Ting Siew May *v* Boon Lay Choo and another
[2014] SGCA 28

Case Number	: Civil Appeal No 121 of 2013
Decision Date	: 26 May 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Alvin Yeo SC, Ong Pei Chin, Hong Jia (WongPartnership LLP), M P Kanisan and P Balagopal (M P Kanisan & Partners) for the appellant; Tang Hang Wu and Ng Lip Chih (NLC Law Asia LLC) for the respondents.
Parties	: Ting Siew May — Boon Lay Choo and another

Contract – Illegality and Public Policy

Land – Sale of Land – Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 4 SLR 820.]

26 May 2014 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the judge ("the Judge") in *Boon Lay Choo and another v Ting Siew May* [2013] 4 SLR 820 ("the Judgment").

2 This appeal concerns the enforceability of an option to purchase a property granted by the Appellant to the Respondents, which was backdated at the request of the latter. It was common ground that such backdating was effected for the purpose of enabling the Respondents to obtain a higher bank loan in circumvention (as well as contravention) of MAS Notice No 632, a notice prescribed by the Monetary Authority of Singapore ("the MAS") pursuant to s 55 of the Banking Act (Cap 19, 2008 Rev Ed) ("the Act"). This notice was prescribed for the purpose of regulating residential property loans. The Judge held that the said option was enforceable at the instance of the Respondents.

3 As we shall see, the present appeal necessitates the consideration of the applicable legal principles in relation to one of the most confused (and confusing) areas in the common law of contract – that of illegality and public policy. Indeed, in this appeal, we would need to consider the legal principles with regard to not only statutory illegality but also illegality at common law.

4 Before proceeding to set out the applicable legal principles as well as applying them to the facts of the present appeal, it would be appropriate – by way of background – to first set out the relevant facts, the decision of the Judge, the relevant issues which arise in the present appeal, as well as a summary of the parties' respective cases.

Facts

Background to the dispute

Background to the dispute

5 The Appellant is the sole owner of 30 Jalan Angin Laut Singapore 489226 ("the Property"). The Respondents are husband and wife. In October 2012, the Appellant granted the Respondents an option to purchase the Property ("the Option"), which was backdated to 4 October 2012.

6 Around mid-2012, the Respondents were interested in purchasing a landed property and approached their banker at United Overseas Bank ("the Bank"), Mr Leslie Ong ("Ong"), about the financing of such a purchase. On 12 July 2012, the Bank granted the Respondents in-principle approval for a loan capped at the loan-to-value ("LTV") ratio of 80%. At that time, this was the prevailing limit imposed by MAS Notice No 632 on the quantum of residential property loans for borrowers in the Respondents' position.

7 On 5 October 2012, the MAS issued an amendment to MAS Notice No 632 ("the 5 October Notice"), the effect of which was that the LTV ratio of the Respondents' proposed loan from the Bank would have to be lowered from 80% to 60%. It was not in dispute that the Respondents knew about the 5 October Notice around the time it was announced.

8 On 10 October 2012, the Respondents made an oral offer to the Appellant to purchase the Property. On or about 12 October 2012, the parties agreed on the purchase price of S$3.68m. On 13 October 2012, the Appellant signed the Option which was backdated to 4 October 2012. According to the Respondents, they had been advised by Ong to ask their property agent to check with the Appellant if she was willing to backdate the Option to 4 October 2012 so that they could obtain a loan for the purchase on the more favourable terms allowed prior to the 5 October Notice. The Respondents' position was that Ong had told them that "a lot of buyers" were backdating their purchases to dates prior to 5 October 2012 for that reason and that this was simply "common practice".

9 On 15 October 2012, the Respondents were offered a loan from the Bank at the LTV ratio of 80% and on 19 October 2012, they accepted the offer. On 24 October 2012, one day before the expiry of the Option, the Appellant's solicitors wrote to the Respondents' solicitors, stating that the Appellant "[did] not want to be a party to any illegality or irregularity" and was withdrawing her offer. According to the Appellant, she only learnt about the 5 October Notice on 19 October 2012 and was then advised not to proceed with the sale of the Property.

10 The Respondents' solicitors responded on 24 October 2012, stating that the Appellant had no right to withdraw the offer as stated in the Option. On 25 October 2012, the Respondents' solicitors unsuccessfully attempted to exercise the Option at the offices of the Appellant's solicitors. A series of correspondence between the parties' solicitors ensued. Amongst other things, the Respondents' solicitors, in a letter dated 6 December 2012, proposed that the parties proceed with the exercise of the Option on the basis that it was dated 13 October 2012 (the actual date of the Appellant's signature) and that the Respondents would also obtain financing for the purchase of the Property on that basis. However, no resolution was reached.

11 On 11 January 2013, the Respondents applied for: (a) a declaration that the Option is valid and binding on the Appellant; and (b) an order for specific performance by the Appellant of the Option or, in the alternative, damages.

The proceedings below

12 In the proceedings below, the Appellant argued that the backdating of the Option for an illegal purpose (*ie*, to obtain a loan at the LTV ratio of 80% in contravention of the 5 October Notice)

rendered the Option void and unenforceable. The Appellant also argued that the Respondents were not entitled to an order for specific performance because they had "unclean hands".

13 Conversely, the Respondents contended that the Option was valid and binding on the Appellant, since it was not illegal *per se* but was capable of being performed lawfully. Further, the Respondents argued that they had "washed their hands" and repented from any alleged illegality (relying on the doctrine of *locus poenitentiae*) by voluntarily undertaking to perform the contract in full compliance with the 5 October Notice.

14 The Judge held that the Option was valid and binding on the Appellant and granted the Respondents an order for specific performance of the Option. The Judge considered that there was no statutory illegality since there was no express or implied legislative intention that the backdating of the Option would render it unenforceable. The Judge also found that the Option was not void and unenforceable for illegality at common law since the illegal manner in which the Respondents intended to procure financing was too remote from the contract and the Respondents did not need to rely on the backdating to found their claim against the Appellant.

The issues before this court

15 The key question in this appeal (as alluded to at the outset of this judgment) is whether the Respondents are entitled to enforce the Option despite the fact that it was backdated for the purposes of enabling the Respondents to obtain a larger credit facility than they were otherwise entitled to under the 5 October Notice. Accordingly, the following issues need to be determined:

(a) Whether the Option is void and unenforceable at *common law* for being contrary to public policy, in particular:

(i) Whether the Option is void and unenforceable for being a contract to commit the tort of fraud or deceit; and

(ii) Whether the Option is void and unenforceable for being a contract that was entered into with the object of committing an illegal act.

(b) Whether the Option is expressly or impliedly prohibited under *statute*.

16 We pause to note that, although the parties' respective cases (and, indeed, the Judgment in the court below) considered the issue of statutory illegality first, for reasons which will be apparent in the following analysis, we think that it is more appropriate to commence with a consideration of the issue relating to illegality at common law – hence, the framing of the issues in the order set out in the preceding paragraph.

17 We also pause to note that there were two other possible issues which were not taken up on appeal. One related to the applicability of the doctrine of *locus poenitentiae.* This particular issue was mentioned but was not (correctly, in our view) pursued by counsel for the Respondents, Prof Tang Hang Wu ("Prof Tang") (if nothing else, because the facts did not, in our view, permit such a doctrine to be invoked in the first place). The other issue related to the Judge's findings on specific performance. Again, given our analysis and decision that follow, this issue has been rendered moot in any event.

The parties' respective cases – a summary

18 The Appellant first characterised the nature of the illegality committed by the Respondents as not only the abetment of an offence by the Bank under s 55 of the Act, but also as the offence of attempted cheating under s 415 read with s 511 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). The Appellant submitted that the Option, which was backdated in order to circumvent the 5 October Notice, was impliedly prohibited by the Act since the policy objective of the 5 October Notice was to protect the public by avoiding a property "bubble" that would destabilise Singapore's financial system.

19 Alternatively, the Appellant argued that the Option was illegal and unenforceable at common law because it was intended to be used for the illegal purpose of cheating or deceiving the Bank. The Appellant submitted that the illegality in this case was not too remote, given that the procuring of financing was central to the Respondents' ability to perform their obligations under the Option and the instrument of the Respondents' deception of the Bank was the backdated Option itself.

20 The Respondents argued that any illegality was now irrelevant since the loan from the Bank was never drawn down and since they had already expressed their unequivocal intention to obtain financing in compliance with the 5 October Notice. They also argued that the Appellant had shifted her case on appeal by raising new characterisations of the alleged illegality and that she should not be allowed to do so because this would unduly prejudice the Respondents.

21 In so far as the issue of statutory illegality was concerned, the Respondents submitted that the Judge was correct in concluding that there was no express or implied legislative intention to render the Option unenforceable since s 55 of the Act and the 5 October Notice were directed only at banks and not the public at large.

22 In so far as the issue of illegality at common law was concerned, the Respondents argued that the Option was for the legitimate purpose of granting them an option to purchase the Property and that they could not be said to have deceived the Bank when the idea of backdating the Option had originated from Ong, an officer of the Bank itself. Even if there was an illegality in financing, this was too remote to render the Option unenforceable, given that there was nothing to prevent the Respondents from performing their contractual obligations lawfully by paying the purchase price in cash. The Respondents also argued that their claim should be allowed as they did not need to rely on the backdating to establish their claim against the Appellant.

