the unjust enrichment claim would here have succeeded. But it is helpful to clarify briefly why Mr Roe would certainly have faced an uphill struggle had the Attorney-General sought to deny that Trinsalvage had a prima facie claim for a quantum meruit in the law of unjust enrichment.

(i) As regards the defendant's enrichment, it was stressed in the lower courts that the work done was beneficial to the State. More specifically, one can say that the receipt of the services and materials constituted an objective benefit to the defendant and the defendant has not sought to argue that that objective benefit was, subjectively, not a benefit to the State (although, even if it had sought to do so, the claimant might have relied on the Ministry's free acceptance, as explained in the extract from *Halsbury's Laws* set out by Seepersad J: see para 10(ii) above).

(ii) Clearly the services were rendered, and the materials were supplied, to the State by Trinsalvage. The defendant's enrichment was therefore "at the expense of" Trinsalvage.

(iii) The most obvious unjust factors were failure of basis which used to be labelled failure of consideration (see *Barton v Morris*, paras 77-84, 231-232); and/or mistake (of law), applying *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, because, as Bereaux JA made clear, there was no suggestion that Trinsalvage was aware that the Permanent Secretary did not have the necessary authority or vires to enter into the contract.

22. The Board can now turn to the issue in dispute which is whether a prima facie quantum meruit claim in unjust enrichment for the reasonable value of the work and materials is defeated because it would stultify the policy of the Central Tenders Board Act.

7. Unjust enrichment and the stultification of statutory policy

(1) The stultification principle

23. It is not in dispute that, in principle, a claim in unjust enrichment will be defeated where it would stultify the relevant statutory policy.

24. The clearest statement of this principle, in the context of benefits conferred under a contract that was void because ultra vires a public authority (as opposed to a contract affected by illegality), is that of Aikens LJ (giving the leading judgment) in *Haugesund Kommune*. That case concerned void swap transactions between an Irish bank and two Norwegian public authorities. The transactions were void because, applying the relevant Norwegian statute, such a transaction was outside the powers of the public authority. The bank, by a counterclaim, sought restitution of the payments made in the law of unjust enrichment. One of the questions at issue was whether it was a defence to that (counter) claim that restitution would be inconsistent with (ie would stultify) the Norwegian statute that rendered the contract void. The Court of Appeal held that restitution would not be inconsistent with the statutory policy. Aikens LJ explained that this issue turned on the correct interpretation of the relevant statute and required the court to determine whether, in the light of the policy of the statute, the statute expressly or impliedly barred the right to restitution. He said at paras 92 and 96:

> "There is no doubt that in English law a restitutionary claim for the return of money may be defeated on grounds of public policy where, on the correct construction of a statute or regulation, recovery in restitution would be contrary to the objective of the statute. … it is well established that if such a

> [restitutionary] claim is inconsistent with the express provisions of a statute or, I would say, its clear intention, then English law will not permit the claim as a matter of public policy. That is because a common law claim for restitution cannot be allowed to circumvent legislation whose object and effect is to bar such a recovery. …"

25. In the context of illegality, an analogous approach was recognised and the language of stultification was expressly used, in, eg, *Boissevain v Weil* [1950] AC 327 at 341 and *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, at para 115. One also finds a similar approach being adopted in relation to restitution in the context of contracts that are void or unenforceable for failure to comply with a requirement of form: see, eg, *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 119-121, 172 (where a restitutionary quantum meruit was denied); and the famous Canadian and Australian cases of, respectively, *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785 and *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 in both of which a restitutionary quantum meruit in the law of unjust enrichment was awarded for work done under a contract that was unenforceable for want of formality. See also the discussion in Mitchell, Mitchell and Watterson (eds), *Goff & Jones on The Law of Unjust Enrichment*, 10th ed (2022), paras 2-22 – 2-31, under the heading "Stultification of Statutory Policy".

26. It is important to recognise that, as Aikens LJ indicated in *Haugesund Kommune*, where the statute does not expressly deal with restitution of unjust enrichment, statutory interpretation is concerned to ascertain whether the claim in unjust enrichment has been impliedly ousted.

