EFG Bank AG, Singapore Branch
v
Teng Wen-Chung

[2017] SGHC 318

High Court — Suit No 1297 of 2015 (Registrar's Appeal No 59 of 2017)
George Wei J
18 April 2017

Contract — Illegality and Public Policy

Conflict of Laws — Choice of Law — Effect of Illegality of Related Contract

15 December 2017

George Wei J:

Introduction

1 The plaintiff is the Singapore branch of EFG Bank AG, a bank incorporated in Switzerland. In these grounds of decision, all branches of EFG Bank AG other than the plaintiff will be referred to as "EFG Bank". The defendant, Teng Wen-Chung, is a Taiwanese national and also a citizen of the Commonwealth of Dominica. The present dispute concerns the defendant's liability under an indemnity agreement to pay on demand all sums owed or payable by a third party to the plaintiff.

2 On 4 December 2015, the plaintiff issued a letter of demand to the defendant for payment of US$199,656,177.77 under the indemnity agreement.

As the demand was not met, the plaintiff commenced High Court Suit No 1297 of 2015. On 23 September 2016, the plaintiff filed an application for summary judgment pursuant to O 14 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). The defendant's response was to apply for leave to amend its defence as part of the attempt to resist summary judgment.

3 On 21 February 2017, the learned Registrar of the Supreme Court ("the Registrar") allowed the defendant's application to amend the defence. However, he also granted summary judgment to the plaintiff. The defendant appealed the grant of summary judgment in Registrar's Appeal No 59 of 2017 ("RA 59"), while the plaintiff appealed the decision to allow the amendment in Registrar's Appeal No 63 of 2017 ("RA 63").

4 After hearing arguments on 18 April 2017, I dismissed both appeals. The defendant being dissatisfied has filed an appeal against my decision in RA 59. I now set out the reasons for my decision.

Facts

Dramatis personae

5 Singfor Life Insurance Ltd ("Singfor") is a Taiwanese life insurance company. The defendant was appointed Vice-Chairman of Singfor on 13 February 2007. The appointment took effect after it was confirmed by the Taiwanese Financial Supervisory Commission on 13 September 2007.[1] Sometime in January 2008, the defendant became the Chairman of Singfor. He held this position until Singfor was placed under government receivership in

[1] Affidavit of Teng Wen-Chung, 7 November 2016, para 14.

August 2014.[2] He was also a director and the majority shareholder of Singfor. According to the plaintiff, from about 2009, the defendant has held 99 percent of the shares in Singfor either under his own name or through various nominees.[3]

6 Surewin Worldwide Limited ("Surewin") is a company incorporated in the British Virgin Islands. Surewin opened an account with the plaintiff on 30 May 2007.[4] According to the plaintiff, a pledge was created that same day in respect of all assets which come into the possession or control of the plaintiff for the account of Surewin as a continuing security for the payment of "all monies and the performance of all current and future obligations to [the plaintiff] of [Surewin]" ("the Surewin Pledge").[5]

7 High Grounds Asset International Ltd ("High Grounds") is another company incorporated in the British Virgin Islands.[6] High Grounds opened an account with the plaintiff on 23 May 2007.[7] The same day, a pledge was created of all assets which come into the possession or control of the plaintiff for the account of High Grounds, also to secure Surewin's liabilities to the plaintiff ("the High Grounds Pledge").[8]

8 Singfor Tactical Asset Allocation Portfolio SA ("the STAAP Fund") is a company incorporated in the Bahamas which also opened an account with the

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2 Plaintiff's skeletal submissions, para 7.

3 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 14.

4 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 23.

5 Statement of claim, para 11(a)(ii)–(iii).

6 Statement of claim, para 11(a)(i).

7 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 23.

8 Statement of claim, para 11(a)(ii).

plaintiff, in July 2007.[9] In August 2007, Singfor executed a "Custodian Agreement" appointing the plaintiff as its custodian, and a "Discretionary Management Mandate" granting EFG Bank the mandate to manage all its assets held in STAAP's account. A pledge was created on 3 September 2007 over the assets held in STAAP's account to secure Surewin's liabilities to the plaintiff ("the STAAP Pledge").[10] The pledge was given in respect of the following:[11]

> [a]ll monies and the performance of all current and future obligations to the Bank of the Borrower and (if different) the Pledgor … and the satisfaction of all liabilities present or future … for which the Borrower and (if different) the Pledgor is now or may at any time after the date of this Pledge be indebted or liable to the Bank …

The borrower was Surewin.[12] The STAAP Pledge was expressly stated to be governed by the laws of Singapore.[13]

9 The SFIP-1 Unit Trust ("SFIP-1") is a unit trust created by a Trust Deed dated 7 March 2008.[14] Singfor is the sole unit holder of this unit trust.[15] SFIP-1 opened a bank account with the plaintiff on 7 March 2008.[16] At the same time, SFIP-1's trustee, Volaw Corporate Trustee Ltd, created a pledge over SFIP-1's assets in favour of the plaintiff in terms similar to the STAAP Pledge ("the SFIP-1 Pledge").[17] Again, this pledge was created to secure Surewin's liabilities to

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9 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 33.

10 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 27 and p 351.

11 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 351.

12 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 356.

13 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 355 (clause 24).

14 Plaintiff's skeletal submissions, para 13(a)(iv).

15 Statement of claim, para 11(a)(i).

16 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 42.

17 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 242.

the plaintiff.[18] The SFIP-1 Pledge was also expressly stated to be governed by the laws of Singapore.[19]

10 It appears that Singfor is the ultimate beneficial owner of Surewin and High Grounds.[20] According to the plaintiff, Singfor is also the ultimate beneficial owner of the STAAP Fund.[21] The defendant disputes that Singfor is the ultimate beneficial owner of Surewin, High Grounds and the STAAP Fund,[22] and avers that Singfor is the ultimate beneficial owner of Surewin and High Grounds only insofar as that is what has been stated in the relevant account opening documents with the plaintiff.[23] The defendant maintains, however, that neither he nor Huang Cheng-Yi ("Huang"), who was the Chairman of Singfor in 2007, was aware that Surewin, High Grounds, or the STAAP Fund had been incorporated as Singfor's beneficially owned companies.[24]

The genesis of the dispute

The Loan Facilities

11 The plaintiff granted two loan facilities ("the Loan Facilities") to Surewin in 2012 under the following facility letters:

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18 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 242.

19 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 241 (clause 24).

20 Statement of claim, para 4; 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 364–365 and 378–383.

21 Statement of claim, paras 4, 11(a)(i), Reply, para 30.6.

22 Amended defence (Annex A to Summons 272 of 2017), para 10.6.

23 Amended defence (Annex A to Summons 272 of 2017), para 28.

24 Amended defence (Annex A to Summons 272 of 2017), paras 10.6 and 12.3.

(a) A facility letter dated 31 January 2012 as amended by facility letters dated 6 November 2012 and 6 June 2013 ("the January 2012 Facility Letter").[25] The January 2012 Facility Letter granted Surewin an overdraft and/or loan facility for up to US$240m ("the First Surewin Facility").[26] The purpose of the First Surewin Facility was stated as for "investments with and/or outside the Bank."[27]

(b) A facility letter dated 6 November 2012 ("the November 2012 Facility Letter"). The November 2012 Facility Letter extended an overdraft/loan for up to US$30m ("the Second Surewin Facility"). The purpose of the Second Surewin Facility was stated as "[t]o finance the single premium payments" for two life insurance policies issued on the life of the defendant (see [21] below).[28]

12 Under cl 25 of the January 2012 Facility Letter and cl 23 of the November 2012 Facility Letter respectively, both of the Loan Facilities are expressly stated to be governed by Singapore law.[29] The terms and conditions of the Loan Facilities are not in dispute.

