IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 320

Suit 2512/1996

Between

Ong Commodities Pte Ltd

… *Plaintiff*

And

Ng Kok Kwan

… *Defendant*

GROUNDS OF DECISION

Contract — Illegality and public policy; Statutory Interpretation — Statutes — Amending; Words and Phrases

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Ong Commodities Pte Ltd v Ng Kok Kwan and Others

[1998] SGHC 320

Suit 2512/1996
S Rajendran J
28 September 1998

Judgment:

S RAJENDRAN J

The plaintiffs are a firm of commodity and foreign exchange brokers. The first defendant had been a customer of the plaintiffs since August 1986 and had entered into foreign exchange transactions through them up to April 1994 by which time he had chalked up debts of over $400,000 to the plaintiffs. On 11 March 1996, the first defendant entered into a settlement agreement (`the first settlement agreement`) with the plaintiffs wherein he agreed to repay his debts by instalments with interest at 5.5% per annum and to provide a guarantee by the second defendants. After having paid a total of $125,000 to the plaintiffs, the first defendant defaulted and the plaintiffs sued the first and second defendants.

2.On 2 August 1996 the plaintiffs entered into a second settlement agreement (`the second settlement agreement`) in which the first defendant agreed to pay the remaining amount of $297,941.70 by instalments with interest at 6% per annum. As required by the second settlement agreement the first defendant

secured a further guarantee by the second defendants and guarantees from the third defendant (his wife) and the fourth defendant (limited to $100,000) for the due payment of the instalments. Upon the guarantees being executed the plaintiffs withdrew their writ.

3.The first defendant also defaulted on the second settlement agreement. By these proceedings the plaintiffs sought the balance due thereunder from the first defendant as principal and from the other defendants as guarantors. In their defences, each of the defendants, inter alia, relied on the defence that the trade that the first defendant conducted through the plaintiffs was illegal. Prior to the hearing, it was agreed between the parties that the defendants waive any dispute on quantum and that the sole issue for determination at the hearing would be the question of illegality.

4.On the morning of the hearing, Mr Chia Ho Choon, counsel for the plaintiffs, informed the court that as the first defendant and the third defendant (his wife) had both been adjudicated as bankrupts he would not be pursuing the claim against them but would only be proceeding against the second and fourth defendants. Mr Jacob Chacko, who was acting for all the four defendants, then informed the court that he had had no further instructions on the matter and asked to be discharged from further acting for the defendants. The application had the consent of the defendants and it was granted.

5.Upon Mr Chacko being discharged from further acting, Mr Liew Chong Fatt, who told the court that he was a director of the second defendants, applied for an adjournment to instruct new solicitors. He told the court that the second defendants were expecting some funds in about three months` time and that if the matter could be adjourned for that period the second defendants would be

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able to generate sufficient income to pay for the legal fees. The fourth defendant associated himself with the request of Mr Liew.

6.The sole issue for determination at the hearing was whether the underlying foreign exchange contracts in this case were illegal contracts. In determining the question of illegality the practice of the trade could be a relevant factor. The plaintiffs had filed evidence-in-chief dealing with the practice of the trade. The defendants, however, had not done so nor was there any indication that they would be calling any expert in the trade to challenge the evidence put forward by the plaintiffs. The only real issue before the court was therefore one of law.

7.I was not inclined to grant the adjournment but as this case had been set down for hearing for five days and the only issue was the question of illegality, it seemed to me that two days would suffice for the hearing. I therefore granted the defendants a two-day adjournment and informed them that at the adjourned date the hearing would proceed whether they had counsel acting for them or not. At the adjourned date Mr Charan Singh appeared for the second and fourth defendants. He told the court that he could act for the second and fourth defendants only if the court granted an adjournment of at least one month for him to get up the case. I rejected this application.

8.Order 12 r 1(2) of the Rules of Court provides that a defendant to an action who is a body corporate may not defend the action otherwise than by a solicitor. In view of that provision I informed Mr Liew that he was welcome to remain in court to observe the proceedings as a representative of the second defendants but that he could not participate in the proceedings.

9.It was the defendants` case that the foreign exchange transactions entered into by the first defendant were futures contracts within the definition of those words

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in s 2 of the Futures Trading Act 1986 (`the Act`). The plaintiffs were required, under s 11 of the Act (which came into operation soon after the first defendant commenced trading with the plaintiffs), to be licensed as futures brokers in order to carry on such a trade. It was the defendants` case that the plaintiffs by entering into the transactions with the first defendant, without holding such a licence, were in breach of the Act and the claims against the first defendant were consequently unenforceable.

