IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 60

Civil Appeal No 96 of 2017

Between

TENG WEN-CHUNG

… Appellant

And

EFG BANK AG,
SINGAPORE BRANCH

… Respondent

In the matter of Suit No 1297 of 2015 (Registrar's Appeal No 59 of 2017)

Between

EFG BANK AG,
SINGAPORE BRANCH

… Plaintiff

And

TENG WEN-CHUNG

… Defendant

GROUNDS OF DECISION

[Contract] — [Illegality and public policy] — [Foreign illegality]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND FACTS **1**

THE DECISION OF THE COURT BELOW **4**

THE ISSUE **5**

OUR DECISION **6**

WHETHER THE APPELLANT DEMONSTRATED A PRIMA FACIE CASE OF ILLEGALITY 6

STATUS OF THE EURO-DIAM DECISION 8

Facts of the Euro-Diam decision *8*

Examining the Euro-Diam decision *9*

CONCLUSION **13**

Teng Wen-Chung
v
EFG Bank AG, Singapore Branch

[2018] SGCA 60

Court of Appeal — Civil Appeal No 96 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
16 August 2018

4 October 2018

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

Introduction

1 Should this court refuse to enforce a lawful contract on the basis that it is allegedly connected to a contract that is illegal and unenforceable in a friendly and foreign country? This was the question that arose in an appeal against the decision of the High Court judge ("the Judge") in *EFG Bank AG, Singapore Branch v Teng Wen-Chung* [2017] SGHC 318 ("the GD"). After considering the parties' submissions, we dismissed the appeal and now give the detailed grounds for our decision.

Background facts

2 The facts of the dispute were canvassed in detail by the Judge in the GD, and it suffices for us to set out only the facts relevant to the appeal. The appellant

is Mr Teng Wen-Chung, who was the chairman, director and majority shareholder of a Taiwanese insurance company, Singfor Life Insurance Ltd ("Singfor"), until it was placed under government receivership in 2014. The respondent is the Singapore branch of EFG Bank AG, a bank incorporated in Switzerland.

3 This matter revolved around two loan facilities ("the Loan Facilities") that the respondent had extended to Surewin Worldwide Limited ("Surewin"), a company incorporated in the British Virgin Islands. The first facility ("the First Surewin Facility") was originally dated August 2007 and provided for a loan of up to US$30m. According to the appellant, this limit was increased over time. Most significantly, it was increased to US$205m in January 2012 before being increased to US$240m in November 2012. The second facility ("the Second Surewin Facility"), originally dated December 2011 and revised in November 2012, allowed Surewin to draw down up to US$30m on the facility. It was expressly provided in the Loan Facilities that they were to be governed by Singapore law.

4 On 19 January 2012, shortly before the loan limit of the First Surewin Facility was increased to US$205m, the appellant and the respondent entered into an indemnity agreement ("the Indemnity Agreement"). Under the agreement, which was expressly governed by Singapore law, the appellant agreed to pay the respondent all sums of money owing or payable to the respondent by Surewin. This included all sums that Surewin owed the respondent under the Loan Facilities.

5 The Loan Facilities were also secured by four pledges, of which two are noteworthy for our purposes. The first pledge was made by Singfor Tactical Asset Allocation Portfolio SA in September 2007 over its assets held in an

account with the respondent, and the second pledge was entered into by Volaw Corporate Trustee Ltd in March 2008 over the assets of SFIP-1 Unit Trust, of which Singfor was the sole unit holder. Like the Loan Facilities and the Indemnity Agreement, both pledges were expressly governed by Singapore law.

6 In August 2014, Singfor was placed under government receivership. This constituted an event of default under the Loan Facilities and led the respondent to terminate the Loan Facilities and demand repayment of the outstanding amounts, as it was entitled to do. After failing to realise its security, the respondent issued a letter of demand in December 2015 to the appellant demanding repayment of approximately US$199.7m as the sum outstanding under the Loan Facilities, and US$12.7m as costs expended in connection with the enforcement of the Loan Facilities.

