Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and Another [2007] SGHC 196

Case Number : Suit 250/2005

Decision Date : 16 November 2007

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Ronnie Tan and Twang Kern Zern (Central Chambers Law Corporation) for the plaintiff; Winston Quek (B T Tan & Co) for the defendants

Parties : Koon Seng Construction Pte Ltd — Chenab Contractor Pte Ltd; Raj Dev s/o Ram Singh

Contract – Illegality and public policy – Agreement between two companies for allotment of shares – Whether agreement a sham – Whether ex turpi causa non oritur actio maxim applying – Whether claim for forfeited shares to be reverted connected with unlawful conduct

16 November 2007 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The dispute in this action arose in relation to the forfeiture of 700,000 ordinary shares of $1 each in the capital of the first defendant, Chenab Contractor Pte Ltd ("Chenab"). The forfeiture process was, according to the plaintiff, Koon Seng Construction Pte Ltd ("Koon Seng"), a plan pursued to thwart its application to wind up Chenab on just and equitable grounds (see CWU Petition No 64 of 2005). The petition has been adjourned pending the outcome of this action. On 12 April 2005, Chenab passed a resolution ("the April resolution") forfeiting Koon Seng's 700,000 ordinary shares in Chenab ("the Shares") for non-payment of the call made on 26 March 2005. Koon Seng is now seeking an order declaring as invalid the forfeiture of the Shares. Besides defending the validity of the forfeiture, Chenab has filed a counterclaim against Koon Seng to recover as a debt the subscription sum of $700,000.

Background

The relationship between the parties

2 To understand this dispute, it is necessary to look at the history of the relationship between Goh Koon Suan ("GKS"), the managing director of Koon Seng, and the second defendant, Raj Dev s/o Ram Singh ("Raj"). Briefly, the relationship started off as one between an employer and employee in that Raj worked for Koon Seng since 1981. They became friends. Later on, they had a business relationship. Apparently, both GKS and Raj had collaborated in some business ventures. One such venture concerned a centre in India to train and recruit workers for the Singapore labour market. The friendly personal relationship between GKS and Raj had spanned a period of at least 23 years. Raj appeared to have prospered from this friendship. However, those close ties have now been broken. They have been replaced by the bitter dispute between the parties which has resulted in several proceedings and this is one of them.

History of the events leading up to the present proceedings

3 Chenab is in the labour supply business for port operations. Koon Seng's business is related to the activities of the building construction industry. In 1999, Chenab was interested in securing a lucrative contract for the provision of workers for lashing/unlashing of containers including drivers for prime movers including forklift drivers at PSA Distripark and Container Logistics Department ("the PSA Contract"). Raj approached GKS with a business proposition. GKS was also interested in this lucrative labour supply contract valued at $12m. As a prerequisite of the PSA tender, Chenab needed to raise the paid up capital by $1m to $1.5m. GKS and Raj discussed the PSA tender and they apparently came to an agreement. There was no written agreement and it was not surprising, at least initially, that the parties' respective versions of the agreement were different. As can be seen, an important feature of this case is the precise terms of the agreement to allot the Shares ("the agreement to allot"). It is noteworthy that it was from their long personal relationship that GKS and Raj came together to collaborate as business partners to secure and accomplish the PSA Contract.

4 It is common ground that Koon Seng was allotted the Shares on 15 November 1999. The Shares were registered in Koon Seng's name. They were forfeited on 12 April 2005 for non-payment of the call made on 26 March 2005. Chenab's issued share capital during the relevant period was reflected as $1.5m in documentation lodged by Chenab with the Registry of Companies, now known as the Accounting and Corporate Regulatory Authority ("ACRA"). It is also undisputed that on 16 September 2000, Chenab faxed to Koon Seng a printout of a Registry of Company Computer Information (Business Profile) search ("the ROC search") showing Chenab's paid up capital as $1.5m and Koon Seng as one of its registered shareholders with 700,000 ordinary shares.

5 I pause here to refer to Mr Ronnie Tan's submissions of 27 October 2007 which he as counsel made on behalf of Koon Seng. Counsel said that a copy of the Return of Allotment of shares was faxed to Koon Seng on 16 September 2000. That statement is not borne out by the evidence. According to Raj, the purpose of faxing the ROC search was to inform Koon Seng that the Shares were registered in its name.[note: 1] GKS in his affidavit of evidence-in-chief identified the two documents that were faxed to him; he did not say when they were transmitted. The documents in question were identified as the ROC search and a copy of the Chenab's Annual Return for the financial year ended 31 December 1999 which was lodged at the Registry of Companies on 17 April 2002 ("the Annual Return"). At page 32 of GKS's affidavit of evidence-in-chief is the second page of Form 24 (Return of Allotment of Shares). Page 1 of Form 24, which usually contains information on the amount paid or due and payable on each share, was not exhibited. In any case, the date and time of the fax transmission appearing at page 32 of the affidavit of evidence-in-chief is 28 March 2005 and not 16 September 2000. The transmission date as shown on the ROC search is 16 September 2000. I hasten to add that at the trial, no reference at all was made to the Return of Allotment which had to be lodged with the Registry of Companies within 14 days of allotment (see s 63(1) of Companies Act (Cap 50, Rev Ed 2006). I should explain that since there are no material changes to the sections relevant to this case, I have for convenience referred to the latest revised edition of the Companies Act.

6 Returning to my narration of the shareholding in Chenab, Raj was the majority shareholder with 799,999 ordinary shares. One share was held in the name of Jagip Kaur d/o Dhian Singh ("Jagip Kaur"). Similarly, the Annual Return reflected the paid up capital of Chenab as $1.5m. It also stated that the total amount of unpaid calls was zero. Those statements were consistent with an earlier statement in the same document where $1.5m was stated to be the total amount of calls received including payments on application and allotment. Moreover, the entries in respect of Chenab's issued share capital in its audited accounts for the financial years 1999, 2000 and 2001 described the share capital of $1.5m as allotted and fully paid for cash at par. The audited balance sheets as at 31 December 1999, 2000 and 2001 respectively described the Shares as allotted and fully paid up. The paid up share capital was stated to be $1.5m.

7 Chenab was successful in the tender and the PSA Contract was duly awarded to Chenab. Disputes have arisen between the parties in connection with the moneys from the PSA Contract. There were allegations of unauthorised payments by Koon Seng to itself during the period 2000 to 2004. Those unauthorised payments, amounting to over $3.2m, were withdrawn from the account with the United Overseas Bank. GKS was the sole signatory of that bank account specifically designated for the PSA Contract ("the UOB account"). There were also counter allegations that moneys from the PSA Contract were not deposited into the UOB account as they were diverted elsewhere. The dissent led to the closure of the UOB account by the defendants who then transferred the bank balance to a new account established by Chenab with Citibank. In the result, Suit No 111 of 2005 was filed on 16 February 2005 by Koon Seng against the defendants.

8 On 26 March 2005, the directors of Chenab sent Koon Seng a notice demanding payment of $700,000 for the Shares. Koon Seng was advised that if the sum was not paid within two weeks, then the procedures and remedies provided in the Articles of Association of Chenab would take place. On 28 March 2005, Koon Seng, as shareholder, petitioned to wind up Chenab on just and equitable grounds (see CWU Petition No 64 of 2005). On 5 April 2005, Suit No 111 of 2005 was ordered to be stayed pending the determination of the winding up petition. On 12 April 2005, the directors of Chenab passed a resolution to forfeit the Shares for non-payment. As stated, the petition to wind up Chenab has also been adjourned pending the outcome of this action.

The proceedings

9 The progress of the proceedings before me turned out to be rather long-drawn, primarily due to the piecemeal evidence that came before the court which eventually showed a different picture from the one each party had chosen to present to the court. For reasons which I shall explain later, the outcome of this action was independent of either version of the facts presented by the parties. This is not controversial since the court is not bound to confine its decision to the version advanced by the parties if, as was the case here, the evidence or the reading of it showed otherwise. For expediency, the proceedings may be divided into three distinct periods of time: (a) the first period covers the trial and closing submissions ("Phase 1"); (b) the second period relates to the audited accounts of Chenab ("Phase 2"); and (c) the third period relates to the appropriate order that I should make in the event either version of the facts is rejected ("Phase 3").

