Sin Yong Contractor Pte Ltd (in liquidation) v United Engineers (Singapore) Pte Ltd [2008] SGHC 43

Case Number : Suit 446/2007, RA 292/2007

Decision Date : 25 March 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Alvin Yeo SC and Janice Goh (WongPartnership) and Andrew J Hanam (Andrew & Co) for the appellant/plaintiff; Andre Yeap SC, Adrian Wong and Dominic Chan (Rajah & Tann LLP) for the respondent/defendant

Parties : Sin Yong Contractor Pte Ltd (in liquidation) — United Engineers (Singapore) Pte Ltd

Contract

Civil Procedure

25 March 2008

Andrew Ang J:

1 The plaintiff sub-contractor, Sin Yong Contractor Pte Ltd ("Sin Yong") (a company in liquidation), instituted Suit No 446 of 2007 to seek payment from the defendant main contractor, United Engineers (S) Pte Ltd ("UE"), for work done in a series of sub-contracts for the installation of fire protection systems in projects undertaken by UE. What distinguished this case from other run of the mill cases in construction contracts is that secret payments had been made by Sin Yong to an agent of UE for more than ten years. UE attempted to have the dispute determined summarily.

2 Before going further, I will set out the background by starting with the civil action filed four years ago by the main contractor to recover those secret payments.

3 In Suit No 13 of 2004 ("Suit No 13"), UE sued Lee Lip Hiong ("Lee"), Tan King Hiang ("Tan") and Sin Yong for moneys paid as bribes to Lee by Tan and Sin Yong over the period, from 1991 to 2002. Lee was UE's engineering manager from 1989 to early 2003. His duties were primarily to negotiate, award, enter into and/or administer contracts with main contractors and sub-contractors for UE's construction projects. Tan was the sole proprietor of Sin Yong Contractor which was subsequently corporatised on 22 October 1999 as "Sin Yong Contractor Pte Ltd" of which Tan was a director and shareholder. Sin Yong was in the business of installing commercial fire protection systems, such as sprinklers, and had been awarded numerous UE contracts.

4 In that suit, Senior Assistant Registrar Kwek Mean Luck ("SAR Kwek"), on 8 September 2004, granted judgment for UE in the sum of $365,758 against all three defendants for the recovery of all bribes paid by Tan personally or on behalf of Sin Yong to Lee. An appeal by Sin Yong was heard and dismissed by Judith Prakash J on 30 September 2004. Thereafter, Tan was made a bankrupt and Sin Yong was placed in liquidation by UE.

5 It is noteworthy that this bribery had come to light only because Tan, the giver of the bribe, had tipped off the Corrupt Practices Investigation Bureau ("CPIB") in January 2003. As a result, and prior to Suit No 13, Lee had in August 2003 pleaded guilty to ten counts of accepting gratification (with 95

other charges taken into consideration) and was convicted, imprisoned and fined under the Prevention of Corruption Act ("the Act") for receipt of bribes totalling $364,758.

6 According to the Statement of Facts in relation to the charges which Lee pleaded guilty to, Lee had proposed to Tan in the late 1970s that Sin Yong could be awarded with the subcontracts, provided that Tan agreed to increase his quoted price for each unit of fire sprinkler installed by $1 or by an amount suggested by Lee. Pursuant thereto, Lee would instruct Tan on the amount Tan was to quote for each subcontract so as to ensure that the amount was within the budget of UE. After Sin Yong was awarded the contract, Tan would have to pay Lee a sum of money computed according to the total number of fire sprinklers to be installed multiplied by the unit price increment as suggested by Lee. Tan had agreed to this proposal.

7 In 2007, Sin Yong obtained sanction of the Official Receiver and commenced the present Suit No 446 of 2007 against UE for the recovery of 53 unpaid invoices aggregating $491,934.48 for the installation of sprinkler systems between 2001 and 2003.

8 In response, UE took out Summons No 4306 of 2007 and an order was made by SAR Tan Ken Hwee ("SAR Tan") pursuant thereto. The present appeal relates to the order that SAR Tan made.

9 By way of Summons No 4306 of 2007, UE sought, *inter alia*:

> (a) a determination of a question of law pursuant to O 14 r 12 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court"), namely, whether Sin Yong's claim in this action is tainted with illegality and/or contrary to public policy and/or unenforceable; and
>
> (b) an order that Sin Yong's claim be dismissed and/or struck out pursuant to O 14 and/or O 18 r 19 of the Rules of Court and/or the inherent jurisdiction of the court.