27. The burden of establishing that the unjust enrichment claim would stultify the statutory policy is on the defendant. This is because one is concerned with a defence to what would otherwise be a valid claim in unjust enrichment. Aikens LJ in *Haugesund Kommune* labelled the defence as the defence of public policy. More specifically, in the context of this case, one is concerned with lack of authority or lack of power as a possible defence to the claim in unjust enrichment. But whatever the label, the point here is that, precisely because what is in issue is a defence, the burden lies with the defendant to establish that the prima facie claim in unjust enrichment is defeated.

(2) A restitutionary quantum meruit in the law of unjust enrichment is distinct from a contractual remedy

28. It is trite law that, in general, the aim of contractual remedies is to put the claimant into as good a position as if the contract had been performed: *Robinson v Harman* (1848) 1 Exch 850, 855 (per Baron Parke). This has sometimes been referred to as the protection of the claimant's expectation or performance interest (see Lon Fuller and William Perdue, "The Reliance Interest in Contract Damages" (1936-37) 46 Yale LJ 52 and 373; Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 LQR 628). In contrast, where there is an unjust enrichment, the aim of restitutionary remedies is to reverse the enrichment. This is the protection of the restitution interest. Where there are concurrent causes of action in contract and unjust enrichment, the different aims of the remedies mean that that there may be different results.

29. The difference may appear less clear-cut where the restitutionary claim in unjust enrichment is for the value of services or goods supplied as opposed to the restitution of money paid. But the underlying difference in aim remains and can result in a different quantum of recovery as between a restitutionary quantum meruit and a contractual remedy. Say, for example, the facts of this case were that Trinsalvage had made a very good bargain with the Ministry so that the agreed price for the work and materials was well above the market rate for that work and materials. The benefit of that profitable bargain would be reaped if Trinsalvage had a valid contractual claim including for a contractual quantum meruit (where there is no agreed price) for extra work and materials. However, it would not be reaped if Trinsalvage merely had a restitutionary quantum meruit in unjust enrichment. That is because in the law of unjust enrichment, the starting point for the valuation of the defendant's enrichment is the objective market rate for the services performed: *Benedetti v Sawiris* at paras 15-16. It may be that a lower rate is ultimately awarded because, to respect the defendant's freedom of choice, the law recognises that the defendant may be able to subjectively devalue what it received: *Benedetti v Sawiris* at paras 18-19. However, it is clear that in the law of unjust enrichment, save perhaps in exceptional circumstances, there is no principle of "subjective overvaluation" (see *Benedetti v Sawiris* at paras 27-34) so that the claimant is not entitled to recover a higher amount than the objective market rate for the services and goods supplied.

30. There are two other differences between a contractual claim and a claim in unjust enrichment that are worthy of mention. The first is that change of position may be a defence to a claim in unjust enrichment but not to a contractual claim. The second difference concerns the award of (pre-judgment) interest. The rate of interest applicable to a contractual claim is commonly specified in the contract (it was here specified as being 6%). However, the award of interest applicable to a restitutionary claim in unjust enrichment, including the rate, is usually for the discretion of the court applying section 25 of the Supreme Court of Judicature Act (which is the equivalent of section 35A of the Senior Courts Act 1981 in England and Wales).

31. In his submissions, Mr Roe argued that there was no difference between the contractual claim and the restitutionary quantum meruit. Therefore, as the statute dictated that the contract was void, and as there was no contractual claim, it must follow that it would be inconsistent to award a restitutionary quantum meruit. This, he submitted, would be a triumph of form over substance: one would be allowing in by the back door, what one would not allow in at the front door. However, for the reasons just set out, his submissions on this matter are flawed because they rest on the false premise that there can be no difference in quantum between the contractual claim and the restitutionary quantum meruit.

(3) Would allowing the claim in unjust enrichment stultify the statutory policy?

