IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 274

District Court Appeal No 3 of 2018

Between

Michel Tan Li Yin (Chen Liyun)

… *Appellant*

And

Avril Rengasamy

… *Respondent*

JUDGMENT

[Contract] — [Contractual terms] — [Interpretation]
[Contract] — [Illegality and public policy] — [common law]

TABLE OF CONTENTS

Tan Li Yin Michel
v
Avril Rengasamy

[2018] SGHC 274

High Court — District Court Appeal No 3 of 2018
Ang Cheng Hock JC
24 September 2018

20 December 2018 Judgment reserved.

Ang Cheng Hock JC:

Introduction

1 This appeal primarily concerned the existence of an alleged oral agreement between two erstwhile close friends. The respondent, who worked in a private bank, had agreed to help the appellant invest her money by carrying out margin trading in foreign currencies on the appellant's behalf. The appellant's contention is that the respondent had orally guaranteed that the capital invested would not be lost but would be returned, with profits, if any. As things turned out, the trading resulted in losses and the appellant's capital was wiped out. The appellant sued for the return of her capital on the basis of the oral guarantee, but the respondent denied ever having given any such guarantee.

Background to the dispute

2 The appellant and respondent had met in their professional capacities in early 2013. The appellant was an insurance agent and personal wealth manager. The respondent was a private banker. The pair quickly became good friends and it was not unusual for them to confide in each other about difficulties with their work, relationships and families. From their WhatsApp exchanges which had been put into evidence, one could see that a regular topic of conversation was how they wished they had more money.

3 Sometime in 2013, the respondent told the appellant that she had a client for whom she was raising funds. The appellant agreed to participate and transferred to the respondent S$50,000 to be placed in a fixed deposit account which would yield an 8% interest per annum. The amount was eventually repaid to the appellant with interest. The appellant also lent the respondent S$15,000 in August 2014 when the latter needed money urgently to pay for the down payment for an apartment in Sydney. The respondent returned the sum in October 2014.

4 The parties kept in regular, and sometimes almost daily, contact through WhatsApp exchanges and telephone calls. On 7 October 2014, the two friends were exchanging messages on WhatsApp late at night into the early hours of the next day, as was usual for them to do. The topic turned to the appellant's woes about money. Just after midnight, the appellant asked the respondent how much one could make trading on the foreign currency exchange market with a capital amount of S$100,000. The pair followed up the conversation with a phone call not long after 1 am on 8 October 2014.

5 The content of that telephone conversation is at the heart of this dispute.

The appellant claims that they had agreed to fairly detailed terms as to the money she was entrusting to the respondent to invest, including terms as to the return on her investment, the respondent's share of any return, and that the respondent would guarantee her capital from any loss. On the contrary, the respondent claims that all that was agreed was that she would try to help the appellant make some money from margin trading in foreign currencies, and that this was after she had warned the appellant about the risks involved in foreign currency trading.

6 What is undisputed is that the parties followed up their WhatsApp exchange the next day with more messages referring to the appellant's father having agreed to give the appellant S$100,000. From the messages exchanged from October 2014 to March 2015, it would appear that the appellant consistently told the respondent that she had lied to her father about placing a sum of S$100,000 in a fixed deposit account which would yield 2-3% interest. Instead, the appellant's plan was to place the sum with the respondent for the respondent to do margin trading in foreign currencies on her behalf to "make [a] quick buck".[1] It also appears that the appellant had told her father that the sum would have to be placed in the fixed deposit account for at least a year and could not be withdrawn before that.

7 The respondent used her own account with Saxo Trader to carry out her margin trading in foreign currencies. Although the sum transferred to the respondent was initially S$100,000, it is undisputed that the appellant eventually transferred a total of S$210,000 to the respondent for the purpose of margin trading. What had happened was that the respondent took a position on the Australian dollar with the initial sum of S$100,000. But when the value of

[1] ROA Vol 2B, p 101

the Australian dollar fell, the appellant transferred another S$110,000 to the respondent for margin top-ups in the hopes that the Australian dollar would rebound. Unfortunately, the Australian dollar continued to perform poorly and the positions taken by the respondent were all closed out in December 2014. The entire amount transferred by the appellant was lost. Apparently, the respondent herself lost about S$700,000 on these trades.

8 The parties subsequently fell out in March 2015 after the appellant demanded that the respondent repay her the sums that she had transferred to the respondent for the purpose of the margin trading.

The parties' cases

9 The appellant commenced action against the respondent on 5 August 2015 to recover the sum of S$210,000. She relied on the guarantee that the respondent allegedly gave her. More precisely, according to the appellant, the parties agreed to the following during their telephone conversation on 8 October 2014:[2]

> (a) The appellant would place with the respondent a sum in the aggregate of between S$150,000 and S$200,000 ("the capital");
>
> (b) The respondent would invest the capital in the foreign exchange market to generate gains or returns for the appellant;
>
> (c) The respondent would "protect the [capital] against any losses, in that the [respondent] would make good any losses to the [capital] that might be incurred in the course of the trading in [the foreign exchange market]" ("the capital guarantee");

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2 ROA vol 2(A) p 3 at para 2.a

(d) The respondent would leverage on the capital for up to five times the capital to trade in the foreign exchange market;

(e) The appellant would be entitled to retain gains up to 25% of the capital and the respondent would be entitled to any additional gains; and

(f) There would be no minimum holding period by the respondent of the capital.

