

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1993] SGCA 48

CA 28/1991

Between

Tokyo Investment Pte Ltd
Another

... Appellant

And

Tan Chor Thing

... Respondent

GROUND'S OF DECISION

Civil Procedure — Summary judgment; Contract — Illegality and public policy; Financial and Securities Markets — Financial markets — Futures

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Tokyo Investment Pte Ltd and Another v Tan Chor Thing

[1993] SGCA 48

CA 28/1991

Chao Hick Tin J; Warren Khoo L H J; Yong Pung How CJ

13 July 1993

1 This was an appeal against a decision of Chan Sek Keong J [see [1991] 3 MLJ 87] who confirmed a decision of the assistant registrar granting to the respondent on an O 14 application a declaration that the respondent was entitled to possession of 290,000 shares of seven Malaysian companies listed on the Stock Exchange of Singapore, damages and costs. Having heard the appeal, we dismissed it. We now give our reasons.

2 The respondent was trading in Japanese red beans through a company, called Heritage Commodities Pte Ltd (Heritage). For that purpose a written agreement dated 27 July 1987 was entered into between them. On or about 3 September 1987 the respondent pledged the 290,000 shares (with executed blank transfer forms) which he owned to Heritage as security for his trading. Some one and a half months later, on 20 October 1987 he instructed Heritage to close his trading account, settle the amount due to him and return the shares. On 2 November 1987 Heritage duly closed the account and paid the respondent the sum of \$100,404.40. He signed an acknowledgment on the same day stating that he had `no further claim or whatsoever` against Heritage on the account. The

respondent alleged that the shares were never returned to him although he had requested them.

3 Some two weeks later, on or about 18 November 1987, the police raided the offices of Heritage and seized documents, including those relating to the 290,000 shares. The police were investigating the trading activities of the first appellants, Tokyo Investment Pte Ltd.

4 Following the police investigations the first appellants were charged under s 11(1)(d) of the Futures Trading Act (Cap 116) (hereinafter referred to as 'the FT Act') for having, between 7 and 26 October 1987, carried on the business of trading in the Hang Seng Index Futures ('HSI futures') without a licence. The first appellants pleaded guilty to the charge and were fined. The first appellants admitted that they had acted as futures broker representatives of the second appellants and were paid a service fee of \$20,000 a month.

5 At the conclusion of their investigations, the Singapore Police were prepared to release the shares. However, the first appellants claimed to be entitled to those shares on behalf of the second appellants which were a Hong Kong company and a licenced dealer there. At that point of time the respondent had settled all outstandings due from him to Heritage and had absolutely ceased trading with Heritage. Thus, the respondent instituted this action to establish his entitlement to the possession of those shares.

6 The basis of the second appellants' claim to the shares was that the shares were pledged to them as security for the trading account of the respondent's brother, one Tan Chor Koon ('TCK'). They claimed to be the equitable owners of those shares.

7 One Steve Lee Woon Lou ('SL') was the person in Heritage who handled the respondent's account. He was a director in both Heritage and in the first appellants. SL stated that on 20 October 1987 when the respondent stopped trading with Heritage, (i) he allowed TCK to deliver the shares to SL as a director of the first appellants to hold for the second appellants by way of security for TCK's trading account with the second appellants; (ii) he signed a receipt for the shares (but no receipt could be produced by SL); (iii) he closed his account on 2 November 1987. In further support of their case the second appellants produced the following documents signed by TCK: (a) a customer's agreement dated 15 October 1987;

8 (b) a pledge agreement dated 20 October 1987 in which the second appellants acknowledged receipt of the shares; and (c) a list of the shares. Both the customer's agreement and the pledge agreement were signed by SL on behalf of the second appellants.

9 TCK did not file any affidavit in the proceedings. Neither was he made a party thereto. We further noted that neither did the respondent explain why he left the shares in the possession of Heritage until 18 November 1987 when the police seized them.