Analysis

Introduction

The public interest overrides parties' rights in situations of conflict

23 The defence of illegality and public policy is not always a "meritorious" one when viewed from the perspective of the individual parties. As Lord Mansfield CJ observed in the oft-cited English decision of *Holman v Johnson* (1775) 1 Cowp 341 at 343:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an 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. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

24 A court will therefore hold that a particular contract is void and unenforceable as being contrary to public policy because of the *wider public interest*, which in such cases overrides the parties' individual contractual rights. As has been observed (see "Illegality and Public Policy" in Ch 13 of *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Illegality and Public Policy*") at para 13.001):

> The topic of illegality and public policy constitutes perhaps the most complex area of the law of contract. This is not surprising because the very concept of public policy is a very nebulous creature indeed. The focus here is not so much on the individual as such but rather, on society. To this end, the courts are prepared to override the contractual rights of the parties concerned if to do so would give effect to the greater public good. This is not to say that matters of broader public interest arise only in some contracts. They arise in all contracts but most of the time they coincide with the parties' contractual rights. There is as much a public interest in upholding properly reached agreements as a private interest between the parties themselves in keeping to the agreement. In the cases discussed in this chapter, however, the public interest element does *not* coincide with the parties' interests and, indeed, the latter *militates against* the former. Where, however, the line is to be drawn by the courts constitutes the difficult issue that lies at the heart of this chapter. [emphasis in original]

25 The defence of illegality and public policy can thus be contrasted with other doctrines in the common law of contract where a particular contract is rendered void (or voidable) owing to some legally objectionable conduct on the part of one of the *individual contracting parties* which falls within the purview of one or more of the *other* doctrines relating to *vitiating factors* (of which the doctrine of illegality and public policy is one). These other doctrines include, for example, misrepresentation, mistake, duress, undue influence, as well as (at least to a limited extent) unconscionability.

26 It would, of course, be ideal if the rendering of a particular contract void and unenforceable as being contrary to public policy *simultaneously* resulted in a just and fair result between the *individual parties*. This is possible but *need not necessarily* be the case. In this last-mentioned regard, although one might view the invocation of the doctrine of illegality and public policy as not being particularly "meritorious", that would not be the reason or rationale why the contract concerned has been rendered void and unenforceable; as just mentioned, this legal result is mandated by a much broader (and general) public interest.

27 The law of illegality and public policy has traditionally been divided into two broad (or general) areas – *statutory* illegality and illegality at *common law*. Indeed, as we have already noted, both categories of illegality are engaged in the present appeal. And, as we shall see, whereas the question of whether a particular contract is prohibited by a particular statutory provision under *statutory* illegality is primarily one of ascertaining the relevant legislative intent of that provision, a contract could be prohibited under illegality at *common law* pursuant to one or more *heads* of public policy.

28 In so far as illegality at common law is concerned, the more general question that arises is whether or not the existing heads of public policy can be extended and, if so, in what manner (see generally *Illegality and Public Policy* at paras 13.060–13.064). This question, however, does not arise for our consideration in the present appeal as it involves heads of public policy that are already well

established by the relevant case law.

Proof of illegality

29 The basic principles with regard to the proof of illegality have been clearly set out in the following four propositions by Devlin J (as he then was) in the English High Court decision of *Edler v Auerbach* [1950] 1 KB 359 ("*Edler*") at 371 (see also the House of Lords decision of *North-Western Salt Co v Electrolytic Alkali Co Ltd* [1914] AC 461, from which these principles originated):

> [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 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.

The above passage was cited with approval by Wilmer LJ in the English Court of Appeal decision of *Snell v Unity Finance Co Ltd* [1964] 2 QB 203 at 215. In local case law, Devlin J's statement of principle in *Edler* has also been accepted as correct (see, for example, the decision of the Federal Court in Singapore in *Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71 at 74, as well as the Singapore High Court decisions of *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 at [31] and *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 ("*ANC Holdings*") at [73]).

30 It is pertinent, at this juncture, to deal briefly with the Respondents' objection to the Appellant's "shifting" of her case on appeal by raising new characterisations of the alleged illegality. In the first place, we are of the view that the illegality in the present case has been adequately pleaded by the Appellant (see above at [12]).

31 However, even assuming that the Appellant had not pleaded illegality at all in the proceedings below, it is evident from the basic principles stated above (at [29]) that the Respondents' objection has no force. As a matter of principle, whether or not a contract is held to be unenforceable on the ground that it is illegal or contrary to public policy should not depend on the characterisation of the illegality (see *ANC Holdings* at [98]). Indeed, the court may take cognisance of an illegality even if it has not been pleaded, provided that all the relevant facts have been adduced and are before the court. In this case, we are satisfied that all the relevant facts are before us and that no new evidence needs to be adduced.

32 So much by way of a few general (and introductory) observations. It would be appropriate to now turn to the first specific issue – whether or not the Option has been rendered void and unenforceable as a result of contravening a head (or heads) of public policy at *common law*.

Illegality at common law

The applicable legal principles

(1) The difficulties with the concept of public policy

33 It bears repeating that the law relating to illegality and public policy is generally confused (and confusing) (see also *Illegality and Public Policy* at para 13.001, quoted above at [24]). This is due, in no small part, to the very nature of this area of the common law of contract. In particular, and in the famous (and oft-cited (see, for example, the decision of this court in *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 ("*Ngiam Kong Seng*") at [40])) words of Burrough J in the leading English decision of *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294 (at 252; 303), public policy is:

> [A] very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law.

34 Not surprisingly, the ebullient Lord Denning MR was far more optimistic than Burrough J. Again, in observations which are well-known and oft-cited (see also *Ngiam Kong Seng* at [40]) in the English Court of Appeal decision of *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591, the learned Master of the Rolls observed thus (at 606):

> With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.

35 Notwithstanding Lord Denning MR's optimism, the fact remains that the concept of public policy is indeed an unruly horse and must therefore be applied wisely. It might also be useful to note that, in the English High Court decision of *Tinline v White Cross Insurance Association, Limited* [1921] 3 KB 327, Bailhache J not only noted Lord Halsbury's view in the House of Lords decision of *Quinn v Leathem* [1901] AC 495 (at 506) that "the law is not always logical" but also (and more importantly for the purposes of the present case) proceeded to observe (at 331) that "[i]f the law is not logical, public policy is even less logical".

36 Fortunately (as already alluded to above), the heads of public policy under which the Option could be caught in the context of the present appeal are established ones, although it should be noted that the *precise facts* become of the first importance.

(2) Contracts to commit a crime, tort, or fraud

37 It has been observed of this particular head of illegality at common law thus (see *Illegality and Public Policy* at para 13.092):

> This is also a straightforward category and it is easy to see why the courts would prohibit such contracts as being contrary to public policy. However, where a contract to commit a *crime* is concerned, whilst the legal effect on the contract is generally draconian and extends to representatives of the party concerned, this approach may not extend to crimes which are basically regulatory in nature. There may also be a possible linkage to statutory illegality inasmuch as a contract to contravene a statutory provision – even if not otherwise prohibited by such a contravention – is nevertheless still illegal inasmuch as it is a contract to commit a crime at common law (provided that *all* parties are involved). [emphasis in original]

38 As the passage quoted in the preceding paragraph notes, it is important to appreciate the potential overlap between this head of illegality at common law (and indeed, illegality at common law in general) and statutory illegality. Even though a contract which contravenes a particular statutory provision may not be not prohibited as such by that provision, it can nevertheless still be held to be void and unenforceable at common law for being contrary to public policy. Put another way, a claim may fail on account of "common law" illegality notwithstanding that a legislative provision provided the background to that failure (R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 3rd ed,

2013) ("*Buckley*") at para 1.10). This will be elaborated upon further in the next section of this judgment on contracts entered into with the object of committing an illegal act.

39 It should also be noted that, in so far as a contract to commit a *fraud* is concerned, this particular category also includes a contract to commit a fraud on *a third party* (see, for example, the English Court of Appeal decision of *Scott v Brown, Doering, McNab & Co.* [1892] 2 QB 724). It should be further noted that such fraud would in fact constitute the *tort* of *deceit or fraudulent misrepresentation.* In such circumstances, the party alleging that fraud has been committed would bear the burden of establishing the requisite elements constituting such fraud in law to the requisite standard of proof. The applicable legal principles were in fact recently set out in the decision of this court in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Wee Chiaw Sek Anna*").

40 Turning, briefly, to the requisite elements which would constitute fraud or deceit, it was observed in *Wee Chiaw Sek Anna*, *inter alia*, at [32]–[33] as follows (see also generally at [34]–[49]):

> 32 The oft-cited statement of principle in so far as the elements of fraudulent misrepresentation are concerned is that of Lord Herschell in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337, as follows (at 374):
>
> > I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (*1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false*. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent* a false statement being fraudulent, there must, I think, always be *an honest belief in its truth*. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. [emphasis added]
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> 33 Lord Herschell's statement of principle is now an established part of the Singapore legal landscape relating to fraudulent misrepresentation (see, for example, the decision of this court in *Wishing Star* (at [16]–[17], as well as the authorities cited therein)).