13 The terms of the First Surewin Facility were governed by the January 2012 Facility Letter. Under cl 20 of the January 2012 Facility Letter, the plaintiff had the right to terminate the facility and declare all outstanding amounts due and payable upon the occurrence of certain "events of default".

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25 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 6.

26 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 35 and 76.

27 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 35.

28 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 79.

29 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 40 and 83.

These included the following events, "or events having materially the same effects" as the following events:[30]

> (a) Any encumbrancer taking possession of, or a trustee, receiver or similar officer being appointed in respect of all or any part of the assets of Surewin (cl 20(f) of the January 2012 Facility Letter);
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> (b) Any payment default or bankruptcy procedures or proceedings having materially the same effects against Surewin's ultimate beneficial owner (cl 20(i) of the January 2012 Facility Letter).

14 The terms of the Second Surewin Facility were governed by the November 2012 Facility Letter. Clause 3 of the November 2012 Facility Letter provided that the plaintiff "[reserved] the right to terminate the Facility at any time at its sole discretion, and to demand with fourteen days' notice payment in full of all amounts actually or contingently outstanding under the Facility".[31] Clause 18 of the November 2012 Facility Letter provided that the Second Surewin Facility was "subject to the [plaintiff's] customary overriding right to require repayment on demand if in the [plaintiff's] opinion it would be contrary to prudent banking practice for the Facility to continue for whatever reason".[32]

15 Both the January 2012 Facility Letter and the November 2012 Facility Letter provided that the Loan Facilities were subject to the plaintiff's general conditions ("General Conditions"), and that the General Conditions would prevail in the event of any conflict between the terms of the Facility Letters and

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30 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 38–39.

31 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 79.

32 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 82.

the General Conditions.[33] The General Conditions contained the following provisions:[34]

> 3.4 A certificate signed by an authorised signatory of the [plaintiff] or the [plaintiff's] computer printout stating the amount due and owing from the Client under or in relation hereto and/or any other matter shall, in the absence of manifest error, be conclusive against and binding on the Client.
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> …
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> 40.2 Notwithstanding the provisions of paragraph 41, the [plaintiff] shall have the right at its absolute discretion to terminate its business relationship with the Client at any time with immediate effect and without stating its reason. The [plaintiff] reserves the right, in particular, to cancel all credit committed or advanced, in which case all amounts owed to [the plaintiff] shall immediately become due and payable without prior notice…
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> …
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> 41. Events of Default
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> An Event of Default shall occur and any security … shall immediately become exercisable without notice to the Client or any third party (and without being obliged to give any reason for the same) if any authorised signatory of the [plaintiff] shall certify in writing that in respect of the Client …. any of the following has occurred and that the [plaintiff] elects to treat the same as an Event of Default:
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> …
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> (i) any event occurs or circumstances exist which, in the [plaintiff's] sole opinion affects or may affect [the Client's] or any third party's ability to perform any of its obligations under these General Conditions … or in respect of any other agreement or contract between the [plaintiff] and the Client or any such third party; or
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> (j) the [plaintiff] in its absolute discretion, otherwise considers it prudent, advisable or necessary to safeguard its interest for whatever reason.

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[33] 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 39 (clause 23) and p 83 (clause 21).

[34] 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 207 and 223.

The collateral for the Loan Facilities

16 The Loan Facilities were secured *inter alia* by an agreement executed by the defendant on 19 January 2012.[35] For reasons that will shortly become clear, the parties diverge sharply on how this agreement ought to be characterised. The plaintiff describes the agreement as an "indemnity",[36] while the defendant's position is that what was provided was a "guarantee".[37] The document is entitled "Guarantee."[38] The question of whether the agreement is in the nature of an indemnity or a guarantee carries legal significance, and will be examined below. For convenience, I will refer to the agreement as the "Indemnity Agreement."

17 Clause 1 of the Indemnity Agreement provided as follows:[39]

> In consideration of [the plaintiff] … making or continuing to make at my/our request advances, loans, credit and other banking facilities … to such an extent and for so long as [the plaintiff] may think fit to [Surewin] … I/WE [the defendant] **HEREBY IRREVOCABLY AND UNCONDITIONALLY AGREE** to pay to [the plaintiff] on demand all sums of money which shall from time to time and at any time be owing or payable to [the plaintiff] by [Surewin] … or which [Surewin] may be or become liable to pay to [the plaintiff] whether in Singapore or elsewhere on any account or otherwise or in any manner howsoever and whether in respect of moneys advanced or paid to or for the use of [Surewin] on before or after the execution of this Guarantee or in respect of any banking facilities of such nature and amount as may have been or may be from time to time granted by [the plaintiff] to [Surewin] pursuant to the terms and conditions of any facility letter … as revised amended or supplemented from time to time …

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35 1st Affidavit of Wu Hsiao-Yun, 23 September 2016, para 60.

36 Plaintiff's skeletal submissions, paras 27–31.

37 Defendant's skeletal submissions for Summons No 4652/2016, para 5.

38 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 26.

39 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 26.

18 It is also worth mentioning cl 9 of the Indemnity Agreement, which provides, in material part:

> 9. This Guarantee shall not be prejudiced diminished or affected in any way nor shall I/we be released or exonerated by any of the matters following:-
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> …
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> (h) any irregularity unenforceability or invalidity of any obligation of the Borrower or any other persons under any security or document to the intent that my obligations under this Guarantee shall remain in full force and effect and this Guarantee shall be construed accordingly as if there were no such irregularity unenforceability or invalidity …

19 Clause 28 of the Indemnity Agreement provided that the Indemnity Agreement was governed by Singapore law.[40]

20 Apart from the Indemnity Agreement, the Loan Facilities were also secured by the Surewin Pledge, the High Grounds Pledge, the STAAP Pledge, and the SFIP-1 Pledge ("the Four Pledges") (see [6]–[9] above). However, the Four Pledges were created many years before the grant of the two Loan Facilities.

21 In addition to the Four Pledges, the Loan Facilities were also secured by two life insurance policies ("the Life Insurance Policies") issued on the life of the defendant. These were a policy issued by American International Assurance Company (Bermuda) Ltd ("the AIA Policy") and a policy issued by the Manufacturers Life Insurance Company ("the Manulife Policy").[41] The AIA policy was assigned to the plaintiff on 27 December 2012 and the Manulife

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40 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 33.

41 Plaintiff's skeletal submissions, para 13(b); 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 79.

policy was assigned to the plaintiff on 26 January 2012. The assignments provided that the Life Insurance Policies were "held as collateral security for any and all liabilities of … [Surewin] … either now existing or that may hereafter arise."[42]

Events of default and the demand under the Indemnity Agreement

22 Following the grant of the two Facilities in 2012, the plaintiff disbursed the loans to Surewin.[43]

23 On 12 August 2014, Singfor was placed under government receivership and the Taiwanese Insurance Guaranty Fund ("TIGF") was appointed as receiver.[44]

24 After Singfor was placed under receivership, the plaintiff elected to notify Surewin that events of default had occurred. The plaintiff terminated both Loan Facilities and demanded repayment of the outstanding amounts.[45] Before me it was not disputed that the plaintiff was entitled to, and validly called, events of default under the terms governing the Loan Facilities, including the General Conditions.