10 The respondent denied that there was any agreement on such terms. She also denied that the parties had any intention to enter into legal relations. According to the respondent, the appellant requested that the respondent trade in the foreign exchange market on her behalf. This was apparently because the appellant was in urgent need of money to make good sums that the appellant had allegedly "misappropriated from her client(s)".[3] The respondent claimed to have explained the risks involved in foreign exchange trading but the appellant remained adamant that she wished to trade in foreign currencies to make quick profits. The respondent thus invested on the appellant's behalf gratuitously as a friend.[4]

11 The respondent was told that the initial sum of S$100,000 was from the appellant's father and that the appellant had lied to her father about depositing the sum in a bank account with desirable interest rates.[5] As mentioned earlier (at [6]), this appeared to be consistent with the WhatsApp messages between the appellant and the respondent at the material time.

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3 ROA vol 2(A) p 7 at para 3b.

4 Defence at para 10 and Respondent's Closing Submissions for the trial below at para 74.

5 Respondent's Closing Submissions for the trial below at paras 20 – 22.

12 At the trial, there was a somewhat unexpected turn of events. Under cross-examination, the appellant claimed that she had made up a story about having obtained the initial sum of S$100,000 from her father so as to induce the respondent to give her the capital guarantee. She testified that, if she made it seem that it was her father's money instead of her own that she was handing over, it would make it easier to persuade the respondent to give her the capital guarantee.[6] She was quite unabashed in the way she described how she had repeatedly lied to the respondent about having lost her father's money. When the respondent's counsel referred her to a WhatsApp message from her father, which stated that he would make a police report about his "hard-earned money" being not returned to him, and pointed out that this message had been forwarded to the respondent, she blithely agreed that this message was "fake".[7] In other words, she admitted to concocting a message from her father, which she then sent to the respondent.

13 At the end of the trial, the respondent submitted that on these facts, even if there had been an agreement between the parties, the agreement would be tainted with illegality, either because of the lie that the appellant had told *her father* or the lie that she told *the respondent*. Thus, it was argued that the agreement between the parties, including the capital guarantee, was unenforceable.[8]

The decision below

14 The appellant's evidence that she had lied to the respondent to secure the capital guarantee shaped the District Judge's decision in this matter. As

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6 Transcript, p 34-35.

7 Transcript, p 36-37.

8 Respondent's Reply Submissions at the trial below at p 23.

mentioned, the appellant had unequivocally stated in the course of being cross-examined that she lied to the respondent about the source of the initial S$100,000 – that the monies were from her, and not from her father as stated in her WhatsApp messages to the respondent. As a consequence of this, the District Judge identified the two key issues for his determination as follows. First, whether the appellant was entitled to rely on the capital guarantee when the capital guarantee was induced by the appellant's lie to the respondent. Second, if the first issue was decided against the appellant, whether she was nonetheless entitled to recover the sum of S$210,000 or any lesser amount from the respondent.[9] This latter issue in turn depended on a finding as to whether the amounts passed to the respondent for trading had indeed been so used and whether they were all lost.

15 On the first issue, the District Judge held that, *if there had been a capital guarantee*, the appellant could not rely on the guarantee because it was induced by her lie to the respondent, which he found to be a form of illegality. However, taking into consideration the "overarching principle of proportionality" as well as the relationship between the unlawful conduct and the claim, the District Judge found that a proportionate response to the appellant's lie was for any purported capital guarantee to be void but not the rest of the agreement, which remained untainted by the lie.[10]

16 Although there were disputes as to the losses that would be covered by the respondent's pleadings, for the purposes of this appeal, it suffices to note that the District Judge found, on the evidence before him, that the entire sum of S$210,000 had been lost in the margin trading in foreign currencies.[11] Thus, in

9 GD at [3] and [4].

10 GD at [10].

11 GD at [18].

relation to the second key issue, the District Judge held that there was nothing for the appellant to recover from the respondent.

17 It must be noted though that the District Judge did *not* make a finding as to the existence or otherwise of the purported capital guarantee.

The parties' arguments in the appeal

18 The appellant appeared in person in the appeal hearing before me. She started by attempting to recant her oral evidence given at trial that the initial sum of S$100,000 came from her. She told me that that the money was in fact from her father, which was consistent with her WhatsApp messages to the respondent at the material time. She explained that she had lied on the witness stand about the source of the S$100,000 when she was cross-examined at trial because she did not want her father to be involved as a potential witness in the case. She was worried that he might be called by the respondent to testify at the trial.[12]

19 But, in any case, she argued that, even if she had lied to the respondent about the source of the initial S$100,000 being her father, this was ultimately irrelevant because it mattered not where the money came from. What mattered was that the respondent had given her a capital guarantee.[13] Her lies to the respondent did not contravene any statutory provision nor fall within the common law understanding of illegality.[14] Thus, the District Judge should not have found that there was illegality which barred her reliance on the capital guarantee.

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12 Appellant's Case at paras 11, 12 and 14.

13 Appellant's Case at paras 19 – 22.

14 Appellant's Case at paras 35 and 36.

20 The appellant recognised that, even if she could persuade me that the District Judge should not have found that her claim was barred by illegality, she still had to show on the evidence that there *in fact* had been a capital guarantee promised to her by the respondent on 8 Oct 2014. This is because the District Judge did not make a finding that there was such a capital guarantee. As such, the appellant devoted a substantial portion of time at the oral hearing arguing that the court should find on the evidence that there was indeed a capital guarantee. In the main, she argued that that the WhatsApp messages and the conduct of the parties supported her contention that a capital guarantee was given to her.[15]

21 The respondent contended that there was no capital guarantee to begin with and that the WhatsApp messages between the parties in fact showed quite clearly that the appellant had acknowledged the losses incurred on the foreign exchange market as her own to bear.[16] The respondent also highlighted that it would have been completely illogical for her to have given the appellant a capital guarantee for something as risky as margin trading in foreign exchange.[17] This is especially since the respondent was a private banker who was well aware of the risks involved.[18] Likewise, being a finance professional herself, the appellant was also alive to the risks involved in foreign exchange trading, and thus would not have expected the respondent to guarantee that there would be no losses.[19] There was also no conceivable reason for the respondent to have given any guarantee to the appellant since she had nothing to gain from doing

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15 Appellant's Case at paras 6 and 8.