41 In so far as the requisite standard of proof is concerned, the following observations in *Wee Chiaw Sek Anna* (at [30]) might be usefully noted:

> 30 It is, in our view, of the first importance to emphasise right at the outset the *relatively high standard of proof* which must be satisfied by the representee (here, the Appellant) before a fraudulent misrepresentation can be established successfully against the representor (here, the Deceased). As V K Rajah JA put it in the Singapore High Court decision of *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 (at [30]), the allegation of fraud is a serious one and that "[g]enerally speaking, the graver the allegation, the higher the standard of proof incumbent on the claimant". If an allegation of fraud is successfully made, the representor would be justifiably found to have been guilty of *dishonesty*. Dishonesty is a grave allegation requiring a high standard of proof. In a similar vein, this court in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 observed thus (at [14]):

> [W]e would reiterate that the standard of proof in a civil case, ***including cases where fraud is alleged*** , is that based on a balance of probabilities; *but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case*. [emphasis added]

[emphasis in original in italics; emphasis added in bold italics]

(3) Contracts entered into with the object of committing an illegal act

42 There is yet another possible – and far more general – category of contracts which might be void and unenforceable at common law. This finds perhaps its best exposition in the leading judgment by Devlin J (as he then was) in the English High Court decision of *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 ("*St John Shipping*"). In an area of law which is both confused and confusing, *St John Shipping* stands (if we may say so) as a rare beacon of light to guide lawyers, courts, jurists, and students along a path which is unclear at best and pitch black (with the occasional obstacle to boot) at worst. That is why it has – and as a first instance judgment at that – not only stood the test of time but has also continued to furnish valuable guidance almost six decades after it was first handed down.

43 The crucial passage in the judgment of Devlin J in *St John Shipping* (at 283) is as follows:

> [A] contract which is entered into *with the object of committing an illegal act is unenforceable*. The application of this principle *depends upon proof of the intent, at the time the contract was made, to break the law*; *if* the intent is *mutual* the contract is *not enforceable at all*, and, *if unilateral*, it is *unenforceable at the suit of the party who is proved to have it*. [emphasis added]

44 The following elaboration of the principle enunciated by Devlin J may be usefully noted (see *Illegality and Public Policy* at paras 13.050–13.052):

> (*c*) *Situations where there is neither express nor implied prohibition*
>
> If, in fact, there is neither express nor implied [statutory] prohibition of the contract, it would appear… that the transaction is wholly untainted by illegality: at least in so far as adverse civil consequences in the context of the law of contract is concerned. This is indeed both logical as well as the general rule. *However*, there is a *qualification* which needs to be dealt with – if only briefly – in this work.
>
> (i) A qualification – Relevance of parties' intentions
>
> The qualification to the general rule that the contract will be upheld in the civil sphere in the absence of either an express or an implied prohibition of the contract centres on the *intention of one or both of the contracting parties*. Once again, the following observations by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [(1957) 1 QB 267] are apposite:
>
> > [A] contract which is entered into *with the object of committing an illegal act is unenforceable*. The application of this *principle depends upon proof of the intent, at the time the contract was made, to break the law; if* the intent is *mutual* the contract is *not enforceable at all*, and, if unilateral, it is *unenforceable at the suit of the party who is proved to have it*. [emphasis added]
>
> To summarise, where a party enters into a contract *with the intention of contravening the*

statute, he (as a "*guilty party*") *cannot* enforce his rights under the terms of the contract. If, of course, *both* contracting parties enter into the contract with such an intention, then *both* of them would *not* be allowed to enforce their respective rights under the terms of the contract (*ie*, both would be considered, in such a situation, to be "*guilty parties*"). All this is eminently logical and commonsensical. It would *constitute a general affront to public policy* for the court concerned to allow either party or both parties to enforce the contract *if either or both had the intention of contravening the provision(s) of the statute concerned*.

[emphasis in original]

45 It will be noticed from the quotation in the preceding paragraph that, even if the statutory provision(s) concerned does not prohibit the contract *per se*, the contract could still be void and unenforceable *at common law* if one or both parties entered into it with the intention or purpose of *contravening the statutory provision(s)* in question. Reference may also be made, in this regard, to the Report by the Law Commission of England and Wales, entitled *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* LCCP No 154 (1999) ("*Illegal Transactions (1999)*") at para 2.24.

46 On the general level of principle, the court will not permit the "guilty party" to benefit from his own (here, legal) wrong as this would be an affront to public policy. As a matter of public interest, the court should not appear to reward or condone a breach of the law. *However*, it is acknowledged that there might conceivably be legal wrongs intended to be committed by one or more parties which are *relatively trivial*. In this last-mentioned situation, it is arguable that it might be *disproportionate* for the court to decide that the contract concerned is rendered void and unenforceable. Put simply, there are *degrees of illegality.*

47 Nevertheless, might it be argued that permitting the court to decide whether or not the (intentional) commission of a particular legal wrong ought to render the contract in question void and unenforceable would result in excessive uncertainty? While we recognise that such an approach may lead to *some* uncertainty, we are ultimately of the view that this does not justify precluding in a blanket fashion the exercise of such discretion by the court. If this were so, the entire contract would be rendered void and unenforceable, regardless of the relative importance (or unimportance) of the legal wrong committed (which might not even be related to the actual contract). This would engender *precisely the opposite* result that was intended to be achieved by Devlin J's proposition (set out above at [43]) and, ironically, undermine the very *raison d'être* of that proposition. Put another way, this would be to extend – in an unjustifiable manner – the reach of the doctrine of illegality and public policy and result in the very dangers which the court has to guard against in the context of this doctrine (which includes the unnecessary negation of contracts otherwise legitimately entered into between the parties concerned).

48 What would constitute a legal wrong that ought, in the circumstances, to result in the contract concerned being rendered void and unenforceable is an exercise in *application*, which is a basic process that the courts effect on a daily basis. This was also recognised by the Privy Council in *Vita Food Products Inc v Unus Shipping Co Limited (In Liquidation)* [1939] AC 277 at 293 where Lord Wright observed thus:

> Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

49 In fact, the recognition of contracts entered into with the object of committing an illegal act as void and unenforceable at common law has recently been confirmed by case law itself. One such decision is that of the English Court of Appeal in *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939 ("*ParkingEye*") and another is the English High Court decision of *21st Century Logistical Solution v Madysen* [2004] 2 Lloyd's Rep 92 ("*Madysen*"). There is also an academic antecedent (at least in the context of the decision of *Madysen*) in the form of one of the leading articles in the Commonwealth on illegality and public policy published almost half a century ago: see M P Furmston, "The Analysis of Illegal Contracts" (1965-1966) 16 *U Toronto LJ* 267 ("*Furmston*").

50 The relevant part of *Furmston* for the purposes of the present analysis centres on the learned author's perceptive analysis of, *inter alia*, the oft-cited English Court of Appeal decision of *Alexander v Rayson* [1936] 1 KB 169 ("*Alexander*"). In *Alexander*, the contract concerned consisted of two separate documents, one a lease (with the benefit of certain services) at a rent of £450 per annum, the second requiring payment of £750 per annum for the provision of various services. The second document, however, covered essentially the *same* services as those embodied in the first document (except for the provision and maintenance of a refrigerator). The object of this "double-document arrangement" was to reduce the amount of tax payable and thus defraud the revenue authorities.

51 The court in *Alexander* held the contract to be illegal and void. Significantly, the court recognised as established the principle that the court might refuse to enforce a contract where it appeared that the *subject matter* of that contract was intended to be used for an unlawful purpose, and held that this principle applied equally where the contract itself (*ie*, the documents themselves) was intended to be used for an unlawful purpose. The court articulated the following principles of law (see *Alexander* at 182):

> It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement *which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose*, that is to say a purpose that is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff. … [emphasis added]

It is interesting to note that the above principles were followed by Devlin J in *Edler*.

52 The facts and holding of *Alexander* are straightforward enough, but what is interesting is the point made in *Furmston* that the contract in *Alexander* was illegal not because it was a contract to defraud the revenue (as it did not require any party to do anything which involved a fraud on the revenue and indeed could have been performed without any such fraud). Instead, it was illegal because of the plaintiff's *intention* to use the contractual documents to assist in misleading the revenue authorities (see *Furmston* at p 287).

53 More generally, Prof Furmston observed that "it is dangerous to think of illegal contracts as consisting wholly or even mainly of agreements to do acts contrary to the policy of the law" and that "it is quite clear that agreements which on their face are harmless, and which can be performed without infringing any legal rule, may still be held illegal" (see *Furmston* at pp 285–286). Prof Furmston therefore suggested that *Alexander* belonged to a class of illegal contracts in which a

contract may involve the doing of an act legal in itself, but with the intention by one of the parties that it provides the setting for the ultimate effecting of an act contrary to the policy of the law. Such a transaction is thus *not* an illegal *contract* as such, although public policy requires that the transaction be treated *as if* the contract itself were illegal. We observe (parenthetically) at this juncture that this is precisely the (broad) category of illegality at common law that we are presently considering and which (as we have already noted) finds expression by Devlin J in *St John Shipping* (quoted above at [43]).

54 Also relevant in the context of the present appeal is Prof Furmston's further analysis in this article of the *limits* of such a category. In particular, he was of the view that in so far as the contract was concerned, "it is clear that there must come a point when the connection with the plaintiff's intention is *too remote*" (see *Furmston* at p 287 (emphasis added), where Prof Furmston had actually drawn upon the reference to the concept of remoteness by du Parcq J *at first instance* in *Alexander* itself (see *Alexander* at 171)). When, in other words, does the link between the contract (which is legal in itself) and the illegal purpose it is supposed to effect become too tenuous?

55 It should be noted that it was precisely this passage from *Furmston* (and the point made therein) which was cited, endorsed, and applied by Field J in *Madysen.* Significantly, in our view, this same passage was also cited by Toulson LJ (as he then was) (with whom Smith and Mummery LJJ agreed) in the English Court of Appeal decision of *Anglo Petroleum Ltd and another v TFB (Mortgages) Ltd* [2007] All ER (D) 243 (May) ("*Anglo Petroleum*") (at [81]). This is significant because of Toulson LJ's later judgment in the (also) English Court of Appeal decision in *ParkingEye* – to which our attention now briefly turns.