25 As Surewin failed to pay the outstanding amounts due under the Loan Facilities, the plaintiff took steps to enforce some of the security which had been provided. However, no steps were taken to enforce the SFIP-1 Pledge.[46] The

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42 Plaintiff's skeletal submissions, para 13(b).

43 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 13.

44 Plaintiff's skeletal submissions, para 7.

45 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 15.

46 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 16.

plaintiff also gave notice of its intention to surrender the Life Insurance Policies if Surewin failed to make full payment of the outstanding sum. After applying the proceeds from the various securities, the plaintiff had realised a sum of US$32,124,570.23, leaving a remainder of US$199,656,177.77 due and outstanding under the Loan Facilities on 4 December 2015.[47]

26 On 4 December 2015, the plaintiff issued a letter of demand to the defendant under the Indemnity Agreement.[48] Aside from the outstanding sum and interest, the defendant was also given notice that US$12,700,000.00 had been expended in connection with the enforcement of the Facilities and/or as a consequence of the default of payment by Surewin. The plaintiff stated that it was entitled to be indemnified by the defendant for such expenses and/or costs under the terms of the Loan Facilities, the General Conditions and the Indemnity Agreement.[49] It is undisputed that the defendant did not and has not paid any part of the sums demanded.[50] The plaintiff commenced the present proceedings on 24 December 2015.

The parties' cases

The crux of the defence

27 In respect of the First Surewin Facility, the defendant's position is that the claim under the Indemnity Agreement is tainted by illegality.[51]

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47 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 18.

48 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 245.

49 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 245 (para 5).

50 2nd Affidavit of Tan Kay Siong, 23 September 2016, para 18.

51 Defendant's skeletal submissions for Summons No 4652/2016, para 45; Amended defence (Annex A to Summons 272 of 2017), paras 17–19.

28 The defendant asserts that an elaborate scheme was concocted by the plaintiff, its staff and EFG Bank to enable Surewin to obtain loans from the plaintiff by using Singfor's assets as collateral.[52] It will be recalled that aside from the Indemnity Agreement and the assignment of the Life Insurance Policies, the Loan Facilities were also secured by the Four Pledges (see [20] above). The defendant specifically pleads that "the pledges of Singfor's assets to the plaintiff and EFG Bank obtained from the STAAP Fund and [SFIP-1] are illegal".[53] The STAAP Pledge and the SFIP-1 Pledge ("the Pledges") are said to have been created in breach of Taiwanese law which prohibits a life insurance company from pledging its assets as collateral to secure loans to unrelated third parties.[54] The First Surewin Facility is similarly void and/or unenforceable for illegality because it was "but a part of [the] fraudulent scheme" to cause Singfor to provide its assets to secure an unrelated third party's loans.[55]

29 The defendant further argues that since the First Surewin Facility is void and/or unenforceable for illegality, the Indemnity Agreement is also tainted with illegality, and as such the plaintiff cannot rely on the Indemnity Agreement to found its claim against the defendant.[56]

30 The defendant applied to amend its defence for the purpose of providing more details on the alleged fraudulent scheme by the plaintiff, its staff and EFG Bank to cause Singfor to provide its assets as collateral for an unrelated third party's loans.[57] The amendments pertained to the particulars of the relevant

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52 Defendant's skeletal submissions for Summons No 4652/2016, para 45.1.

53 Amended defence (Annex A to Summons 272 of 2017), para 18A.

54 Amended defence (Annex A to Summons 272 of 2017), para 9.

55 Amended defence (Annex A to Summons 272 of 2017), para 10.

56 Defendant's skeletal submissions for Summons No 4652/2016, para 76–77.

57 Amended defence (Annex A to Summons 272 of 2017), para 17.

Taiwanese legal provision as well as the conviction of the defendant and Huang in the Taiwanese District Court ("Taiwanese Court") in respect of charges related to the Pledges and the Loan Facilities. I note that the Registrar allowed the amendment, which decision I have upheld. The plaintiff has not appealed against my decision.

31 In respect of the Second Surewin Facility, the crux of the defendant's position is that this facility and the Indemnity Agreement (insofar as the claim on the Indemnity Agreement is based on the Second Surewin Facility) are also unenforceable because of fraudulent misrepresentation and/or mistake.[58] The defendant asserts that one Jolene Wu represented to him that the plaintiff and EFG Bank were offering the defendant an opportunity to purchase the Life Insurance Policies as a VIP client, and that the financing of the policy premiums would occur through a loan from the bank which would in turn be financed by interest paid by the insurance companies on the Life Insurance Policies. Further, Jolene Wu had represented to the defendant that the loans would be taken out by the defendant *personally*, and not by Surewin.[59] The defendant further asserts that the Second Surewin Facility is not enforceable because he did not understand the nature of the relevant documents, including the November 2012 Facility Letter, when he signed them. He was not proficient in English and had signed the documents in reliance on Jolene Wu's (allegedly fraudulent) representations concerning their contents.[60]

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58 Amended defence (Annex A to Summons 272 of 2017), paras 21–23.

59 Amended defence (Annex A to Summons 272 of 2017), para 21.

60 Amended defence (Annex A to Summons 272 of 2017), para 23.

32 Besides the defences as summarised above, the defendant asserted there were many other triable issues of fact meriting a trial of the claim. Some of these will be touched on later in these grounds of decision.

The plaintiff's case

33 Before the Registrar, the plaintiff took the position that the debt due under the Second Surewin Facility had been "completely settled".[61] Some US$32.124 m had been realised from the collateral, including the Life Insurance Policies. Citing "Clayton's case" (*ie*, *Devaynes v Noble* (1816) 35 ER 781), the plaintiff argued that it was entitled as creditor to appropriate the monies it had realised from the collateral as it deemed fit, and it did so towards the claim on the Second Surewin Facility.[62] The defendant did not challenge the validity of the plaintiff's position in this regard, whether before the Registrar or in the submissions before me. The plaintiff's arguments were therefore focused on countering the defence in respect of the First Surewin Facility.

34 The plaintiff's position in essence was that it had raised a *prima facie* case for summary judgment, and that the defendant had failed to establish a fair or reasonable probability that he had a real or *bona fide* defence.[63] In the first place, the plaintiff argued that even if the defendant was able to make out his case that the Loan Facilities were void or unenforceable for illegality or misrepresentation or mistake, this would not defeat the plaintiff's claim under the Indemnity Agreement. This was because the Indemnity Agreement was in the nature of an *indemnity* and not a mere *guarantee*. While liability under a guarantee was "collateral to and dependent upon the liability of a third person",

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61 Certified Transcript, 21 February 2017, p 3.

62 Plaintiff's outline for oral submissions, paras 11–15.

63 Plaintiff's skeletal submissions, para 21.

liability under an indemnity was "original and independent" (citing *PT Jaya Sumpiles Indonesia v Kristle Trading Ltd* [2009] 3 SLR(R) 689 ("*PT Jaya*") at [50]). While the fact that a principal contract is void would generally render a guarantee similarly unenforceable, an indemnity was in the nature of a primary obligation and was not affected even if the principal contract was found to be defective (citing *S Y Technology v Pacific Recreation Pte Ltd* [2007] 2 SLR(R) 756 ("*S Y Technology*") at [22]).[64]

35 The plaintiff argued that in any event, the First Surewin Facility was not void or unenforceable under Singapore law. There was no basis for the defendant's case that the First Surewin Facility was part of a "fraudulent scheme" by Jolene Wu, the plaintiff and EFG Bank to cause Singfor to provide its assets as collateral for an unrelated third party's loans. Even if it was illegal under Taiwanese law for a life insurance company to pledge its assets as collateral for an unrelated third party's loans, this would only render *the Pledges* illegal.[65] It would not mean that the Loan Facilities or the Indemnity were illegal.

