Boon Lay Choo and another *v* Ting Siew May
[2013] SGHC 175

Case Number : Originating Summons No 27 of 2013

Decision Date : 16 September 2013

Tribunal/Court : High Court

Coram : Lionel Yee JC

Counsel Name(s) : Ng Lip Chih (NLC Law Asia LLP) for the plaintiffs; P Balagopal (M P Kanisan & Partners) for the defendant.

Parties : Boon Lay Choo and another — Ting Siew May

Contract – Illegality and Public Policy

Land – Sale of Land – Contract

16 September 2013 Judgment reserved.

Lionel Yee JC:

1 From around the middle of 2012, the plaintiffs Boon Lay Choo and Law Khim Huat ("the Plaintiffs") were looking to purchase landed property. They approached their banker at United Overseas Bank ("the Bank"), one Leslie Ong ("Ong"), about the financing of such a purchase, and on 12 July 2012, they were granted in-principle approval for a loan by the Bank. The maximum quantum of this loan would be capped at the prevailing loan-to-value ratio of 80% [note: 1] imposed by MAS Notice 632 for purchasers in the Plaintiffs' position. MAS Notice 632 is a notice prescribed by the Monetary Authority of Singapore ("the MAS") pursuant to s 55 of the Banking Act (Cap 19, 2008 Rev Ed) ("the Banking Act") to banks for the purposes of regulating residential property loans. The term "value" is defined as the market value or the net purchase price of the residential property sought to be purchased, whichever is lower. [note: 2]

2 On 5 October 2012, the MAS issued an amendment to MAS Notice 632 (the amended MAS Notice 632 is hereafter referred to as "the 5 October Notice"). The press release accompanying the 5 October Notice explained that this was "part of the Government's broader aim of avoiding a price bubble and fostering long term stability in the property market". [note: 3] The 5 October Notice, addressed to banks, provided, *inter alia*, that from 6 October 2012, for purchasers in the Plaintiffs' position, the loan-to-value ratio would be capped at 60% if the tenure of the facility sought exceeded 30 years or if the sum of the tenure and the age of the borrower at the time applying for the loan facility exceeded 65. [note: 4] This represented a tightening of the permissible loan-to-value ratio from 80% previously. [note: 5]

3 On 10 October 2012, the Plaintiffs made a verbal offer to the defendant Ting Siew May ("the Defendant") to purchase a property owned by her known as 30 Jalan Angin Laut Singapore 489226 ("the Property"). On 12 October 2012, almost a week after the new restrictions imposed by the 5 October Notice were imposed, an agreement was reached between the parties on the purchase price of $3.68 million. [note: 6] According to the Plaintiffs, they were advised by Ong to ask their property agent to check with the Defendant if she was willing to date the option to purchase as 4 October

2012 instead of the actual date when the Defendant was to sign it. [note: 7] They thought that if the Option to Purchase was dated prior to 5 October 2012, they would be able to obtain financing for the purchase on the more favourable terms allowed prior to the issue of the 5 October Notice. This was because the tenure of the loan they sought to obtain was 24 years, [note: 8] which when added together with the Plaintiffs' ages exceeded 65 years, and banks were accordingly allowed to grant the Plaintiffs a loan at a loan-to-value ratio of up to 60% instead of 80%. [note: 9] The Plaintiffs also deposed that Ong had told them that "a lot of buyers" were backdating their purchases to dates prior to 5 October 2012 for that reason [note: 10] and that it was simply "common practice" to do so. [note: 11] On 13 October 2012, an option to purchase was signed by the Defendant and was dated 4 October 2012 ("the Option to Purchase"). [note: 12] An option fee of $36,800, being 1% of the purchase price, was paid by the Plaintiffs to the Defendant by way of a cheque.