10 In the light of the foregoing and quite rightly so, counsel for the respondent had conceded before the learned judge and before us that there was a triable issue on whether the respondent had consented to TCK pledging the shares to the second appellants. That concession notwithstanding, the learned judge accepted the argument, which we also accepted, that this was not an obstacle to judgment being given for the respondent because even if there had been consent on the part of the respondent, the pledge was illegal because the underlying transaction was illegal by virtue of s 11(1)(a) of the FT Act.

11 The learned judge found that the first appellants acted as the agents of the second appellants in carrying on the business of futures trading in Singapore. In coming to this finding he relied on these facts. One, the admission of the second appellants that the first appellants were their service agents in Singapore. Two, copies of the second appellants' printed buying and selling order forms duly signed by SL in Singapore with respect to TCK's transactions with the second appellants; these documents with the executed prices indicated thereon showed that SL was taking buying and selling orders from TCK as agent of the second appellants. Although the appellants denied that the second appellants were carrying on futures broking business in Singapore through the first appellants, this denial per se could not found a defence upon which leave to defend should be given. As Ackner LJ observed in ***Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray***, at p 23:

... the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.

12 It was common ground that neither the first nor the second appellants were licensed futures brokers under the FT Act. Counsel for the appellants submitted that there were the following triable issues: firstly, whether the transactions were transactions to which the FT Act applied; secondly, whether the first appellants were authorized to act for the second appellants in the manner in which they did; thirdly, whether the first appellants could or could not have been authorized in law to act in an illegal manner; fourthly, even if all the foregoing issues were to be ruled against the appellants, whether the trading agreement and/or the pledge of the shares by TCK to the second appellants should be rendered unenforceable.

13 In elaboration of the fourth issue, counsel for the appellants submitted that licensing regulations, and the FT Act was such a licensing law, were primarily regulatory in nature and that a failure by the first appellants and/or the second appellants to obtain a licence under the FT Act should not render the contract or security illegal. He said unlike s 15 of the Moneylenders Act (Cap 188), the FT Act did not state that a contract entered into or a security furnished to an unlicensed futures broker was not enforceable.

14 The FT Act applies to any person whether as principal or agent, who carries on the business of **soliciting or accepting** orders for the purchase or sale of any commodity under futures contracts. The term `commodity` is defined to mean, inter alia, a financial instrument, which expression is in turn defined to include share indices or a group or groups of share indices. In our view, on the evidence before the learned judge there was ample undisputed evidence for him to find that the second appellants, through the first appellants, were carrying on the business or holding themselves out as carrying on the business of futures brokers. There was documentary proof to show that TCK traded with the second appellants through the first appellants - the trading order slips were executed and completed in Singapore by the first appellants on behalf of the second appellants. There was also an admission by the second appellants that the first appellants were the service agents of the second appellants for whose services the second appellants paid the first appellants a substantial sum of \$20,000 per month. The first appellants were authorized by the second appellants to hold on the latter`s behalf the securities furnished by TCK to the second appellants for purposes of trade. The first appellants solicited orders from TCK for the second appellants.

15 The assertion by the second appellants that the first appellants were also the service agents of TCK in the transactions was entirely without any

foundation whatsoever. It was just a bare assertion. The second appellants did not even attempt to explain what was a service agent or the powers or functions of such an agent. In our opinion, there was simply no merit in the first three triable issues advanced by the appellants' counsel.

16 Counsel for the appellants attempted to raise the point that it was a triable issue whether the respondent was the owner of the shares. On the affidavits filed it was never really in issue that the shares belonged to the respondent; the issue was whether the respondent had allowed his brother TCK to use the shares as a pledge for TCK's account.

17 We now turn to the last issue, the question of illegality. This was truly the nub of the appeal: did the fact that neither of the two appellants was registered under the FT Act render the transactions entered into between TCK and the second appellants, and the security furnished by the respondent on behalf of TCK, illegal and unenforceable? Section 11(1) of the FT Act provides that:

Subject to any regulations made under this Act, no person, whether as principal or agent, shall -

(a) carry on business as a futures broker; or

(b) hold himself out as carrying on such a business,
unless such person -

(i) is licensed as a futures broker under this Act; and

(ii) trades in accordance with the business rules and practices of an Exchange or futures market on which the trading takes place.