56 However, before proceeding to do so, it is important to emphasise that the application of the principle of remoteness is very much a *fact-centric* inquiry. One possible factor that could be applied to this inquiry is whether there was any overt step in carrying out the unlawful intention taken in the transaction itself (see, for example, *Alexander* at 189). This requirement of "overt action" was one of the factors identified by the commentary in *Buckley* on *Alexander* and *Madysen*, which cautioned that it was an important but not necessary condition for a finding of illegality (see *Buckley* at para 7.11).

57 Returning to *ParkingEye*, in that case there was a contract for the plaintiff to supply the defendant with an automated parking system at some of its supermarket car parks. Under this contract, the plaintiff received no payment from the defendant but instead was allowed to retain all the "fines" collected from the defendant's customers who overstayed their free parking time in the car park.

58 In *ParkingEye*, when the plaintiff brought a claim for damages for repudiatory breach of the contract, the defendant raised an illegality defence based on false representations made in the demand letters sent by the plaintiff to the defendant's customers. The form of the demand letters was not stipulated in the contract but had been drafted by the plaintiff and approved by the defendant before the contract was made. The trial judge rejected this defence and found that although the plaintiff had committed the tort of fraud or deceit by deliberately inserting falsehoods into some of the demand letters (even though it had not appreciated the potential legal implications of the letters), the contract was not tainted by illegality because the approval of the form of the demand letters was *collateral* and *distinct* from the main contract.

59 The English Court of Appeal (comprising Laws and Toulson LJJ, as well as Sir Robin Jacob) held that the trial judge had rightly rejected the illegality defence since the illegality was neither central to nor necessary for the performance of the contract and to disallow the claim on the ground of illegality would lead to a disproportionate result.

60 At first glance, it would appear that Toulson LJ and Sir Robin Jacob (with whom Laws LJ agreed) applied different tests to arrive at the same result in *ParkingEye*. In particular, Toulson LJ considered the three factors of (a) the object and intent of the claimant; (b) the centrality of the illegality; and (c) the nature of the illegality whereas Sir Robin Jacob applied the "disproportionate" test. A closer examination of the judgment in *ParkingEye*, however, demonstrates that all three judges in *ParkingEye* were really in agreement that the *general approach* of the courts should be to look at the various policy considerations underlying the defence of illegality to assess whether refusal of the remedy sought would be a *proportionate* response to the illegality.

61 Sir Robin Jacob, who applied the "disproportionate" test, explained the principle of proportionality as involving "the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality" (see *ParkingEye* at [39]). Indeed, Toulson LJ was very much in agreement that this should be the approach taken towards the application of the illegality defence. This is evident from the preliminary sections of Toulson LJ's analysis (see *ParkingEye* at [51]) endorsing the following provisional recommendations in the Consultative Report by the Law Commission of England and Wales, entitled *The Illegality Defence* LCCP No 189 (2009) ("*The Illegality Defence (2009)*") (at paras 3.142–3.144):

> 3.142 We provisionally recommend that the courts should consider in each case whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. Against those policies must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected. *Ultimately a balancing exercise is called for which weighs up the application of the various policies at stake. Only when depriving the claimant of his or her rights is a proportionate response based on the relevant illegality policies, should the defence succeed.* The judgment should explain the basis on which it has done so.
>
> 3.143 We also consider that it would be helpful if, rather than simply asking whether the contract is illegal – a term which itself is vague and confusing – the courts were to ask whether the particular claimant, in the circumstances which have occurred, should be denied his or her usual relief in respect of the particular claim. This focus on the particular claimant and particular claim are important. As we have suggested, one of the most important factors bearing on the case will be the closeness of the connection between the claim and the unlawful conduct. It may well be the case that it would be a proportionate response to deny the claimant relief in respect of one of the defendant's obligations, where this is closely linked to the claimant's unlawful actions, but not to any other.
>
> 3.144 We provisionally recommend that the courts should consider whether illegality is a defence to the particular claim brought by the particular claimant, rather than whether the contract is "illegal" as a whole.
>
> [emphasis in bold in original omitted; emphasis in italics added]

62 Significantly, Toulson LJ also particularly endorsed (see *ParkingEye* at [53]) the following statement by Etherton LJ in the English Court of Appeal decision of *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593; [2013] RPC 21 ("*Les Laboratoires*") at [75]:

> [W]hat is required in each case is an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce

a *just and proportionate* response to the illegality. That is not the same as an unbridled discretion. [emphasis added]

Toulson LJ then discussed the principle enunciated by Devlin J in *St John Shipping* that a contract which is entered into with the object of committing an illegal act is unenforceable (see above at [43]), and enunciated the three factors summarised above (at [60]) *in the context* of this principle. It thus appears that Toulson LJ's three factors were *specific* to assessing the proper scope and application of the principle in *St John Shipping* and certainly did not detract from the *general* approach addressed earlier that the court should consider the various policy considerations underlying the illegality principle so as to produce a *proportionate* response to the illegality. Indeed, in Toulson LJ's conclusion, he reiterated that the illegality defence should be rejected in that case since "it would not be a just and *proportionate* response to the illegality" [emphasis added] (see *ParkingEye* at [79]).

63 It would however appear that "remoteness" or "proximity" was the decisive test which was adopted in *Madysen*, as opposed to a test of proportionality. In *Madysen*, the plaintiff company was incorporated as part of a "missing trader fraud" or "carousel fraud" scheme designed to defraud the tax authorities of value added tax ("VAT"). This scheme involved a trading entity (*ie*, the "missing trader") being incorporated and registered for VAT within the United Kingdom. This entity would purchase goods from suppliers outside the United Kingdom but within the European Union free from VAT, sell the goods on in the United Kingdom, charging VAT, and then pocket the VAT arising from the supply of goods without accounting to the tax authorities. In *Madysen*, the plaintiff purchased a consignment of goods from Luxembourg without VAT, and then entered into a contract to sell the goods (with VAT) on to the defendants. The defendants refused to make payment and contended that the contract was unenforceable for illegality. Field J held that the fraudulent intention of the plaintiff at the time of the contract did not render the contract illegal because it was too remote from the contract; there was not "a sufficient proximity between [the plaintiff's] fraudulent intention and the contract for the contract to be vitiated by illegality" (see *Madysen* at [21]).

64 In our view, there is, in substance, no real difference between the approaches taken in *ParkingEye* and *Madysen*. For instance, if the illegal conduct is *too remote* from the contract concerned, then it could be argued that to find that that contract is rendered void and unenforceable because of that illegal conduct would be to administer the doctrine of illegality and public policy in a *disproportionate* manner. However, it seems to us that the principle of proportionality is broader and more malleable than that of remoteness. It is capable of encompassing not only the concept of remoteness of the illegality but also considerations such as the nature of the illegality (*ie*, whether the illegality was of a serious or trivial nature) and the relative effects on the parties of rendering the contract concerned unenforceable.

65 Therefore, whilst there may (in most situations at least) be no real difference between these two approaches in *ParkingEye* and *Madysen* respectively, the principle of proportionality is probably preferable for its simplicity and adaptability. Indeed, proportionality has long formed part of the judicial approach towards the doctrine of illegality and public policy. As Bingham LJ (as he then was) observed in the English Court of Appeal decision of *Saunders v Edwards* [1987] 1 WLR 1116 at 1134:

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.

66 We would therefore agree that where a contract is entered into with the object of committing an illegal act, the general approach that the courts should undertake is to examine the relevant policy considerations underlying the illegality principle so as to produce a *proportionate* response to the illegality in each case. As alluded to above, this was the approach advocated by the English Law Commission and endorsed by Toulson LJ in *ParkingEye*. The English Law Commission in *The Illegality Defence (2009)* at paras 3.126–3.135 considered that the factors relevant to assessing proportionality included: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the seriousness of the offence; (c) the causal connection between the claim and the illegal conduct; (d) the conduct of the parties; and (e) the proportionality of denying the claim (similar factors were previously stated in *Illegal Transactions (1999)* at paras 7.27–7.43).

67 Factor (c) above relates to how closely the unlawful conduct is connected to the particular claim. It is in substance similar to the principle of remoteness of the illegality, which was the very pith and marrow of Prof Furmston's view as set out above (at [54]), and which (as we have seen) was also applied in *Madysen*, *Anglo Petroleum* and (most recently) *ParkingEye*. This principle of remoteness of the illegality means that some real or central (and not merely remote) connection must be demonstrated by the party relying on the defence of illegality between the contract concerned and the unlawful intention (whether that unlawful intention relates to a contravention of statute or the common law). We have also noted above that a key indication as to whether the illegality is too remote from the contract lies in whether any overt step in carrying out the unlawful intention was taken in the contract itself (see above at [56]).

68 In so far as the factor (e) at [66] above concerning the proportionality of denying the claim is concerned, we would observe from the commentary on this factor that it in fact relates to the consequences of denying the claim (see *The Illegality Defence (2009)* at paras 3.135). Proportionality is therefore not simply one of the factors to be considered, but applies as *an overarching principle* for the court to determine whether denial of the relief sought is a *proportionate* response to the illegality.