4 The Defendant's evidence was that she was abroad when the draft of the Option to Purchase was sent to her by her estate agent, Ryan Liew ("Liew"), for her signature and she did not know why 4 October 2012 had been typed into the draft as the date of the Option to Purchase. [note: 13] She said that when she signed the Option to Purchase on 13 October 2012, her son, who was with her at that time, did not sign as a witness in the relevant signature block of the document because he wanted an explanation from Liew on the date stated in it. She said that she did not agree to such backdating. [note: 14] On her son's return to Singapore on 15 October 2012, he was informed by Liew that the backdating was to "facilitate" the obtaining of a loan by the buyer and that it was common practice and there was nothing wrong in doing so. [note: 15] Her evidence was that her son in good faith accepted Liew's explanation and handed over the signed Option to Purchase in exchange for the cheque from the Plaintiffs. It would appear that Liew subsequently signed as a witness to the Defendant's signature in the Option to Purchase. According to the Defendant, it was only on 19 October 2012 that she and her son learned about the 5 October Notice. [note: 16] The Defendant was advised by her son that to have backdated the Option to Purchase was illegal and that she should not proceed with the sale of the property. [note: 17]

5 The Option to Purchase provided that it was to expire "at 4:00pm on the 25th day of October 2012". [note: 18] On 24 October 2012, one day before the expiry of the Option to Purchase, the Defendant's solicitors wrote a letter to the Plaintiffs' solicitors stating that the backdating of the Option to Purchase to 4 October 2012 in order to enable the Plaintiffs to obtain a bank loan in contravention of the 5 October Notice was an "illegality or irregularity", and that the Defendant did not want to be a party to it. [note: 19] They said that they had instructions to reject any exercise of the Option to Purchase. On the same day, the Plaintiffs' solicitors wrote two letters to the Defendant's solicitors informing them that the Plaintiffs had the right to proceed with the exercise of the Option to Purchase, and informing them that if the Defendant refused to accept such exercise, she would be sued for damages for any loss suffered by the Plaintiffs as a result of penalties imposed by their bank for not proceeding with taking the loan that had already been approved. [note: 20] On 25 October 2012, the Plaintiffs' solicitors attempted to exercise the Option to Purchase at the offices of the Defendant's solicitors. This was rejected by the latter. There was a series of correspondence between the parties' solicitors which followed. Among other things, the Plaintiffs' solicitors, in a letter dated 6 December 2012, proposed performing the contract on the basis that it was dated 13 October 2012, the actual date of signature of the Option by the Defendant, and that they would obtain bank financing on that basis in accordance with the 5 October Notice. [note: 21] However, no resolution was reached.

The present application

The present application

6 Originating Summons No 27 of 2013, the present application before me, was brought by the Plaintiffs on 11 January 2013 for:

(a) a declaration that the Option to Purchase is valid and binding on the Defendant; and

(b) an order for specific performance by the Defendant of the Option to Purchase or, in the alternative, damages.

The Defendant's contention of illegality

7 It was the Defendant's case that because the Plaintiffs backdated the Option to Purchase for an illegal purpose, namely, to obtain a loan at an 80% loan-to-value ratio in contravention of the 5 October Notice, the Option to Purchase was an illegal contract and was therefore unenforceable. The Defendant further contended that because of the alleged illegality, the Plaintiffs were approaching the court with "unclean hands" and were therefore not entitled to an order of specific performance.

8 The Plaintiffs did not deny that the Option to Purchase was backdated in order to obtain the better loan terms but contended that this did not make the Option to Purchase unenforceable. Further, they argued that their hands were not unclean or that even if they were, they had "washed them" prior to coming to the court for relief by agreeing to perform the contract as though it had not been backdated by obtaining financing from the Bank under the conditions stipulated in the 5 October Notice.

Was the contract illegal or contrary to public policy?

9 The unenforceability of contracts for illegality or public policy is often regarded as a facet of the maxims "*ex dolo malo non oritur actio*" and "*ex turpi causa non oritur actio*". The courts are asked to refuse to enforce contracts which are otherwise validly formed, in order to give effect to the principle that in certain circumstances, the broader objectives of the greater public good override the parties' otherwise legitimate contractual rights. Where the balance is to be struck between public and private interests is often not a straightforward exercise.

10 What was the alleged illegality in the present case? According to the Defendant, the 5 October Notice was issued by the MAS pursuant to its power under s 55 of the Banking Act to give directions or impose requirements on or relating to the operations or activities of banks and s 71 of the Act provided that a bank which acted in contravention of a s 55 notice is subject to the penalty of a fine not exceeding $100,000, and in a case of a continuing offence, to a further fine not exceeding $10,000 for every day during which the offence continued after conviction. The Defendant contended that this constituted the statutory backdrop against which it could be said that the backdating of the Option to Purchase to avoid the consequences of the 5 October Notice was an attempt to contravene the law, and it rendered the Option to Purchase unenforceable. [note: 22] The Defendant also argued that the backdating was an act of deception on the MAS. [note: 23]