Phase 1: The trial

10 The trial of the action was listed for hearing on three intermittent occasions spanning the period from May 2006 to April 2007. The case as presented is straightforward. Notably it was, to begin with, premised on the common ground that Koon Seng was a shareholder of Chenab in the years prior to the forfeiture of the Shares. But as it turned out in the end, the aforementioned common premise was simply a convenient tale to adopt for the reasons which I shall address in due course. At Phase 1, the contemporaneous documentary evidence touching on the company's issued share capital of $1.5m during the relevant period was accepted by the parties and, hence, was unchallenged.

The competing arguments

(1) Koon Seng's case

11 Koon Seng's case is set out in the Statement of Claim (Amendment No 3). In summary, it is that in or about 1999, GKS and Raj agreed that in consideration for, inter alia, the provision of financial assistance in relation to the PSA Contract, the defendants agreed to allot 700,000 shares in Chenab

to Koon Seng. Koon Seng claimed to have performed its side of the bargain by the making or continuing to make loans to Chenab to fund the PSA Contract, and also in providing or continuing to provide other forms of financial assistance by way of guarantees and indemnities to third parties. GKS contended that in the years prior to 12 April 2005, he reasonably believed that Koon Seng held 700,000 shares in Chenab. GKS further contended that he was not told that he had to pay for the Shares. In fact, Koon Seng was never asked to pay for the Shares until 26 March 2005. In all that time, the defendants took the benefit of the financial assistance from Koon Seng. Furthermore, it was argued that the defendants are estopped from denying that the Shares were allotted to Koon Seng as fully paid up by virtue of statements in the various documents available in the public domain. Koon Seng, therefore, alleges that the forfeiture was wrongful in the circumstances. I should mention that Koon Seng subsequently abandoned the contention that the April resolution was invalid in that the signatures of Jagip Kaur and Raj were forged.

(2) The defendants' case

12 In a common defence, the defendants denied that any such agreement as is alleged by GKS and Koon Seng was made. There was no agreement to allow Koon Seng to have the Shares in exchange for the loans and other forms of financial assistance. Their case is that the provision of financial assistance for the PSA Contract was separate from Koon Seng's liability to pay for the Shares in cash. There was no "package deal" as claimed by Koon Seng. Loans to Chenab to defray the operating costs of the PSA Contract were repaid together with interest. The defendants alleged that the agreement with GKS was for Koon Seng to subscribe for 700,000 ordinary shares (representing 47% of the share capital in Chenab) in order for Chenab to qualify to tender for a lucrative contract to be awarded by the PSA for the supply of labour. The subscription was to be the working capital needed for the PSA Contract. The pleaded case is that Koon Seng was required to pay for the Shares at the time of allotment. Koon Seng never paid for the Shares and as such, the April resolution to forfeit the Shares was valid and effective. The forfeiture was neither wrongful nor was it for a collateral purpose. Furthermore, no estoppel can arise in circumstances where Koon Seng knew and accepted that it had not paid for the Shares. Counsel for the defendants, Mr Winston Quek, distinguished on the facts the case of *Wills v Jimah Rubber Estate Ltd* [1911] 12 SLR 112, a decision on share certificate estoppel which he drew to the court's attention. In that case, the plaintiff had arranged for someone to make the balance payment for him and he had no reason to believe that the shares were not paid for in full when the company issued the share certificate to him.

13 As a corollary to the forfeiture, pursuant to Art 42 of the Articles of Association, Chenab seeks by way of counterclaim payment of $700,000 with interest thereon at the rate of 8% per annum from 12 April 2005 to the date of payment.

The witnesses

14 It is appropriate at this juncture to comment on the testimony and reliability of the witnesses of fact.

(1) Koon Seng's witnesses

15 GKS was the principal witness for Koon Seng. His animosity towards Raj was plainly evident from his demeanour, his facial expression and body language. GKS portrayed himself as someone with a genuine belief that he had been wronged and was telling what he believed to be true, rather than seeking to mislead the court. But that appearance by no means dispelled his conflicting evidence. Like Raj, he was not averse to resorting to untruths to win. I did not regard GKS to be a credible witness. There were, however, aspects of his evidence that was accepted as they were either corroborated or

related to a fact which was common ground or was accepted by the other side in cross-examination.

16 The next witness was Goh Teck Hua ("Goh"), the accounts manager of Koon Seng. He spoke of being present at some of the meetings between Raj and GKS. He testified that should Chenab secure the PSA Contract, Chenab would require financial assistance to meet the operational costs of the PSA Contract, and because of that, it was agreed that in exchange for the provision of financial assistance, Koon Seng would get 700,000 shares. Not only did his testimony have a sense of partiality towards Koon Seng, the reliability of his evidence was further undermined in the face of inconsistencies in the testimony of GKS which he came nowhere near dispelling. He was a witness with little to contribute.

17 I now turn to the other witnesses called by Koon Seng, Pereira Denis Kenneth ("Pereira") and Harbans Singh s/o P Kishen Singh ("Harbans"). Pereira was a former employee of Chenab and had worked closely with Raj. He was called to lead evidence on the forgery point. His testimony would not have withstood scrutiny given the expert's evidence. In any event, forgery was no longer a live issue as Koon Seng decided to drop its accusation that the directors' signatures on the April resolution were forged. Harbans was the former chief executive office of Chenab. He was called to testify on the motive behind the call for payment of the Shares some five years after allotment. He said non-payment was raised as a ploy to stop Koon Seng from winding up Chenab. It was a tactic which had come up at a meeting with the defendants' lawyers and Harbans was present at that meeting. This allegation was denied by the defendants. Mr Quek argued that Harbans's story was untrue as the call was made two days before the winding up petition was filed. I do not consider his argument as a complete answer to Harbans's story. Chenab had to wait for the notice period to lapse, and in the interim, Koon Seng did not ignore the demand. Mr Tan wrote to inform Mr Quek that Koon Seng was not paying as it was under no liability to pay for the Shares. The debate continued in the exchanges of correspondence. On 28 March 2005, the winding up petition was filed. After expiry of the 14-day period, Chenab forfeited the Shares even after the liability to pay was disputed.

(2) The defendants' witnesses

18 Raj was the principal witness for Chenab. He was an argumentative witness who preferred to give rhetorical answers when cross-examined. His own counsel had described his oral testimony as "a little incoherent and sometimes confused". I must stress that this "incoherence" and "confusion" was not due to his poor recollection of the evidence but more from the half-truths and lies that was said in court having regard to the appearance the defendants wanted to create to the court. The difficulty I have with his evidence (as I shall explain later) is its complete incompatibility with the audited accounts which he, in his capacity as director of Chenab, signed on the accompanying Directors' Report as being a true and fair reflection of the financials of the company. His evidence on the alleged non-payment of the allotment turned out to be false and deliberately misleading. I did not regard him as a credible witness. He willingly participated in the deception of PSA through the use of misleading documents.

19 The second witness for the defence was Raj Nita Dev ("Nita"). Nita was an articulate and intelligent witness. She is Raj's daughter. Her father described her as the general manager of Chenab, a position she denies holding. Despite downplaying her role to that of an assistant helping out in her father's company, she is plainly a witness who has a stake in the outcome of this action. The reliability of her evidence was undermined in cross-examination on the letter she wrote to GKS on 17 February 2006. Nita described the letter she wrote to GKS as essentially "cosmetic". In other words, she did not mean what she said and her letter contained some truths, some half-truths and even lies. She was defensive and evasive and whenever she was in a tight corner, chose from a range of possible answers which she considered most likely to assist, or least likely to damage the

defendants' case. In the result, her oral testimony was incompatible with the sentiments expressed in her letter, which were consistent with some aspects of the circumstances prevailing prior to 26 March 2005. In any case, the letter's relevance is in the writer's reference to, and hence recognition of, Koon Seng as Chenab's 47% shareholder of the PSA Contract.

20 The third witness of fact was Sim Kwan Liang ("Sim"). Sim is the sole proprietor of HiPoint Management Consultancy. Sim provides book keeping services to Chenab and has been the latter's book keeper since 15 March 2002. He checked on the matter of payment for the subscription in January 2005 upon being asked to do so. He confirmed going through Chenab's bank statements and was unable to identify any direct payment received by Chenab for the Shares. Consequently, he deduced that Koon Seng had not paid for the Shares. Sim's evidence was meant to corroborate Chenab's case as presented but later found to be gravely misleading and false.