7 The respondent subsequently commenced this action against the appellant. About a year later, in December 2016, the respondent filed an application for summary judgment, which was granted by the Registrar of the Supreme Court in February 2017. The appellant sought to resist summary judgment on the basis that the Indemnity Agreement was unenforceable as a result of foreign illegality. It turned out that he had been convicted for breach of trust and money laundering with respect to Singfor in June 2016 by the Taipei District Court, which observed in its judgment ("the Taiwanese Judgment") that the pledges were illegal and of no effect under Taiwanese law.

8 The appeal against the Registrar's decision was dismissed by the Judge, whose decision was appealed against by the appellant to this court. At this juncture, we ought to point out that the respondent sought to enforce only the Indemnity Agreement in relation to the First Surewin Facility. Approximately

US$32.1m had been realised from the collateral securing the Loan Facilities, and the respondent had put that sum towards repaying the amount owed under the Second Surewin Facility. The appellant did not contest the respondent's entitlement to do so, and we were thus concerned only with the First Surewin Facility in this appeal.

The decision of the court below

9 In dismissing the appeal, the Judge found that the respondent had established a *prima facie* case for judgment, and that the appellant thus bore the burden of establishing a fair or reasonable probability that he had a real or *bona fide* defence. To that end, the appellant's only defence was that the Indemnity Agreement was unenforceable for illegality because it was part of a fraudulent scheme that caused Singfor to provide its assets as collateral for loans extended to an unrelated third party (*ie*, Surewin). In support of this contention, the appellant relied on the Taiwanese Judgment and argued that the pledges contravened a Taiwanese law that prevented an insurance company from providing its assets as collateral for another party's debt (see the GD at [50] and [74]–[75]).

10 The Judge determined that the contractual place of performance for the First Surewin Facility and the Indemnity Agreement was Singapore, and that neither involved the pledging of assets by an insurance company as security for an unrelated third party's debts (see the GD at [54]–[57]). There was thus nothing on the face of these contracts that revealed an intention to do an illegal act in Taiwan or to circumvent Taiwanese law (see the GD at [61]). Accordingly, he held that they were not *directly* affected by foreign illegality. He then proceeded to examine whether the contracts were *tainted* by foreign illegality by applying *Euro-Diam v Bathurst* [1990] 1 QB 1 ("*Euro-Diam*") and

endorsed the following principles from Staughton J (as then was) (*Euro-Diam* at 23–24):

> … when an English claim is said to be tainted by foreign illegality, one must first inquire whether, applying the appropriate connecting factor, the transaction from which the taint is said to arise would be enforceable here. If not, one has next to decide whether there is sufficient connection between that transaction and the claim to amount to taint within the *Bowmaker* or *Beresford* principle. If the answer to that second question is yes the claim is unenforceable here.

11 We will elaborate on the principles in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 ("*Bowmakers*") and *Beresford v Royal Insurance Co Ltd* [1938] AC 586 ("*Beresford*") (as referred to by Staughton J in the passage above) later in this judgment (see [19] below). It suffices to note for now that, applying *Euro-Diam*, the Judge held that the pledges from which the taint was said to arise were enforceable in Singapore, and it followed that both the First Surewin Facility and the Indemnity agreement were enforceable (see the GD at [73]–[75]). Even on the assumption that the pledges were *unenforceable* in Singapore, the present claim on the contracts was enforceable because the contracts were not sufficiently proximate to the "proceeds of crime" and because the respondent did not need to plead or prove illegal conduct in order to establish its claim (see the GD at [77]–[79]).

The issue

12 The law in relation to summary judgments is well-established, and the parties did not dispute that the respondent had established a *prima facie* case for summary judgment. The parties also did not dispute the Judge's findings that the First Surewin Facility, the Indemnity Agreement, and the pledges were all legal and enforceable under Singapore law. The only issue before us was thus

whether the Indemnity Agreement was unenforceable on the basis of foreign illegality.