16 Respondent's Case at paras 32 – 37.

17 Respondent's Case at paras 38 – 43.

18 Respondent's Case at paras 26 – 29.

19 Respondent's Case at para 27.

so. The respondent just trying to help her friend make some money from margin trading.

22 Moreover, the respondent maintained that any such capital guarantee would be unenforceable because there was neither an intention to create legal relations[20] nor consideration.[21] Lastly, it was argued that the giving of any purported guarantee would have been induced by the appellant's lies, as admitted at the trial, that the amount of S$100,000 was from her father, and thus she should not be entitled to rely on it.[22]

Issues to be determined

23 The District Judge below made no finding as to whether the respondent did in fact give a capital guarantee to the appellant which was legally enforceable. This was because he reasoned that any purported capital guarantee would in any event have been tainted with illegality and void.

24 In my view, there were two main questions in this appeal. The first is whether the respondent did in fact give a capital guarantee to the appellant on 8 October 2014. It is only if I find that she did would the second main question arise, namely whether the District Judge was right in determining that the capital guarantee was tainted by illegality and therefore unenforceable. There were some further subsidiary issues as to whether the guarantee was unenforceable because of lack of consideration and or an intention to create legal relations, but the need to decide these issues would depend on whether I found that there was a capital guarantee given in the first place.

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20 Respondent's Case at paras 54 – 57.

21 Respondent's Case at paras 65 – 71.

22 Respondent's Case at paras 72 – 77.

25 I should also add that, as neither party has challenged the District Judge's finding that the entire sum of S$210,000 had been lost by the respondent in her margin trading in the foreign exchange market, should I find that there was no enforceable capital guarantee given to the appellant, her claim for the recovery of the amounts that that had been handed over to the respondent for margin trading would necessarily fail.

Was a capital guarantee given by the respondent?

26 The issue before me is whether the evidence showed that the appellant and respondent had come to an oral agreement on 8 Oct 2014 that the respondent would, *inter alia*, guarantee the appellant's capital that would be used for margin trading in foreign currencies from any loss. This was really the crux of the dispute between the parties.

27 I start by noting that the High Court, sitting as an appellate court, has the powers needed to make the appropriate findings of fact in the present case; section 22(2) Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") states that the High Court shall have the "like powers and jurisdiction" on the hearing of appeals from the District Court as the Court of Appeal does on the hearing of appeals from the High Court. Section 37(5) of the SCJA in turn provides that the Court of Appeal may draw inferences of facts and give any judgment, and make any order which ought to have been given or made. In my view, this was an appropriate case for me to make necessary findings of fact as the appellate judge given the fairly straightforward facts, the fact that the trial was only a day long and there were only two witnesses.

28 In addition, counsel for the respondent expressly invited me to make a finding on whether an oral agreement was entered into on 8 October 2014 on

the terms as alleged by the appellant and whether any such agreement contained a capital guarantee. As for the appellant, in the appeal, she made substantial arguments as to why I should find that there was in fact a guarantee that had been given by the respondent to her. Thus, parties were in consensus that it would be appropriate for me to find on the basis of the evidence adduced before the District Judge whether there was a capital guarantee given by the respondent to the appellant.

29 In ascertaining the existence of an oral agreement, the court has to consider the relevant documentary evidence and contemporaneous conduct of the parties at the material time (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [39]). The test for determining the existence of any such agreement is objective (at [40]). The Court of Appeal has also emphasized the importance of looking to the relevant documentary evidence *first* as they would be more reliable than a witness' oral testimony given well after the fact, and which may be coloured by the onset of subsequent events and the dispute between the parties (*OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41]). Where there is little or no documentary evidence, the court will "attempt its level best by examining closely (and in particular) the precise factual matrix" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [60]).

30 In this case, the said oral agreement on 8 October 2014 was not reduced into writing, nor was there any document detailing the discussion between the appellant and respondent. The only contemporaneous documents were the WhatsApp messages between them. In my view, the messages were indicative of the parties' intentions, belief and conduct in relation to this venture into margin trading on foreign exchange currencies. I also considered the parties' testimonies in the court below to determine the context within which these

WhatsApp messages should be understood. Having reviewed them at some length, I find, on the balance of probabilities, that the respondent had *not* agreed to give the appellant a capital guarantee in relation to the amounts transferred to the respondent for margin trading in the foreign exchange market. My reasons are as follows.

31 First, the appellant's conduct and statements to the respondent when she was first informed about the losses suffered in margin trading was inexplicably inconsistent with there being a capital guarantee given to her. Her distress, fear and anxiety, as demonstrated by the WhatsApp messages below, was completely inconsistent with her contention that she was given a capital guarantee. If it was indeed the case that she had the benefit of a capital guarantee promised to her by the respondent, there would be no reason for her to be stricken with worry when the Australian dollar dropped in value, given that she would be protected from any loss to the capital sum and would be able to return the sum to her father in a year.