32. At least as a starting point, and in the absence of an express statutory provision ousting a claim in unjust enrichment, it is hard to see why a statute dealing with contractual principles of agency and ultra vires should be read across to the independent cause of action in unjust enrichment given that: first, as Mr Roe accepted, the essential elements of unjust enrichment can here be made out; and, secondly, the restitutionary quantum meruit may yield a different amount than a contractual claim. In contrast to the contractual claim, the restitution of unjust enrichment is not seeking to enforce a void contract. Rather it is seeking, so far as possible, to restore the parties' status quo ante to reflect the policy of the Act that there is no valid contract. Admittedly it is more difficult to achieve the status quo ante where the enrichment in question is a non-monetary benefit, such as work and materials, that, unlike the payment of money, cannot be restored as such. But through an award of quantum meruit, the law is doing the best it can where precise restitution is impossible. It is misleading to view the restitutionary quantum meruit as if it were a type of contractual enforcement.

33. Turning to the specific policy or policies of the Act, these can be accurately gleaned from an examination of the provisions of the Act assisted by Seepersad J's judgment and the judgment in the *Mootilal Ramhit* case which was helpfully cited on this question (albeit then puzzlingly ignored) by Bereaux JA in the Court of Appeal.

34. The policies can be said to be: ensuring value for money so that public money is not wasted on arbitrary and self-serving contracts; minimising the risk of kickbacks, financial impropriety and unwarranted favouritism; ensuring a transparent and fair process; and discouraging or deterring non-compliance with the Act.

35. In the Board's view, allowing the restitutionary quantum meruit would not stultify those policies. The parties have agreed that the precise quantum will be

resolved by the valuation of the works by a joint expert (see para 7 above). As the Board understands it, the parties accept that, in line with the starting point in the law of unjust enrichment, the joint expert will be fixing an objective market value; and, as has been explained in para 29 above, it would be contrary to principle for Trinsalvage to reap the benefit of a good bargain. Awarding the objective market value of the work done and materials supplied ensures that public money is not wasted and enables the Ministry to escape if the bargain were a bad one. It also ensures that kickbacks and financially improper sums paid to a corrupt official cannot be recouped by the contractor in the form of inflated sums for the work done and the materials supplied.

36. It is also relevant that there is no question of the CTB itself deciding which projects Government should undertake. As Mr Roe accepted, and he was correct to do so, it was for Government to decide which projects should be undertaken and the role of the CTB was then to ensure, for example, that the contracts entered into were value for money.

37. On the facts of this case, there was nothing hidden. A public tender process was gone through; and in contrast to the contract being carried out behind closed doors, the work was performed in plain view for all to see.

38. The Court of Appeal also made clear (see para 11(vi) above) – and this was accepted by Mr Roe - that there was no suggestion that Trinsalvage was aware of the Permanent Secretary’s lack of authority or that there was otherwise some element of collusion, or one might add unwarranted favouritism, so as to circumvent the provisions of the Act.

39. In any event, if there were any evidence of bribery and corruption, that would trigger criminal offences and the possible defence of illegality to the claim in unjust enrichment (see, eg, *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1).

40. It is also unrealistic to imagine that awarding a restitutionary quantum meruit might deter contractors from going through the process laid down in the Central Tenders Board Act. To rely on a restitutionary quantum meruit would be a massive risk not least because until the work had been substantially performed, there could be difficulty in establishing that the defendant had been enriched and, until that point in time, the contractor would have no redress (because there would be no valid contract) if, for example, the defendant chose to stop the work. In any event, as has been explained at paras 29-30 above, the claim in unjust enrichment would not enable the claimant to reap the benefit of a good bargain and might be susceptible to a change of

position defence. The true deterrent against not complying with the Act is already being achieved by the contract being rendered void.

41. For these reasons, it is the Board's view that the defendant falls far short of satisfying the burden on it of establishing that the claim in unjust enrichment would here stultify the statutory policy. The common law of unjust enrichment has not been ousted by the Act.

(4) Three final points on the stultification issue

42. For completeness, there are three final points.

43. The first is that Bereaux JA's analysis of the policy of the Act as being at best merely for administrative convenience (see para 11(v) above) is unconvincing. As Mr Roe submitted, it cannot be correct to treat the extra regulatory hurdle of having to go through the CTB as promoting convenience for the Government. On the contrary, if administrative convenience were the policy, a Permanent Secretary would be likely to find it much more convenient simply to decide, within the Ministry, which contracts should be awarded without any independent control or procedure.