Our decision

Whether the appellant demonstrated a prima facie *case of illegality*

13 In every case involving illegality, the first task is to identify the alleged illegality. To this end, counsel for the appellant, Mr Kenneth Pereira ("Mr Pereira"), submitted that the First Surewin Facility was part of the respondent's scheme to illegally extract Singfor's assets by having Singfor "pledge its assets as collateral for the loans of an unrelated party, which is a breach of Taiwanese law". He argued that this scheme was evidenced by the fact that the loan limit under the First Surewin Facility had been increased from US$30m to US$240m (see [3] above), notwithstanding that Surewin itself had no assets. This was purportedly commercially insensible, and according to Mr Pereira, the increase in loan limit was a result of the illegal pledges through which assets could be extracted from Singfor.

14 We disagreed with Mr Pereira's submission. In our view, the principal difficulty undercutting the appellant's case was his inability to show that the Indemnity Agreement was *part of* a fraudulent scheme. Even if *ex hypothesi* such a scheme existed, the evidence simply did not demonstrate that the illegal pledges were linked to the Indemnity Agreement, or that the respondent was behind the scheme. Indeed, the appellant's case was filled with speculation and inconsistencies. When pressed, Mr Pereira could not explain precisely how the First Surewin Facility and the Indemnity Agreement were part of a fraudulent scheme concocted by the respondent. He also struggled to explain how a scheme that allegedly involved the respondent extending vast sums of money to Surewin would enable the respondent to eventually extract money from Singfor.

15 More fundamentally, the very existence of such a scheme was not supported by the objective evidence. Taking the appellant's case at its highest, the evidence demonstrated only that the pledges were illegal under Taiwanese law. As the Judge noted, "[e]ven if the creation of the *Pledges* violated Taiwanese law, nothing on the face of either the First Surewin Facility or the Indemnity Agreement reveal[ed] an intention to do an illegal act in Taiwan or to circumvent Taiwanese law" [emphasis in original] (see the GD at [61]). Mr Pereira could not point to us any evidence demonstrating that the Judge had erred in that finding. He also could not demonstrate how the respondent was responsible for the alleged scheme. In this regard, he drew our attention to a portion of the Taiwanese Judgment where it was observed that some of the respondent's employees had worked with the appellant to commit breach of trust. But there was no suggestion that these employees had acted as the respondent's agents, and it hence could not be said on the evidence that the respondent was responsible for the alleged scheme.

16 Accordingly, we did not think that the appellant had discharged his burden of establishing a fair or reasonable probability that he had a real or *bona fide* defence. The threshold for resisting summary judgment is not a high one, but it does not suffice for a defendant to simply make unsubstantiated or equivocal claims. In assessing the affidavit evidence supporting the defence raised, the court will "determine, in the first instance, whether the statements contained in the affidavits have sufficient *prima facie* plausibility to merit further investigation as to their truth" (*Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) at para 14/4/2). On the facts, aside from making grandiose claims such as how the alleged scheme was "unsettlingly reminiscent of the global financial disasters for which Enron and Lehman Brothers are renowned for", the appellant did not demonstrate how

there was a fraudulent scheme involving the First Surewin Facility, the Indemnity Agreement, or even the respondent. Indeed, as pertinently observed by the Judge, "of all the parties said to be involved in the alleged scheme to defraud the [appellant] and Singfor, the [appellant] was the *only* person whose involvement in the scheme had been tested in a court" [emphasis in original] (see the GD at [94]).

Status of the* Euro-Diam *decision

17 Given the appellant's inability to show that there was a fraudulent scheme involving the First Surewin Facility and the Indemnity Agreement, the principles of law enunciated by Staughton J in *Euro-Diam* (see [10] above) *do not even apply in the first place*. However, as the Judge in the court below had endorsed and applied the decision, we consider it necessary to make a few observations because, as we will explain, there are potential difficulties with the decision in *Euro-Diam* and that decision will need to be ***revisited*** when it next arises for consideration before the courts. As it is unnecessary to arrive at a definitive conclusion in the present appeal, the following brief observations will suffice.

Facts of the Euro-Diam *decision*

18 We begin by setting out the facts of the case. In *Euro-Diam*, the plaintiff was a UK company in the business of selling diamonds. Sometime in 1982, it entered into an agreement to export diamonds to Germany. The diamonds were exported, and the plaintiff drew up an invoice that misrepresented the diamonds' value in order to deceive the German customs. Misfortune struck, and the diamonds were stolen after arriving in Germany. Prior to this, the plaintiff had entered into an insurance contract with the defendant in relation to the export of those diamonds, and it commenced an action against the defendant claiming to

be indemnified from the loss flowing from the theft. In its defence, the defendant contended that the plaintiff's claim was tainted by illegality and that no recovery should be permitted under the insurance contract *vis-à-vis* the stolen diamonds.