10 After hearing parties on 8 October 2007, SAR Tan ordered, *inter alia*, that:

> 1. insofar as the Defendants [UE] may be able to demonstrate that the invoices that are the subject of the Plaintiffs' [Sin Yong] claim in this action correlate to a project or works or a contract that was entered into with the connivance of Tan King Hiang [Tan] and Lee Lip Hiong [Lee] in furtherance to the corrupt activities that they engaged in, as was determined in Suit No. 13/2004/C, the Plaintiffs' case in this action would be tainted with illegality and would be unenforceable;
>
> 2. the Defendants be granted liberty to make a further application under O 18 r 19 of the Rules of Court and/or the inherent jurisdiction of the Court to strike out the Plaintiffs' action.

11 For the purposes of the present appeal, Tan filed an affidavit stating his account of the circumstances under which the bribery took place. He stated that payments were made to Lee only out of duress and after the contracts had been awarded and not before. Lee had extorted the bribes from him by refusing to acknowledge completion of works and payments by UE were thus withheld. The payments that were made to Lee were, according to Tan, not bribes but extorted payments. Tan denied that he was asked to increase the price of the sprinklers, let alone agree with Lee to do so. This entire account, Tan said, was told to CPIB in 2003 and was also in his pleadings for Suit No 13. Tan further sought to show that the prices Sin Yong charged UE was 33% to 50% lower than what was charged for other companies.

12 Tan's affidavit also drew attention to an affidavit Lee had provided for the purposes of Suit No 13

whilst in prison. In Lee's affidavit, he explained that he had chosen not to contest the accuracy of the Statement of Facts for fear that the prosecution would withdraw its offer to proceed only with ten charges and to take the remaining 95 charges into consideration. Whatever motives Lee may have had in providing that affidavit, the import of Lee's affidavit was to suggest that the real circumstances surrounding the bribery might not have been accurately recounted in the Statement of Facts.

13 In this regard, counsel for UE argued that since Tan was the one who had tipped off the CPIB, the Statement of Facts would, accordingly, reflect what Tan had earlier told the CPIB. However, I did not think the fact that Tan was the informant meant that it inexorably followed that the Statement of Facts necessarily recorded Tan's account accurately.

14 After hearing parties on 19 November 2007, I allowed the appeal, setting aside SAR Tan's order with costs below and in the appeal to be in the cause. UE subsequently requested leave for further arguments and, after granting such leave, I heard parties again on 8 January and 30 January 2008. After further arguments, I affirmed my original decision on 19 November 2007 and ordered that costs of the further arguments be the plaintiff's costs in the cause. My reasons are set out below.

Summons No 4306 of 2007

15 To recapitulate, UE made two applications by way of Summons No 4306 of 2007: first, a determination of a question of law pursuant to O 14 r 12, namely, whether the unpaid invoices were tainted by illegality and thus unenforceable; second, an application to strike out under O 18 r 19 of the Rules of Court. The latter application was essentially predicated upon the premise that Sin Yong's pleadings reveal no reasonable cause of action because the unpaid invoices were tainted by illegality. The issue of illegality was therefore the key question I had to consider.

16 UE's arguments before me were essentially four-tiered. First, UE argued that Sin Yong was estopped by Suit No 13 from disputing that it was part of a conspiracy to commit a crime, which UE described as the payment of bribes to Lee for the purposes of securing UE contracts, for the smooth administration of such contracts and the subsequent inflation of the invoices by the bribe amount ("the conspiracy"). The precise content of the conspiracy is germane to the present appeal and ought to be borne in mind. Second, UE submitted that the corollary of Sin Yong being a party to the conspiracy was that the underlying contracts had an illegal *purpose*, and therefore the law would not assist such a party in recovering the fruits of its crime.

17 In further arguments, UE argued that the *mere* fact of bribery was a form of fraud, which *ipso facto* renders the contracts unenforceable. Alternatively, notwithstanding that the underlying subject matter of the contracts was legal, *viz*, the installation of sprinklers and payment pursuant thereto, the contracts were nevertheless tainted by illegal *performance* and were thus unenforceable.

Estoppel and conspiracy

18 After careful consideration, I rejected UE's argument that issue estoppel prevents Sin Yong from asserting that it was not a party to a conspiracy.

19 UE argued that issue estoppel was made out because the fact that the conspiracy existed had already been decided in and/or formed a necessary ingredient of the judgment in Suit No 13 where SAR Kwek granted judgment to UE, and that since Prakash J had dismissed the appeal, it clearly showed that she too disagreed with Sin Yong's arguments in that suit.

20 Counsel for Sin Yong raised the point that judgment was entered in Suit No 13 pursuant to an application made by UE under O 27 r 3 of the Rules of Court, which reads:

> **Judgment on admission of facts (O. 27, r. 3)**
>
> 3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just.

21 Counsel for Sin Yong argued that judgment was entered based on the admissions by Sin Yong and Tan that secret payments had been paid. Sin Yong had pleaded in its Defence for Suit No 13 that it did not *conspire* with Lee and Tan to facilitate the securing of contracts. In his Notes of Evidence for UE's application under O 27 r 3 dated 8 September 2004, SAR Kwek noted that UE was relying on the admission of fact in Tan's pleadings of "giving money, not full legal liability".