18 and the expression 'futures broker' is defined in s 2 to mean -

a person whether as principal or agent who carries on the business of soliciting, or accepting orders, for the purchase or

sale of any commodity under a futures contract on any Exchange or futures market and, who in connection therewith, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that may result therefrom whether or not the business is part of, or is carried on in conjunction with, any other business.

19 Under s 11(3) any person who contravenes sub-s (1) would be guilty of an offence and would be liable on conviction to a fine not exceeding \$30,000 or to imprisonment for a term not exceeding three years or to both.

20 A general statement on the applicable principles in determining such a question was set out in Vol I **Chitty on Contracts** (26th Ed) para 1245 as follows:

*... where the statute is silent as to the civil rights of the parties but penalises the making or performance of the contract, the courts consider whether the Act, on its true construction, is intended to avoid contracts of the class to which the particular contract belongs or whether it merely prohibits the doing of some particular act ... However, it is important to note that where a contract or its performance is implicated with breach of a statute this does not entail that the contract is avoided. Where the Act does not expressly deprive the plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it. Although dealing with the effect of criminal illegality and not with the effect of statutory illegality, there is much to commend the approach of Hutchinson J in **Thackwell v Barclays Bank plc** that in determining the effects of illegality the court should seek the answers to two questions: 'first, whether there had been illegality of which the court should take notice and, second, whether in all the circumstances it would be an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act'.*

21 In **Cope v Rowlands**, all brokers with the City of London were required to be admitted by the Court of Mayor and Aldermen 'under such restrictions and limitations for their honest and good behaviour as that court shall think fit

and reasonable` and were on admission required to pay a fee and a yearly fee thereafter. Any broker who so acted without being admitted would commit an offence and was liable to pay a penalty. Parke B said:

It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition ... and the question for us now to determine is, whether the enactment ... is meant merely to secure a revenue to the city and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?

22 In order to decide this point, it is only necessary to look at the statute itself. If its object had been simply the pecuniary advantage of the Mayor and Corporation, it would have been wholly unnecessary to have made any provision for securing the good conduct of the persons admitted. The more that should be allowed to practise, the larger the revenue of the city; but the enactment, that all person who should act as brokers should be admitted by the Court of Mayor and Aldermen under such restrictions and limitations for their honest and good behaviour as the court should think fit and reasonable, shews clearly that the legislature had in view, as one object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken (in the language of Lord Holt, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action (so far as it relates to brokerage) is brought.

23 Adopting very much the same approach, the Singapore High Court in ***Raymond Banham v Consolidated Hotels Ltd*** disallowed a claim for fees in respect of professional engineering services rendered on the ground that the contract was illegal and unenforceable because the plaintiffs were not registered under the Professional Engineers Act.

24 One of the objects of the FT Act is of course to regulate trading on futures contracts. It is certainly not a statute to generate revenue. There is a clear prohibition against any unlicensed person trading as a futures broker. Under s 14, the regulatory authority is empowered to refuse to grant a licence in certain circumstances, all of which are quite clearly for the protection of the investing public. Under s 15 the authority in granting a licence can impose such conditions or restrictions as it thinks fit. Obviously, it is a question of construction: does the FT Act mean to prohibit the contract? In our judgment, considering the objects of the FT Act, we had no doubt that the FT Act is meant to prohibit a transaction entered into by an unlicensed futures broker. Such a transaction should be treated as illegal and unenforceable.

25 Considerable reliance was placed by the appellants on s 22 of the FT Act to contend otherwise. To understand correctly the scope and meaning of s 22, it is necessary that we set out that provision in full:

(1) A person whose licence is revoked under section 20 or revoked or suspended under section 21 shall, for the purpose of this Part, be deemed not to be licensed from the date that the Authority revokes or suspends the licence, as the case may be.

(2) A revocation or suspension of a licence of a person shall not operate so as to -

(a) avoid or affect any agreement, transaction or arrangement relating to the trading in futures contracts entered into by such person, whether the agreement, transaction or arrangement

was entered into before or after the revocation or suspension of the licence; or

(b) affect any right, obligation or liability arising under any such agreement, transaction or arrangement.