36 The plaintiff highlighted that the Loan Facilities and the Indemnity Agreement were contracts separate from the Pledges, and were executed some four to five years after the STAAP and SFIP-1 Pledges were entered into. In oral submissions, the plaintiff contended that the Indemnity Agreement was not tainted by any foreign illegality, citing the case of *Euro-Diam v Bathurst* [1990] 1 QB 1 ("*Euro-Diam*") in support of its position.

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64 Plaintiff's skeletal submissions, para 28.

65 Plaintiff's skeletal submissions, para 41.

Principles applicable to summary judgment

37 The principles applicable to summary judgment under O 14 r 1 of the Rules are well established and can be dealt with briefly. In order to obtain summary judgment, a plaintiff must first establish a *prima facie* case for judgment. Once this has been done, the burden as such shifts to the defendant who, in order to obtain leave to defend, must establish a fair or reasonable probability that he has a real or *bona fide* defence in order to resist summary judgment (see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) ("*SCP*") at para 14/4/5 and also *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [17]). Under O 14 r 3 of the Rules, the defendant may also obtain leave to defend by establishing "that there is an issue or question in dispute which ought to be tried" or "that there ought for some other reason to be a trial".

38 Even where there is a conflict in the affidavit evidence, a judge is not bound to uncritically accept as raising a dispute of fact every statement in an affidavit however equivocal, lacking in precision or inherently improbable (*SCP* at para 14/4/2, citing the remarks of Lord Diplock in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212). *SCP* rightly goes on to state at para 14/4/2 that the judge will need to exercise discretion so as to determine whether the statements have sufficient *prima facie* plausibility to merit further investigation as to their truth. Similar comments are made by Jeffrey Pinsler SC in *Singapore Court Practice 2017* vol 1 (Jeffrey Pinsler gen ed) (LexisNexis, 2017) at para 14/3/1 where, for example, it is said that the sworn evidence of the defendant will not be accepted if it is inconsistent with contemporaneous documents or is inherently implausible or contrary to other compelling evidence.

39 While it has been said that leave to defend should be given where a difficult question of law is raised, where the point is clear and the court is satisfied that it is unarguable, leave to defend will be refused (*SCP* at para 14/4/8).

Issues

40 As mentioned at [33] above, the defendant has not challenged the plaintiff's position that it was entitled to apply the monies it had realised from the collateral towards the claim on the Second Surewin Facility. I, therefore, proceeded on the basis that only the claim based on the First Surewin Facility (and the defences thereto) remained to be considered.

41 The questions that arose for determination were as follows:

(a) Whether the plaintiff had established a *prima facie* case for summary judgment;

(b) Whether the defendant had established a reasonable probability that it has a real or *bona fide* defence. This, in turn, raised the following sub-issues:

(i) Whether the First Surewin Facility and/or the Indemnity Agreement is unenforceable by virtue of foreign illegality; and

(ii) Whether the Indemnity Agreement is in the nature of a guarantee or an indemnity.

(c) Whether the defendant had succeeded in raising any other triable issue.

Decision

Is there a prima facie *case for summary judgment?*

42 It was clear, in my view, that the plaintiff had established a *prima facie* case for summary judgment.

43 The plaintiff has pleaded the grant of the First Surewin Facility to Surewin, the disbursement of loans under the First Surewin Facility,[66] the defendant's execution of the Indemnity Agreement in favour of the plaintiff,[67] the termination of the First Surewin Facility upon the occurrence of events of default,[68] the unmet demand for repayment from Surewin,[69] and the demand against the defendant under the Indemnity Agreement.[70] In its written submissions, the plaintiff submitted that the above pleaded facts are "undisputed" and that a *prima facie* case had therefore been established.[71]

44 I note that in his defence, the defendant does not admit that the loans were disbursed.[72] The defendant also does not admit the paragraphs in the statement of claim where the termination of the Loan Facilities is pleaded.[73] The defendant does not even admit the plaintiff's pleading that the letter of demand

66 Statement of claim, para 19.

67 Statement of claim, para 13.

68 Statement of claim, para 24.

69 Statement of claim, para 25.

70 Statement of claim, para 27.

71 Plaintiff's skeletal submissions, para 22.

72 Amended defence (Annex A to Summons 272 of 2017), para 38.

73 Amended defence (Annex A to Summons 272 of 2017), paras 38–44.

under the Indemnity Agreement was sent to the defendant.[74] However, in the course of submissions before the Registrar and in these appeals, the defendant has not addressed any of these points. The submissions instead were almost entirely focused on the question of illegality as well as the defences of misrepresentation, mistake and *non est factum*.

45 The plaintiff argues that there can be no doubt or dispute over the basic underlying facts. Its supporting affidavits refer to and exhibit the following documents: the letter by which the plaintiff notified Surewin of the events of default and demanded repayment,[75] the letter by which the plaintiff informed Surewin that it had taken steps to enforce the debt against other collateral including the Life Insurance Policies,[76] the letter of demand to the defendant under the Indemnity Agreement,[77] and a conclusive evidence certificate stating that the outstanding amount due under the Indemnity Agreement was US$199,656,177.77.[78]

46 I also note that cl 3.4 of the General Conditions provides that "a certificate signed by an authorised signatory of [the plaintiff] … stating the amount due and owing from the Client under or in relation hereto … shall in the absence of manifest error, be conclusive and binding on the Client" (see [15] above). A similar provision is set out in cl 18 of the Indemnity Agreement.[79]

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74 Amended defence (Annex A to Summons 272 of 2017), para 46.

75 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 232.

76 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 234.

77 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 245.

78 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 247.

79 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 31.

47 In the circumstances, I was satisfied that the plaintiff had indeed established a *prima facie* case for summary judgment. I now turn to whether the defendant had established a reasonable probability that he has a *bona fide* defence.

Has the defendant demonstrated a reasonable probability that he has a bona fide *defence?*

48 As mentioned above, the burden is on the defendant to show that there is a fair case for a defence or a reasonable probability that he has a *bona fide* defence. I note that the defence of *non est factum* was only pleaded in connection with the Second Surewin Facility.[80] The defendant does *not* specifically plead *non est factum* in relation to the First Surewin Facility and the Indemnity Agreement.[81] Thus the main argument arising for consideration was the defendant's claim that the First Surewin Facility is void and/or unenforceable for illegality. This in turn depended on (a) whether the First Surewin Facility is void and/or unenforceable for illegality; and (b) if the First Surewin Facility was void and/or unenforceable for illegality, whether the Indemnity Agreement would similarly be void and/or unenforceable.

49 Nevertheless, for completeness, I have also considered below whether the general points raised by the defendant concerning his lack of proficiency in English and his claim that he was tricked or misled by Jolene Wu raise any triable issues in relation to the claim on the First Surewin Facility.

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80 Amended defence (Annex A to Summons 272 of 2017), paras 8, 9 and 22.