22 Counsel for Sin Yong also brought to the court's attention the three causes of action relied upon by UE in its Statement of Claim in Suit No 13, namely, moneys had and received, s 14 of the Act and constructive trust. SAR Kwek's order did not state the cause(s) of action for which he entered judgment. Counsel argued that whilst a successful claim under a constructive trust against Sin Yong would necessarily entail a finding of conspiracy, the first two causes of action did not. In other words, Sin Yong's submission was that the judgment entered in Suit No 13 did not decide on the issue of conspiracy.

23 Counsel for UE strenuously contended that no judgment could have been entered against Sin Yong if there was no finding that there was a conspiracy to which Sin Yong was a party. He pointed out that the allegation of a conspiracy was an integral part of UE's pleadings in Suit No 13. He further showed that the order by SAR Kwek included, not only against Lee but against Tan and Sin Yong as well, an account and tracing of all the bribes that were paid.

24 I had difficulty accepting UE's argument. Nothing in the Notes of Evidence or the final order made by SAR Kwek showed or implied that a finding as to the conspiracy had been made. As SAR Kwek noted and this is borne out by my perusal of UE's skeletal submissions in that application, UE was simply relying on the admission that secret payments were made. That, in itself, was a sufficient basis for judgment to be granted; a finding of conspiracy was not required and indeed UE did not press for such a finding. I quote from paras 51 and 52 of UE's said skeletal submissions:

> 51. By their own admission of the payment of bribes, the 2nd and/or 3rd Defendants therefore clearly have no defence against the Plaintiff's claim in the present proceedings and the Plaintiffs ought to be entitled to judgment for $365,758.
>
> 52. In so far as the 2nd and 3rd Defendant allege that they were under duress when they paid the bribes to the 1st Defendants, the Plaintiffs would submit that the motive for the payment of the bribes is neither a justification nor defence.

25 From these submissions, it is apparent UE knew that the argument of duress raised by Sin Yong was irrelevant to the question whether Sin Yong was liable to UE for the bribe that had been paid. A claimant need not show that the briber's motive was corrupt: *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [53]–[54]. The best that can be said is that SAR Kwek, in including Sin Yong specifically in the order, found that Sin Yong had made secret payments as well.

That did not *ipso facto* make it party to the alleged conspiracy, or any conspiracy at all.

26 The order of accounting and tracing against Sin Yong was a remedy which UE was entitled to against both the *briber* and UE's agent once it is found that *bribes had been paid* to its agent: *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643; *Ultraframe (UK) Ltd v Fielding (No.2)* [2006] FSR 17; Bullen & Leake & Jacob's, *Precedent of Pleadings*, vol 2, (Sweet & Maxwell, 16th Ed, 2008) ("*Bullen & Leake*") at para 54-03. This order, again, does not necessarily entail that Sin Yong was party to the conspiracy.

27 Accordingly, I found that Sin Yong was not estopped from contending that it was not party to the conspiracy. I turn next to consider whether the contracts are nevertheless unenforceable for having an illegal purpose.

Illegality and enforceability

28 Whilst a court must not be deterred from determining a dispute under O 14 r 12 of the Rules of Court when there are complex points of law, determination would be inappropriate when novelty of legal issues is coupled with uncertainty of factual issues: see *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] SGCA 4 at [40]. In my view, the present case warrants a full trial, not least because of the unsettled state of the law on the question whether and, if so, how illegality affects contracts made between a principal and a briber when bribes had been given to an agent of the principal.

29 Before me, counsel for Sin Yong was prepared to concede that if there had been a finding that Sin Yong was party to the conspiracy which, as explained in [16] above, includes in particular the inflation of invoices with the amount of the bribe, the underlying contracts would be unenforceable since Sin Yong had defrauded UE. That concession, to my mind, was rightly made in the face of *Taylor v Bhail* [1996] 50 ConLR 70 ("*Taylor v Bhail*") and *PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd* [1975-1977] SLR 226 ("*PT International*").

30 In *Taylor v Bhail*, the English Court of Appeal refused to enforce a contract between a building contractor and a headmaster of a private school made after storms had damaged a wall in the school playground. The cost of the repairs was recoverable from the school's insurers and the agreement made between the contractor and the headmaster was that the contractor would do the work for an inflated price of £13,480 from which the headmaster would take a cut of £1,000 from the insurance proceeds as a reward for awarding the contract to the contractor. The contractor did the work and sued on the contract for his remuneration. The headmaster claimed that the contract was a contract made to defraud a third party, *viz*, the insurers, and was therefore unenforceable. The contractor replied that the inflated portion of £1,000 could be severed from the agreement to undertake the work for £13,480 and that he should be paid the balance since he had actually done the work.