69 It should be noted that the factors first proposed by the English Law Commission in *Illegal Transactions 1999* were also discussed by the Law Reform Committee of the Singapore Academy of Law in its report entitled *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) (at para 8.10) and adopted in a modified (but substantially similar) form in the Committee's proposed draft bill, entitled "Illegal Transactions (Relief) Act 2002", which accompanied the report. The relevant section of the draft bill reads as follows:

> **Relevant considerations**
>
> **6**.—(1) In granting or refusing to grant relief… the court shall have regard to all relevant circumstances including —
>
> (a) the public interest;
>
> (*b*) the seriousness of the illegality;
>
> (*c*) whether denying relief will act as a deterrent;
>
> (*d*) whether denying relief will further the purpose of the rule which renders the transaction illegal;
>
> (*e*) whether denying relief is proportionate to the illegality involved;

(*f*) the circumstances of the formation or performance of the illegal transaction, including the intent, knowledge, conduct and relationship of the parties;

(*g*) whether any party to the illegal transaction was, at a material time, acting under a mistake or fact or law;

(*h*) the extent to which the illegal transaction has been performed;

(*i*) whether the written law which renders the transaction illegal has been substantially complied with;

(*j*) whether and to what extent the written law which renders the transaction illegal provides relief; and

(*k*) other consequences of denying relief.

70 We would summarise the general factors which the courts should look at in assessing proportionality in the context of contracts entered into with the object of committing an illegal act as including the following: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.

71 It should be emphasised that this is not necessarily a conclusive list of factors and, more importantly, that these factors should not be applied in a rigid or mechanistic fashion. Rather, these factors should be applied to each individual case, and weighed and considered by the court in the context of the particular facts of that case itself. All this underscores the very *fact-centric* nature of the inquiry that has to be undertaken by the court in this regard. This is not perhaps entirely satisfactory when viewed from a strictly theoretical perspective but is, in our view, only to be expected in the *practical* context in which the *application* of the law to the relevant *facts* is involved (and in which the inherently difficult concept of public policy (see above at [33]–[35]) is also involved).

72 Similar sentiments were echoed by Etherton LJ in *Les Laboratoires* at [63] (which sentiments were, in turn, cited in part by Sir Robin Jacob in *ParkingEye* at [28]), as follows:

> Counsel on both sides conducted an extensive review of many authorities on the illegality principle. They all argued, however, in their respective ways for an analysis and statement of the law which is too dogmatic and inflexible. It is not necessary in order to resolve this appeal to undertake a comprehensive analysis of the decided cases. Such an exercise would in any event be complex, very lengthy, and in large part unrewarding. *The decisions inevitably turn on their own particular facts. The statements of law or principle they contain are not all consistent or easily reconciled. The jurisprudence in this area has been an evolving one, but its evolution has not followed a consistent pattern.* … [emphasis added]

73 A more general observation on this particular category of illegality at common law is apposite at this juncture. As we have already noted, this category is a rather *broad and general* one. On one view, it can be seen as a kind of "*bridging*" category which focuses on the substance of the transaction instead of its form. To elaborate, one or both of the contracting parties will not be permitted to evade the law (whether in its statutory or common law form) by simply structuring the transaction in a manner which renders the contract lawful on its face – if the underlying purpose of

the transaction would constitute a general affront to public policy.

74 That having been said, what, then, would constitute an *unlawful act* which would trigger the operation of such a category? Put another way, what would constitute a purpose that is illegal or contrary to public policy?

75 One clear situation would involve contravention of a *statutory provision*. Indeed, it should be noted that Devlin J in *St John Shipping* rendered his statement of principle (see above at [43]) in the context of an alleged situation of *statutory illegality*. Likewise, in *Anglo Petroleum*, the English Court of Appeal expressly stated that a contract might be illegal and unenforceable if it was entered into for the purpose of doing an act prohibited by *statute* (see *Anglo Petroleum* at [54]). However, whether or not there is a sufficient linkage or connection between the contract concerned and the statutory contravention is one that depends upon the application of the principles set out above (at [42]–[72]).

76 What, then, about an intended act or purpose that is unlawful in the context of *the common law*? In particular, would that intended act or purpose need to fall within the purview of *an established head* of illegality? It would appear that this ought to be the case simply because, whilst the heads of public policy at common law are not closed, it would be a circular argument of sorts to seek to premise unlawful conduct on a head that has yet to be established at common law. However, if so, could it then be argued that the contract concerned would fall foul of *that* particular head of public policy *in any event*, so that there would be *no need to invoke* the present (and more general) category? Correlatively, if the court could be persuaded that a new head of public policy ought to be established, then there would be no need to invoke this (more *general*) category in the first place. That having been said, it is unnecessary for us to arrive at a conclusive view in the present appeal, since the only unlawful act at common law which is potentially involved in this case is the defrauding of a third party, which clearly falls within an established head of public policy.

77 To *summarise*, there is a category of contracts illegal at common law which comprise contracts entered into with an illegal or unlawful object. Such contracts, because they are in themselves not unlawful, can be distinguished from contracts to do acts that are illegal or contrary to public policy (for example, contracts to commit a crime, tort, or fraud). Case law has demonstrated that this category may include contracts entered into with the object of using the *subject-matter* of the contract for an illegal purpose, contracts entered into with the intention of using the *contractual documentation* for an illegal purpose, as well as contracts which are intended to be performed in an *illegal manner*. Further, the application of the doctrine of illegality to this particular category of contracts is subject to the (limiting) principle of proportionality. This, in turn, necessitates a consideration of (*inter alia*) the factors outlined above (at [70]), including the remoteness or centrality of the illegality to the contract. In the final analysis, the question is whether, on the facts and circumstances of each individual case, the refusal to enforce the contract is a proportionate response to the unlawful conduct concerned, taking into account the various policies underlying the doctrine of illegality and public policy.

78 Let us now turn to apply the relevant legal principles set out above to the facts of the present appeal.

Our decision

79 It is necessary to first identify and define the alleged illegality. If the illegality cannot be identified, then there is no need to even consider the effects of illegality, let alone how such effects can be mitigated (see *Illegality and Public Policy* at para 13.005). Also, the fact of an alleged illegality

cannot be assumed when it has yet to be proved (see, for example, the decision of this court in *AJU v AJT* [2011] 4 SLR 739).

80 In our view, the illegality in the present case was the (intended) contravention of a statutory instrument in the form of the 5 October Notice. On the Respondents' own evidence, they had intentionally requested that the Option be backdated for the purposes of obtaining a bank loan on the more favourable terms allowed prior to the 5 October Notice (see above at [8]). The illegality was in the Respondents' *intention* (which was not apparent on the face of the Option) to use the Option itself (*ie*, its documentation) to circumvent and contravene the 5 October Notice.

81 It is no answer to say that the Option itself did not require the doing of anything which involved a breach of the Act or the 5 October Notice, or that the Option could have been performed by the parties without such contravention of the law. The Option falls under the head of illegality at common law concerning contracts entered into with the object of committing an illegal act (discussed above at [42]–[77]). As we have seen, this category of contracts is recognised as void and unenforceable at common law because the courts will look not only at the form of the transaction but also its substance and therefore find that an unlawful intention behind the contract renders the contract itself unlawful.

82 Proceeding to apply the principle of proportionality, we are of the view that to refuse the Respondents enforcement of the Option would indeed be a proportionate response to the illegality, taking into account the relevant factors identified above (at [70]). First of all, the Respondents' object and intent from the outset was to use the (false) date stated in the Option for a purpose which they knew was prohibited. As we have already noted above, the Respondents very well knew about the 5 October Notice around the time it was announced.

83 Secondly, the nature of the illegal act which the Respondents set out to commit was not trivial. The main policy objective of the 5 October Notice was to limit the quantum of residential property loans so as to foster stability in the property market (a point which will be elaborated on further at [119] in the context of statutory illegality). That part of the 5 October Notice which the Respondents sought to contravene was directly related to this policy objective and was not merely trivial or administrative in nature.

84 Thirdly, allowing the Respondents' claim would undermine the purpose of the rule which the illegal conduct has infringed, that is, the 5 October Notice. As we have already noted, that part of the 5 October Notice which the Respondents sought to contravene was directly related to its main policy objective of fostering price stability in the property market; this policy objective would indeed be undermined if we were to permit the Respondents to enforce the backdated Option.

85 Fourthly, and most importantly, the Respondents' illegal purpose was not too remote from the Option. In this regard, a key factor to take into account is that there was indeed an overt (an integral) step in carrying out the Respondents' unlawful intention taken in the Option itself; this overt step was the stating of a false (and earlier) date in the Option. In other words, the objectionable part of the transaction resided within the Option itself and not outside it. In this respect, the present case bears resemblance to the case of *Alexander*, where the splitting of the transaction into two documents was held to be an overt step in carrying out the fraudulent intention and therefore rendered the documents unenforceable (see *Alexander* at 189).

86 In so far as the remoteness of the illegality is concerned, the present case is also analogous to two other cases in which the contracts concerned were held to be unenforceable. The first case is the English Court of Appeal decision of *Napier v National Business Agency, Ltd* [1951] 2 All ER 264

("*Napier*"), which concerned an employment agreement that provided for payment in two capacities, the first being £13 per week for salary and the second being £6 per week for expenses. It was known to both parties that the latter figure of £6 per week for expenses was inflated for the purposes of reducing the amount of income tax payable by the employer. It was therefore held that the employee was not entitled to enforce the agreement, although his claim was only in respect of his salary of £13 per week, because the "insertion of a fictitious figure for expenses in order to defraud the revenue" was illegal and vitiated the whole agreement (see *Napier* at 266).

87 The second case is the decision of the Canadian Supreme Court in *Zimmermann v Letkeman* [1978] 1 SCR 1097 ("*Zimmermann*"). In this case, the transaction, which was for the sale and purchase of a property, consisted of two documents: (a) an offer to purchase and an acceptance stating a price of CAN$135,000; and (b) a document stating the actual price of CAN$117,500 and that it rendered the signed offer to purchase "null and void pertaining to purchase price". Applying *Alexander*, the trial judge held that the buyer was not entitled to enforce the agreement for sale of the property since he had intended to use the false purchase price in the first document for the purpose of getting a larger loan from the mortgage company than he would otherwise have been able to justify. The Canadian Supreme Court affirmed the trial judge's decision. It is evident from the outcome of the case that the court did not think that the buyer's illegal intention was too remote from the contract, even though it did not expressly address the issue.