19 At first instance, Staughton J decided in favour of the plaintiff. In reaching his decision, which was upheld by the English Court of Appeal, Staughton J noted that there are circumstances in which a contract would be unenforceable not because it is itself illegal, but because "it has a connection with some other illegal transaction which renders it obnoxious" (*Euro-Diam* at 15). He then held that where the taint is alleged to have arisen from a foreign illegal transaction, the first step is to ascertain whether that transaction would be enforceable locally. If the answer is in the negative, the next step is to ascertain whether the foreign transaction is sufficiently proximate to the claim such that the latter is unenforceable. To do this, the court has to apply the principles in *Bowmakers* and *Beresford* (*Euro-Diam* at 23–24). In brief, the *Bowmakers* principle provides that a claim is unenforceable for illegality if the claimant has to plead or prove the illegality to make out his claim (*Euro-Diam* at 18). The *Beresford* principle, which has been described as a "conscience test", states that a claimant will not be allowed to claim a benefit from his crime (*Euro-Diam* at 19).

Examining the Euro-Diam *decision*

20 Since the decision in *Euro-Diam* was handed down over three decades ago, the law relating to contractual illegality has developed quite significantly in the local context. Indeed, whilst *Euro-Diam* has been applied (see, *eg*, the High Court decision of *Overseas Union Bank Ltd v Chua Kok Kay and another* [1993] 1 SLR 686) and referred to (see, *eg*, the decision of this Court in *Station Hotel Co v Malayan Railway Administration* [1993] 2 SLR(R) 818 at [57]) in

Singapore, the *current* law relating to contractual illegality in the local context is to be found in this Court's decision in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*"), as well as most recently *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid Trading*").

21 In the two last-mentioned cases, this Court recognised that, in so far as contracts that were not themselves illegal but that were entered into to achieve an illegal purpose or object are concerned, there are *degrees of illegality* that militated against a blanket prohibition of such contracts (*Ting Siew May* at [46]; *Ochroid Trading* at [39]). We eschewed an approach employing rigid and inflexible rules, adopting instead a balancing exercise to determine whether the contract in question is enforceable despite the illegal object underlying it (*Ting Siew May* at [70]–[71]; *Ochroid Trading* at [64]). Additionally, in *Ochroid Trading*, this Court also elaborated (especially at [128], [129] and [139]) upon the concept of "reliance" in the context of contractual illegality and drew a distinction between "reliance" in a formal or procedural sense and "reliance" in a normative or substantive sense (at [128]):

> [T]here are, in fact, ***two different conceptions of "reliance" which must be disengaged***. First, there is ***reliance in the procedural or formal sense***, as applied in the cases of *Bowmakers* and *Tinsley*, which is triggered whenever the plaintiff has to assert, whether by way of pleading or evidence, the illegal acts and *therefore* (***literally***) *rely on the illegal contract*. This is ***a wholly separate and looser*** *concept of "reliance"* from the distinct conception of ***the reliance principle as a normative or substantive principle which is only engaged when a plaintiff seeks to enforce, and thereby profit from, the illegal contract through his claim.*** Such a claim is *legally impermissible*, in our judgment, because it offends the fundamental principle that there can be ***no recovery*** under a contract that is prohibited on the basis of illegality. [emphasis in original]

22 The principles laid down in *Euro-Diam* would need to be re-examined in the light of these recent developments and, in particular, this distinction drawn between procedural and substantive reliance in *Ochroid Trading*. This is an important point since one of the legal criteria in the second part of the test laid down by Staughton J in *Euro-Diam* is based on the concept of "reliance" as embodied within the *Bowmakers* principle (see [19] above). Indeed, we would think that *Euro-Diam* might similarly have to be revisited in England after the latest UK Supreme Court decision in *Patel v Mirza* [2017] AC 467 ("*Patel*") (albeit in a different manner, bearing in mind that this Court in *Ochroid Trading* did *not* follow the approach adopted in *Patel*).