31 That appealed to Judge Marcus Edwards at Brentford County Court but his decision was reversed by the English Court of Appeal. Sir Stephen Brown P said (at 74–75):

> The important feature of the case is that the contract was, in substance, an agreement between the appellant and the respondent to defraud a third party, the insurance company. This, in my judgment, is not capable of severance …
>
> [T]he message should be sent out loud and clear that if parties conspire to defraud an insurance company, as in this case, they cannot expect the courts to assist them in implementing their agreement.

Millett LJ said (at 76–78):

> [I]llegality is a question of substance, not form. Whether the arrangements between the plaintiff and the defendant comprised a single contract or two separate contracts is, in my judgment, immaterial; they constituted a single, indivisible arrangement tainted by fraud, neither component of which was ancillary or subsidiary to the other, and neither of which is severable so as to leave the other enforceable.
>
> *It is important to bear in mind that the law refuses to enforce not only contracts which are in themselves illegal, but also contracts which are ex facie legal but which, to the knowledge of the parties, have an illegal purpose or are intended to be performed in an illegal manner …*
>
> [I]t is time that a clear message was sent to the commercial community. Let it be clearly understood if a builder or a garage or other supplier agrees to provide a false estimate for work in order to enable its customer to obtain payment from his insurers to which he is not entitled, then it will be unable to recover payment from its customer and the customer will be unable to claim on his insurers even if he has paid for the work. [emphasis added]

32 Perhaps a more analogous case can be found in *PT International*. The respondents had sued the appellants for timber sold and delivered. The appellants alleged that the purchase price for the timber was inflated because their agent had taken a bribe and conspired with the respondents' agent to inflate the invoice prices. The Court of Appeal disallowed the respondents' claim for the unpaid timber on the ground of illegality.

33 If Sin Yong had similarly connived with Lee and inflated the invoices from which Lee would take a cut, Sin Yong would, likewise, be unable to claim on the invoices. But that is not the case here. At this stage, the only finding of fact emanating from Suit No 13 was that secret payments had been made to Lee; this does not mean that Sin Yong and Lee had conspired to defraud UE.

34 Counsel for UE also cited *Suntoso Jacob v Kong Miao Ming* [1986] SLR 59 ("*Suntoso Jacob*") and a string of English authorities for the proposition that where a transaction was *ex facie* lawful but had been entered into for an unlawful purpose or to achieve an unlawful end, the transaction was tainted with illegality and thus unenforceable. Counsel asserted that although the contracts in the present case were *ex facie* lawful, they were entered into for an *unlawful purpose*. Whilst initially attractive, this argument falls apart upon careful scrutiny.

35 It cannot be said, at least at this stage, that the contracts were entered into to defraud UE through the inflation of the prices. That was the precise factual issue in dispute. The making of secret payments to Lee may have had an unlawful purpose but, in contradistinction to the state of the present facts, the contracts sought to be enforced did not.

36 In response to UE's submissions, counsel for Sin Yong relied on *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 ("*American Home Assurance*") and contended that Sin Yong's cause of action could be established independently of the illegality. Sin Yong's position was perhaps encapsulated in a statement made by Nelson Enonchong in *Illegal Transactions* (LLP, 1998):

> A claim under a lawful contract will not fail by reason of illegality in another contract if the plaintiff can make out his claim without reference to the illegal agreement.

37 In *American Home Assurance*, the insurers had refused to pay up on performance bonds because the shipbuilding agreement in connection with which the bonds were issued had been backdated to

avoid compliance with certain statutory provisions. The insurers cited *Suntoso Jacob* ([34] *supra*) and *Alexander v Rayson* [1936] 1 KB 169 ("*Alexander*") for the proposition that although the shipbuilding agreement was *ex facie* legal, it was unenforceable because it was entered into for an unlawful purpose or to achieve an unlawful end.

38 The Court of Appeal examined *Suntoso Jacob* and *Alexander* closely. In *Suntoso Jacob*, the appellant (an Indonesian), held 95% of the paid-up capital of a Singapore company while the balance was held by the respondent, a Singaporean. The appellant decided to purchase a tugboat for the purpose of chartering it to Pertamina. In order to obtain financing, the tugboat had to be registered as a Singapore vessel. However, under the then administrative guidelines laid down by the Registrar, such a vessel would not be accepted for registration in Singapore if it was foreign owned, and a vessel was considered to be foreign-owned if the majority of shares in the company which owned it were owned by foreigners.

39 In order to facilitate the registration of the tugboat as a Singapore vessel, it was agreed that the appellant would transfer sufficient shares to the respondent so that he could become the majority shareholder and the tugboat could then be registered as a Singapore vessel. It was also agreed that the shares would be held by the respondent on trust for the appellant. Subsequently, the appellant wanted to transfer the shares to another nominee but the respondent refused to do so. The appellant thereupon issued proceedings against the respondent claiming that the shares were held on trust for him. The Court of Appeal refused to give effect to and enforce the trust in his favour, holding that he had "soiled his hands" by practising "a deception on the public administration" and could hardly expect the court to lend its assistance to him.