Summary of the issues in closing arguments

21 By the end of the trial, the main question was whether the call to pay $700,000 was validly made. In examining this poser, the debate centred on the precise terms of the agreement to allot, which GKS, acting on behalf of Koon Seng, entered into with Chenab, acting by Raj. Essentially, the court is asked to decide whose version of the agreement to allot was more likely. As stated, this is not to say that the court is confined to the version advanced by the parties if, as was the case here, the evidence or the reading of it shows otherwise. In any event, the further question that arises is whether, in the circumstances, Koon Seng has sufficiently established a case for the relief claimed, and if not whether, in the circumstances, Chenab has sufficiently established a case for the counterclaim which is dependent upon the defence succeeding.

22 In the course of Mr Tan's closing submissions, I asked to see the audited accounts for the other financial years since the defendants had only given discovery of the audited accounts for the financial year ended 31 December 1999, and that set of audited accounts on its own was plainly inadequate for it gave an incomplete picture. At the conclusion of Mr Tan's closing submissions, Mr Quek rose to explain that he did not have the audited accounts with him. I was concerned that a resolution of the issues as presented by counsel would be injudicious without sight of Chenab's audited accounts for the subsequent financial years. Directions were then given to the defendants to give discovery and produce the audited accounts of the company right up to the last set of audited accounts in 2002. If the accounts were not audited for one reason or another, Chenab was to produce management accounts for the particular financial year in question. I further directed (after the defendants confirmed that the auditor of the company would not be called as a witness for the defence) that the auditor, Lim Whay Yuan of Lim Whay Yuan & Co ("Lim"), be summoned as a court's witness to testify on the audited accounts. The proceedings were adjourned to a date to be fixed.

Phase 2: The audited accounts

23 The adjourned hearing resumed on 26 June 2007. Mr Quek produced a bundle of documents comprising the audited accounts for the financial years ended 31 December 1999, 2000 and 2001 respectively. Included in the same bundle of documents were copies of the trial balances for 2000 and 2002, but not 2001. Mr Quek explained that the missing trial balance was not with the defendants. Lim took the stand and was questioned on the audited accounts.

24 Lim was not a helpful witness and was deliberately vague in his answers relating to the paid up capital of $1.5m and the Shares reflected in the audited accounts as fully paid. To be generous to Lim, I ascribed that attitude to his desire to guard his own position as the audited accounts were under scrutiny. Although I did reach the conclusion that the audited accounts contained misleading

statements, I need not go further than to find that the audited accounts reflected the position as recorded in Chenab's books of accounts. The accounts are examined in [41] to [47].

25 On 3 July 2007, the parties tendered their respective submissions covering the audited accounts and auditor's testimony. I pause here to make an observation. In the course of writing this judgment, I noticed that the ACRA search exhibited in GKS's affidavit of evidence-in-chief showed that the 2002 accounts were laid at the Annual General Meeting held on 27 August 2003. Yet, the defendants, at the resumed hearing, omitted to produce a set of the audited accounts for the financial year ended 31 December 2002.

Phase 3: The maxim ex turpi causa non oritur actio

26 Notwithstanding the battle lines drawn and arguments advanced by the parties, the two conflicting accounts of the terms of the agreement to allot each had its own difficulties. This will be explained later. In the meantime, the point merits the following observations. First, it was by then apparent to me that the true picture that emerged upon examining the evidence critically was fundamentally different from the one each party had chosen to present to the court. A vital point is that each party had chosen not to present the whole truth to the court. Second, the documents discovered showed that an allotment had been made to Koon Seng, albeit not the allotment based on the agreement to allot that was now claimed before me. But, so far as they go, the documents do, at least, as much harm to Koon Seng's claim as they do to the pleaded defence.

27 Given the problems observed and outlined in [26], the agreement to allot itself is put in issue. Consequently, if the agreement to allot is held to be a sham, the further question that arises is why the Shares were issued. If I come to the conclusion that they were issued for the purpose of the PSA tender and to deceive PSA, I have to consider whether the parties have fallen foul of the maxim *ex turpi causa non oritur actio* ("the *ex turpi* principle"). With that in mind and having regard to the gravity of the potential consequences (both civil and criminal), on 28 September 2007, I drew parties' attention to the possibility that there might arise a factual outcome that is different from the conflicting versions alleged before me. Consequently, the parties were directed to submit on the following points:

(a) If the court rejects the conflicting versions of the agreement to allot, what orders should the court make?

(b) Is the agreement to allot as claimed by either party contrary to the company law? If so, what are the consequences, if any, of the illegality?

(c) Is the shareholding registered in the name of Koon Seng a sham? If so, what are the consequences, if any, of the sham transaction?

In the context of those questions, I alluded to counsel to consider the application of the *ex turpi* principle in the event the agreement to allot is adjudged to be *prima facie* illegal. Illegality can arise if the agreement to allot is prohibited by statute or, it may be rendered illegal at common law on grounds of public policy. If the allotment was a sham, a fiction as it were, the agreement to allot could also be held to be invalid and illegal. So the query is whether this case is one in which the parties have fallen foul of the *ex turpi* principle so that the court on grounds of public policy would not assist them since the relief claimed and the counterclaim were closely connected with or inextricably bound up with the parties' illegality or unlawful conduct. Mr Quek tendered his submissions on 12 October 2007. Mr Tan sent his in on 26 October 2007.

Ex turpi causa: the law

General principle

28 It is convenient at this juncture to restate the principle of public policy encapsulated in the *ex turpi* principle. Under English law, a claim in contract or in tort may be defeated on the ground of illegality or, *ex turpi causa non oritur actio*. In fact, the *ex turpi* principle is not confined to any particular cause of action. Beldam LJ in *Clunis v Camden and Islington Health Authority* [1998] 2 WLR 902 observed that the *ex turpi* principle was not so limited to cases of tort. At 908, he said:

> We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action.

29 The classic statement of the principle was by Lord Mansfield in *Holman v Johnson* [1775] 1 Cowp. 341 at 343:

> No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country there the court says he has no right to be assisted.

The ex turpi principle arises where the plaintiff seeks to, or is forced to found his claim on an illegal contract or to plead its illegality in order to support his claim. The ex turpi principle also extends to conduct which, though not legally prohibited, is nevertheless prohibited as contrary to public policy. A fundamental bar to success based on public policy consideration, where the grant of relief to the claimant would enable him to benefit from his criminal conduct, is best seen in the leading case of Beresford v Royal Insurance Co Ltd [1938] AC 586. The principle of public policy that is infringed by the enforcement of, for instance, the contract or gift is the principle that no court would assist a criminal to derive benefit from his crime (as to which see Lord Atkin at 598).

30 Ultimately, in applying the *ex turpi* principle, the authorities support the pragmatic approach described by Bingham LJ (as he then was) in *Saunders v Edwards* [1987] 1 WLR 1116 at 1134:

> Where the plaintiff's action in truth arises directly *ex turpi cause*, he is likely to fail …Where the plaintiff has suffered a genuine wrong, to which the allegedly unlawful conduct is incidental he is likely to succeed.

Circumstances in which the ex turpi principle is invoked

The four guiding propositions

31 Bearing in mind the court's pragmatic approach to the application of the *ex turpi* principle, depending on the circumstances, the court may invoke of its own motion the *ex turpi* principle (see *Snell v Unity Finance Co Ltd* [1964] 2 QB 203 at 212 to 213). This can happen if the illegality is plain from the arrangement before it or, if all the relevant facts have been adduced and the court is satisfied that the evidence proves the illegality (see *Chettiar v Chettiar* [1962] AC 294). As a guide, the House of Lords in *North-Western Salt Company v Electrolytic Alkali Company Ltd* [1914] AC 461 set out four propositions which Delvin J restated in *Edler v Auerbach* [1950] 1 KB 359, an authority cited by Mr Quek. Mr Tan relied on *Chitty on Contracts* (Sweet & Maxwell, 27th Ed, 1994) at para 16-174 for the same point. The four propositions are:

(a) Where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not.

(b) 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 circumstance relied on are pleaded.

(c) Where facts not pleaded which taken by themselves show an illegal objective, 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.

(d) Where the court is satisfied that all the relevant facts are before it and it 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.