20 November 2014

Respondent (9.45 pm):	Haha ya fx is easy money some times but other times have to be able to hold thru otherwise realised losses no joke
Appellant (9.46 pm):	Yes understood
	But nw dry le
	Hahah that's y i ask first
	Scarrd [sic] not enuff n dad hantam me
	Hahha
	But no la... wont so sway la
Respondent (9.47 pm):	Hahah **why would your dad hantam u**

	U not asking him for more money what lol
Appellant (9.49 pm):	**If margin call if i don find momey [sic] ma**

26 November 2014

Respondent (5.18 pm):	Wow this is serious Shit.. Better transfer what u can k.. If cant get thru today we are dead man
Appellant (5.26 pm):	I dont have money le babe
	... ***I v stress nw***
	...
Respondent (5.30 pm):	Can talk for 2 mins.. Coz cut off time is 6
Appellant (5.33 pm):	I am w client lei
	How to wire u money nw
Respondent (5.36 pm):	It's ok I sold off some positions already take loss.. Call me when u are done with client pls
Appellant (5.37 pm):	Ok
	I wana faint le
	Did i lose alot?
Respondent (5.38 pm):	Yes can faint I'm frantically calling clients now
Appellant (5.38 pm):	***Oh dear***
	Oh dear oh dear oh dear
	I wana cry la

3 December 2014

Appellant (1.46 am):	If i dont top up ***wil i lose everything***?
Respondent (1.52 am):	Not everything but a lot and when it rebounds u wont have much aud left to make back the losses

10 December 2014

Respondent (12.19 am):	...I don't know where to go find another 50k – 100k to put into the acct now.. If dont put in can't buy back and jut [sic] watch it go up and up and we can only just cry
Appellant (12.36 am):	So margin call lidat end up left hw much Did we lose all of it? Oh god i have to pay dad
Appellant (12.55 am):	***Cos if i lost the 200k i can go die le***
Respondent (1.07 am):	Almost all..
...	
Appellant (1.38 pm):	***Pls save my dad money or i am so dead***
...	
Respondent (2.02 pm):	Yes on the plane now...Will try my best I jut [sic] need to find money that's the tough part else confirmed [c]an get back the losses

[Emphasis added]

32 The appellant's willingness to put in more of her own money as collateral for an increased exposure because of unanticipated foreign currency movements was more consistent with there being no capital guarantee promised to her. When the appellant was informed of the potential losses arising from a fall in the value of the Australian dollar in November 2014, she transferred to the respondent various sums ultimately totalling S$110,000 to top up the margin at the respondent's suggestion so as to avoid losing the initial S$100,000 capital. If she truly believed that she had a guarantee from the respondent covering the initial capital of S$100,000, there would have been no need for the appellant to

scramble to come up with these additional funds to try to protect the initial S$100,000 from being lost. She could have simply relied on the capital guarantee to recover the said sum. This was especially when there was no allegation that the respondent could not afford to repay the initial S$100,000, if given time to make payment. In other words, there was no serious suggestion that the respondent would not have been able to honour the capital guarantee, if there was one.

33 In addition, it is notable that what in fact happened was that the respondent had advanced monies to the appellant for the margin top-up. But, when she did so, the respondent made it clear to the appellant it was an advance which had to be repaid *and* the appellant too acknowledged that she had to do so. Such conduct sits uncomfortably with any finding that there was a capital guarantee. If there was one, it made no sense why, in her WhatsApp messages to the respondent, the appellant would bemoan that she was struggling to come up with funds for the top-up. Rather, she would have stated, or at least mentioned, that it was up to the respondent to ensure that the foreign currency positions were not closed out and the capital amount lost.

4 December 2014

Respondent (4.23 pm):	Hi I already transferred another 25k to tong your acct first coz today this morn it plunged further. Now at 0.836.. U transfer to me before u leave ok?
Appellant (4.23 pm):	I was abt to tell u i cant trf anymore le lei I v dry lr ... But I dryy until cannot dry ...

9 December 2014

Appellant (3.44 pm):	Hw d situation babe
	Tot can release some funds so ***pay u bk***
	Don like owe u money...[referring to the top ups made by the respondent on the appellant's behalf to avoid a margin call]

[Emphasis added]

34 When the margin top-ups failed to prevent the foreign currency positions from being closed out and losses were incurred, the appellant panicked but never once sought assurance in, or much less mentioned, the capital guarantee. The appellant's responses, and the tone of those responses, was quite unlike that of someone who had the benefit of a capital guarantee given to her by the respondent:

16 December 2014

Appellant (11.52 pm):	... babe [referring to the respondent] ***can help*** cos I told him [the appellant's father] deposit is no capital loss

...

17 December 2014

Respondent (12.38 am):	... I completely understand. I also don't know what to do... My side still no sound no picture.. If cant get my funds out I can t even do fx to get it back ...
Appellant (12.39 am):	Understand
	I tryg to buy time
Respondent (12.39 am):	I know u told him [referring to the appellant's father] no capital loss but u also told him one year tenor can't break right ?

...

Appellant (12.40 am):	Ya la

10 January 2015

Appellant (12.29 am):	Cos i dono whr to find funds
	N dad is stressing me out everydy
…	
Appellant (2.11 am):	I am quite miserable
	So i am speechless
	But onli can talk to u
	Cos i dono what to do
	Cos i don have deals ***i no money pay dad***
Respondent (2.14 am):	Your dad side u really just have to delay as much as u can… After all it was supposed to be a year

12 January 2015

Appellant (10.06 am):	Dad went mad yestd
	I realli dono what to do
	He say this week he wana complain
Respondent (3.59 pm):	My god what's wrong with your dad?! Complain to who
Appellant (4.12 pm):	I dono man
	I am like pulli g [sic] hair
	I told him i have funds n will buy over in march
	Becos I thimk [sic] he see no docs
…	
Respondent (4.35pm):	Aiyah should have never taken his money since hes like that sigh anyway we discuss later.. So traumatizing…
…	

Appellant (4.36 pm):	I am so drained
	If can i meet
	If not icall [sic] u
	Ya shdnt have
	But ***what choice do i have rite?***
...	
Appellant (8.31 pm):	I jus v worried la
	I told him [referring to her father] March i pay him first

[Emphasis added]