40 The Court of Appeal in *Suntoso Jacob* also cited the Privy Council decision of *Palaniappa Chettiar v Arunasalam Chettier* [1962] MLJ 143. There, a father transferred to his son without consideration 40 acres of a rubber plantation with a view to avoiding the Rubber Regulations then in force in Malaysia and thereafter sought to recover from his son the land he had transferred. It was found by the trial judge that the transfer was made to deceive the public administration.

41 The Privy Council held that the father, in order to succeed in his claim, had not only to prove that the property was transferred to his son without any consideration but also to rebut the presumption of advancement in favour of his son in respect of the property and he could only succeed in discharging these burdens by disclosing that he had practised a deceit on the public administration and, accordingly, the courts would not lend their aid to him to recover the property.

42 In *Alexander*, a landlord entered into a lease and an agreement with his tenant of certain premises. The intention of the landlord was to disclose only the lease to the rating authority and to suppress the agreement which provided for payment to him of a higher amount of service charges than that in the lease; the object clearly was to defraud the rating authority. The English Court of Appeal held that both the lease and the agreement were unenforceable and said (at 188–189:

> So in the present case, it was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject-matter of the transaction, of which an illegal use was to be made. In one sense, no doubt, it may be said that the plaintiff intended to use only the lease for an unlawful purpose, and not to use, but to conceal, the agreement. In reality there was only one transaction between the parties. The splitting of it up into two documents was a device essential for the success of the plaintiff's fraud and both documents must be regarded as equally fraudulent in purpose.
>
> For these reasons we are of opinion that the plaintiff is not entitled to seek the assistance of a

court of justice in enforcing either the lease or the agreement.

43 The Court of Appeal in *American Home Assurance* then went on to distinguish these three cases at [67]:

> First, in all three cases, the purpose of the transaction was to deceive some authority. In *Suntoso Jacob*, the purpose of the trust was to deceive the Registrar; in *Alexander v Rayson*, the purpose of the separate agreement was to deceive the rating authority; and in *Palaniappa Chettiar*, the purpose of the transfer was to deceive the public administration. In the present case, however, the purpose of the shipbuilding agreement was not to deceive the Registrar. In fact, the purpose of the agreement was perfectly legitimate and proper. The building of the vessel involved no illegality. Even the backdating itself was not illegal and it was the purpose of the backdating which was tainted with illegality; in other words, the backdating only became illegal when it was used for an illegal purpose — to obtain registration of the vessel in Singapore, which it was not entitled to. Second, in all three cases, the plaintiffs had to reveal the illegal purpose in seeking the assistance of the courts to enforce the contract or transaction. In *Suntoso Jacob*, the plaintiff had to reveal the unlawful intention behind the share transfer in order to prove that the shares were held by the defendant on trust for him; in *Alexander v Rayson*, the plaintiff had to explain the reasons for having two agreements, one being a lease and the other being a services agreement: the agreement was suppressed in order to defraud the rating authority; and in *Palaniappa Chettiar*, the father had to disclose the fraudulent purpose behind the transfer of the land. In the present case, in contrast, the respondents did not need to rely on the backdating in order to succeed in their counterclaim against the shipyard. It was not necessary for them to found their claim against the shipyard as the owners of a Singapore-registered ship, as their cause of action was based on the delay in the delivery of the vessel in breach of a specific term of the shipbuilding agreement. If they had to go behind the backdating to prove the actual date of the shipbuilding agreement in order to succeed in their claim, or if their claim was dependent on the status of the vessel as a Singapore-registered ship, the cases cited by the shipyard (viz *Suntoso Jacob*, *Alexander v Rayson* and *Palaniappa Chettiar*) might be relevant and applicable since the respondents would be basing their claim on a state of affairs which was obtained through a deception on the registrar.

44 In essence, the Court of Appeal examined two factors: first, whether the purpose of the transaction was itself lawful; and second, whether the claimant had to reveal the illegality in seeking the assistance of the courts. To my mind, that is an appropriately nuanced approach that draws a balance between competing considerations. RA Buckley in *Illegality and Public Policy* (Sweet & Maxwell, 2002) at para 7.23 quoted Bingham LJ in *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 courts 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 or how disproportionate his loss to the unlawfulness of his conduct.

45 Applying the two factors, the purpose of the transactions sought to be enforced in the present case was not illegal: see [35] above. The second factor, however, depends on the content of the illegality, *viz*, the precise circumstances surrounding the bribe.

46 If we assume that Sin Yong's version of the circumstances of the bribe was true, *viz*, secret

payments were made to Lee out of duress only after the contracts had been entered into, Sin Yong would have a strong case in arguing that its claim was independent of the illegality. The contracts were procured and discharged by Sin Yong in a perfectly legitimate manner for a legitimate purpose; UE therefore owed a corresponding obligation to make payment.