81 Certified Transcript, 18 April 2017, p 10 (lines 1–7) and p 11 (lines 12–15).

Whether the First Surewin Facility is void for illegality

50 As I have mentioned, the defendant's case is that the First Surewin Facility was part of a fraudulent scheme to defraud Singfor into providing its assets as collateral for loans to an unrelated third party (Surewin).[82] This was a breach of Taiwanese law, which also led to the prosecution and conviction of the defendant and Huang. On this basis, the defendant argues that the First Surewin Facility is void and/or unenforceable for illegality.[83] Since the First Surewin Facility is void and/or unenforceable for illegality, the Indemnity Agreement (which the defendant calls the "Guarantee") is also said to be tainted with illegality.[84]

51 I note that the plaintiff has pleaded that it was "not aware of any reason why the STAAP Pledge and/or the SFIP-1 Pledge would be illegal under Taiwanese law".[85] The plaintiff has also highlighted that it had obtained and relied on two legal opinions from a Taiwanese law firm, Chien Yeh Law Offices, which opined that "a Taiwan-based insurance company [may] invest in foreign bonds or foreign securities based investment trust funds and the bondholders or fund investor [may] grant a security interest, mortgage or pledge the assets of the fund in support of a loan from a bank to any third party … with the only condition being to comply with the laws of the registered country of the investment trust fund".[86]

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82 Defendant's skeletal submissions for Summons No 4652/2016, para 58.

83 Amended defence (Annex A to Summons 272 of 2017), paras 17–18.

84 Defendant's skeletal submissions for Summons No 4652/2016, para 76–77.

85 Reply, para 37.2.1.

86 Plaintiff's skeletal submissions, para 49(a); 2nd Affidavit of Tan Kay Siong, 23 September 2016, pp 458–462.

52 The defendant for his part relies on the findings of the Taiwanese Court in support of his position that it is illegal under Taiwanese law for a life insurance company to pledge its assets to secure loans to an unrelated third party.[87] In coming to my decision, I should clarify that I have not made any finding as to what exactly the position under Taiwanese law is. Foreign law is an issue of fact which may be proven either through the adducing of raw sources of foreign law as evidence or by adducing the opinion of an expert in the foreign law in question (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54]). I note that the defendant filed an affidavit affirmed by a Taiwanese lawyer, Hsieh Fu-Kai.[88] However, neither party made any reference to this affidavit in the hearing before me, and the arguments proceeded on the basis that the Pledges were illegal under Taiwanese law. I have considered whether the defendant has a *bona fide* defence on the assumption that it *is* indeed a breach of Taiwanese law for a life insurance company to pledge its assets to secure loans to an unrelated third party. The question, however, is what effect this would have on the plaintiff's claim in the present proceedings.

(1) Applicable legal principles

53 Before I deal with the legal principles relevant to this question, it may be helpful to clarify three points.

54 First, there is no doubt that the First Surewin Facility and the Indemnity Agreement are both governed by Singapore law. Where a contract contains express provisions as to its governing law, the governing law of the contract is generally determined in accordance with such express terms (*Pacific Recreation*

87 Defendant's skeletal submissions for Summons No 4652/2016, para 45.1.

88 Affidavit of Hsieh Fu-Kai, 9 November 2016.

at [36] citing *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285 at [82]). As stated at [12] and [19] above, Singapore law is expressly stated to be the governing law of both the First Surewin Facility and the Indemnity Agreement.

55 Secondly, I have found that the place of performance for both the First Surewin Facility and the Indemnity Agreement is Singapore. With regard to First Surewin Facility, the defendant accepts that the place of performance is "arguably" Singapore given that the plaintiff is the Singapore branch of EFG Bank and the funds to be disbursed under the First Surewin Facility would be disbursed to Surewin's bank account located in Singapore. I note, however, that the defendant argues that there is a connection between the First Surewin Faciltiy and Taiwan in that the source of Surewin's instructions came from the defendant in Taiwan.[89] In my view, the place of performance of the First Surewin Facility is clearly Singapore. As noted by the court in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR (R) 842 ("*Peh Teck Quee*") at [21]:

> According to the *Encyclopaedia of Banking Law* (1998 Ed), the key obligation in a loan contract is generally the obligation to make payments, and the place where those payments must be made is accordingly the place of performance. …

56 The terms of the Indemnity Agreement were silent as to where repayment was to take place. However, the same arguments which the defendant acknowledged in relation to the First Surewin Facility similarly apply in respect of the Indemnity Agreement – *ie*, that the place of performance is in all likelihood Singapore, given that the Indemnity Agreement was executed in favour of the plaintiff, which is the Singapore branch of EFG Bank, and any

89 Defendant's skeletal submissions for Summons No 4652/2016, para 59.2.1.

payment would presumably take place in Singapore. The plaintiff also cites *Dicey, Morris & Collins on The Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 11-197 for "[t]he general rule … that where no place of payment is specified … the debtor must seek out his creditor".[90] I agree. There was certainly nothing in the contract that required payment to take place in Taiwan.

57 Thirdly, and at the risk of stating the obvious, the First Surewin Facility is a loan facility between a bank (the plaintiff) and a borrower (Surewin). The Indemnity Agreement is an agreement by the defendant to pay the plaintiff sums which Surewin is liable to pay to the plaintiff. Neither of these agreements involves an insurance company pledging its assets as collateral for the debts of an unrelated third party.

58 I raise these three points at the outset because they have implications for the line of authorities which is relevant to determining the effect of the alleged Taiwanese illegality on the First Surewin Facility. In this regard, I note that in the course of submissions the defendant made references to cases such as *Foster v Driscoll* [1929] 1 KB 470 ("*Foster v Driscoll*"), *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 ("*Regazzoni*"), *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (*"Ralli Brothers*") and the decision of the Singapore International Commercial Court ("SICC") in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1 ("*BCBC*").[91] The defendant sought to argue on the basis of these decisions that "the test in *Euro-Diam* as to the enforcement of a contract tainted with foreign illegality does not appear to be

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90 Plaintiff's outline for oral submissions, para 21.

91 Defendant's skeletal submissions for RA 59 of 2017, paras 66–69.

the be all and end all of the matter" and "the Courts can consider a foreign illegality without having to apply the test in *Euro-Diam*".[92]

59 It is worth quoting from the SICC's survey of the law on foreign illegality in *BCBC* at [174]–[176]:

> 174 Although the subject of foreign illegality raises a host of difficult issues and is a fertile ground for academic discourse, the doctrine of foreign illegality in Singapore comprises two separate strands: see [*Peh Teck Quee*]…
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> 175 The first, based on [*Foster v Driscoll*] and [*Regazzoni*] … is a principle of domestic public policy that a Singapore court will not enforce a contract or award damages for its breach, if its object or purpose *would involve doing an act in a foreign and friendly state which would violate the law of that state.* In *Foster v Driscoll*, the agreements were to smuggle whisky from Scotland to the United States of America in contravention of the Prohibition then in force. In [*Regazzoni*] a contract, governed by English law, for the sale of India jute CIF Genoa and thence to South Africa, by an English company (with an Indian director), to a Swiss company, was held unenforceable *because the object of one of the parties, known to the other, was to evade an Indian prohibition of export of Indian goods to South Africa.* …
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> 176 The second, based on [*Ralli Brothers*] …, has been said to be an independent conflict of laws principle, *viz*, a contract is, in general, invalid in so far as the performance of it is unlawful by the law of the country *where the contract is to be performed*, *ie*, the *lex loci solutionis*. … In [*Ralli Brothers*], under a contract governed by English law, Spanish shippers contracted with English charterers to ship goods from Calcutta to Barcelona, agreeing to pay freight at £50 per ton upon arrival in Barcelona. After the voyage had commenced, but before the vessel arrived in Barcelona, Spain passed a law prohibiting the charging of freight above £10 per ton. The charterers refused to pay more than £10 per ton. In English proceedings, the shipowners failed to recover the balance from charterers as the charging of a freight rate above the legal limit was illegal at the place of performance, the *lex loci solutionis*.
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> [emphasis added]

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92 Defendant's skeletal submissions for RA 59 of 2017, para 66.