35 As seen from the above exchange, even in January 2015, the appellant continued to be in a state of distress, and was pleading with the respondent to help her recover the losses suffered in the margin trading. This appeared to be because the appellant had told her father that the capital sum would be guaranteed and protected from losses. But, if indeed there had been a capital guarantee given by the respondent, I was unable to understand why the appellant would be worried to the extent of asking the respondent for help to recover the capital sum and lamenting about the lack of a solution. I note parenthetically that the appellant did briefly mention to the respondent that there was a capital guarantee on 22 December 2014. But the respondent was confused as to what the appellant was referring to and the parties agreed to follow up on the conversation in person the next day because "texting ... [can be] confusing".[23] If the appellant did confirm the existence of a capital guarantee the next day, she could have simply sought reassurance that the sum was covered by the capital guarantee, or mentioned that she expected the respondent to live up to her obligations under the capital guarantee. But, there was not even any passing mention of the alleged capital guarantee thereafter. Instead, the appellant went

[23] ROA vol 3D p 850

as far as to ask if she could *borrow* S$100,000 from the respondent to return to her father when, according to her, he started to question where the sum has gone to:

> **24 January 2015**
>
> | | |
> |---|---|
> | Appellant (11.17 pm): | Ya. I prob ***borrow*** the 100k first from u

He is drivg [sic] me nuts

Gv threatening wana go to bank |
> | … | |
> | Respondent (11.52 pm): | Wah your dad is seriously a major headache man... If the client gives me back the funds sure.. If not i don't know how to ***lend u*** 100k lol.. I think if that's the case better try and do the deals quick cannot stall Liao.. ***I pass u prospects u gotta close somehow with your skills*** |
> | … | |
> | Appellant (11.52 pm): | Yes

We do deals first. |
>
> [Emphasis added]

36 From the above excerpts of the WhatsApp messages exchanged, it was evident that the respondent perceived the appellant to be responsible to her father for the margin trading losses suffered. Certainly, the appellant was herself conveying that impression to the respondent. I observe that, if it was the case that the respondent was obliged to return to the appellant the amounts she had used for margin trading, it would have been entirely odd for her to suggest that it was up to the appellant to "close" deals to earn the S$100,000 back and even more incongruous for the appellant to agree with such a suggestion.

37 Ultimately, the appellant bore the burden of proving that there was, on a balance of probabilities, a capital guarantee that had been orally promised to her. The conduct of the parties as evidenced by the WhatsApp messages in the period from October 2014 to January 2015 weighed against a finding that there was any agreement on a capital guarantee.

38 Second, I find that the inconsistency between the parties' conduct and the existence of a capital guarantee was made all the more apparent in the light of the significant amounts that the appellant had transferred to the respondent for margin trading and the relative positions of the parties. On the one hand, it was unlikely that the appellant, who was an insurance agent and personal wealth manager and thus someone used to documentation, would have been satisfied by simply relying on an oral agreement to guard against the risks of losing up to S$200,000, particularly if it was true that the initial sum of S$100,000 was not even hers, but her father's. On the other hand, I found it quite unlikely that the respondent, a private banker who was well aware of the volatility of the foreign exchange market, would have agreed to give a capital guarantee that would expose her to the risks involved in margin trading in foreign currencies while keeping the appellant's investment risk-free, when there was realistically little to gain for the respondent by doing so.

39 To explain what I mean by that last point, one must examine the appellant's allegations in relation to the terms of the oral agreement in more detail. As I mentioned at [9], the appellant alleged that there were fairly specific terms agreed with the respondent over the phone call at approximately 1.45 am in the morning of 8 October 2014. Aside from the capital guarantee, three particular terms stand out. First, the appellant would place the sum of S$150,000 to S$200,000 with the respondent for the margin trading in foreign currencies for the purpose of generating returns for the appellant. Second, the

respondent would be "entitled to retain the part of the gains made from the investment that exceed a value equivalent to 25% of the [appellant's capital]. The [appellant] would be entitled to retain the part of the gains made up to value equivalent to 25% of the [appellant's capital]".[24] Third, there would be "no minimum holding period" for the appellant's capital, which meant that the appellant could ask for her money back at any time.

40 The respondent denied that any of these terms were ever agreed. Her evidence was that she would never have agreed to such an "absurd proposition", which involved her taking on liability to the appellant in exchange for returns that were unlikely to even materialise, in light of the high risks involved in foreign exchange trading. All she agreed to was to help try to make the appellant some money through margin trading, without any promised return, because the appellant was looking for a way to make some money quickly.

41 On balance, I found the appellant's evidence on these alleged terms of the oral agreement to be far less plausible than that of the respondent's. The WhatsApp exchanges do show at the material time that the appellant was looking for a quick way to make money. She appeared to be in need of money because of some trouble she had encountered at work. The appellant's allegation that the respondent had agreed to guarantee S$150,000 to S$200,000 of the appellant's monies on that phone call on 8 October 2014 is not supported at all by the contemporaneous WhatsApp exchanges. They instead showed that the two of them had only ever mentioned an initial investment amount of S$100,000 by the appellant.

42 There was also no document, email or WhatsApp message that even hinted that the parties had agreed that the respondent could keep the returns on

[24] ROA vol 2(A) p 3 at para 2.a

the trading only if it exceeded 25%. To my mind, this allegation bordered on being fanciful. It stretched credibility that the parties could even expect to make a return of 25% in foreign exchange trading, let alone that they had agreed that the appellant would be entitled to keep all of it up to 25%. That is why I earlier suggested that, if this was indeed true, the respondent would be taking on substantial risk for very little in exchange in terms of the likely return to her. I find that it would have been illogical for the respondent to have agreed to such an arrangement.