47 The point to be made, therefore, is that not only were the legal issues novel, the precise circumstances surrounding the bribery were crucial to the outcome of this dispute. Whenever the question of illegality is raised, the intention of the parties is paramount: *Siew Soon Kim v Lim Eng Beng alias Lim Jia Le* [2004] SGCA 4 at [39]. It is only after the circumstances of the bribery are established that the court is able to judge whether Sin Yong's cause of action was independent of the illegality. Accordingly, I had no doubt this was not an appropriate instance for determination under O 14 r 12.

48 With regard to the application under O 18 r 19 for striking out, Sin Yong's case did not reek of being "plainly and obviously unsustainable": see *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97. On that basis, I therefore allowed the appeal and set aside the SAR's order.

Further arguments

49 Counsel for UE took a different tack in further arguments and contended that even if I accepted Sin Yong's account of the bribery, the contracts would still be unenforceable.

50 Counsel first cited *Kensington International Ltd v Republic of Congo* [2007] EWCA 1128 ("*Kensington*") for the proposition that the mere fact of bribery was fraudulent and this *ipso facto* rendered the contracts unenforceable. UE relied on the following dicta in *Kensington* by Moore-Bick LJ:

> 60. The allegation in this case is that payments were made by or on behalf of Vitol SA to an agent of the Congolese government in return for favours in connection with contracts for the purchase and sale of oil. Those parts of section 1 of the 1906 Act which are material for present purposes, therefore, provide as follows:
>
> > If any person corruptly gives … any gift … to any agent as an inducement or reward for doing or forbearing to do … any act in relation to his principal's affairs or business … he shall be guilty of [an offence].
>
> 61. Although dishonesty as such need not be proved, the word "corruptly" signifies that the circumstances in which the gift was given were such that it had a tendency to corrupt, that is, to suborn the agent to disregard his duty and act contrary to the interests of his principal, thereby causing him harm. If the agent is moved by the gift to act contrary to his principal's interests, his conduct is of the same quality as that covered by section 4 and does in my view involve deception. It is for that reason, I think, that one finds in the authorities references to fraud in the context of bribery. Thus in Panama and South Pacific Telegraph Co v India Rubber (1875) LR 10 Ch App 515, at page 526, James LJ said:
>
> > I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal and in Mahesan v Malaysia Government Officers' Cooperative Housing Society [1979] AC 374 the Privy Council confirmed the right of a person whose agent has acted upon a bribe to recover damages for fraud from the agent or the person giving the bribe.

> 62. *I have no doubt, therefore, that offering a bribe with the intention that it be accepted and acted upon involves a form of fraudulent conduct, or at any rate of fraudulent purpose*. Mr Gruder has to argue, therefore, that fraud is not a necessary or inevitable characteristic of corruption offences, so that if a person who offers or gives the bribe does not intend it to be acted upon (for example, because he intends to expose the recipient's corrupt nature by reporting the matter to the police, as in R v Smith), there is no fraudulent conduct or purpose of any kind. If he were right, corruption offences would not in my view be "related offences" within the meaning of section 13(4)(b) since I agree that the matter has to be judged by reference to the essential character of the offence rather than one particular manner of committing it.
>
> 63. In my view, however, Mr Gruder's argument fails to take account of two matters. The first is the fact that the only purpose of offering or giving a bribe is to undermine the agent's loyalty to his principal and persuade him to abandon his duty. That is the essence of the corruption and therefore any offer of a bribe can only be intended to have that corrupting effect. It also involves deception in the sense described earlier. The second is the fact that a bribe necessarily exposes the principal (or, in the case of bribery of a public official, the public) to the risk of harm, even if it does not lead to actual harm. In my view, therefore, offering or giving a bribe necessarily involves a form of fraudulent conduct or purpose within the meaning of section 13(4)(b). [emphasis added]

51 Secondly, and in the alternative, UE argued that the contracts were nevertheless tainted by illegal performance and cited *Xiong Zhensheng v Ding Chiang Kum* [2004] SGMC 13, *Ashmore Benson Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828 and *Anderson Ltd v Daniel* [1924] 1 KB 138. These cases applied the principle that even if the contract was lawful in its inception, nevertheless where one or both of the parties intended to perform the contract in an illegal manner, the court will deny its assistance in enforcing the contract.

52 However, *Chitty on Contracts*, vol 1, (Sweet & Maxwel1, 29th Ed, 2004) at para 16-010 notes:

> However, that a party commits some illegality in the course of performance does not result in his being unable to enforce the contract.

It cited *Coral Leisure Group Ltd v Barnett* [1981] ICR 503 at 509:

> The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract *unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law.* [emphasis added]

It also cited *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 where the carrier was able to enforce its claim for freight even though it had illegally overloaded its vessel. It explained that:

> However, the plaintiff company would not have been entitled to recover freight had it intended from the beginning to perform the contract in an illegal manner.