88 Conversely, the present situation can be distinguished from *ParkingEye* and *Madysen*, where any illegality was merely *external or incidental to* the contracts concerned and there was no overt step in the transaction itself taken in pursuance of the fraud. In *ParkingEye*, the form of the demand letters was not stipulated in the contract, which was for the installation of automated parking systems in car parks. Similarly, in *Madysen*, the contract itself was a straightforward agreement for the sale of goods that was lawful in itself; it merely provided the *opportunity* for the plaintiff company to profit from the intended fraud (see *Madysen* at [19]). In contrast, in the present case, the Option itself misrepresented the actual facts by stating a false date.

89 It is pertinent to note that a number of other factors distinguish the present case from *ParkingEye*. Firstly, in *ParkingEye*, one of the relevant considerations which led to a rejection of the illegality defence was that the claimant did not have a "fixed intention" of acting unlawfully as it had not appreciated the potential legal implications of the letters and that if someone had pointed them out, the letters would have been changed (see *ParkingEye* at [19], [68] and [75]). In contrast, it is not in dispute in this appeal that the Respondents appreciated the legal implications of the 5 October Notice on the quantum of their impending loan from the Bank and had asked for the backdating of the Option precisely to avoid those legal implications.

90 Secondly, in *ParkingEye*, it was recognised that the contract was not a one-off contract but a contract involving continuous performance over time that was largely carried out lawfully and, indeed, could have been lawfully performed for the rest of the contractual term had the defendant drawn attention to the objectionable features of the claimant's demand letters (see *ParkingEye* at [35] and [77]). Such a consideration obviously does not apply to the Option in the present case, which is a one-off contract for the sale of real property.

91 Finally, in *ParkingEye*, the court considered that to allow the illegality defence to succeed would have given the defendant a windfall reward for its own previous illegality and left the plaintiff with no remedy for its lost income. This was a key factor which led the court in *ParkingEye* to conclude that to disallow the claim on the ground of illegality would not be a proportionate response to the illegality.

92 This brings us to the final factor in relation to the consequences of denying the Respondents'

claim. In the present case, to deny the Respondents' claim would mean the loss of their entitlement to purchase the Property. Of course, it could be argued that the Respondents would lose any increase in the value of the Property from the time the Option was entered into, or the loss of the opportunity to purchase another property. But there is no evidence of such consequences adduced in the present case. Even if there were such consequences, unlike the situation in *ParkingEye*, this would not entail the denial of compensation for substantial expenses incurred or work already done by the Respondents. Nor do we regard as significant the Respondents' unsupported allegation that denial of their claim would give the Appellant a windfall due to the rising property market.

93 Perhaps the most that could be said of the Respondents' loss if their present claim is denied is that they might incur cancellation fees if they chose to cancel the loan from the Bank or failed to draw down on the loan within the requisite period. We note that this point was highlighted by the Respondents' solicitors in their letter of 24 October 2012 in response to the Appellant's withdrawal of the offer as stated in the Option as well as by the Respondents in one of their affidavits filed in these proceedings. But a cancellation of the loan from the Bank is not the necessary consequence of the Respondents' loss of the entitlement to purchase the Property. Moreover, this point (even if it had been made) does not sit well with the Respondents' reliance on the fact that the loan was never drawn down and that they had offered to obtain financing in accordance with the 5 October Notice. In the circumstances, we are of the view that the consequences of denying the Respondents enforcement of the Option would not be so great as to render it a disproportionate response to the illegality.

94 There are a number of finer issues which we should address for the sake of completeness. For one, we would reject the Respondents' argument that they had abandoned their original unlawful intention by not drawing down on the loan from the Bank and undertaking to obtain financing in compliance with the 5 October Notice (see above at [20]). There is no authority for the proposition that a contract entered into with the intention of committing an illegal act will no longer be considered illegal and unenforceable if the party with that original intention subsequently decides not to carry out that intention. The English decision of *Waugh v Morris* (1873) LR 8 QB 202 ("*Waugh*"), on which the Respondents relied, does not in fact assist them.

9 5 *Waugh* concerned a charterparty contract, under which the plaintiff's ship was to carry a cargo of hay from France to London. Unknown to the parties, the law at that time prohibited the landing of hay from a French port in the United Kingdom. When this law was discovered, the parties' original intention to land the hay in London was abandoned and the defendant charterers received the cargo into another vessel and exported it. Blackburn J held that the charterparty contract was not void, since the contract was not made knowingly with the intention to violate the law and could be carried out without violating the law (see *Waugh* at 207–208). He held that "in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance" (see *Waugh* at 208). The decision in *Waugh* has often been contrasted with the more recent decision of the English Court of Appeal in *J M Allan (Merchandising) Ltd v Cloke and another* [1963] 2 QB 340 ("*Allan*") and, in particular, Lord Denning MR's holding in that case (see, for example, the case of *Anglo Petroleum* at [64] and the commentary in *Buckley* at paras 3.05–3.06).

96 It is however unnecessary for us to discuss the distinction between *Waugh* and *Allan* in this case, as it is clear in any event that any abandonment of an original unlawful intention can be taken into account only if there was an ignorance of the unlawfulness of the intention in the first place. *Waugh* does not assist the Respondents, who can be said to have had the "wicked intention to break the law" at the time they entered into the Option. The Respondents knew from the outset about the

5 October Notice and that the backdating of the Option was to permit them to circumvent the 5 October Notice by obtaining a larger loan than they were otherwise entitled to.

97 Viewed from another perspective, the Respondents' attempt to "abandon" their original intention by proposing to perform the contract in compliance with the 5 October Notice is also irrelevant since the Respondents' original intention, which was unlawful and known to them to be unlawful, renders the contract illegal in its very formation. For the same reason, there is nothing in the Respondents' point to the effect that the Option could have been performed lawfully (by, for example, paying the purchase price in cash).

98 It is similarly irrelevant whether or not the Bank was eventually deceived or suffered any damage such that it had a valid cause of action against the Respondents. Once an illegal object of the contract has been established, that object taints the *contract itself* and it is no answer to say that the illegal object has not been carried out. This point was noted in the English Court of Appeal decision of *Birkett v Acorn Business Machines Ltd* [1999] 2 All ER (Comm) 429 ("*Birkett*"), where a contract drafted by the parties with the intention of deceiving a finance company was held to be unenforceable. In that case, Colman J held that "whether [the finance company] was or was not deceived is irrelevant" since "the agreement was indisputably one under which [the finance company] was *to be* deceived" [emphasis in original] (see *Birkett* at 434). In a similar vein, Sedley LJ held that the contract was founded upon an *intended* fraud on a third party which tainted the contract with illegality and was sufficient to render it unenforceable (see *Birkett* at 436). Whereas *Birkett* related to an intended fraud rather than an intended contravention of a statutory provision, we are of the view that the principles inherent in the statements referred to above apply equally to the present case.

99 We have hitherto held that the illegality in the present case was the intended contravention of a statutory instrument in the form of the 5 October Notice. In the course of argument, however, counsel for the Appellant, Mr Alvin Yeo SC ("Mr Yeo"), submitted that the illegality was in the Respondents' intention to deceive or defraud the Bank. In other words, the Respondents had entered into the Option with the unlawful intention of committing the tort of deceit or fraudulent misrepresentation on a third party, the Bank.

100 Mr Yeo disputed the Respondents' evidence that it was Ong who had suggested the backdating of the Option to them and argued that in any case, even if Ong had given evidence to that effect, his actions would have been outside the scope of his authority and therefore could not be imputed to the Bank. In our view, there is some merit to Mr Yeo's submissions, especially since the Respondents' knowledge of the 5 October Notice would cast at least some doubt on whether they really thought that Ong was acting with the authority of the Bank or in accordance with the official policy of the Bank. However, bearing in mind the relatively high standard of proof required for fraud and the fact that there was no affidavit evidence from Ong, we decline to express a definite view on this particular issue.

101 If, however, it had been sufficiently shown that the Respondents had entered into the Option with the unlawful intention of deceiving or defrauding the Bank, we are of the view that the Option would still fall under the general category of illegal contracts considered earlier, namely, contracts entered into with the object of committing an illegal act. That being said, we might then have been faced with a potential overlap between the category of contracts to commit a crime, tort, or fraud on the one hand, and the (more general) category of contracts entered into with the *object* of committing an illegal act (such as a crime, tort, or fraud) on the other. The distinction between the two categories which has been maintained thus far has been that contracts in the latter category are *ex facie* legal and can be performed without any illegality. We would however observe that a persuasive argument might *also* be made to the effect that the fraud concerned is such *a*

fundamental part of the Option that the Option itself is so "tainted" (and is therefore "turned into") a *contract* to commit a fraud on a third party (*ie*, the Bank). In this vein, reference may be made to *The Illegality Defence* (2009) at para 3.19, note 29, where, in the dealing with the situation when the purpose of the contract is to facilitate the commission of a legal wrong, the Law Commission of England and Wales noted that "[i]n several of the cases the unlawful purpose has been to commit a fraud on a third party, such as the revenue authorities" and that "[s]ome texts treat these contracts as falling within *a discrete heading of public policy*", although "we intend to include them here *as the principles appear to be the same as when any other unlawful purpose is intended*" [emphasis added]. This point is, in our view, not unrelated (at least on a factual level) to the issue of proportionality, which is an integral part of the category presently considered (*viz*, contracts entered into with the object of committing *an illegal act*).