43 It also hard to believe that the parties could have come to an agreement that the appellant was entitled to demand for the return of her invested capital *at any time*. If this were true, it would mean that, on demand, the respondent would have to immediately close out all the outstanding trading positions, whether they were profit or loss making, and return the appellant's capital to her. Further, in such a case, if the net position at that moment was loss-making such that part or all of the appellant's capital would be depleted by the close-out, the respondent would be obliged to make the appellant whole by paying the shortfall in the capital amount. I found no conceivable reason for the respondent to have possibly agreed to this. This is especially when the WhatsApp exchanges show that it was not even the respondent who had initiated the discussion on trading in the foreign exchange market. Rather, it was the appellant who first mooted the idea to the respondent.

8 October 2014

Appellant (12.29 am):	General qn If u have 100k. U play FX. How much can u avg get bk in a month ...
Respondent (1.00 am):	Fx is something that's q hard to gauge monthly
Appellant (1.00 am):	No I need make quick buck babe I think oni u can help AND UNDERSTAND

Given the above considerations, it was simply not credible that the respondent would have agreed to take on such an onerous financial risk even if they were close friends.

44 The appellant did rely on several references made by the respondent in the course of certain WhatsApp messages in *March 2015* to an alleged agreement to provide a capital guarantee. It appears from the WhatsApp messages that this was when the appellant and or her father had already consulted a lawyer. The tone of the appellant's WhatsApp messages to the respondent started to change in this period to become more accusatory. When the appellant told the respondent that her father was allegedly threatening to report the matter to the police, the respondent asked the appellant to manage her father and to give her some time to find a way to raise the S$100,000:

12 March 2015

Respondent (2.22 am):	[referring to the appellant's father's police report] What the hell man How can he do such a thing? Really gonna hai me big time man.. Why dont u just tell him the truth that u used it to buy fx.. im already so stressed out with all this crap.. Now one more thing to worsen it.. God
Respondent (2.28 am):	I'm seriously v sick of all this u know.. I know your dad is not an easy man to handle but u really have to try to manage him while we try and settle this shit… Every other day give attitude and undue stress isn't gonna solve anything is it.. If we are both feeling like this how to work and get the cash to pay him back ?!
…	
Respondent (2.44 am):	It's not a small sum and the fact is that we really lost it
…	
Respondent (2.45 am):	But now it's me that gotta go find some way to get the money and try to pass u to return him and its 100k leh how not to be stressed u tell me sigh So how u tell me what do u suggest we do How to placate him for now? U have to consistently deal with him… I have no other means to invest anymore so can't make back any losses.. ***So only way is to work and try to refer u to more deals so we can make back bit by bit and pay him and yet timeline is so short***… And all this negativity and stress is making things so hard… We are living day to day with your Dad's

	threats.. How to concentrate on doing deals I also don't know I am seriously going crazy here…
Appellant (9.46 am):	… Like u said 100k is not a small amt so is my 50k. N I tahan this 1 n half year alrdy
Respondent (10.42 pm):	understand.. I will try and buy u out ASAP.. Give me some time.. ***I will pass u partial first then the rest***
13 March 2015	
Respondent (3.44 am):	Hey what's going on ah? What situation are u not comfy with ? I'm seriously damn stressed out can u pls at least let me know what's going on
Appellant (7.24 am):	U [keep] telling me u r stressed but nothing is being done. I have laid out all the cards w ongoings from the beginning since 13 Aug 2013 where I helped u with deposit of 50k cos u said u needed to raise funds for this "client" n her fengshui. ***U knw what my dad n his lawyer said?*** They say how do you knw even that the total 195k funds were supposedly even use for generating the aforesaid interest via deposits or investments? It was more of a personal loan to ur friend n upon return you get some interest back. What realli pissed me off is that d day b4, u mentioned something bad abt my dad. Honestly you also know that the loan from him required no capital loss n interest. I asked u time n time again when i deposited n trf to u abt the capital loss n told u that all the total ***u make sure no capital loss***. So ***it was trust*** that at least when the time was up that i would be able to withdraw. Now

	its always about your client n depending on your client. We all now dont even knw if that client is existent. Like you said, it is ur responsibility n i am tired of waitg n listening to the clients. Therefore i feel i wana keep things all seperate [sic]
	I suggest u return the 195k + 50k deposit in totality n offer a dateline. The first 50k is already 14days past. I dont even see a cent of interest even. I have been holidng on to all parties in aspect of friendship n hopefully trust that i am wrong. I understand ur job m [sic] career in the finance insdustry [sic] n do not wish any of us to resort to harsh measures. I sick of this so lets settle this. Gv me the dateline n return everything i trf to you n be done w it.
…	
Respondent (4.21 pm):	First of all for, I apologize since u are offended that i said something bad about your dad, thou I would appreciate if u let me know what it was. Secondly back to the money issue, I am v upset that it has come to this. I was not even the one who approached u for the money so i dont like it that u all make it sound like its a personal loan to me and that I will pass u back at the end of tenor with some interest?! u were the one who came to me and said u were in trouble and we talked about what trouble and how to settle it, then u asked me if I could use fx to help u make back the money since I made money for my clients.. You of all people know the truth behind the 195k that originated from buying fx to try and recover losses or

	miscalculation on your client's policy and u were there all those times we were stressed out when aud plunged and we both had to rush to do the top ups. So it doesnt feel good that it sounds like u all are now accusing me of playing punk or borrowing money from u. I really tried to help u, and becoz of that greed got the better of me and I lost my own money as well which I'm not even saying anything about coz it was my own fault for being greedy. . But it's so disappointing that while I tried to help u, monitor like crazy the aud day in day out, u would say such things about me.. I guess money is really the root of all evil isn't it.. And it really spoils friendships
Appellant (4.26 pm):	I jus wan a solution No point pointg fingers As mentioned the amt n dateline
Respondent (4.35 pm):	Of coz when we talked about the loan that u took with you rdad.. U told him no losses, capital guaranteed and u will also pass him about some interest. I am fully aware of that and even thou I know fx is v v risky and no capital guarantee at all.. i still wanted to help, genuinely as a friend I really wanted to.. ***So we came to an agreement that capital guaranteed.. 1 year tenor***.. No preterm withdrawing coz i need the time to try and make the money back for u.. We both thought aud was a good buy.. And u were there with me when it plunged day after day,. Being stressed together with me.. I was even more stressed Coz we were in huge deficit and ***I know i had to find a way to fork out the money to pass u back when***