26 In our judgment, in the absence of s 22, there cannot be any doubt that a transaction between an unlicensed broker and a client would be illegal and unenforceable. The question is whether the presence of s 22 makes a difference. Subsection (1) **deems** a person whose licence is revoked or suspended not to be licensed from the date of the revocation or suspension. By that subsection, such a person commits an offence if he continues to carry on the business of a futures broker notwithstanding the revocation or suspension. We perceive sub-s (2) as a saving provision, expressly saving those transactions entered into by that person after his licence has been revoked or suspended. It seems to us that if Parliament had intended to also save the transactions entered into by a person who has never been registered as a futures broker, it would have easily said so. Contrary to what the appellants argued, in our view the presence of s 22(2) confirms that Parliament intended that such a transaction should not be saved and should be treated as illegal and unenforceable.

27 In the premises, the contracts which the second appellants had put through for TCK in Singapore were all illegal and the court should not lend its assistance for the recovery of any money due thereunder.

28 We come next to the final question: should the respondent be entitled to recover the shares? Should the courts assist the respondent to recover those shares? The learned judge gave three grounds why the shares were recoverable by the respondent:

In my view, the shares were recoverable on a number of grounds. Firstly, the plaintiff, assuming he had consented to the shares being used by TCK as security for his futures dealings with the

*second defendants, was in the position of a guarantor of the liabilities of TCK to the second defendants to the extent of the value of the shares. The consideration for the security was that the second defendants would carry out the buying and selling orders of TCK. This must imply the carrying out of **lawful** and not **unlawful** orders unless the plaintiff had agreed or accepted otherwise. There was no evidence or any allegation of fact before me that the plaintiff was aware that the transactions when entered into would be illegal or that TCK would be entering into illegal contracts with the second defendants. Accordingly, there was no consideration for the plaintiff's security and the shares must be returned to him.*

29 Secondly, one of the objects of the Futures Trading Act is to protect that class of the public who trade in futures. As there was no allegation that the plaintiff was in *pari delicto*, he was also entitled to recover the shares on this ground: ***Kiriri Cotton Co Ltd v Dewani*** [1960] AC 192.

30 Thirdly, the statutory definition of 'futures broker' includes a person who, in connection with the carrying on of his business of futures trading, accepts securities to margin, guarantee or secure any trades or contracts that may result therefrom. In my view, this definition has the effect of prohibiting an unlicensed broker from taking securities in connection with the soliciting or acceptance of orders for the buying or selling of futures. Accordingly, even if a security interest in the shares could pass to the second defendants, a point which I need not decide, they were not entitled to retain the shares.

31 Counsel for the respondent further cited to us a Privy Council decision in ***Mistry Amar Singh v Kulubya***, a case on appeal from Uganda, to support his submission that the respondent should be entitled to possession and that the learned judge's opinion in our case here was correct. In ***Mistry Amar Singh*** an African, the plaintiff, who was the registered proprietor of certain 'mailo' lands, purported to lease the lands to an Indian, the defendant, without first obtaining the consent of the Governor as required by law. Both had in fact committed a

punishable offence. The African claimed only possession of the land and eviction of the Indian (having abandoned his claim for rent and mesne profits) who pleaded that the agreements by which the lands were leased were illegal and that the African could not file an action on them. The Privy Council held that the African had the right to recover as he required no aid from the illegal transactions to establish his case. It was sufficient for him to show that he was the registered proprietor of the lands and that the Indian, a non-African, was in occupation without the consent of the Governor. The Board further held that as the African was not obliged to found his claim on the illegal agreements he was not in *pari delicto* with the Indian. In fact, he was a member of the protected class, the very persons whose interests the enactments were intended to safeguard. The Board said (at p 151):

It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant, who was a non-African, was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was, however, in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their Lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary, such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation.

32 There is, however, the case of **Taylor v Chester**, where the court refused the recovery of half of a £50 bank note which the plaintiff deposited with the defendant by way of a pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by the defendant to be there consumed in a debauch. The court held that the maxim *in pari delicto*

potior est conditio possidentis` applied. As the plaintiff could not recover without showing the true character of the deposit and as he was a party to the illegal transaction he was precluded from obtaining the assistance of the law to recover it back.