44. The second point is that it is possible to detect behind Mr Roe's submissions a whiff of the old discredited implied contract approach to restitution. The impression conveyed by the submissions was that it would be a nonsense to deny contractual enforcement only to allow restitutionary recovery of much the same sum on a basis that is closely linked to contract. It was that sort of thinking that led to the decision of *Sinclair v Brougham* [1914] AC 398. There a building society acted ultra vires (outside its powers under the society's rules) by carrying on a banking business. On the winding up of the society, the question arose, inter alia, as to whether those who had loaned money under the ultra vires banking facilities (the "depositors") could recover that money in an action for money had and received. In other words, while they could not succeed on a contractual claim because the contract was void as being ultra vires, could they succeed in their restitutionary claims for restitution on the ground of failure of consideration (or, as we would now say, failure of basis)? The House of Lords held that they could not. The primary reasoning was that to allow the action would indirectly contradict the ultra vires bar by producing the same loan repayment as if the contract had been valid. This was linked to what their Lordships saw as the underlying explanation for the action for money had and received, namely an implied contract. If an express contract was invalid so must be an implied contract to the same effect. That decision and reasoning blighted the development of an independent law of unjust enrichment, separate from contract, for many decades. Fortunately, the common law

has moved on. In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 unjust enrichment was formally recognised as the principle or, one might say, the cause of action or category of causes of action, underpinning restitution (leaving aside restitution for wrongs); and in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, as very clearly explained by Aikens LJ in *Haugesund Kommune*, at paras 62-88, *Sinclair v Brougham* was overruled in its denial of the depositors' action for money had and received and its implied contract reasoning was explicitly rejected in favour of unjust enrichment reasoning.

45. The final point is that the old case of *H Young & Co v Mayor and Corpn of Royal Leamington Spa* (1883) 8 App Cas 517 (see para 11(iv) above) can be distinguished because it was dealing with an entirely different statute and policy. In that case a claim was denied for a contractual or "quasi-contractual" quantum meruit for work carried out for, and accepted by, a public authority under a purported contract. This was because the contract was void as there had been non-compliance with section 174(1) of the Public Health Act 1875 (38 & 39 Vict C 55) which required the contract to be sealed with the common seal of the public authority. But that case was not dealing with a contract that was void because of lack of authority or because ultra vires. Rather it was dealing with a requirement of form, namely a corporate seal (and note that such a formal requirement for a seal was abolished generally by the Corporate Bodies' Contracts Act 1960). In any event, the Board tends to agree with Bereaux JA's assessment that, if one applied the modern approach of considering whether the claim in unjust enrichment for a quantum meruit would stultify the policy behind the formal requirement of a seal, the case would be decided differently. However, this is not something that the Board needs to decide in this case not least because we are not here concerned with non-compliance with a requirement of form.

8. Conclusion

46. For all these reasons, the appeal is dismissed.

9. Addendum

47. Subsequent to the hearing, the Board was informed by the respondent that on 25 April 2023, a week before the hearing on 3 May 2023, a proclamation had been made bringing into effect the Public Procurement and Disposal of Public Property Act 2015. That Act sets up new arrangements for public procurement including the establishment of the Office of Procurement Regulation. By section 64(1) it repeals the Central Tenders Board Act but does not do so retrospectively as regards "actions in respect of a procurement ... which had commenced before the proclamation of this

Act”. The Board is therefore assuming, and the parties accept that this is the position, that nothing in the new Act affects the issues in this case.

LORD BRIGGS (dissenting):

48. I have the considerable misfortune to find it necessary to express my dissent, both from the majority of the Board and from the courts below. My disagreement relates solely to the central question whether to grant a remedy in unjust enrichment to Trinsalvage would stultify the purposes of the Central Tenders Board Act (“the Act”). I gratefully adopt the summary of both the Act and the relevant facts by Lord Burrows, and I accept his analysis that, in principle, a restitutionary quantum meruit in the present context would not be a form of contractual or even quasi-contractual remedy and might, if the contract price or price formulae represented an advantageous bargain for the contractor (which the Board does not know), produce a smaller reward for Trinsalvage than the strict enforcement of the void contract. Restitution is not therefore just enforcement of the void contract by the back door.