60 As the excerpt above makes clear, the line of cases cited by the defendant and discussed by the SICC in *BCBC,* including *Foster v Driscoll*, *Regazzoni* and *Ralli Brothers*, are fundamentally different from the present case. *Foster v Driscoll* and *Regazzoni* concerned contracts which *themselves* involved "doing an act in a foreign and friendly state which would violate the law of that state" (*BCBC* at [175]); while *Ralli Brothers* concerned a contract which was "unlawful by the law of the country where the contract is to be performed" (*BCBC* at [176]). Those cases did *not* involve contracts which, in the defendant's *own* words, "are *not directly affected* by illegality but are *instead tainted* by illegality" [emphasis added].[93]

61 In the present case, I am concerned with the enforceability of the First Surewin Facility and the Indemnity Agreement. Even if the creation of the *Pledges* violated Taiwanese law, nothing on the face of either the First Surewin Facility or the Indemnity Agreement reveals an intention to do an illegal act in Taiwan or to circumvent Taiwanese law. Neither of these contracts involves "doing an act in [Taiwan] which would violate the law of [Taiwan]" (as in *Foster v Driscoll* and *Regazzoni*). Similarly, neither the First Surewin Facility nor the Indemnity Agreement is a contract which is "unlawful by the law of the country where the contract is to be performed" (as in *Ralli Brothers*). The contracts in question are governed by Singapore law and the place of performance is Singapore.

62 In other words, the present case concerns contracts which "are not directly affected by foreign illegality". The only question is whether they are *tainted* by foreign illegality. As the defendant himself recognises, in cases of

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93 Defendant's skeletal submissions for Summons No 4652/2016, para 49.

this variety, the "important case" is *Euro-Diam.*[94] I agree that the applicable principles are to be found in that decision.

63 In *Euro-Diam*, the plaintiff was a UK supplier of precious stones who had entered into a contract of indemnity insurance (governed by English law) with the defendant insurer in respect of the export of consignments of precious stones. After the plaintiff exported certain diamonds to West Germany, the diamonds were stolen from the German company's warehouse. The stolen diamonds were part of two consignments negotiated by one "B", an Israeli citizen engaged in business in contravention of West German immigration laws, and addressed to the German company. The plaintiffs claimed to be indemnified for the loss of the stolen diamonds under the contract of insurance. The defendants denied liability, arguing that the plaintiffs had misrepresented the value of the second consignment of diamonds on the invoice sent to the German company to enable the German company to evade West German import tax law. The defendants argued that the plaintiff's claims were thus tainted by illegality.

64 Staughton J gave judgment for the plaintiffs and held that a claim could be tainted with illegality and unenforceable *if the plaintiff needed to plead or prove illegality* to establish his claim, or if the claim was so closely connected with the proceeds of crime as to offend the conscience of the court. Since the plaintiff's claim against the defendant insurers did not fall afoul of those principles, the claim was allowed.

65 In coming to his decision, which was upheld on appeal, Staughton J held at 23–24:

> … when an English claim is said to be tainted by foreign illegality, one must first inquire whether, applying the

[94] Defendant's skeletal submissions for Summons No 4652/2016, para 49.

> appropriate connecting factor, the transaction from which the taint is said to arise would be enforceable here. If not, one has next to decide whether there is sufficient connection between that transaction and the claim to amount to taint within the *Bowmaker* or *Beresford* principle. If the answer to that second question is yes the claim is unenforceable here.

66 Staughton J identified three possible "connecting factors" in a case concerning the topic of contractual illegality – the forum, the proper law, and the place of performance (*Euro-Diam* at 21).

67 The *Bowmaker* principle refers to the decision of the English Court of Appeal in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 71:

> … 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.
>
> [emphasis added]

68 The *Bowmake*r principle as developed in the UK applies where the plaintiff *needs* to plead or prove the illegality in order to make out his claim (see *Euro-Diam* at 18). Staughton J in *Euro-Diam* at 18 cited the following excerpt from *Chitty on Contracts* vol 1 (A G Guest gen ed) (Sweet & Maxwell, 25th Ed, 1983) at p 627:

> It is not sufficient, in order to bring the plaintiff within the maxim, that he should merely be obliged to give evidence of an illegal contract as part of his case … for the rule applies only where the action is *founded upon* the illegal contract, and is brought to enforce it.
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> [emphasis added]

69 The *Beresford* principle refers to the principle set out by Lord Atkin in *Beresford v Royal Insurance Co Ltd* [1938] AC 586 ("*Beresford*") at 598-599:

> I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime, and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that the Courts will not recognise a benefit accruing to a criminal from his crime.

70 The *Beresford* principle has been described as a test based on conscience as it raises the question of the degree of proximity between the plaintiff's claim and the criminal behaviour: the more remote the crime, the less reason to apply the principle. As Staughton J noted in *Euro-Diam* at 19:

> The precise degree of proximity between the plaintiffs' claim and criminal behaviour, which is necessary to bring the *Beresford* principle into force, will vary with the circumstances of a particular case.

71 To summarise the approach in *Euro-Diam*, in deciding whether a contract not in itself illegal, is "tainted" by a foreign illegality, the court considers the following:

(a) Whether the illegal transaction from which the "taint" is said to arise is enforceable in Singapore on the application of the appropriate connecting factor. If it is enforceable in Singapore, then the claim is enforceable.

(b) If the illegal transaction from which the "taint" is said to arise is unenforceable in Singapore, the court next considers:

(i) Whether the plaintiff needs to plead or prove illegal conduct to establish his claim (*ie,* whether the claim falls within the *Bowmaker* principle).

(ii) Whether the claim is so closely connected with the *proceeds* of crime to offend the conscience of the court (*ie*, whether the claim falls within the *Beresford* principle).

72 *Euro-Diam* was referred to and applied by the Court of Appeal in *Station Hotel Co v Malayan Railway Administration* [1993] 2 SLR(R) 818 at [57], although that case involved local illegality instead of foreign illegality.

(2) Application of *Euro-Diam* to the present facts

73 Applying the above framework, the first question to consider is whether the illegal transaction from which the taint is said to arise (*ie* the STAAP and SFIP-1 Pledges) would be enforceable in Singapore on the application of the appropriate connecting factor.

74 Pausing here, I note that the Taiwanese Court in convicting the defendant and Huang found that the STAAP Pledge and SFIP-1 Pledge were illegal and of no effect under Taiwan law.[95] However, with regard to the connecting factors identified in *Euro-Diam*, the forum is Singapore, and the proper law of the Pledges is Singapore law (see [8] and [9] above). As the plaintiff rightly points out, there was no contractual performance required in Taiwan.[96]

75 The foreign illegality relied on is a rule under Article 143 of the Taiwanese Insurance Act that no insurance company may provide its assets as collateral for the debt of another.[97] The plaintiff submits that this provision is

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95 3rd Affidavit of Tan Kay Siong, 21 December 2016, para 8.