102 In summary, the Option was a contract entered into with the illegal object (at least on the part of the Respondents, who are therefore "guilty parties" in the context of this part of the law relating to illegality and public policy (see above at [44])) of contravening the 5 October Notice. Refusal to enforce the Option in the present case would be an appropriate and proportionate response in light of the Respondents' clear intent to violate the 5 October Notice at the time they entered into the Option. Moreover, the insertion of a false date in the Option constituted an overt step in the contract itself in furtherance of this illegal purpose. Having regard to this factor and the similar cases of *Alexander*, *Napier* and *Zimmermann*, the backdating of the Option cannot be said to have been too remote from the Option to render it unenforceable. In our view, public policy dictates that the court in this case refuse its assistance to a party who has knowingly backdated a contract with the clear purpose of using that false date to contravene the law.

Statutory illegality

The applicable legal principles

(1) Contravention as a threshold requirement

103 A second source of difficulty in relation to the law relating to illegality and public policy (at least in the context of the present appeal) lies in the more specific sphere of *statutory* illegality. Put simply, it is not always easy to ascertain what the relevant legislative intent is. In this regard, it is of the first importance to observe that there are at least two significant principles which ought to be borne in mind. The first is an eminently logical and commonsensical one: there must have been a contravention of the statutory provision(s) concerned in the first place.

104 It should also be noted that the rubric of "statutory illegality" should not be read too literally. As has been noted (see *Illegality and Public Policy* at para 13.008):

> It should also be noted that contravention of *subsidiary legislation* (as opposed to primary acts or legislation) might also result in adverse consequences under the law relating to contractual illegality. This is not surprising in view of the fact that subsidiary legislation also has, of course, the force of law. Where, however, guidelines do *not* have the force of law, there will be no legal consequences … [emphasis in original]

In the context of the present appeal, it should be noted that the 5 October Notice was prescribed by the MAS pursuant to s 55 of the Act.

(2) Prohibition of *contract* required *in addition to* prohibition of conduct

105 This leads to the second principle: a contravention of the statutory provision(s) concerned does not, *ipso facto*, result in the *contract* concerned being declared as void and unenforceable by the court. This brings us back to the question of legislative intent. As has been observed (see *Illegality and Public Policy* at para 13.010):

> After it is established that there is in fact a contravention of a given statutory provision (or provisions, or subsidiary legislation), it must then be considered whether this contravention will result in adverse civil consequences. It does *not necessarily* follow that adverse *civil* consequences *will* follow. While there may inevitably be relevant *criminal* consequences for contravention (which are virtually always embodied with the statutory provisions themselves), the same is not necessarily true with respect to *civil* consequences. In the civil sphere, whether or not the *contract* itself will be rendered void as a result depends very much on the *interpretation* of the provision(s) themselves in order to ascertain whether or not such a drastic consequence was indeed part of the *legislative intent*. [emphasis in original]

106 Put simply, the inquiry is whether the statutory provision concerned is intended to prohibit only the conduct *or* whether it is, instead, intended to prohibit not only the conduct *but also the contract* as well.

107 In order to ascertain what the relevant legislative intent is, the court will generally adopt a "purposive approach" towards the construction of statutes (see generally *Illegality and Public Policy* at para 13.011). Where the legislative intent is clear on the face of the statutory provision itself, there is, *ex hypothesi*, no need for the court to engage in further analysis; as has been observed (see *Illegality and Public Policy* at para 13.015):

> In other words, whilst the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of parliament in so far as that particular statute (or material provision thereof) is concerned.

108 As Ambrose J observed in the Singapore High Court decision of *Turquand, Youngs & Co v Yat Yuen Hong Co Ltd* [1965-1967] SLR(R) 517 (at [9]):

> The dominant purpose in construing a statute is to ascertain the intention of the Legislature as so expressed. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself, *which must, if they are plain and unambiguous, be applied as they stand*: *Halsbury's Laws of England* vol 36 (Butterworths, 3rd Ed) at para 578. As the words of [this] ordinance are clear and unambiguous, *it is not open to the court to ascertain the intention of the Legislature by considering how the law stood before the enactment of the ordinance and by looking at the objects and reasons set out in the original bill to discover the mischief which was intended to be suppressed.* [emphasis added]

109 Where the statutory provision is so clear, this would be a situation of "*express* prohibition". In the nature of things, however, situations of "express prohibition" are likely to be rare (albeit by no means non-existent (see the examples set out in *Illegality and Public Policy* at para 13.026)). The more common situation is that of "*implied* prohibition". As already alluded to above, this particular situation entails the court having to ascertain the legislative intent that is unclear on the face of the relevant statutory language itself. This is, as has been pointed out, "a more problematic category" as the analysis required "is not always easy" (see *Illegality and Public Policy* at para 13.027). In this regard, the following observation (reiterating the very important point made above at [105]) might also be usefully noted (see *Illegality and Public Policy* at para 13.027):

> It [is] helpful to state … what the *key focus* ought to be in the form of the following question: is the *object* of the statute (or, more appropriately provision(s) thereof) *only* to prohibit the *conduct* that is the subject of the statutory penalty *or* is the object, *in addition*, to prohibit *the very contract itself*? Adverse civil consequences *vis-à-vis* the contract concerned follow only where the latter question is also answered in the affirmative. The *contract*, at this point, is *impliedly prohibited*. [emphasis in original]

110 In so far as the category of "implied prohibition" is concerned, Devlin J's words of caution in *St John Shipping* that the courts should be slow to imply the statutory prohibition of contracts should also be borne in mind. Devlin J was of the opinion, and we agree, that a court should not hold that any contract or class of contracts is prohibited by statute unless there is a "clear implication" or "necessary inference" that this was what the statute intended; an example of such a "clear implication" would be where a contract had as its whole object the doing of the very act which the statute prohibited (see *St John Shipping* at 288).

111 In our view, judicial reticence in this particular regard is warranted for the simple reason that statutory illegality generally takes no account of the parties' subjective intentions or relative culpability. As Devlin J put it in *St John Shipping* (at 281), the doctrine of statutory illegality "cares not at all for the element of deliberation or for the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned". A liberal approach towards implied prohibition could render contracts unenforceable even where the infraction was committed unwittingly. We would therefore reiterate that courts should be reluctant to find that contracts are impliedly prohibited by statute, especially given the proliferation of administrative and regulatory provisions in modern legislation. In this connection, any concern that contracts involving statutory contraventions (especially intentional ones) might go unpunished will be addressed by the common law.

112 As we have noted above (at [38] and [45]), a contract which contravenes a particular statutory provision but is not prohibited by that provision *per se* can still be held to be void and unenforceable at common law for being contrary to public policy. In particular, the broad category of contracts entered into with the intention of committing an illegal act plays an important "bridging" role (see above at [73]) to ensure that a party who has entered into a contract with the intention of contravening a statutory provision will not (subject to the principle of proportionality) be entitled to enforce that contract. In such a situation, however, the illegality of the contract is *not* founded on the legislative intention that it should be so prohibited, but because the court as a matter of public policy will not assist such a party to benefit from his own wrongdoing.

113 To the extent that the focus is on whether or not the relevant legislative intent is to prohibit the *contract* in question, it has been argued – persuasively, in our view – that the distinction drawn between contracts illegal as *formed* and illegal as *performed* is, in the final analysis, unhelpful simply because, where *the contract* is indeed prohibited, "[t]he statutory contravention strikes *in substance* at the very root of the contract itself" (see *Illegality and Public Policy* at para 13.044 (emphasis in original)). Put simply, this relates to the very *formation* of the contract itself, even where the contract has been said to have been illegally "performed". In other words, where there has been illegal *performance* which has resulted in the *contract* being prohibited, the word "performance" ought *not* to be equated with the word "conduct" (the latter of which merely refers to conduct that contravenes the statute and which results (in all likelihood) only in criminal penalties). On the other hand, as has been observed (see *Illegality and Public Policy* at para 13.043):

> [T]he concept of "illegal *performance*" (in the context of the law of *contract*) is a legal term of art that centres around the issue as to whether or not there are *additional (and adverse) civil consequences beyond the criminal penalty in a situation where the prohibition is not express but,*

rather, implied. There are, in other words, *two conceptions* of the concept of "illegal performance", both of which are *quite different*. The *first* refers to *literal* (illegal) performance, without which no issue of illegality can arise in the first place; *criminal* penalties may attach but it still remains to be considered whether *additional (adverse) civil consequences* will attach. The *second* refers to illegal performance that is held – in law – to *entail (in addition to the relevant criminal penalties) adverse civil consequences*, having regard to the legislative intention concerned. [emphasis in original]

114 In summary, there are two conceptions of the concept of "illegal performance". The first relates to the (literal) *conduct* that is illegal inasmuch as it (invariably) results in criminal penalties. The second relates not only to the (literal) conduct just mentioned but also to the fact that there are *legal* consequences (in addition to the criminal penalties that might be administered) inasmuch as *the contract itself* is prohibited (either by way of "express prohibition" *or* "implied prohibition"). The law of contract is concerned primarily with this second conception (in particular, the legal consequences just mentioned) at which point it is unhelpful to maintain the distinction between the illegal formation and illegal performance of contracts, simply because what is (legally) relevant are the very (formative) roots of the contract.