49. There are at first blush powerful reasons of fairness and justice for granting Trinsalvage the relief sought. Both the Government and (standing behind it) the general Trinidadian public have derived a substantial economic benefit from the carrying out of Trinsalvage’s works, in the form of the improvements thereby effected to the relevant harbour installations, for which Trinsalvage has been deprived of its ordinary contractual remedy due to a lack of authority of which Trinsalvage was at the time unaware. And blame for the failure to comply with the Act naturally lies with Government rather than with Trinsalvage. Nor is this a case of criminal conduct, or illegality. And it matters not that Trinsalvage has already been paid the base contract price, so that its claim is for what in contractual terms may be described as variations (or ‘extras’). It is to give practical effect to that sense of fairness and justice that, subject to the question of stultification, the law might afford Trinsalvage a restitutionary claim.

50. But the criteria of fairness and justice have to give way where the conferral of a restitutionary remedy would stultify the purposes of the legislation that has been infringed. This much is common ground. There have been widely divergent judicial views about the purposes behind the Act, ranging from mere administrative convenience (in the view of the Court of Appeal) to the much broader summary provided by Lord Burrows in paragraph 34 of the Board’s judgment, of which the most important elements might be said to be value for public money, transparency and the avoidance of financial impropriety. It is said by the majority that there was in fact transparency in this case (because there was a public tendering process) and that by quantifying Trinsalvage’s remedy by reference to the benefit which the Government

and the public received from the extra works done, value for public money is not compromised. No actual financial impropriety is alleged. I do not disagree.

51. But in my respectful view that analysis misses a critical point. Standing back, the relevant provisions of the Act (quoted in full by Lord Burrows at paragraph 8) provide for a public body (the CTB) which is independent of the executive arm of Government not merely to seek out competing bids for, but actually to choose the best contractor for, goods or services which Government has decided need to be procured or carried out. In the present case Trinsalvage was chosen not by the CTB but by Government. That central duty of the CTB to choose the best contractor has in the present case been wholly undermined by the Government's choice of Trinsalvage.

52. It is destructive enough of the statutory scheme of the Act that Trinsalvage has already been paid the full contractual price for the works it agreed to do, rather than some other contractor which the CTB might have chosen in its place. The restitutionary remedy now sought would also give to Trinsalvage (rather than its potential competitor) the full objective value of the extras, which it rather than a competitor was enabled to carry out, because it was the chosen contractor already on site.

53. It is obvious that the conduct of a fair and transparent tendering process by a body independent of executive government, where the choice of the winning bid is vested exclusively in that body, serves to strengthen a competitive market for government work, free of any requirement to curry favour with the executive or, still worse, to offer secret inducements. But if in fact the choice of contractor is made by the executive, no amount of transparency in the seeking of tenders, or in the actual carrying out of the work, will dispel the suspicion of favouritism or worse, or remove the temptation to offer secret inducements, either or both of which are likely to have a chilling effect on genuine competition.

54. It is not enough to say that, in the present case, there is no complaint about, or evidence of, favouritism or worse. The critical element of the statutory procurement scheme that is designed to ensure such mischief does not happen is the CTB's exclusive competence to choose the contractor, and that has been flouted in the present case. In my judgment for the court to confer any restitutionary remedy upon the contractor thus chosen is to confer a form of sanction (in the sense of approval rather than penalty), albeit after the event, for a fundamental departure from the requirements of the Act, and thereby to stultify a central element in its purpose.

55. I would add, although it is not instrumental in my analysis of the stultification issue, or the outcome of this appeal, that I am by no means persuaded that Trinsalvage

is entitled to much sympathy for being ignorant of the requirement in the Act that the CTB choose the contractor. This is a basic element in the statutory scheme, contained in primary legislation, rather than buried away in a schedule or in regulations. Any firm seeking government work ought to be familiar with it, just as it ought to know the requirements of health and safety legislation or the impact of public liability.

56. I would therefore have allowed the appeal.