32 The fourth proposition finds expression and is applied in the case of *Lewis & Queen v NM Ball & Sons* (1957) 48 Cal. 2d 141. The illegality there did not arise from the pleadings and the defendants did not raise it in their defence, but the court raised the illegality of its own motion and dismissed the action on that ground. The plaintiffs there argued on appeal (and that too was Mr Quek's contention) that the trial court should not have raised the issue of illegality because it should have confined its findings to the issues raised by the pleadings. The court rejected the contention and at 147-148 Traynor J said:

> Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and the duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids … It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality.

33 Similarly, in *Cross v Kirby*, unreported, 18 February 2000 (cited in *Stone & Rolls Ltd (in Liquidation) v Moore Stephens (A Firm) and another* [2007] EWHC 1826), Beldam LJ (with whose judgment Otton LJ agreed) at para 76 explained the circumstances in which the court of its own motion will apply the *ex turpi* principle in the following words:

> I do not believe that there is any general principle that the claimant must either plead, give evidence of or, rely on his own illegality for the principle to apply. Such a technical approach is entirely absent from Lord Mansfield's exposition of the principle. I would, however, accept that for the principle to operate the claim made by the claimant must arise out of criminal or illegal conduct on his part. In this context, "arise out of" clearly denotes a causal connection with the conduct, a view which is implicit in such different cases as Lane v Holloway [[1968] 1 QB 379] and the recent case to which were referred in this court, Standard and Chartered Bank v Pakistan National Shipping Corporation & Ors, Court of Appeal transcript, Friday 3 December 1999. In my view the principle applies when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct.

34 In a similar vein, Judge LJ at para 103 said:

> In my judgment, where the claimant is behaving unlawfully, or criminally, on the occasion when

his cause of action in tort arises, his claim is not liable to be defeated *ex turpi causa* unless it is also established that the facts which give rise to it are inextricably linked with is criminal conduct.

Material considerations to applying the four propositions

35 A material consideration is whether the claimant has to plead or rely on his own illegal conduct in order to found the claim. In *Tinsley v Milligan* [1994] 1 AC 340, the plaintiff and the defendant had purchased a property from joint funds on the understanding that they were joint beneficial owners but vested it in the sole name of the plaintiff to assist the defendant, with the connivance of the plaintiff, in continuing to make false benefit claims. The monies obtained contributed in only a small way to the acquisition of the equity in the property in which the parties lived. The defendant had an attack of conscience and confessed to the fraud. The parties quarrelled and the plaintiff moved out. The plaintiff then sought to claim possession of the property asserting that she was sole owner of it. The defendant counterclaimed for a declaration that the property was held by the plaintiff in trust for the parties in equal shares. The majority decision was firmly founded on a property right and the ability to claim it without being "forced to plead or rely on illegality". The *ratio* of the case is that a party cannot rely on his own illegality in order to prove his equitable right.

36 Clarke LJ in *Timothy Hewison v Meridian Shipping and Another* [2002] EWCA Civ 1821("*Hewison*"), put forward a broad test for the *ex turpi* principle to apply, namely whether is the claim or the relevant part of it based substantially (and not therefore collaterally or insignificantly) on an unlawful act. Tuckey LJ (at para 51) in accepting the virtues of the broad test said:

> Such a broad test has the merit of simplicity. It does not involve the judge having to make very specific and difficult value judgments about precisely how serious the misconduct is or whether it would result in imprisonment or whether the claimant's loss is disproportionate to his misconduct.

37 Finally, Langley J in *Stone & Rolls Ltd (in Liquidation) v Moore Stephens (A Firm) and another* [2007] EWHC 1826 at para 43 after reviewing the authorities helpfully drew together the various judicial statements on the application of the *ex turpi* principle and concluded as follows:

> The conclusion I draw from these authorities is that the ex turpi maxim requires a "reliance test" to be satisfied. The claim must be "founded on" or "arise from" an illegal act of the claimant (Lord Mansfield) or the illegal act must necessarily be pleaded or relied upon to sustain the claim (*Tinsley v Milligan*) or to put forward the case (*Clunis*) or the facts which give rise to the claim are "inextricably linked with" the illegality (*Cross v Kirby* per Judge LJ). The contrast is with a claim to which illegality is only "collateral" or "insignificant: (*Hewison*) or "incidental" (Bingham LJ). It is also acceptable that only part of a claim or loss is defeated by the maxim (*Hewison*).

38 All those propositions provide valuable guidance. They were uttered in cases where the issue was whether the claimant was entitled to bring his claim notwithstanding his own illegal act or conduct. Moreover, the intention of the parties is a relevant consideration whenever the question of illegality arises (as to which see Chao Hick Tin JA in *Siow Soon Kim and others v Lim Eng Beng @ Lim Jia Le* [2004] SGCA 4 at para 39 where he noted the dicta of L P Thean J (as he then was) in *Suntoso Jacob v Kang Miao Ming* [1986] SLR 59 ("*Suntoso Jacob*") at 65). Finally, it is a question of fact and degree where the line is to be drawn in any particular case. In judging where the line is to be drawn, it is important to remember that the law is rooted in public policy.

Discussion and analysis of the evidence

39 As stated, based on the pleaded case and initial submissions advanced on behalf of the respective parties in Phase 1, the case was presented as one that turned in essence upon a single factual question: "what was said, and (if anything) agreed between GKS and Raj prior to Chenab securing the PSA Contract." No notes of the discussions between GKS and Raj were taken. Neither was the alleged agreement to allot reduced to writing, so that, at first sight, the case turned upon the recollection by the witnesses of events which took place more than six years ago. The evidence of the supporting witnesses did not bear directly on what was discussed and eventually agreed between GKS and Raj. I have already commented on the witnesses and the evidential value of their testimonies.

40 Significantly, the information gathered from the audited accounts and trial balances revealed a picture different from the one each party had chosen to present to the court. Raj as a director of the company had in the Directors' Report to the 1999 audited accounts confirmed in the accompanying statement that the balance sheet and profit and loss account together with the explanatory notes "[were] drawn up so as to give a true and fair view of the state of affairs of the Company at 31 December 1999 and of the results of the business of the Company for the year ended on that date." It bears noting that the defendants did not proffer any explanation as to why the entire share capital of $1.5m was described as allotted and fully paid, when their case, as argued by Mr Quek, is that Koon Seng did not pay cash for the Shares. In response to Koon Seng's case that the Shares were given in exchange for financial assistance, Mr Quek suggested that, if anything, Koon Seng should have converted part of the loans in the sum of $700,000 into equity as opposed to receiving full discharge of the loans together with interest. Raj simply said he trusted GKS to pay for the Shares. I will later elaborate on Mr Quek's incomprehensible attempts to persuade me to take a different view of, or to ignore the evidence in the audited accounts which on an objective reading of the balance sheet and the evidence as a whole ostensibly showed at least inferentially, and at best without any ambiguity that the Shares were paid for. Suffice it to say, the statements in the audited account were side- stepped and the court was asked to focus on Sim's testimony and the bank statements. At any rate, that is also not the end of the matter for the reasons discussed below.

Analysis of the audited accounts

41 The position as gathered from the trial balances for 1st January 2000 and 1st January 2002 and the audited accounts from the financial year ended 31 December 1999, 2000 and 2001 may be summarised as follows. The Shares were allotted at par for cash. They were described in the audited accounts as "issued and fully paid". In the audited accounts for the financial year ended 31 December 1999, *a director* borrowed money from the company and that loan, as I have been able to ascertain, was to pay for the Shares identified as "Share account–Goh KS" in the trial balance as at 1 January 2000. By the financial year ended 2000, the "Share account–Goh KS" and the "Share account–Rajdev Singh" were wiped out as they no longer appeared in the trial balance of 1 January 2002. Put another way, the "Share a/c Goh KS" and "Share a/c – Rajdev Singh" were no longer shown under the debit column as debts owing to the company by *a director* in the opening balance as at 1 January 2002. Two other items of indebtedness to the company, namely the Indian Investment project and Chenab Construction, which were previously included in the total amount of $911,633 owing to the company by *a director* with no fixed terms of repayment, were reclassified as "Other debtors". The only reasonable inference from the evidence is that either money had been paid and received in respect of Shares or by way of a set-off in respect of a liability or liabilities incurred by the company to the director in question.

42 I now examine the audited accounts to flesh out the scheme adopted in connection with the increase of the paid up capital and allotment summary outlined in [41].