96 Plaintiff's outline for oral submissions, para 27.

97 Defendant's skeletal submissions for RA 59 of 2017, p 69, para 2(e).

not part of Singapore law, nor is there an equivalent provision under Singapore law.[98] That submission has not been challenged by the defendant. It would appear that the illegal transactions from which the taint is said to arise – *ie* the STAAP and the SFIP-1 Pledges – *would* be enforceable in Singapore. It follows that the First Surewin Facility, too, is enforceable in Singapore.

76 Even if I am wrong on this point, however, and the STAAP and SFIP-1 Pledges are unenforceable in Singapore, the First Surewin Facility (and by extension, the Indemnity Agreement) would still be enforceable because the *Bowmaker* and the *Beresford* principles do not apply here.

77 In my view, the *Beresford* principle does not apply on the facts because the First Surewin Facility and the Indemnity Agreement do not involve or have a sufficient proximity with the "proceeds of crime". I note that both of these agreements were executed in 2012, many years after the making of the Pledges in 2007 and 2008. Counsel for the defendant had suggested that the scheme by the plaintiff and its officers to cause Singfor to breach Taiwanese law may have been formulated as early as 2007 or 2008, and only came to fruition in 2012 when the Loan Facilities were granted. As he stated in oral submissions:[99]

> Actually one cannot divorce the guarantee from the pledges and the facility, because on my client's case, the plaintiff went into Taiwan, sold a deal to the client, said, you have to pledge Singfor, through a scheme, and Singfor is prohibited from pledging, so you give the pledge, *we give you the facility, some years later we follow with a guarantee*.
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> [emphasis added]

78 Even if that were true, however, I was of the view that this would not bring the First Surewin Facility within the *Beresford* principle. As stated by

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98 Plaintiff's outline for oral submissions, para 28.

99 Certified Transcript, 18 April 2017, p 3 (lines 2–7).

Lord Atkin in *Beresford*, the principle is that "a man is not to be allowed…to claim a benefit from his crime" (*Beresford* at 598). To refuse to hold the First Surewin Facility void would simply be to enforce the debt owed by Surewin to the plaintiff. It is difficult to see in what sense that would be allowing the plaintiff to *benefit* from the alleged crime of causing Singfor's assets to be pledged as collateral for that loan. The same reasoning applies all the more to the Indemnity Agreement. To enforce the Indemnity Agreement would *not* allow the plaintiff to benefit from causing Singfor's assets to be pledged as security for the First Surewin Facility. It would simply be allowing the plaintiff to enforce a security arrangement entered into in *parallel* with the allegedly illegal Pledges.

79 The *Bowmaker* principle does not apply because the plaintiff in this case does not need to plead or prove illegal conduct to establish his claim at all. The plaintiff would simply need to prove that it entered into a contract of indemnity (*ie* the Indemnity Agreement) with the defendant. I note that in oral submissions, the defendant highlighted that the plaintiff had, as a matter of fact, described the "illegal transactions" (*ie* the Pledges) in its statement of claim. The point, however, is that there is no *need* for the plaintiff to even make any mention of the Pledges in order to establish its entitlement to claim indemnity from the defendant. If the plaintiff did so, it was only for the purpose of setting out the background narrative. That did not mean that it was *necessary* for the plaintiff to plead the alleged illegality in order to make out its cause of action.

80 Accordingly, I find that the defendant has failed to raise a reasonable probability that it has a *bona fide* defence that the First Surewin Facility and/or the Indemnity Agreement is void and/or unenforceable for illegality.

81 I should also mention that the defendant had referred to the decision of the Court of Appeal in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*"), which sets out an extensive review of the law concerning when a contract is unenforceable for illegality.[100] *Ting Siew May* concerned the back-dating of an option to purchase property in Singapore. The back-dating was for the purpose of obtaining loans on better terms as a result of certain changes implemented by the Monetary Authority of Singapore. The illegality in *Ting Siew May* pertained to the contract sought to be enforced (the back-dated option), and also concerned acts done in Singapore as opposed to illegality in respect of the law of another country. In the present case, it is clear that the place of performance of the First Surewin Facility and the Indemnity Agreement was Singapore. Whilst the STAAP and SFIP-1 Pledges were found to contravene Taiwan law on insurance companies, I emphasise that (i) the present action is not concerned with enforcement of these two Pledges; (ii) the express choice of law clauses in the Pledges point to Singapore as the governing law; (iii) there is no suggestion that the Pledges were illegal under Singapore law. *Ting Siew May* was therefore of limited assistance.

The nature of the Indemnity Agreement: indemnity or guarantee?

82 I was prepared to grant the plaintiff summary judgment based on my findings at [50]–[81] above that the Indemnity Agreement was not void or unenforceable for foreign illegality. However, I set out my brief views with respect to the plaintiff's alternative submission: *ie*, that even if the First Surewin Facility was void/unenforceable for illegality, there would still be no defence to the claim because the invalidity of the First Surewin Facility would not affect the validity of the Indemnity Agreement.

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100 Defendant's skeletal submissions for Summons No 4652/2016, para 63.

83 The plaintiff has highlighted the distinction between an indemnity and a guarantee. Liability under a guarantee is "collateral to and dependent upon the liability of a third person" whereas "an indemnitor's liability is original and independent" (*PT Jaya* at [50], citing Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia* (LexisNexis Butterworths, 2nd Ed, 2003) at pp 52–53). Since an indemnity is in the nature of a primary obligation, a creditor may still recover the relevant losses even if the primary transaction is defective (*S Y Technology* at [22]).[101]

84 The plaintiff argues that the label or title used in a document is not decisive and the essential nature of the agreement must always be considered (citing *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1 at [16] to [21]).[102] Thus, even though the word "Guarantee" appears in the title of the Indemnity Agreement,[103] the plaintiff maintains that there are several factors which support the conclusion that the Indemnity Agreement was a true indemnity:

(a) There are several clauses in the Indemnity Agreement which expressly use the expression "indemnify";

(b) Clauses 9(g), (h) and (i) expressly preserved the liability of the defendant even if the Facilities were deemed void or unenforceable;

(c) Clause 20 makes provision for the claim being recoverable as though the defendant were the sole and principal debtor; and

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101 Plaintiff's skeletal submissions, para 28.

102 Plaintiff's skeletal submissions, para 29.

103 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 26.

> (d) Clause 25(a) provides that "as a separate and independent stipulation [the defendant] agree[s] that all sums of money which may not be recoverable from me/us on the footing of a guarantee … shall nevertheless be recoverable from me on demand as though I/we were the sole and principal debtor."[104]

85 While the defendant does refer to the Indemnity Agreement as a "Guarantee Agreement", the question as to whether the agreement embodied a true indemnity was not dealt with in his written submissions

86 Looking at its terms and provisions, I was satisfied that the Indemnity Agreement was in the nature of a true indemnity. In my view, the strongest factors weighing in favour of the plaintiff's construction of the Indemnity Agreement as a true indemnity were cll 9 and 25(a). In particular, I note that cl 25(a) was almost identical to the wording of a clause considered in *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [45], which the court in *PT Jaya* described as appearing on its face "to be a true indemnity" (*PT Jaya* at [56]).

87 The question, however, was whether the Indemnity Agreement would remain enforceable even if the First Surewin Facility was found to be void or unenforceable for illegality. The plaintiff relied on cl 9(h) of the Indemnity Agreement, which stated "the guarantee shall not be prejudiced… by … any irregularity, unenforceability or invalidity of any obligation of the Borrower or any other persons under any security or document …" The plaintiff further submitted that a similar clause had been found to be valid in *Gulf Bank KSC v*

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104 2nd Affidavit of Tan Kay Siong, 23 September 2016, p 32.