10.The plaintiffs contended, however, that the transactions in question were not futures contracts but foreign exchange transactions or leveraged foreign exchange transactions placed directly with banks and not on any futures exchange and therefore not within the ambit of the Act. Such transactions, they submitted, came within the ambit of the Act only after the Futures Trading (Amendment) Act 1995 came into force.

11.The Futures Trading (Amendment) Act came into force on 1 April 1995 - well after the first defendant had ceased trading with the plaintiffs. The amendments effected by the Amendment Act are therefore not relevant to these proceedings except insofar as the fact that the legislature found it necessary to specifically amend the Act in order to bring certain transactions within the framework of the Act, assists in the interpretation of the Act.

12.The provision in the Act which governs the licensing of brokers is s 11(1). It provides:

> *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 -

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> (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.

The expression futures broker was defined in the Act to mean:

> *a person ... 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 ...*

In the light of this definition, the following features: (a). the transaction must relate to a commodity;

(b). it must be a futures contract;

(c). it must relate to transactions on any Exchange or futures market;

are pre-requisites before a person can be said to be carrying on the business of a futures broker under the Act.

13.The first question to ask therefore is whether the transactions in this case were transactions relating to the purchase or sale of a commodity. The word commodity is defined in the Act to mean:

> (a) a financial instrument; and
>
> (b) gold and such other items, goods, articles, services, rights and interests, which are the subject of futures contracts, as the Authority may by order prescribe.

Financial instruments is defined to include `currencies, interest rate instruments, share indices, a group or groups of share indices and such other financial

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instruments as the Authority may by order prescribe`. The Authority has not prescribed any other financial instrument. Under category (b) of the definition, by the Futures Trading (Commodity) Order of 3 January 1989, the Authority has prescribed `all classes of oil, which are the subject matter of futures contracts` as a commodity under the Act. The position therefore was that the Act only governed futures contracts relating to gold, oil and financial instruments (as defined). All other kinds of futures contract did not fall within the purview of the Act.

14.The above interpretation accords with commercial practice. Ng Lai Wah, the managing director for the plaintiffs, who also testified as an expert, told the court that brokers in Singapore regularly and freely, without being licensed under the Act, enter into futures contracts in respect of commodities that were not regulated by the Act, such as wheat, oats, cattle, hogs, cotton, cocoa, potatoes, copper, silver, aluminium, nickel, tin, etc, on various exchanges, such as, CBOT - the Chicago Board of Trade; NYCE - the New York Cotton Exchange; LIFFE - the London International Financial Futures and Options Exchange; and LME - the London Metal Exchange. That this would be so was envisaged from the time the Act came into force. In moving the Bill in Parliament, the Minister of Finance stated:

> *At present, the scope of the Bill is limited to the regulation of trading in gold and financial futures contracts. Trading in futures contracts based on commodities not listed on SIMEX, such as coffee, red beans, etc, is not regulated under this Bill. It is not considered as yet appropriate for the MAS to regulate these other activities since they do not involve the financial sector. Broking firms that offer facilities solely in commodities futures are thus not subject to the regulations of this Bill and members of the public who trade with them will have to accept the risks involved in dealing with these firms.*

15.The commodity in this case, currency, was, however, a regulated commodity as it came within the definition of financial instruments. One has therefore to go

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further and ask whether this trading in currencies was by way of futures contracts on an Exchange or futures market.

16.The Act defines the term futures contract to mean a contract the effect of which is that: (a). one party agrees to deliver a specified commodity, or a specified quantity of a specified commodity, to another party at a specified future time and at a specified price payable at that time pursuant to terms and conditions set forth in the business rules or practices of an Exchange or futures market; or

(b). the parties will discharge their obligations under the contract by settling the difference between the value of a specified quantity of a specified commodity at the time of the making of the contract and at a specified future time, such difference being determined in accordance with the business rules or practices of the Futures Exchange or futures market at which the contract is made.

The term business rules in relation to an Exchange or futures market is defined by the Act to mean the rules, regulations and bye-laws, by whatever name called, governing the activities and conduct of - (a). the body corporate and its members;

(b). its clearing house; and

(c). other persons in relation to the futures market.

The term Exchange or Futures Exchange was defined to mean: (a). the Singapore International Monetary Exchange Ltd (SIMEX); or

(b). a body corporate -

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(i). that provides or proposes to provide the physical facilities necessary for trading in futures contracts; and

(ii). that maintains or proposes to main a futures market that is approved by the Authority under s 4.