43 I begin with an examination of the 1999 audited accounts. The entry in respect of Chenab's share capital was stated as $1.5m "issued and fully paid". The following explanation was provided in the audited accounts:

> The authorised capital of the Company was increased to S$2,000,000 by the creation of an additional 1,700,000 ordinary shares of $1 each. In addition, a further 1,250,000 ordinary shares of S$1 each were allotted to shareholders at par for cash for the purpose of raising working capital. These shares issued ranked *pari passu* with the existing shares then in issue.

44 Chenab allotted 700,000 ordinary shares to Koon Seng on 15 November 1999. Raj's shareholding was increased by 550,000 shares to 799,999 as at 31 December 1999. Interestingly, the balance sheet as at 31 December 1999 in so far as relevant reflected the following set of figures:

	Note	1999	1998
Share Capital and Reserves		S$	S$
Share capital	2	1,500,000	250,000
Accumulated losses		(375,143)	(207,657)
		1,124,857	42,343
Represented by:-			
FIXED ASSETS	3	294,500	222,599
CURRENT ASSETS			
Trade debtors		667,428	414,266
Other debtors		31,269	26,268
Due by directors/shareholders			
(non-trade)	4	911,633	_
Cash at bank			14,163
		1,610,330	454,697

		---	---
Less			
CURRENT LIABILITIES			
Trade Creditors		515,145	298,864
Accruals		132,582	148,116
Due to a director (non-trade)	4	-	164,151
Hire Purchase creditors - due within 12 months	5	39,395	23,822
Bank debit balance		42,405	_
		---	---
		729,527	634,953
		---	---
NET CURRENT ASSETS		880,803	(180,256)
		---	---
Less		1,175,303	42,343
NON CURRENT LIABILITY			
Hire purchase creditors – due after 12 months	5	(50,446)	_
		---	---
		1,124,857	42,343
		========	======

45 The figure of $911,633 was reflected on the balance sheet as an amount "Due by directors/shareholders (non-trade)" and the important explanatory note to this entry is note 4. Explanatory note 4 is headed "DUE BY (TO) A DIRECTOR (NON-TRADE) and the note reads:

> The amount due *by*/(to) *a director* are unsecured, free of interest and there is (*sic*) no fixed terms of repayment.

[emphasis added]

46 Notably, as shown on the balance sheet, no money was owed by the company *to* the directors/shareholders. It follows that explanatory note 4 relates specifically to money (*ie* $911,633) that was owed *by a director* to Chenab. Who then is this director? GKS was never a director of Chenab. The only two directors were Raj and his wife, Jagip Kaur. The loan was most probably made to Raj as Jagip Kaur was only involved in the company in name.[note: 2] She remained a director even after their divorce.[note: 3] On the face of the audited accounts, and on a proper interpretation of the document, Raj took a loan from the company for the share allotment of 700,000. The sum of $911,633 was the net figure arrived at after deducting the following items (see trial balance as of 1 January 2000):

	Dr	Cr
	S$	S$
India Investment project	29,000.00	
Loan - Chenab Construction	127,466.45	
Share a/c – Goh KS	700,000.00	
Share a/c – Rajdev Singh	550,000.00	
Loan a/c - Rajdev Singh		411, 776.32
Loan a/c – Rajdev Singh		83, 057.04

Lim clarified, and it was accepted by the defendants, that the figure of $911,633 is inclusive of the $700,000 described as "Share a/c–Goh KS".

47 On its face, the balance sheet as at 31 December 2000 indicated that figure of $911,633 was reduced to $837,410. Again, Lim and the defendants accepted that the sum of $700,000 was included in the figure of $837,410. No opening balance as at 1 January 2001 was furnished. However, the sum of $837,410 was not featured in the balance sheet as at 31 December 2001. It appeared to have been wiped out. In contrast, the company now owed $181,838 to the *directors*. The directors in question were identified as Raj and Jagip Kaur. This is evident from the opening balance as at 1 January 2002 where the amount owing by the company *to* Raj was stated as $162,989.61 and *to* Jagip Kaur, the sum of $18,848. Lim confirmed that the Shares have been paid for. Mr Quek accepted that on the face of the accounting documents, the Shares have been paid for. But that did not stop him from pressing the point that no actual cash payment was given. I shall discuss his point later.

Difficulties with the plaintiff's version of the facts

48 Each side invited me to accept their version of the agreement. In particular, I do not accept that there was a specified *quid pro quo* bargain for Koon Seng to be given the Shares in Chenab in return for a promise of financial assistance for the PSA Contract. On this, GKS's evidence was not corroborated by any other evidence, oral or documentary. GKS, as Mr Quek rightly pointed out, had

difficulty characterising the funding for the PSA Contract. In his written testimony, the funding was characterised as loans. In the witness box, GKS contradicted his written testimony when he termed the funding as an investment which is about injecting capital into a company in return for equity (whether for himself or Koon Seng) as opposed to making a loan to Chenab thereby becoming a creditor. In the end, the position adopted in closing submissions was that financial assistance in the form of, *inter alia*, loans were given to Chenab. Separately, Koon Seng's other contention, which Raj accepted, is that GKS was interested in only the PSA Contract and not the other contracts given to Chenab. Koon Seng was entitled to 47% of the profits from PSA Contract. In addition, Koon Seng had no director on the Chenab board. The extrinsic facts reinforce the view that Koon Seng's 47% interest was only in the profits of the PSA Contract as opposed to ownership of the company (see [61] below).

Difficulties with the defendants' version of the facts

49 Putting aside the audited accounts for a moment, I note that even on the defendants' pleaded defence, there are difficulties. First, the plea was that Koon Seng had to pay for the Shares upon allotment. In contrast, Raj testified that the Shares were expected to be paid in March 2000 before the start of the PSA project. His oral testimony contradicted the version in his written testimony.[note: 4] The upshot is that the pleaded case is not supported by Raj's inconsistent evidence.

50 Second, aspects of the defendants' conduct prior to forfeiture seemingly undermined their own defence. It must be remembered that the call was made five years after its due date (*ie* the date of allotment). Article 38 of the Articles of Association allows for interest to accrue from the date of allotment to the date of payment. The analysis is the same even on Raj's evidence that the Shares were to be paid by March 2000. It is self-evident from the notice of 26 March 2005 that Chenab did not claim interest on the unpaid sum of $700,000. Again, Mr Quek's demand for payment of $700,000 (issued after forfeiture of the Shares) did not include a claim for interest. This omission is significant for the reason that the interest (whether accrued or prospective) claimable under Art 38 (and read with Art 19) is tied to the alleged liability to pay for the Shares. If what Raj said was true and not an afterthought, as a matter of common experience and business sense, the demand letters would have included a claim for interest.

51 Third, no satisfactory reason was forthcoming as to why Chenab, out of the blue after a lapse of five years, suddenly demanded payment for the Shares. I did not accept Raj's explanation that he had trusted GKS to pay for the Shares but Koon Seng did not, implying that Raj knew all along that it was not paid. He later appeared to contradict himself in cross-examination when he claimed that he thought GKS had paid but found out it was not paid after Sim checked the bank statements. This was about the time Sim raised some discrepancies in the PSA accounts. The close relationship between GKS and Raj turned sour, but I make no finding as to when and how that occurred.

52 Reverting to the audited accounts, Raj's evidence that the Shares were unpaid contradicted the position in Chenab's audited accounts for the financial years 2000 and 2001. From explanatory note 4 to the balance sheet as at 31 December 1999, there is nothing in the contractual term in relation to the loan to Raj which made it repayable as a matter of law otherwise than on demand. The loan to Raj appeared to have been subsequently repaid, either by money paid and received or by a set-off in respect of a liability or liabilities incurred by the company to Raj (see [47] above). Contrary to Mr Quek's submissions arising from a mischaracterisation of the issue, the burden of proof is on Raj as the borrower and Chenab as lender to establish what has become of the loan, *ie* has it been paid, set off against a liability or liabilities of the company, written off or otherwise. In the case involving a loan and where the issue is whether there has been repayment, the onus rests upon the defendant to

prove that the debt was repaid (see *Young v Queensland Trustees Ltd* [1956] 99 CLR 560). Raj proffered no explanation. Little assistance could be derived from the defendants' defence or affidavit of evidence-in-chief.