	the one year is up.. Now it has become my sole burden what a joke but ***it was an agreement and i abide by it***...
	...As for your Dad's ***I will pass u back exactly <u>one year from the date u transferred me</u>, the <u>full capital amount as per our agreement</u>***... And whilst trying to help u, I get myself into a shitload of losses that I need to bear. What a joke isn't it.. Never expected appreciation but to actually turn nasty against me that's really sad..
Appellant (4.54 pm):	I get bk to u on this
...	
Respondent (5.27 pm):	Sure I just hope u will be fair to me as based on our ***1 year agreement.*** The ***losses have now become my responsibility*** and its not a small amount so I hope we can be civil on this.

[Emphasis added]

45 On its face, the above exchange suggested that the respondent herself might have believed that she was bound by a capital guarantee to return the entire capital sum to the appellant in a year's time from October 2014. This is made worse by the fact that the respondent's messages were sent at a time where their relationship was becoming strained. One would therefore expect the respondent to raise the point that the losses were for the appellant to bear, and to say so immediately after highlighting that the foreign exchange market was a volatile one. Instead, she appeared to acknowledge the existence of an agreement between the parties on a capital guarantee.

46 When cross-examined at trial, the respondent explained that what she had meant by "capital guarantee, 1 year" was that she had guaranteed to keep

the funds and to invest them as best as she can for a year.[25] The respondent also explained that the statements that she made by WhatsApp on 13 March 2015 had to be understood within the relevant context. She explained that the appellant had informed her at the start that she would pass the respondent the sum of S$100,000 for the respondent to invest in the foreign exchange market on her behalf for a year beginning October 2014. However, in the months leading up to March 2015, the appellant began to harass her to return the money and repeatedly told her that her father was threatening to either make a police report or to confront the respondent at her work place. This was "unimaginable" for the respondent and might lead to her losing her job at the bank. She therefore wanted to remind the appellant that the agreement was for the capital of S$100,000 to be placed with the respondent for at least a year, and the appellant should not be harassing her in the meantime. Thus, when she said that she would return the "full capital amount as per [their] agreement" exactly one year later, she was not referring to a capital guarantee she had promised the appellant, but was trying to assure the appellant that she would try her best to recover the funds on the foreign exchange market and would try to return the initial investment of S$100,000 to her within a year. She wanted the appellant to stop harassing her.[26]

47 The respondent also added that, at that time, she was very stressed at the thought of the appellant's father appearing in her office to confront her and wanted to make the appellant "go away". She therefore said whatever she could say to prevent the appellant and her father from kicking up a fuss. For these reasons, the respondent made reference to a capital guarantee despite there

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25 NE (11 Jul 2017), p 130 at lines 13 – 14.

26 NE (11 July 2017), p 134 at lines 14 – 17.

being none agreed between the parties on 8 October 2014 or any time thereafter.

48 After carefully considering the evidence, I accepted the respondent's explanation. Her evidence that she was very stressed at the thought of the appellant's father making a police report or confronting her at her workplace was consistent with her responses on WhatsApp. I noticed that the respondent would appear highly vexed and anxious each time the appellant mentioned that her father wanted to get involved. Her anxiety appeared to worsen each time the appellant informed her that her father was threatening to go look for her at her workplace:

3 March 2015

Appellant (11.51 pm):	I scared he [referring to the appellant's father] march into bank ah
Respondent (4 March, 12.28 am):	Oh my god pls everytime u say that I wanna die of stress... Already feel like fainting already !...

By March 2015, the respondent had been told by the appellant about the appellant's father's threats for about five months. It is therefore not inconceivable that the respondent would have mentioned a capital guarantee to try to stave off the appellant and her father even though there was no such agreement between the parties. This is especially since the appellant had by this time mentioned the involvement of her father's lawyers.[27]

49 While the WhatsApp exchange of messages on 13 March 2015 does support the appellant's case that she had mentioned to the respondent from the

[27] P 426 Whatsapp messages.

outset that she told her father that his S$100,000 had to be protected from capital loss, it still has to be shown that the appellant extracted a contractual promise from the respondent that the capital amount would be guaranteed. I find that the respondent's messages do show that she was aware of the importance to the appellant that her father's monies should not be lost, but they do not go so far as to show that the respondent had promised to *guarantee* the capital from losses. Rather, they show that the respondent had agreed to try her best to help the appellant earn profits from the initial S$100,000 investment if she was allowed to keep it for a year.

50 It must not be forgotten that the appellant and the respondent were close friends at that time, and a scrutiny of the WhatsApp exchanges from December 2014 to March 2015 showed that the respondent felt bad that the appellant's monies had been lost in the margin trading. She was constantly being told by the appellant that the latter's father was pressing for the return of his S$100,000 and it is quite clear to me that the respondent was trying to find a way to assure the appellant that she would help her make back the money that was lost so that she could repay her father, if given time. It is in this context that the respondent's WhatsApp messages on 12 and 13 March 2015 should be read. In my view, the respondent was planning to help the appellant make back the amount that had been lost, but she needed time to do so. For this reason, the respondent made references to a "capital guarantee" with a one-year tenor to buy time.