115 The above analysis is also consistent with that of Devlin J in *St John Shipping*, where the learned judge observed as follows (at 284):

> But whether it is the terms of the contract or the performance of it that is called in question, the test is *just the same*: is the *contract*, ***as made or as performed*** , a contract that is prohibited by the statute? [emphasis added in italics and bold italics]

116 Put simply, it is important to focus on the crux of the inquiry which is whether or not *the contract* (as opposed to only the conduct) has been prohibited. To this end, it is unhelpful, in our view, to get caught up in semantical tangles (here, centring on the various conceptions of the concept of "illegal performance"). Where *the contract* is in fact prohibited, it is struck (as has already been pointed out above) at *its very (formative) roots*. Whilst the court below did (in substance) deal with the Option on this basis, there appears, with respect, to be at least some conflation of the various conceptions of the concept of "performance" (see the Judgment at [16]). Such conflation can be avoided by focusing on whether or not the statutory provision(s) concerned intended that *the contract* be prohibited, as opposed to (only) the conduct.

Our decision

117 In the present case, the relevant statutory instrument is the 5 October Notice, a notice issued by the MAS pursuant to s 55 of the Act, which reads as follows:

> **Notices to banks**
>
> **55**.—(1) The Authority may, if it appears to the Authority to be necessary or expedient in the public interest, or in the interest of depositors or the financial system in Singapore, by notice in writing to a bank in Singapore or a class of banks in Singapore give directions or impose requirements on or relating to the operations or activities of, or the standards to be maintained by, the bank or banks.
>
> …
>
> (3) A bank in Singapore shall comply with any direction given to the bank or any requirement

imposed on the bank by any notice issued under this Act.

…

118 The penalty for non-compliance with the 5 October Notice is found in s 71 of the Banking Act:

General penalty

71. Any bank which contravenes any of the provisions of this Act for which no penalty is expressly provided shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part thereof during which the offence continues after conviction.

119 The purpose and policy rationale of the 5 October Notice was explained in its accompanying press release as follows:

… [The MAS] will restrict the tenure of loans granted by financial institutions for the purchase of residential properties. MAS' move is part of the Government's broader aim of avoiding a price bubble and fostering long term stability in the property market.

…

… Mr Tharman Shanmugaratnam, Chairman of MAS, said, "Monetary conditions worldwide are far from normal. QE3 and low interest rates have made credit easy, but this will eventually change. We are taking this step now to require more prudent lending, and will continue to watch the property market carefully. We will do what it takes to *cool the market*, and *avoid a bubble that will eventually hurt borrowers and destabilise our financial system*."

…

[emphasis added]

120 In our view, there is neither express nor implied prohibition of the Option in the present case. Neither the Act nor the 5 October Notice expressly states that contracts such as the Option (*ie*, options to purchase that are concluded after 5 October 2012 but backdated for the purpose of circumventing the 5 October Notice) should be rendered void and unenforceable by the courts. There are also insufficient grounds for holding that such a statutory prohibition should be *implied* (although there were also indicia pointing the other way which, however, had to be borne in mind in the light of the warning Devlin J had sounded in *St John Shipping* (see above at [110])).

121 Firstly, the parliamentary intention behind the 5 October Notice was to regulate and control the financial institutions responsible for granting credit facilities for the purchase of residential property, and not to interfere with private transactions relating to residential property. The obligations in the 5 October Notice relating to the granting of credit facilities are imposed on banks and not on the individual borrowers. In fact, the wording of s 55 of the Act makes it clear that notices such as the 5 October Notice are issued to *banks* and not the public at large. Correspondingly, s 71 of the Act only penalises banks who do not comply with the requirements in the 5 October Notice.

122 Secondly, this was not a situation where there was a "clear implication" or "necessary inference" that the statute intended to prohibit contracts such as the Option (see, again, *per* Devlin J in *St John Shipping*, referred to above at [110]). There would be such a "clear implication" if the

Option had as its whole object the doing of an act which was prohibited by the statute, since it would hardly make sense in that situation for the statute to prohibit the act and not a contract to do it (see *St John Shipping* at 288). But in this case, although one of the (latent) objects of the Option was undoubtedly to enable the Respondents to procure a bank loan in contravention of the 5 October Notice, there were also other important objects of the contract, such as the sale and purchase of the Property.

123 We would therefore be reluctant to hold that there was such a "clear implication" in this case, bearing in mind once again Devlin J's warning that the courts should be slow to imply the statutory prohibition of contracts (although this warning nevertheless does not affect the analysis with regard to the (more general) category at common law set out above (at [79]–[102])).

124 Whilst we have found that there is no express or implied *statutory* prohibition of the Option in the present case, we would reiterate that the Option is nevertheless rendered void and unenforceable at *common law* on the basis that it was entered into with the intention of contravening a statutory instrument. As we have noted above (at [112]), this result is not founded on the legislative intention that the Option itself should be prohibited, but rather, on the public policy that the court will not assist the Respondents to benefit from their own wrongdoing.

The reliance principle

125 Before concluding, we address Prof Tang's attempt to rely upon the "reliance principle" to buttress the Respondents' case. Prof Tang argued that the Respondents did not have to rely on the backdating of the Option to found their claim against the Appellant in the sense that their claim did not depend on them in fact pleading that the Option was backdated. In this regard, Prof Tang agreed with the Judge's interpretation of *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 92 ("*Hong Lam Marine*") that if a plaintiff's cause of action is founded on the contract itself but the plaintiff does not need to rely on the illegal act or purpose, the claim should be allowed.

126 We did not hesitate to reject this argument. It should be noted that the "reliance principle", as traditionally understood, has a narrow ambit of operation. It is usually invoked only by a contracting party seeking to recover (on a *restitutionary* basis) what it had transferred to the other party pursuant to the (illegal) contract. Even more importantly, such recovery has been traditionally premised upon *an independent cause of action* – thereby avoiding the need to rely upon the (illegal) contract (see generally *Illegality and Public Policy* at paras 13.137–13.154). It is clear that this was *not* the situation in the present appeal, based on the facts and submissions.

127 Further, the reliance principle is not merely literal or descriptive in nature; it is a *legal* principle necessarily embodying *normative* elements. The question therefore is not whether the illegality (in this case, the backdating of the Option) had to be specifically pleaded by the Respondents, but whether the Respondents were endeavouring to enforce an illegal contract. Since we have already found that refusal to enforce the Option would be a proportionate response to the illegality in the present case (taking into account the various factors outlined above (at [70])), and there is no cause of action other than one based on contract (*ie*, based on the Option), there is no room for any argument based on the "reliance principle". Put simply, in so far as the category of contracts entered into with an illegal or unlawful object is concerned, once the court has concluded that it is contrary to public policy at common law to uphold such a contract, it is no longer relevant whether or not a party needs to "rely" on the illegality in its plea.

128 In truth, Prof Tang's argument entailed (in substance and perhaps form as well) an *extension* of the reliance principle as traditionally understood. In our view, the extension of the reliance principle in

the manner argued for by the Respondents would undermine (in a significant manner) the very rationale which the doctrine of illegality and public policy is premised upon, which is the wider public interest. Indeed, permitting the *factual* argument from "non-reliance" to be made would create enormous uncertainty as parties seek to characterise (or, more accurately, "dress up") the facts in order to make the argument.

129 We finally come to the decision of this court in *Hong Lam Marine* (which was, in turn, apparently applied in another Court of Appeal decision of *Siow Soon Kim and Others v Lim Eng Beng alias Lim Jia Le* [2004] SGCA 4 at [38] and in the Singapore High Court decision of *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd and another* [2011] 1 SLR 657 at [204]) which Prof Tang (and the Judge) relied on for the proposition that a plaintiff who has entered into a contract with an illegal purpose may nevertheless enforce the contract if he does not need to reveal or rely on the illegal purpose to found his claim. For the reasons set out in the preceding paragraphs, we would disagree with this proposition.

130 In any event, did *Hong Lam Marine* really establish the proposition which the Judge relied upon (and which is also relied upon by Prof Tang)? In our view, it did *not*. To elaborate, *Hong Lam Marine* was concerned with an application for leave to appeal against an arbitration award and, *inter alia*, whether the arbitrator had erred in ruling that four performance bonds issued by the appellant insurer to the respondent shipowners were enforceable. The arbitrator had adopted the findings in a previous arbitration that a related shipbuilding agreement between the respondents and a shipyard (who had procured the four performance bonds in favour of the respondents) was enforceable even though it had been backdated for the purpose of registering the vessel in Singapore. In that first arbitration concerning the related shipbuilding agreement, it was held that the respondents did not need to rely on the backdating in order to succeed in their claim against the shipyard, unlike a situation in which they had to prove the actual date of the shipbuilding agreement to establish their in order to succeed in their claim or if their claim had been dependent on the status of the vessel as a Singapore-registered vessel (see *Hong Lam Marine* at [67]).

131 Significantly, in *Hong Lam Marine*, it was unclear whether this court was directly endorsing such a principle of "reliance" (see *Hong Lam Marine* at [68]). But even if this was the case, such endorsement would merely be *obiter dicta*, given the ultimate holding that leave to appeal against the arbitrator's decision would be refused because the performance bonds were *independent* of the underlying shipbuilding agreement and therefore not affected by the illegality in the form of the backdating of the shipbuilding agreement. Therefore *Hong Lam Marine*, on a proper interpretation, did *not* hold that the backdating of a shipbuilding agreement was not a bar to its enforcement where the claimants did not need to rely on the backdating to found their claim.

Conclusion

132 For the reasons set out above (in particular, at [79]–[102]), we allow the appeal with costs and with the usual consequential orders. We also order that the Respondents remove the caveat lodged against the Property if they have not done so to date.