53 Whilst Mr Quek conceded in his submissions that the audited accounts showed that the Shares were paid for, he continued to press the point that Chenab's bank statements did not show any cash payment of $700,000. Unless explained and clarified by the defendants, the reader would infer from the audited accounts that entries in the books of accounts were made and accorded with the intention that all the issued shares of Chenab were fully paid. Accordingly, matching debit entries were made to supposedly balance the books. In drawing up and auditing Chenab's balance sheets the company was reflecting the treatment in the company's books that all the issued shares were fully paid. It seems to me that objectively speaking this amounted to payment for the Shares "in cash" for the purposes of the allotment in accordance with the structure set up by Chenab in its audited accounts. Payment was ostensibly satisfied by this approach. It constituted money paid and received in respect of the Shares.

54 However, as pointed out, the accounts do cry out for some explanation if the defendants' defence is to be given any credence. There was no explanation from the defendants. If anything, on the face of the audited accounts, it should have been Raj asking for repayment rather than Chenab. There was no explanation for the loan from Chenab. In reality, any meaningful explanation would have been difficult for the audited accounts were accepted as a true and fair presentation of the financial state of the company. In fact, Raj and his wife as directors whose approval and consent of the true and fair presentation of the accounts had sanctioned the statement in the audited accounts to the effect that the paid up capital was $1.5m and the Shares were fully paid. It is also a fact, consistent with the position reflected in the audited accounts, that Koon Seng or GKS never received audit confirmation of the balances from Chenab's auditors for any money due under the "Share account–Goh KS" or for the Shares *per se*. I have already pointed out that Raj had not satisfactorily explained what triggered the issuance of the notice to pay in 2005. In these circumstances, the defendants had to resort to the cash argument and Sim's testimony based on the bank statements which was of limited evidential value. Mr Quek's point that the loans from Koon Seng to fund the PSA Contract were fully paid with interest does nothing to aid Chenab's case of non-payment. Arguably, repayment of the Koon Seng loans in full with interest is consistent with the position reflected in the audited accounts.

55 I should add that Mr Quek relied on the 15 November 1999 resolution ("the 1999 resolution") to corroborate the defendants' case that Koon Seng had agreed to pay for the Shares in cash. The 1999 resolution reads as follows:

> Directors' Resolution in Writing
>
> Allotment of Shares
>
> Resolved that, pursuant to the approval granted by the company in General Meeting on 15 November 1999, 1,000,000 ordinary shares of $1.00 each in the Company be and are hereby issued and allotted for cash at par to the following persons in the manner set out below and that such shares shall rank pari passu in all respects with the existing issued shares of the Company, and subject to the payment of the consideration therefore, share certificates be issued to the allottees under the Common Seal of the Company which shall be affixed thereto, signed by a Director and countersigned by the Secretary or by a second Director.

Name of Allottees	Number of Shares of $1.00 each
Koon Seng Construction Pte Ltd	700,000
Raj Dev s/o Ram Singh	300,000

	1,000,000

Dated this

Signed Raj Dev S/O Ram Singh Jagip Kaur D/O Dhian Singh

56 The 1999 resolution was for the issuance of 700,000 ordinary shares allotted for cash at par to Koon Seng and 300,000 ordinary shares to Raj. The defendants argued that the 1999 resolution was contemporaneous evidence which supported the defendants' position that the agreement between Chenab and GKS was that Koon Seng would pay cash for the allotment. In my judgment, for the reasons explained below, the 1999 resolution was, and I so find, a step in the erection of a mere façade. The allotment of the Shares was, and I so find, a segment of the same façade.

A different factual picture and the legal consequences

57 Putting matters in perspective, the proper conclusion on the evidence before the court is that on, a balance of probabilities, there was never any intention on the part of Raj and GKS that Raj or Koon Seng would actually expend money of his or its own, either in a lump sum or by way of instalments to meet some deferred payment arrangement. Instead, payment for the Shares would be achieved by some kind of paper exercise. Raj and GKS were well aware that this was the situation, and indeed the intention with which the arrangements were entered into was mutual. This paper exercise was designed to make it appear that the Shares had been paid in cash when in truth they had not been. The defendants faxed on 16 September 2000, the ROC search as proof that the Shares were allotted to Koon Seng. Chenab had on paper presented an appearance of capital adequacy in the accounts of Chenab to qualify for the PSA tender.

58 On the face of the accounting documents, Chenab's loan to Raj was to pay for the subscription of the Shares. Such a loan *prima facie* constitutes financial assistance by the company in the acquisition of the allotment contrary to s 76 of the Companies Act (see *Walter Woon on Company Law*, (Sweet & Maxwell, 3rd Ed, 2005) at paras 12.37 and 12.38). So long as the loan was made, it is irrelevant that the loan was not made to the recipient of the share (see *Juniper Pty Ltd v Grausom* reported in 8 ACLR 212).

59 As with the other things, the loan was also a paper exercise. It did not make sense that the defendants would openly admit (and that was apparent on the face of the audited accounts) to a breach of s76 which carries with it penal liabilities unless there was, in reality, never a loan by Chenab to Raj. In fact, there is extrinsic evidence supporting this conclusion. There is no doubt, on the evidence, that the structure as shown in the audited accounts, which described 700,000 shares as fully paid in cash by way of a loan from the company to *a director*, was nothing more than the

scheme chosen to implement the common intention of the parties that no money was to change hands. In my view, the allotment to raise Chenab's share capital to $1.5m was a paper exercise which generated paper liabilities in the audited accounts which, in my judgment, were not real. I reached this conclusion based on the following reasons.

60 I start first with the factual position as accepted by the parties that there was to be no direct cash or cheque payment of $700,000 for the Shares. The predicament of the company at that time was well known to both GKS and Raj. It was recognised that the company needed substantial financial assistance to fund the PSA Contract. Raj admitted that he needed financial assistance from GKS. It is not disputed that Raj had no capital and that was his reason for involving GKS as Koon Seng would have to bankroll the PSA Contract for at least six months. Raj estimated the operating costs of the PSA Contract to be about $700,000 to $900,000 for at least six months before seeing any money from the PSA Contract.[note: 5] GKS had made it clear that he was not so foolish as to inject $700,000 into a company that had little or no assets. More importantly, as GKS was not a director of Chenab, he and Koon Seng would, more probably than not, wish to guard against any capital injected into the company being used for the other contracts of the company which Koon Seng was not interested in. Besides, until Chenab secured the PSA Contract, GKS would not want to put any money into the company. But without a paid up capital of $1.5m, Chenab was not eligible for the tender. This dilemma was overcome by the company increasing the paid up capital without any actual cash injection. I am not persuaded by Mr Tan's contention that GKS did not know that Chenab was not going to put in cash for the capitalisation. How was Raj able to put up the cash for the equity? Raj to the knowledge of GKS had no capital and needed his financial assistance. Notably, GKS testified that he left the paperwork to Raj who had informed him that he had spoken to some consultants. By that he meant and was saying that a person with financial expertise would be able to find a way in which the Shares could be issued as fully paid shares without money actually changing hands. Even though GKS may not have a precise idea of how it was to be done, he expected the paperwork to be done. Raj testified that he gave instructions to Ideal Commercial to issue fully paid up shares. It is sufficient for the purpose of this analysis of the evidence to note that Raj was the provider of the information recorded in the Annual Return and as to its accuracy and meaning, as to Ideal Commercial's instructions and the latter's involvement in its preparation and implementation.

61 Second, it is important to bear in mind that Koon Seng was only interested in the PSA Contract and not the other contracts secured by Chenab. This fact was accepted by Raj. It was also accepted that save for the PSA Contract, Koon Seng had no share of the profits of the company. Koon Seng's share of the profits from the PSA Contract was 47%. The cumulative effect of these facts taken together led to Mr Quek making the point that Koon Seng had "admitted that they are not in a real sense, shareholders of the company because the Plaintiffs are only entitled to 47 % share of the profits of the PSA contract … and not any other contracts or profits of the company."[note: 6] There is merit in his contention which is tantamount to a shift from the common premise at the outset of the proceedings that Koon Seng was a shareholder of Chenab until the Shares were forfeited in 2005. Mr Tan has inasmuch confirmed Mr Quek's point. He said that the reason why Koon Seng did not buy the Shares with cash was because Koon Seng was not interested in the other contracts of the company and that Koon Seng's interest was only limited to the PSA Contract.[note: 7] Quite clearly, the situation would have been different had a separate class of shares been issued to give effect to Koon Seng's interest in only the PSA Contract.