11 The Defendant did not, in my view, define the alleged illegality with sufficient precision. From a perusal of the affidavits before me, it would appear that either or both parties could be said to have engaged in illegal conduct in two possible ways. First, on the faith of being shown the Option to Purchase which was dated 4 October 2012 rather than its actual date, the Bank offered the Plaintiffs a loan facility at an 80% loan-to-value ratio which was promptly accepted by them on 19 October 2012, [note: 24] and this was something the Bank would not otherwise have done but for the

backdating. In other words, the act of deception was on the Bank, rather than MAS and the act of backdating by either or both parties could be viewed as abetting such a deception. Secondly, the Bank itself could *possibly* be in breach of the 5 October Notice by providing the loan facility and accordingly would have committed an offence under s 55 of the Banking Act punishable under s 71 and the act of backdating was an abetment by either or both parties of such an offence by the Bank. I need to emphasise, however, that this analysis has been based solely upon the assertions made and the evidence adduced by the two parties to this action and should not be taken as a determination of the liability of the Bank, which was not a party and did not have the opportunity to put its version of events to the court.

12 I will not undertake a comprehensive review of the relevant jurisprudence on unenforceability of contracts for illegality or public policy. I note that broadly speaking, the leading writers organise the cases into two categories: those involving statutory illegality and those involving illegality at common law founded on the concept of public policy. It will therefore be on these two bases that I consider whether the Option to Purchase in the present case is a contract which will not be enforced by this court.

Statutory illegality

13 The mere existence of a contravention of a statutory provision does not automatically result in the adverse consequence of the contract being rendered unenforceable. The question to ask is whether, on a proper construction of the statute in question, it was the legislature's intention that, on account of the contravention, the contract in question should be prohibited. In the most obvious of cases, a statute may expressly prohibit the contract by declaring it illegal. In most cases, however, such prohibition, if any, will be implied rather than express, and it is incumbent on the court to ascertain if it was the legislature's intention that over and above proscribing the conduct in question, the contract should also be prohibited. As succinctly framed by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 ("*St John Shipping*") at 287:

> The fundamental question is *whether the statute means to prohibit the contract*. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive.
>
> Two questions are involved. The first... is: does the statute mean to prohibit contracts at all? But if this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit?
>
> [emphasis added]

In the words of Choo Han Teck JC (as he then was) in *Hemlata Pathela (trading as Coco Properties) v Suresh Partabrai and another* [2000] 2 SLR(R) 393 at [10], the exercise is one of gauging "the parliamentary pulse".

14 As I have noted, the statutory contravention in the present case would be an abetment of the Bank's possible breach of s 55 of the Banking Act when it committed itself to giving a loan to the Plaintiffs at an 80% loan-to-value ratio (see above at [11]). What I then need to determine is whether it was the legislature's intention in enacting this provision in the Banking Act to prohibit contracts such as the present Option to Purchase.

15 There is no express provision in the Banking Act or its subsidiary legislation that loan agreements, let alone options to purchase property for which such loan agreements are taken out,

are invalidated by virtue of a contravention of a s 55 notice. As to whether there is an implied parliamentary intention to that effect, I note that the Banking Act deals with the regulation of banks and s 55 empowers the MAS to issue notices to banks. Any prohibition imposed by such notices under s 55 is therefore a prohibition imposed on "banks" within the meaning of the Act and not the general public at large. The 5 October Notice is a case in point as is apparent from the words of the applicable para 2 which provides that: [note: 25]

> 2. ***A bank shall not*** grant –
>
> (a) any credit facility for the purchase of Residential Property to a Borrower...
>
> [emphasis added]

in certain specified circumstances. Further, the penalties imposed under s 71 of the Banking Act for contraventions of s 55 are only imposed on banks. It should also be noted that the 5 October Notice was directed at loans which banks could give to their customers. The only reference in the 5 October Notice to "options to purchase" is to define by date the property transactions which would be subject to the new loan-to-value limits. Accordingly, as the Plaintiffs pointed out to me, if any contract is to be impliedly prohibited by the statutory scheme, it would be the loan agreement between the Bank and its customer. It would require far more cogent evidence to establish that Parliament intended by implication that the prohibition would cover agreements entered into by two private parties which were separate from but merely related to the loan agreement and to which the Bank was a total stranger. I am accordingly not persuaded that there was any express or implied legislative intention that the act of backdating the Option to Purchase to enable the Plaintiffs to obtain a loan beyond the limits which the Bank could give would render the Option to Purchase unenforceable.