The term futures market was defined to mean a market, Exchange or other place at which futures contracts are regularly made whether that market, Exchange or place is in or outside Singapore.

17.It would appear from these definitions that to constitute a futures contract the transaction must not only relate to a future date but that the transaction must be governed by the business rules of an Exchange or futures market. The definition of the words Exchange and futures market also makes it clear that what is envisaged is that the contract must be made under the rules of a formally instituted organisation at which futures contracts are regularly made.

18.Ng Lai Wah told the court that the practice of the trade was to consider `futures contracts` as contracts which are highly uniform and standardised, with fixed specified quantities and fixed specified delivery dates, and traded on a physical exchange (such as SIMEX) with regulated settlement procedures through a central clearing house. This definition conforms with the definition of futures contracts in the Act.

19.Ng Lai Wah also testified that all the transactions of the first defendant with the plaintiffs were margin trades in foreign exchange, namely, United States Dollars, Japanese Yen, Deutsche Mark, British Pound and Swiss Francs. She demonstrated by taking a few examples that these trades were not placed with SIMEX or any other futures market but were placed directly with banks such

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as, Hongkong & Shanghai Bank, Standard Chartered Bank and ABN Amro Bank, with whom the plaintiffs maintained trading accounts. They were not in the standardised forms issued by a Futures Exchange or futures market but were negotiated contracts in terms of quantities and delivery dates. To that extent, these off-Exchange contracts were more informal and less regulated. The market for such contracts, she told the court, was loosely organised, had no physical geographical location but comprised a network of banks and brokers. Such contracts, she said, would, in the trade, be treated as `forward` contracts and not as `futures` contracts. Ng Lai Wah`s evidence was not challenged. I accepted her evidence.

20.On the basis of Ng Lai Wah`s evidence, as the transactions entered into by the first defendant were not transactions that were governed by the business rules of an Exchange or futures market, they would not fall within the definition of the term futures contract as used in the Act.

21.The Act was entitled `An Act to regulate trading in futures contracts and for matters connected therewith`. Sometime after the first defendant`s trade with the plaintiffs had come to a stop, the Act was amended by the Futures Trading (Amendment) Act 1995. The main purpose of the amendment Act was to extend the scope of the Act to include leveraged foreign exchange trading. To reflect this extension the title of the Act was amended to read `An Act to regulate trading in futures contracts and leveraged foreign exchange trading and for matters connected therewith`. Counsel for the plaintiffs submitted that this change in title, by itself, showed that the legislature considered leveraged foreign exchange transactions to be something distinct from futures contracts.

22.The extension of the Act to include leveraged foreign exchange transactions necessitated the widening of the definition of futures broker. It was now defined

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to mean a person who: (a). carries on the business of soliciting or accepting orders, for the purchase or sale of any commodity under a futures contract or any Exchange or futures market whether or not that person accepts any money, securities or property ... to margin ...; or

(b). carries on the business of leveraged foreign exchange trading.

It is to be noted that the qualification in respect of a futures contract in (a) that it must be a contract on any Exchange or futures market was not applied to leveraged foreign exchange trading in (b). Further, in the definition of the expression leveraged foreign exchange trading, such contracts made on a Futures Exchange or a futures market is specifically excluded, thereby again reflecting the distinction between futures contracts transacted on an Exchange or a futures market and futures contracts that are transacted outside of an Exchange or futures market.

23.Ng Lai Wah testified that the `forward` contracts entered into by the first defendant with the plaintiffs were leveraged foreign exchange transactions and that, with the coming into force of the amendment Act of 1995, persons carrying on such a business would fall within the definition of futures broker and therefore required a licence under s 11. Her views were fully borne out by the terms of the amendment Act. The amendment Act gave such brokers a grace period of six months from the date that the amendments came into effect to obtain the necessary licence (s 10A(1) of the amendment Act).

24.I accepted the submission of counsel for the plaintiffs that the fact that a licence was required for a person to conduct the business of leveraged foreign exchange trading only after the amendment Act came into force is a clear indication that no licence was required in respect of such trade prior to the

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amendment. As noted earlier, all the plaintiffs` trade with the first defendant were prior to the amendment Act coming into force.

25.For the above reasons, I find that the plaintiffs did not require a futures brokers licence under s 11(1) of the Act at the time the foreign exchange contracts in dispute in this case were entered into. The defendants` plea of illegality therefore fails and I give judgment with costs for the plaintiffs against the second and fourth defendants.

S Rajendran J

Chia Ho Choon and Boey Swee Siang (Bih Li & Lee) for the plaintiffs
Second defendant unrepresented and fourth defendant in person

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