62 In these circumstances, the situation that emerged from the evidence is that the allotment to raise Chenab's share capital to $1.5m was not real. Allied to the false figure of $1.5m was the implicit representation about the underlying fact of the Shares having been allotted as fully paid in cash. The words "issued and fully paid" in the audited accounts were intended and not used in error. The accounts were not true and fair if they were misleading by reason of material misstatements that

generally resulted in overstatement of assets, equities and profits and material understatement of liabilities and losses. The Annual Return left no room for doubt that the Shares were to be paid for in cash and as that was done no money was outstanding and subject to a call. But as I reasoned, having regard to the paper liabilities generated by the paper exercise undertaken, I find that these false statements offend ss 199 and 401 of the Companies Act. Consequently, I find that the apparent receipt of cash for the allotment of the 700,000 shares by way of set-off as suggested in the audited accounts and trial balances was dishonest, misleading or deceptive in a material way.

63 It follows from the above findings that there was no agreement to allot on the terms alleged by each party. On the further question why the Shares were issued, my conclusion is that they were issued for the purpose of the PSA tender and to mislead the PSA into thinking that Chenab's paid up capital was $1.5m and, hence, was eligible to tender for a labour supply contract called by the PSA. Plainly, the share capital of $1.5m was a sham transaction in the sense described by Lord Diplock in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 at 802:

> I apprehend that, if [sham] has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities … that *for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.* No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.
>
> [emphasis added]

64 Of significance is the common intention of the parties that despite outward appearances, the acts or documents were not meant to create legal rights and obligations. Selvam J in *TKM (Singapore) Pte Ltd v Export Credit Insurance Corporation of Singapore Ltd* [1993] 1 SLR 1041 at 1058 restated the applicable test:

> To ascertain whether the documents represent the true relationship between the parties the following test as laid down by Lindley LJ in [*Yorkshire Wagon Co v Maclure* (1881) 19 Ch D 478) and Diplock LJ in [*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786] may be formulated: Whether the documents were intended to create legal relationships and whether the parties did actually act according to the apparent purpose and tenor of the documents.

65 In my judgment and I so find that in so far as the status of Koon Seng as shareholder was concerned, it was not the parties' intention to create the normal and expected rights and obligations for unpaid calls as shareholder. I am of the view, and I so find, that GKS knew of the paper exercise. The paperwork was a façade created to satisfy PSA's tender requirements. The allotment of the Shares was, and I so find, a segment of the same façade. The pretence, in my judgment, was accepted and acted upon by both parties and that is, *inter alia*, sufficient to satisfy the elements of a sham transaction (see [64] above). The conclusion that the allotment to Koon Seng was a paper exercise with no intention by the parties that property in the Shares would pass to Koon Seng is supported by other salient facts:

> (a) Koon Seng did not have any representation on the board of directors of Chenab and GKS was given financial control over the PSA Contract from his appointment as the sole authorised signatory of the UOB account designated for the PSA Contract; and

(b) At the time of the allotment, the relationship between GKS and Raj was a close one.

66 Plainly, the PSA was being seriously misinformed of the capital asset of the company. In fact, Raj admitted that Chenab had hoodwinked PSA. This was what he said in cross-examination:[note: 8]

> Q: And we say Mr Goh at that point in time was not interested in the other contracts that you had developed, okay, making him … a 47% shareholder means he has a share in all these other contracts. It doesn't make sense, does it? You don't want him to be involved in the other contracts.
>
> …
>
> A: Mr Ronnie, first place, Mr Goh did not comply with PSA requirement to raise the capital ... to 700,000 at $1 each, you know. Anyway, we hoodwinked PSA also.

Q: You hoodwinked PSA? How did you …

A: You see, Chenab hoodwinked PSA. Because to raise the capital 1.5 million, other commission, right, in fact I took other commission. We should have … thinking that he will pay later.

In re-examination, Raj attempted to change his testimony by saying that it was GKS and not he, who had hoodwinked the PSA as GKS did not pay for the Shares.[note: 9] In my judgment, both the defendants and Koon Seng acting by GKS hoodwinked the PSA.

67 I have already said that GKS and Raj were not credible witnesses. Bluntly put, GKS and Raj were ready to lie and did lie when it suited them in order to present to the court the picture each had chosen to portray. The explanations they put forward were inconsistent and not credible when tested against a fact which is common ground or not in issue. As I found, the purported allotment of 700,000 shares was a sham. There is no valid underlying basis for a claim by Koon Seng that the Shares were the property of Koon Seng. The relief claimed is, therefore, unfounded. Equally, Chenab's defence and counterclaim fails for the same reason. Plainly, the parties have not established on a balance of probabilities their respective pleaded case. Consequently, I dismiss the action and as a corollary of my decision, the counterclaim is also dismissed.

Is the claim for the forfeited shares to revert to Koon Seng closely connected with the unlawful conduct

68 Separately, I see no reason why the ex turpi principle should not apply here bearing in mind the principles set out in [28] to [38] above. All the relevant facts are before the court from which a decision can be properly made on whether the parties had fallen foulof the *ex turpi* principle. The court's refusal upon grounds of public policy to lend its assistance is a separate reason for a dismissal of the relief claimed and counterclaim.

69 Mr Tan submits that Koon Seng was unaware of the illegal manner in which the paid up capital was increased. It was the defendants who had contravened the Companies Act and not Koon Seng. The latter should not be penalised for the defendants' wrongdoing, there being no complicity in the affair on the part of Koon Seng. Mr Quek's position is that the arrangement or share transaction between Raj and GKS was not illegal nor was it against public policy. In any case, not only was illegality not pleaded, there was no illegality on the face of the contract for the court take cognisance.

70 In this case, as a matter of construction it is not the intention of Parliament that breaches of ss 199 and 401 of the Companies Act would have the effect of rendering the agreement to allot illegal *per se*. Nevertheless, an agreement made with the object (direct or indirect) of deceiving a third party is illegal. If authority is needed, I refer to *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, cited in the footnote of *Cheshire, Fifoot & Furmston's Law of Contract*, (Butterworths, 15th Ed, 2006) at 473. Morris LJ at 636 identified the elements making the consideration illegal, namely, the making of a representation of fact which was false and it was known to be false with intent that it should be acted upon. Morris LJ went on to explain that:

> If the consideration for the promise was the making of such a representation, then the unlawful consideration made the contract unenforceable whether or not damage resulted to someone who acted on the representation and therefore had a cause of action.

71 In that case the shipowner issued clean bills of lading in respect of a quantity of orange juice in barrels. Some barrels were old, frail and leaking at the time of shipment. The defendant undertook unconditionally to indemnify the shipower against losses which might arise from the issuance of the clean bills of lading in respect of the goods. The barrels when delivered at Hamburg were leaking and the shipowner had to make good the loss. The plaintiff as agent of the shipowner and to whom the letter of indemnity was assigned sued the defendant under the indemnity. The defendant refused to pay alleging that the contract of indemnity was illegal because it had as its object the making by the shipowner of a fraudulent misrepresentation. Even though the granting of clean bills of lading against indemnities was a common practice so much so that the plaintiff did not desire that anyone should be defrauded, the question was whether the contract sued upon was founded upon an illegal consideration. The appellate court held that an agreement is illegal and unenforceable if it has as its object the commission of a tort. The object of the indemnity was the making by the shipowner of a fraudulent misrepresentation that the orange juice was shipped in apparent good order and condition when it was not.

72 In the circumstances of the present case, all the elements of the tort of deceit against a third party, the PSA, were present. The capital asset of the company was falsely stated as paid. The allotment was a sham. The allotment was a segment of the same façade erected with the objective of deceiving a third party, namely the PSA. The PSA was seriously misinformed of the capital asset of the company. In any case, the parties were *in pari delicto* and neither could establish a cause of action against the other without relying on its own wrongdoing. I shall now consider these issues in turn.

73 Of relevance to the question of illegality, is the intention of the parties and the purpose of the transaction (see *Suntoso Jacob* at [65]). I pause here to observe that in *Tinsley v Milligan*, the intention of the parties was to hold the property purchased from joint funds as joint beneficial owners but vested it in the sole of one of them. In *Suntoso Jacob*, the plaintiff there did not intend to benefit the defendant. He created a trust whereby the defendant held the shares as the plaintiff's nominee. This distinction is significant as the transfer of property in that case did not give rise to independent rights of ownership. In contrast, the majority decision of *Tinsley v Milligan* was firmly founded on a property right and the ability to claim it without being "forced to plead or rely on illegality". Milligan's equitable claim depended only on the presumption of resulting trust which arose from the fact that (a) Milligan had put up half of the purchase price of the house; and (b) no presumption of advancement arose from the relationship between Tinsley and Milligan.