23 Another legal criterion in the second part of the test laid down in *Euro-Diam* (which is embodied in the *Beresford* principle; see [19] above) has, as the Judge himself stated, "been described as a test based on *conscience* as it raises the question of the degree of proximity between the plaintiff's claim and the criminal behaviour" [emphasis added] (see the GD at [70]). It is clear, however, that what appears to be "the public conscience test" (which, we would add, Kerr LJ laid down clearly at the Court of Appeal stage in *Euro-Diam* (at 35) (see also Lee Kiat Seng, "Suicide and Life Policies – A Fresh Perspective" [1996] Sing JLS 79 at 97–103 and Lord Sumption, "Reflections on the Law of Illegality" (2012) 20 RLR 1 at 4)) is clearly *not* part of Singapore law (see, generally, *The Law of Contract in Singapore* (Academy Publishing, 2012) at para 13.124 (and the authorities cited therein)) and, indeed, was itself rejected in the English context in the House of Lords decision of *Tinsley v Milligan* [1994] 1 AC 340. In this regard, reference may also be made to the Hong Kong Court of Final Appeal decision of *Ryder Industries Ltd (Formerly Saitek Ltd) v Chan Shui Woo* [2016] 1 HKC 323 ("*Ryder Industries*"), where Lord Collins of Mapesbury NPJ observed as follows (at [57]):

> … Aspects of this decision [*ie*, *Euro-Diam*] must be *treated with* ***considerable reserve*** because its 'public conscience' discretionary approach to illegality was disapproved in *Tinsley v Milligan* [1994] 1 AC 340, at 360−361, and in [*Les Laboratoires Servier and another v Apotex Inc and others* [2011] 3 WLR 1257 at] [14]−[15] and [*Bilta (UK) (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168], although it may be consistent with *Hounga v Allen and another* [2014] 1 WLR 2889]. [emphasis added in italics and bold italics]

In these circumstances, this particular legal criterion in *Euro-Diam* might also have to be revisited. We add, by way of a side-note, that the status of the public conscience test as laid down in *Euro-Diam* in England after *Patel* is an issue that did not concern us here as it is clear that that test has *not* been revived in Singapore following the decisions in *Ting Siew May* and *Ochroid Trading* which, as mentioned, represent the current law on contractual illegality in Singapore.

24 Finally, a learned commentator has argued that "care should be taken not to apply the *Bowmaker* and *Beresford* principles unless English law [or in our situation, Singapore law] is the proper law of the relevant contract" (see C F Forsyth, "When can a Foreign Illegality Taint an English Contract?" [1987] CLJ 404 at 406). Certainly, even setting aside the considerable aforementioned difficulties underlying both principles, it is not entirely clear that they ought to apply where foreign illegality is concerned. Both *Bowmakers* and *Beresford* concerned illegality within the *local* context, and it has been suggested that cases concerning local illegality should be reasoned differently from cases involving *foreign* illegality, which in turn ought to be resolved with reference to conflict of laws rules (see *Ryder Industries* at [1], [36] and [52]). We say no more for the time being, but note that these observations potentially raise yet other issues that might be considered by this Court in some future case.

25 To summarise, it is clear that there are significant difficulties with the principles laid down in *Euro-Diam* and, as already mentioned, that decision would need to be ***revisited*** in due course (*cf Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016) at para 75.367 (we note, however, that the learned author, Prof Yeo Tiong Min SC, was merely setting out the principle as well as the rationale in *Euro-Diam* in a fairly neutral manner (see also, by the same author, "Restitution, Foreign Illegality and Foreign Moneylenders" (1996) 8 SAcLJ 228 at 240–242))). It is therefore also clear that the Judge's unqualified acceptance of *Euro-Diam cannot*, with respect, represent the law in Singapore in the meantime.

Conclusion

26 For the foregoing reasons, we dismissed the appeal and fixed costs in the respondent's favour in the sum of $20,000 with disbursements to be taxed, if not agreed.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Pereira Kenneth Jerald and Lai Yan Ting Francine
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