51 Given their close friendship, the appellant's statements to the respondent at the material time about how she had deceived her own father about the use of his S$100,000 must also have had a significant impact on the respondent's frame of mind and emotions. From the respondent's perspective, she believed that the appellant had lied to her father that the capital was protected from loss,

since the appellant had come up with a story that it would be placed in an interest-bearing fixed deposit. In fact, the two of them had joked about this deception at that time.[28] Understandably, the respondent must have felt complicit in the appellant's lie to her father and, as a result, felt a joint sense of responsibility with the appellant towards her father for the S$100,000 that was lost. That would explain some of the respondent's messages on 13 March 2015, which I have referred to above. That probably also explained the respondent's tone of irony in the WhatsApp message that read "the losses have now become my responsibility" when she felt that the appellant was shirking responsibility for her father's losses. But, all this is quite different from the appellant's claim in these proceedings that the respondent had undertaken a *contractual* obligation to the appellant on 8 October 2014 to ensure that the monies passed to her would be guaranteed from loss. For the reasons explained above, I am unable to agree with the appellant that the existence of such a contractual obligation on the respondent's part is made out on the evidence.

52 In the final analysis, even if the respondent's explanation of her WhatsApp messages on 12 and 13 March 2015 was not watertight, the burden was not on her to prove that there was *no* capital guarantee. Instead, the burden was on the appellant to prove that it was more likely than not that the parties had agreed to a capital guarantee during their telephone conversation on 8 October 2014. In my judgment, the appellant had failed to discharge her burden of proving so.

53 In all, I found that the appellant's case on the terms of the oral agreement, including the alleged capital guarantee, to be lacking in credibility, logic and also mostly unsupported by the evidence in terms of any documents,

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[28] ROA vol 3A, p 154

emails or WhatsApp exchanges, when read in their proper context. In particular, the position taken by the appellant in relation to the other terms of the oral agreement, which I have found to be quite illogical, seriously damaged her credibility and was a factor in my finding that, on balance, there was in fact no capital guarantee promised by the respondent to the appellant.

54 For completeness, I should add that whether or not the initial S$100,000 was from the appellant's father, and whether the appellant had perjured herself in her evidence at the trial below on the source of the funds, has no bearing on my findings above. This is because I am satisfied that the respondent believed that the sum was from the appellant's father, and had operated under that belief at all material times. Thus, her replies to the appellant in the WhatsApp exchanges were premised on such an understanding and should be evaluated as such. The relevance of any "lie" as to the origin of the S$100,000 would only be in relation to the issues of illegality and misrepresentation (see [58] and [59] below).

Illegality and misrepresentation

55 Given that I have found that there was in fact no capital guarantee agreed between the parties, there is strictly no need for me decide whether or not the appellant's lies to the respondent about the source of the initial S$100,000 investment amount being her father's money rather than hers would be a basis to find that the appellant's claim on the guarantee is barred by the doctrine of illegality. However, since the District Judge had decided the case below on this point, I feel it incumbent on me to express some brief views on the correctness of his ruling in this regard.

56 Generally speaking, the doctrine of illegality can be divided into two types - statutory illegality and illegality at common law. Statutory illegality, which requires the contravention of a statutory provision, is not relevant in the present circumstances. There is no allegation by either party, nor any finding by the District Judge, that there has been any contravention of any statute.

57 On the other hand, illegality at common law is rooted in the concept of public policy. The first stage of the inquiry involves a determination of whether the contract was prohibited pursuant to an established head of common law policy (*Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid Trading*") at [22] and [29]). This would include contracts which are not unlawful per se but entered into with the object of committing an illegal act (*Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [44] and [46]). For a contract to fall within this category, one or both of the contracting parties must have intended, at the time the contract was made, to use the contract for the commission of an illegal act. If illegality is made out in this first stage, the courts will then consider whether there can be restitutionary recovery of the benefits conferred under the contract despite it being prohibited (*Ochroid Trading* at [42]).

58 I did not think that any agreement entered into between the appellant and respondent for the purposes of margin trading in the foreign exchange market would be void for illegality at common law simply because the appellant had lied about the source of the monies to be invested. Her statements to the respondent about the initial sum of S$100,000 being from her father, if untrue, are separate from any agreement that the parties then entered into. Also, there was simply no evidence that the appellant wanted to enter into an agreement with an intention to commit an illegal act or to use the agreement for any

unlawful purposes. As such, the District Judge should not have found that the appellant's reliance on the alleged capital guarantee was barred by illegality. Such a conclusion was not supported by principle or authority.

59 In my view, the proper cause of action (if any) for the respondent in such a situation would be one founded on a fraudulent misrepresentation by the appellant, which induced the respondent to give a capital guarantee to the appellant. But, it bears pointing out that fraudulent misrepresentation was not pleaded or pursued as a defence in this case. Nor was there any attempt by the respondent to amend its pleadings to raise fraudulent misrepresentation (or for that matter, illegality) after evidence emerged during the cross-examination of the appellant that she had lied to the respondent about the source of the initial S$100,000. As such, there would also have been no basis for any finding that the appellant's claim must fail because of fraudulent misrepresentation.

Conclusion

60 For all the reasons above, the appellant's claim fails but for different reasons as those given by the District Judge below. On a balance of probabilities, I find that there was no capital guarantee given by the respondent to the appellant. On the facts of the case, I do not think that any capital guarantee, if found to have been given by the respondent, would be void for illegality, but this issue was ultimately moot given my finding that there was no capital guarantee to begin with. There was also no need for me to express any views on the merits of the respondent's arguments on lack of consideration and or lack of intention to create legal relations.

61 I therefore dismiss the appeal. The respondent is entitled to the costs of the appeal fixed in the amount of S$12,000, inclusive of disbursements, to be paid by the appellant.

Ang Cheng Hock
Judicial Commissioner

The appellant in person;
Alvin Lim Xian Yong and Vincent Ho Wei Jie (WongPartnership LLP) for the respondent.