74 In *Suntoso Jacob*, the company in question wished to register its ownership of a tug in the Singapore Register of Ships. At that time, under the guidelines laid down by the Registrar of Ships, the tug could not be registered as a Singapore flagged vessel if it was foreign-owned. It was then

agreed between the plaintiff and the defendant that the plaintiff would transfer to the defendant to hold on trust 92,000 shares of the company. After the transfer of shares, the tug was registered as a Singapore flagged vessel in the name of the company. Subsequently (and this is an important point as it reinforces the defendant's status as nominee of the shares), the defendant executed a blank transfer of the shares and also signed a board resolution approving the transfer. He delivered both the documents to the plaintiff. After the loan for the finance of the tug had been repaid in full, the plaintiff decided to have the shares transferred to another Singaporean nominee. The plaintiff, therefore, caused the blank transfer to be completed and executed by the new nominee. It was dated and submitted together with the board resolution to the company secretary for registration. All the while the share certificate in question was retained by the defendant who had refused to deliver it to the company secretary. The defendant maintained that he was the legal and beneficial owner of all the shares and had never agreed to transfer them to the new nominee or any other person. The plaintiff then sued the defendant as trustee of the shares pursuant to an express trust. The defendant denied the trust. He argued that the shares were sold to him and the sale was to enable the company to own the tug under the Singapore flag. No plea of illegality of or in connection with the transfer of the shares was raised in the pleadings. At the conclusion of the trial, the trial judge found that the defendant did not pay or provide consideration for the shares transferred to him. He dismissed the claim on the ground that the plaintiff had practised a deception on the Registrar of Ships, and the court would not lend its aid to a person who founded his claim on an illegal act.

75 At the appeal stage, the plaintiff changed tact and explained that he was not founding his claim on an illegal act. Instead, he premised his case on, *inter alia*, a resulting trust following the judge's finding that the defendant did not pay any consideration for the transfer of the shares. That resulting trust, it was argued, was not tainted with any illegality. In other words, the plaintiff was not relying on the antecedent transaction of an express trust to found his claim against the defendant. The Court of Appeal disagreed. It observed that the claim was not based on any independent right of ownership of the shares. Thean J noted that to recover the shares, the plaintiff had to rely on the trust created in his favour and in so doing the illegal purpose of the transfer that gave rise to the trust was revealed. The Court of Appeal upheld the decision of the trial judge that the share transfer was a deception on public administration and the court will not aid the plaintiff to recover the shares. Thean J at 65 said:

> It is too artificial to sever the purpose from the transaction, *ie* the transfer of the said shares to the [defendant] without any payment, and look at only the transaction in isolation and say that it was not tainted by the unlawful purpose. The intention of the parties and the purpose of the transaction are clearly relevant. Where a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality and is unenforceable.

76 Likewise, Koon Seng's claim to be reinstated to its status as a shareholder is not premised on an independent right of ownership of the Shares. There was as I have found no intention to pass property in the Shares as the whole scheme was a paper exercise (see [57] to [67]). Koon Seng is seeking to enforce, rely upon, or found its claim on the allotment which is a sham.Koon Seng was a business partner who was entitled to a share of the profits of the PSA Contract and not a share of the profits of the whole company. Even though the parties had premised this case on the common ground that Koon Seng was a shareholder, it was simply a convenient tale to adopt to avoid the embarrassment of having to explain the window-dressing meant to hoodwink the PSA. GKS did appreciate that the PSA was being misinformed of the true capitalisation of the Chenab. Having participated in the tender for the PSA Contract, GKS cannot be absolved of involvement in the deception, he as the alter ego of Koon Seng and Raj as the alter ego of Chenab.

77 Koon Seng's participation and involvement in the tender was consistent with its acceptance of the pretence that the share capital of Chenab was $1.5m. In fact, there is participation in the unlawful conduct if the claimant does some act, not necessarily required by the contract, but goes towards assisting in the defendant's unlawful scheme. In *Hodgson v Temple* (1813) 5 Taunt 180, this principle was applied in favour of a vendor who was able to sue for the price of spirits despite knowing that the purchaser, who was licensed to sell spirits by retail, intended to use the spirits in a distillery owned by him. His ownership contravened a statute which forbade licensed retailers from being interested in the trade or business of distilling. Lord Mansfield held that it is necessary that the vendor should be a participant in the illegal transaction; mere knowledge was not sufficient.

78 It is a question of fact in each case whether there has been a sufficient degree of participation by the party concerned. Mr Tan in his Opening Statement said that Koon Seng provided financial assistance and other forms of assistance to Chenab, and '[s]uch assistance was to enable [Chenab] to tender for a PSA contract and to pay for its operations." GKS in his written testimony confirmed that Koon Seng had given assistance to help Chenab secure the PSA Contract. In his affidavit of evidence-in-chief, Raj exhibited the affidavits filed by GKS in Suit No 111 of 2005 and CWU Petition No 64 of 2005). In the affidavits filed in those proceedings, GKS confirmed that Koon Seng had assisted the defendants in their bid to tender for the PSA Contract. The forms of assistance that were necessary for the tender included the provision of a performance bond and corporate and personal indemnities as required by the PSA. That testimony was accepted by Raj who also admitted that as a condition of the award of the contact, Chenab had to provide a performance bond and corporate and personal indemnities. Personal indemnities were furnished by GKS and his family members. In assisting Chenab, Koon Seng had accepted and allied itself to the false statement that Chenab's paid up capital was $1.5m and perpetuated that falsehood during the tender process leading to the award of the contract.

79 Applying the broad test laid down in *Hewsion* to the facts in the present case, the issue of non-payment and forfeiture of the Shares are so closely or clearly connected or inextricably bound up or linked with the unlawful conduct that no claim should succeed for illegality. It may well be the case that the misstatements came at a time anterior to the supply of labour after the PSA Contract. But that is not the point in contention here. The contest in these proceedings is not about the profits under the PSA Contract and the parties' share of the profits. For the sake of argument, even on their respective pleaded case, the parties cannot succeed here without proving that the Shares were either paid for or unpaid. Koon Seng invoked the doctrine of estoppel in relation to the false documentation representing the paid up capital as $1.5m and the allotment described as fully paid to support its contention. GKS had relied on the documents publicly available to show that the Shares were fully paid and as such Koon Seng was under no liability to pay for the Shares. In the defendants' case, they made use of the 1999 resolution as contemporaneous evidence in support of their case that Koon Seng had to pay cash for the Shares. I have already ruled that the 1999 resolution was a feature of the façade in play.

80 To summarise, Koon Seng's claim to reinstate its status as a shareholder arose out of the unlawful conduct of the defendants in creating the sham paid up capital of $1.5m and shareholding to deceive the PSA with, first the connivance of Koon Seng, and second its participation by assisting in securing the PSA Contract. In my judgment, I find that the relief claimed is based substantially (and not therefore collaterally or insignificantly) on the parties' unlawful conduct. In the same way, the defence and, hence, the counterclaim is equally affected.

Result

81 For the reasons stated, I dismiss the relief claimed in this action as well as the counterclaim. On

the question of costs, each party is to bear their own costs of the action and the costs of the counterclaim. If necessary, I shall hear parties on the orders to be made with a view to rectifying the share register and consequential orders, if any.

[note: 1] Transcript of Evidence p 55 line 31. Tab A of Plaintiff's Core Bundle pp 1 to 3 is ROC search faxed on 16/9/00.

[note: 2] Plaintiff's supplementary bundle of documents p 41 para 5 of Jagip Kaur's 1st affidavit filed in divorce proceedings.

[note: 3] Plaintiff's supplementary bundle of documents p 42 para 15 of Jagip Kaur's 1st affidavit filed in divorce proceedings.

[note: 4]Raj's Affidavit of evidence-in-chief, para 49

[note: 5] Transcript of Evidence p 38 line 31, p51 line 9 to 19.

[note: 6] Defendants' Amended Supplemental Closing Submissions dated 3 July 2007, para 13.

[note: 7] Plaintiff's Submissions dated 30 April 2007, para 19.

[note: 8]Transcript of Evidence p 60

[note: 9] Transcript of Evidence p 128