Mitsubishi Heavy Industries Ltd (No 2) [1994] 2 Lloyd's Rep 145 ("*Gulf Bank KSC*").

88 In oral submissions, the defendant questioned whether it is settled law that an indemnity can never be affected by the illegality of the underlying transaction.[105] However, no authorities were raised to counter the plaintiff's position.

89 Apart from *Gulf Bank KSC*, which weighs in favour of upholding cl 9(h) of the Indemnity Agreement, the position that the Indemnity Agreement would remain enforceable even if the underlying transaction (*ie* the First Surewin Facility) was void or unenforceable for illegality also appears to be consistent with authorities such as *PT Jaya* (at [50]) and *S Y Technology (*at [22]), which have emphasised the original and independent nature of the indemnitor's liability. However, it is not necessary for this court to decide this point since I have found above that the First Surewin Facility is *not* rendered void or unenforceable by reason of illegality. The Indemnity Agreement would remain valid and enforceable whether or not the illegality of an underlying transaction would also render an indemnity in respect of that transaction void or unenforceable. I, therefore, say no more on this.

Has the defendant succeeded in raising any triable issues?

90 I note that the defendant had in his affidavit submitted that there were numerous triable issues, including the following:[106]

105 Certified Transcript, 18 April 2017, p 7 (line 30) to p 8 (lines 1–3).

106 Affidavit of Teng Wen-Chung, 7 November 2016, paras 38–96.

(a) The scope of the plaintiff and EFG Bank's involvement in the scheme to cause Singfor to pledge its assets as collateral for Surewin's loans;

(b) Whether the defendant had the authority to act on behalf of Singfor and/or sign documents on behalf of Singfor before 13 September 2007;

(c) Whether the defendant did in fact sign the documents that Singfor had issued and which bore his signature;

(d) Whether Surewin and High Grounds were affiliates of Singfor and whether the defendant and/or Singfor were aware of their existence;

(e) Whether Singfor and the defendant were aware of the STAAP Pledges and the SFIP-1 Pledge; and

(f) Whether Huang and the defendant had given the instructions that the plaintiff, EFG Bank and Jolene Wu asserted that they had.

91 For convenience, these can be arranged into two broad categories: (i) illegality and its effect on the claim under the Indemnity Agreement; and (ii) the claim that the defendant had been misled or tricked by the plaintiff, EFG Bank and their officers. I have dealt with the arguments concerning illegality at [50]–[81] above. I turn now to deal briefly with the issues surrounding the claim that the defendant had been misled or tricked by the plaintiff, EFG Bank and their officers and the related defence of *non est factum*. While the defendant asserts that he is a victim of fraud or misrepresentation, an assertion of fraud is not necessarily sufficient to avoid summary judgment if the court believes that there is no prospect of success at trial.

92 The issues surrounding this claim flowed essentially from the general assertion that the defendant and Huang were the victims of misrepresentation or fraud on the part of the plaintiff's officers. Put at its worst, the allegation was that the plaintiff and its officers hatched a plan to deceive the defendant over the nature and scope of the various transactions (the Pledges, the Loan Facilities and the Indemnity Agreement) so as to cause Singfor to provide its assets as collateral for the loans to Surewin. The transactions were allegedly structured in a way such that Singfor (and the defendant) did not know its assets were being used as collateral for Surewin's liabilities.

93 In seeking to establish this narrative, the defendant has relied heavily on the findings of the Taiwanese Court, as well as the testimony of various witnesses who gave evidence in the proceedings before that court.[107] The plaintiff for its part argued that the Singapore courts are not bound by the findings of the Taiwanese Court, and that any evidence adduced in the proceedings before that court are inadmissible as hearsay.[108]

94 The parties did not make full arguments on the admissibility of the findings of the Taiwanese Court or the evidence that was considered by that court in making its decision. However, even if I disregarded the specific findings of the Taiwanese Court and the evidence adduced in the proceedings before it, the following was clear and beyond dispute: It was *the defendant himself* (as well as Huang) who was charged with, and convicted of, breach of trust in the Taiwanese Court. The plaintiff and its officers were not charged with any offence before the Taiwanese Court. In this regard, it was ironic that counsel

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107 Affidavit of Teng Wen-Chung, 7 November 2016, para 25; Defendant's skeletal submissions for Summons No 4652/2016, para 11.

108 Plaintiff's skeletal submissions, para 25.

for the defendant sought, on one hand, to rely on the findings of the Taiwanese Court, and on the other, to argue that the defendant was appealing his conviction and "[his] client's involvement in the scheme [had] not been tested".[109] On the contrary, of all the parties said to be involved in the alleged scheme to defraud the defendant and Singfor, the defendant was the *only* person whose involvement in the scheme had been tested in a court. Seen in that light, the defendant's position that he had unwittingly been tricked into pledging Singfor's assets to secure loans to an unrelated third party was without basis.

95 I also note that the defendant is by all accounts a very experienced businessman who was in 2007 taking on a very senior position in Singfor. He was appointed Vice Chairman of Singfor on 13 February 2007, which appointment was approved by the FSC on 13 September 2007. Sometime at the start of 2008, the defendant was appointed as Chairman of Singfor.[110] It bears repeating that the undisputed sequence of events establishes that shortly after the defendant was appointed Vice Chairman in 2007, the four accounts of Surewin, High Grounds, the STAAP Fund, and the SFIP-1 Unit Trust were opened with the plaintiff, and the accompanying Four Pledges (including the Pledges alleged to be illegal) were created. Some four years later on 19 January 2012, the defendant entered the Indemnity Agreement. On 31 January 2012, the First Surewin Facility (as referred to above) was granted. On 6 November 2012, the Second Surewin Facility was granted. This was followed by the defendant's assignment of the Life Insurance Policies in late December 2012. Singfor was placed under receivership in Taiwan on 12 August 2014. I find it is inconceivable that the defendant would have signed so many documents

109 Certified Transcript, 18 April 2017, p 7 (line 4).

110 Affidavit of Teng Wen-Chung, 7 November 2016, para 14.

including the Indemnity Agreement without ensuring that he understood the nature of the documents and transactions.

96 In any case, while the defendant has made a general assertion that his English is poor, the defence of *non est factum* is only pleaded in respect of the Second Surewin Facility. The plaintiff took the position that the sums due under the Second Surewin Facility have been satisfied already by the measures taken to enforce the collateral (see [33] above). As I have mentioned, the plaintiff's claim is now limited to the First Surewin Facility. In my view, it was clear that there was no triable issue in respect of the First Surewin Facility and the Indemnity Agreement.

Conclusion

97 For the reasons set out above, I dismissed the defendant's appeal in RA 59 and affirmed the decision of the Registrar.

98 For completeness, I also dismissed the plaintiff's appeal in RA 63 (on amendment). There was no appeal against my decision in RA 63.

99 Costs were awarded to the plaintiff fixed at $5,000 plus disbursements.

100 The court records its gratitude to counsel for their arguments and submissions.

George Wei
Judge

Andre Francis Maniam SC, Lionel Leo Zhen Wei and Russell Pereira Si-Hao (WongPartnership LLP) for the plaintiff/respondent;
Kenetth Jerald Pereira and Lai Yan Ting (Aldgate Chambers LLC) for the defendant/appellant.