53 Accordingly, two counter-arguments could be levelled against UE in this regard. First, even if some illegality had been committed whilst Sin Yong had been installing the sprinklers under the contracts, it did not *ipso facto* render the contracts unenforceable. UE would have to show that Sin Yong had intended to perform the contracts in an illegal manner at the time of the formation of the contracts. Sin Yong's account of the bribery did not go so far.

54 UE may be able to overcome this hurdle at trial by showing that even if we accept Sin Yong's account of the bribery, Sin Yong had formed such an intention for contracts that were formed after a consistent and prolonged period of making secret payments. That, however, is a question of fact which I cannot address at this instance.

55 The second argument was a more fundamental challenge. The cases cited all involved illegal performance by a party whilst it was discharging its contractual obligations. If we accept Sin Yong's account of the bribery, Sin Yong had discharged its contractual obligations legitimately, *viz*, it had supplied the sprinkler systems and raised the invoices. In this light, any illegality was not in the performance of the contracts sought to be enforced but was subsequent to it.

56 That left me with UE's submission that the mere fact of bribery was a form of fraud which would render the contracts unenforceable. The upshot of accepting UE's argument was that a briber in Sin Yong's shoes would not be able to claim for goods and services he had provided, whilst the principal could recover from the briber either restitution of the bribe amount or damages for loss suffered: see *Mahesan v Malaysia Government Officers' Cooperative Housing Society Ltd* [1979] AC 374; *Bullen & Leake* ([26] *supra*). It is interesting to observe that this may, in certain circumstances, have an invidious effect: principals may be tempted not to expose the bribery promptly when they come to know of it and wait until all the goods and services have been provided by the briber in the expectation that they would not have to pay for the goods and services.

57 Furthermore, the precise issue before *Kensington* was whether bribery was considered an offence involving a form of fraudulent conduct or purpose such that certain privileges against self-incrimination would arise under s 13 of the Fraud Act 2006. Ultimately that was a construction of the statute with its attendant policy considerations that may not be apposite for the present contractual context. I was more persuaded by the reasoning in *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] BLR 331 ("*Barnes*") and *Edwin Dyson & Sons Ltd v Time Group Ltd* [2001] EWCA Civ 1845 ("*Dyson*") which were raised by counsel for Sin Yong in further arguments.

58 In *Barnes*, a contractor by that name brought a claim against Time Talk in respect of unpaid invoices for the work it had done in fitting Time Talk's shops with displays for Time Talk's retail of mobile phones. Barnes had successfully obtained judgment at trial but, on appeal, Time Talk alleged that the claim was tainted with illegality in that a director of Barnes (Mr Gibson) had conspired with a director of Time Talk (Mr Colbert) and the project manager (Mr Craft) engaged by Time Talk to enable Barnes to obtain the work and charge artificially high prices. In other words, not only was Mr Craft being paid project management fees by Time Talk, he was also getting paid project management fees by Barnes through the inflation of invoices issued by Barnes to Time Talk. The arrangement was described in [2] of the judgment as follow:

> This agreement was that Barnes was to go on Time Talk's list of contractors who would be invited to tender for work and, if work was done, Mr Craft was to raise an invoice against Barnes for his supposed services and Barnes would then incorporate the sum so invoiced in the invoices they raised against Time Talk. Those Barnes invoices would then be passed for payment by Mr Colbert and once Barnes had received payment, they would pass a sum of £2,500 or so to Mr Craft for services rendered; the defendants further alleged that, to the extent that any such services might be rendered by Mr Craft, they might include selection of Barnes for future projects and a not too exacting scrutiny of the bills and invoices rendered by Barnes to Time Talk.

59 The trial judge in Barnes rejected the conspiracy allegation but accepted the alternative argument that Mr Gibson had dishonestly assisted in Mr Craft's and Mr Colbert's breach of trust since Time Talk's relationship with Mr Colbert and Mr Craft was a fiduciary one. It was submitted on behalf of

Time Talk therefore that the claim had to fail because the arrangement for Mr Craft to be doubly paid was an integral part of the contractual relationship between Barnes and Time Talk and the whole claim had to fail because it was tainted with that illegality. The trial judge allowed the claim on a *quantum meruit* basis which did not include any project management fees element. This was upheld on appeal.

60 Counsel for UE sought to distinguish this case primarily by pointing out that Barnes was seeking a *quantum meruit* claim. However, for our purposes, the focus was on how the English Court of Appeal dealt with the illegality in a similar factual context, and the following points gleaned are unaffected by the fact that the claim was on a *quantum meruit*.