33 However, it seemed to us that **Taylor v Chester** , should be distinguished on the ground that it did not concern any statute and in the case there was no protected class. That this point made all the difference could be seen from **Kiriri Cotton Co Ltd v Dewani** , also a decision of the Privy Council. In **Kiriri Cotton** , the appellant in granting a sublease of a flat for a term of seven years in Kempala Uganda for residence asked for and received from the respondent, the tenant, a premium of Shs 10,000, contrary to the provisions of s 3(2) of the Uganda Rent Restriction Ordinance 1949. Of course, neither party thought that they were doing anything illegal. The Ordinance made no provision for the recovery of illegal premiums. Having got into occupation of the flat the respondent claimed the return of the premium. The Privy Council held that the tenant was entitled to recover. After referring to the principle stated in **Hastelow v Jackson** , that `if two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract but not afterwards,` the Board stated (at p 203):

*But so soon as the illegal transaction has been fully executed and carried out the courts will not entertain a suit for recovery (see **Herman v Jeuchner** (1885) 15 QBD 561) unless it appears that the parties were not in pari delicto (see **Lowry v Bourdieu** (1780) 2 Doug KB 468 at p 472, by Lord Mansfield).*

34 It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not in pari delicto with the defendant.

35 The Board then went on to reason why the tenant was not in pari delicto in this way (at p 205):

*... the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant 'key-money'. Section 3(2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who 'asks for, solicits or receives any sum of money', but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see **Johnson v Youden** [1950] 1 KB 544; [1950] 1 All ER 300 and s 3 of the Rent Restriction (Amendment) Ordinance 1954), but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to 'jump the queue', or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.*

36 Finally, we would refer to a passage in the judgment of the Court of Appeal in **Bowmakers Ltd v Barnet Instruments Ltd** , at p 71 where the court said:

In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.

37 In our view, what were stated in **Kiriri Cotton** , and **Bowmakers Ltd** , were precisely in point. The respondent here was not relying on the illegal agreement to found his claim to possession of the shares or to support the claim.

The scheme of licensing prescribed under the FT Act is intended to protect the class of investing public of which the respondent was a member. The Act places the burden to obtain a licence on the person who seeks to trade as a futures broker and not on the clients. The penalty is imposed on the unlicensed futures broker. Accordingly, the respondent was not in pari delicto with the second appellants. It further seemed to us that in line with the policy behind the Act the respondent must be allowed to recover the shares; otherwise we would be encouraging illegality rather than deterring it. We would add that neither the respondent nor TCK knew that they were dealing with an unlicensed futures broker. There was no assertion in the affidavits of the appellants that either of them was aware of that. Indeed we did not see how such an assertion could have been made when the contention of the appellants was that what they did did not come within the FT Act. The appeal must fail.

38 In view of this, there was no necessity for this court to consider the first and the third grounds canvassed by the learned judge.

39 Before concluding we would like to touch on a point of procedure. This appeal arose out of an O 14 decision. The fact that a point of law or points of law were raised in an O 14 application did not necessarily mean that leave to defend must be given as was urged upon us by the appellants: see ***European Asian Bank AG v Punjab & Sind Bank (No 2)*** , at p 516 and ***Carter (RG) Ltd v Clarke*** , at p 213. To our mind the answers to the legal issues raised in this appeal were clear. There was no arguable defence to the respondent's claim to possession of the shares. A decision on the legal issues would finally decide the rights as between the parties. There was no point in granting leave to defend merely on the ground that there was a triable legal issue or were several triable issues of law. This was so even if the issues of law were of some complexity. The High Court was correct in hearing arguments on the issues of law and

deciding them. To grant leave to defend in circumstances such as the present would not serve any useful purpose; instead it would only cause unnecessary delay, a course which the courts should certainly not countenance.

40 Appeal dismissed

Chao Hick Tin J
Warren Khoo L H J
Yong Pung How CJ

Andre Yeap (Allen & Gledhill) for the appellants
Kenneth Tan (Rajah & Tann) for the respondent
