Fan Ren Ray and others *v* Toh Fong Peng and others
[2020] SGCA 117

Case Number	: Civil Appeal No 50 of 2020
Decision Date	: 03 December 2020
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Woo Bih Li J; Quentin Loh J
Counsel Name(s)	: Tan Chuan Thye SC, Shaun Ou (Rajah & Tann Singapore LLP) (instructed) and Robert Raj Joseph (Gravitas Law LLC) for the appellants; Muthu Kumaran s/o Muthu Santha (Kumaran Law) for the respondents.
Parties	: Fan Ren Ray — Fan Ruicheng — Chua Teng Da — Chia Chee Tian Joe — Toh Fong Peng — Andy Bong Kit Siong — Kristie Pui Keh Leh — Wong Diong Chai — Chin Kah Thing — Ho Kum Fatt — Liu Chang Hai

Contract – Breach

Contract – Illegality and public policy

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2020] SGHC 51.]

3 December 2020

Andrew Phang Boon Leong JA (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in *Toh Fong Peng and others v Excelsior Capital Finance Ltd and others* [2020] SGHC 51 ("the Judgment").

Facts

2 The seven named respondents and 546 other individuals (collectively, "the Participants") were participants in a network marketing scheme ("the Scheme") owned and operated by a network marketing business in Malaysia ("the Malaysian Business"). Under the Scheme, the Participants could earn fixed returns and commissions by purchasing and selling financial products on online platforms known as "Web Shops". These returns and commissions were reflected as credits that were stored in "E-Wallets" maintained on the Web Shops.

3 Each of the Participants had entered into the Scheme through an oral agreement ("Contract") with a representative of the Malaysian Business. As the Malaysian Business did not have a separate legal personality, the Contracts were effectively concluded between the Scheme participants on one hand, and the owners of the Malaysian Business on the other.

4 The respondents, representing the Participants, alleged that the appellants were the owners and operators of the Malaysian Business, and that the appellants had breached three terms of the Contracts, namely:

(a) a term which obliged the Malaysian Business to allow the Participants access to the Web

Shops ("the Access Obligation");

(b) a term which obliged the Malaysian Business to effect the Participants' redemption of their Web Shop credits for cash ("the Redemption Obligation"); and

(c) a term which obliged the Malaysian Business to insure 60% of the principal sum invested under certain financial products known as "silver packages" ("the Insurance Obligation").

5 In the proceedings below, the appellants' primary defence was that the Malaysian Business was in fact owned by the first respondent ("Ms Toh"). It was not suggested by any party that Ms Toh might be a co-owner of the Malaysian Business together with any of the appellants. The parties' positions as to ownership were thus binary: Liability for breach of the Contracts, if established, would fall only on the appellants or on Ms Toh, to the exclusion of any other entity or individual.

The decision below

6 After a close examination of the evidence before him, the Judge found that the appellants were the owners and operators of the Malaysian Business. Accordingly, in respect of the respondents' claim for breach of the Access Obligation by the appellants, the Judge entered interlocutory judgment with damages to be assessed. The Judge also allowed the fourth respondent's claim for breach of the Redemption Obligation. Finally, the Judge entered interlocutory judgment in favour of the third respondent in respect of his claim for breach of the Insurance Obligation, with damages to be assessed. The respondents' remaining claims were dismissed.

Issues

7 On appeal, the appellants' case essentially rests on two planks:

(a) first, that the Judge evinced a fundamental misappreciation of the facts in finding that it was the appellants, and not Ms Toh, who owned the Malaysian Business,

(b) second, that the respondents' claim against the appellants cannot be allowed because the Contracts are unenforceable for illegality.

8 We do not think the appellants' submissions have any merit for these brief reasons.

Whether the appellants were the owners of the Malaysian business

9 In our view, the Judge's findings on the issue of ownership are neither plainly wrong nor against the weight of the evidence. In addition to undertaking a comprehensive analysis of the witnesses' testimonies, the Judge had also carefully scrutinised the documentary evidence before him, which included e-mail correspondence, receipts, as well as video and audio transcripts. Having considered the appellants' submissions and the evidence, we see no reason to overturn the Judge's detailed findings of fact on this issue. We accordingly dismiss this ground of the appeal.

Whether the Contracts are unenforceable for illegality

10 We turn now to the issue of illegality. In this regard, we note at the outset that the appellants had not only failed to plead or raise the issue of illegality in the court below but had also confirmed that they were *not* running any alternative case based on the issue of illegality (see the Judgment at [13] and [28]). In the circumstances, it seems to us that the attempt to now raise this issue before this court is something bordering on – if not constituting – an abuse of the process of the court.

11 Even if we were to entertain the issue of illegality in the present appeal, there would, in our view, be insuperable problems facing the appellants.

12 The first relates to *pleadings* – or, more accurately, the total absence thereof. That the appellants were legally obliged to "plead specifically any matter, for example … any fact showing illegality" is clearly set out in O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Indeed, the underlying consideration of the law of pleadings is to prevent surprises arising at trial (see, for example, the decision of this court in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGCA 95 at [125]). The general rule is that parties are bound by their pleadings and that the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. A departure from this rule is permitted only in very limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so (see the decision of this court in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [38] and [40]).

13 However, it is also clear that, in certain very specific and limited circumstances, the court would be bound to consider the issue of illegality. In this regard, we endorse the following observations by Devlin J (as he then was) in the leading English decision of *Edler v Auerbach* [1950] 1 KB 359 at 371 (and cited with approval by the Singapore High Court in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 at [31]):

> [F]irst, that, where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that, where … the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

14 Turning to the present case, there is no evidence that the Contracts were *ex facie* illegal. Indeed, no proof whatsoever has been proffered to support the allegation that the Contracts were illegal under Singapore law inasmuch as the relevant transactions took place outside Singapore – a point that was noted by the Judge himself (see the Judgment at [13]); nor was there any evidence proffered that the Contracts were even governed by Singapore law. All that was proffered – and at the very late stage of skeletal submissions on appeal at that – was a bald assertion that "the governing law [of the Contracts] *may well be* Singapore law" [emphasis added].

15 In so far as the allegation that the Contracts were illegal under Malaysian law is concerned, it is clear that foreign law (here, Malaysian law) must be pleaded and proved (see, for example, the decision of this court in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [56]–[57]). The appellants did not tender any evidence of Malaysian law in the court below, nor have they sought leave to adduce further evidence of Malaysian law before this court. That there was no relevant evidence whatsoever before the Judge is unsurprising because no facts in support of this allegation were ever pleaded and, hence, the facts that were necessary for the Judge to make a finding were, *ex hypothesi*, never before him (see also the Singapore High Court decisions of *Sim Tony v Lim Ah Ghee (trading as Phil Real Estate & Building Services)* [1994] 2 SLR(R) 910 at [60] (affirmed, *Sim Tony v Lim Ah Ghee (trading as Phil Real Estate & Building*

Services) [1995] 1 SLR(R) 886 (with no apparent consideration of this particular point)) and *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 at [98]).

16 The appellants' arguments on the issue of illegality therefore fail to pass legal muster.

Conclusion

17 For the reasons set out above, the appeal is dismissed. Having regard to the parties' respective costs schedules, we award the respondents costs of $40,000 (all-in). There will be the usual consequential orders.