61 First, if there had been a finding that a conspiracy to commit a crime existed, the claim in *Barnes* would have been unsuccessful: see [8] of *Barnes*. Second, *Barnes* was not an instance where the contract had an illegal purpose or there was an intention to perform the agreement in an illegal manner. This dovetailed neatly with our preceding analysis. Longmore LJ said at [11] and [13]:

> The contracts for supply and fitting out in the present case were not, however, contracts with an illegal purpose. Nothing in the judgment suggests that the contracts were made with the purpose of causing either Mr Colbert or Mr Craft to act in breach of their fiduciary duty towards Time Talk. It so happened that the mode of performing the contracts entailed such breach of fiduciary duty; but illegality in performance is not, in itself, enough to render the contract unenforceable unless the contract was made with the purpose of doing an unlawful act or an act contrary to public purpose, see *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267.
>
> …
>
> Mr Booth forcefully submitted that the arrangement about the project management fees was an integral part of the contracts between Barnes and Time Talk and was an illegal arrangement which infected the whole of the contracts. But, in my judgment, this submission does not justify the conclusion that the contracts are unenforceable. Unless, as Millett LJ put it, the contracts themselves had an illegal purpose or were intended to be performed in an illegal manner, there is no reason for them not to be enforceable. The private arrangement between Mr Craft and Mr Colbert to which Mr Gibson dishonestly lent his assistance, was not an integral (or, indeed, any) part of the contract made between their principals.

62 Thirdly, even if the invoices had been inflated, Longmore LJ would not rule out the possibility of severing the inflated portion from the invoices. Similarly, this would be a relevant consideration for our case and this turned on the precise details of the bribery, in particular, how the prices were quoted on the invoices. Longmore LJ said at [15]:

> If the claim had been based, as were the contracts in the first phase of the fitting out, on an accepted quotation which included an agreement to pay project management fees, the position might well have been different. In that case it could well be said that the claimants were founding their cause of action on an agreement to do something illegal or immoral viz that Time Talk would pay Barnes money which Barnes would then use to make improper payments (or bribes as I would prefer to call them) to Mr Craft. The question would then arise as to whether the illegal or immoral agreement was severable from the main agreement.

63 Fourthly, if one accepted Sin Yong's version of the bribery, Sin Yong would be able to establish its cause of action independently of the illegality. Longmore LJ reasoned thus at [20]:

These considerations show that there is a certain artificiality in the arguments of illegality in the present case. It is only because Mr Booth is able to point to an agreement between Mr Craft and Mr Colbert to commit a breach of fiduciary duty in which Mr Gibson dishonestly assisted, and because, by virtue of that agreement, Time Talk became committed to pay sums to Barnes who would then pay them to Mr Craft, that an argument of illegality of contract can get off the ground. If this were a straightforward case of a bribe paid by Barnes (or Mr Gibson) out of their own pocket, *Time Talk would only be entitled to refuse payment if they could rescind the contracts ab initio*. As it is put in Lewin on *Trusts* (17th ed, 2000) at paragraph 20–35:

> … it is well established that a principal who discovers that his agent has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled … to elect to rescind the transaction *ab initio* or, if it is too late to rescind, to bring it to an end for the future.

See also Bowstead and Reynolds, *Agency* (17th ed, 2001) para 8–219.

It is now too late to rescind the contracts, on which Barnes claim, since the work has been done and the status quo cannot be restored. That is, as it seems to me, the simple justice of this case. [emphasis added]

64 The simple justice of this case would incline me towards a similar view: if Sin Yong's version of the bribery was accepted, UE would *only* be entitled to refuse payment if it could rescind the contracts *ab initio*. It was, of course, too late to do so. One ought to bear in mind that the principal already had a cause of action against the briber in either restitution of the bribe amount or for damages suffered: [56] above and UE did succeed in Suit No 13 against Sin Yong for recovery of the moneys paid as bribes.

65 Lastly, *Dyson* was a suit brought by a contractor of that name against Time Group involving a similar factual matrix as in *Barnes*. The English Court of Appeal refused the summary judgment application in respect of the sums under the contracts which Time Group asserted to be related to "project management fees" that were actually bribes meant for Mr Craft. However, summary judgment was entered in respect of the balance. Arden LJ, at [30] of the judgment, rejected Time Group's argument that the arrangement for secret payments made the whole claim unenforceable:

> The question then is whether Time can resist payment of the whole of the outstanding balance to Craft, even if that outstanding balance does not relate to Craft's management fees. There are two ways of putting this point so far as Time is concerned. First, there was an arrangement for the payment of secret commissions and this made the whole of the quantum meruit claim on which Dyson relies unenforceable. As I see it that argument is not correct. If Mr Colbert was involved, then his knowledge of secret commissions would not be imputed to Time and Dyson's claim therefore is not affected by that arrangement for secret commissions. The position is a fortiori if, which is yet to be determined, Mr Colbert was not involved.

66 In light of the foregoing, I decided that UE did not have a case that warranted a determination under O 14 r 12 or a striking out of Sin Yong's defence under O 18 r 19.