16 The writings in this area traditionally also draw a distinction between contracts illegal as formed and illegal as performed although in the view of the learned author in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at paras 13.042–13.043, such a distinction is "unhelpful". Be that as it may, could it be said that although the Option to Purchase itself is not prohibited by the statutory provisions, the Plaintiffs intended, in the performance of it, to act contrary to statutory provisions, and so the contract ought not to be enforced? I do not find that to be so. First, it is not apparent that the parties' *performance* of any contractual obligation pursuant to the Option to Purchase would contravene the law. The illegality was in the backdating of the contract, and not its performance. Secondly, in analysing the relevant cases, Devlin J in *St John Shipping* (at 284–286) explained that it was not the illegal manner of performance which renders a contract unenforceable, but rather, a contract may be rendered unenforceable where the performance of it "turned" it into a contract prohibited by statute (at 284):

> When fully considered, it is plain that [the previous cases] do not proceed on the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that *the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute*. [emphasis added]

Devlin J went on to note (at 289):

> In the statutes to which the principle has been applied, what was prohibited was a contract which had at its centre – indeed often filling the whole space within its circumference – the prohibited act...

In the present case, it must be remembered that the Option to Purchase in question is a contract which concerned a sale and purchase of land and its grant and exercise were, in and of themselves, perfectly legal. The illegal (if at all) manner in which the financing of the sale and purchase was intended to be procured by the Plaintiffs was a matter only merely incidental to the contract and so cannot be said to transform it into a contract prohibited by statute.

17 Even if performance of the contract did not involve a breach of a statutory provision, is there a more general proposition that if at least the Plaintiffs in this case entered into the contract with the *intent* of abetting such a breach, this would render the contract unenforceable by them? *The Law of Contract in Singapore* (at para 13.051) refers to another *dictum* of Devlin J in *St John Shipping* (at 283) that:

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

From this passage, the textbook suggests (at paras 13.052 and 13.055) that even where the contract in question is not expressly or implied prohibited by statute, a party cannot seek enforcement of it where he entered into it with the intention of contravening the statute and that this would be in position in Singapore law.

18 I will proceed on the basis that no distinction is to be drawn in this regard between contracts entered into with the intention to commit a statutory breach and contracts entered into with the intention to *abet* such a breach. It is not evident to me that the observations made in *The Law of Contract in Singapore* I referred to envisage a *fixed* rule that any intention of a party at the outset of a contract to do something prohibited by a statute, however serious or however incidental, would automatically render the contract unenforceable at his suit. Toulson LJ in the English Court of Appeal in *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939 ("*ParkingEye*") at [63], in analysing this part of Devlin J's judgment in *St John Shipping*, observed that, when Devlin J's judgment was read as a whole, it was apparent that there was no such *fixed* rule. Toulson LJ observed from the other parts of Devlin J's judgment that even Devlin J himself recognised that any such fixed rule had the potential of leading to peculiar results, and concluded (at [63]):

> When Devlin J's judgment is read as a whole his reasoning is characteristically subtle and cogent. To draw from it a fixed rule that any intention from the outset to do something in the performance of the contract which would in fact be illegal must vitiate any claim by the party concerned does not do justice to his judgment. It is too crude and capable of giving rise to injustice.

19 Professor M P Furmston ("Prof Furmston") in M P Furmston, *The Analysis of Illegal Contracts* (1966) 16 UTLJ 267 at 280 discussed the category of cases where there is an agreement to commit a crime, and observed that:

> Yet it is probable that even in this class the Court must exercise some element of decision. It is not clear that because X is a crime, the contract is necessarily illegal. The general principle stated in the books that an agreement to commit a crime is illegal is based on cases where the crime was a serious one and here the principle is clearly sound. The policy considerations are much less clear where the crime involves only a venial infraction of a minor statutory requirement. Here to hold the contract illegal may be to impose a penalty very greatly in excess of any fault. Suppose, for instance, a contract is made to carry goods by road and the parties know that the

> goods can only be delivered by a short period of illegal parking. It seems very doubtful whether public policy really requires the carrier to be deprived of his freight and it is even more doubtful whether he should be discharged from any liability for negligence on the ground that the contract is illegal. Certainly if the contract is to be held illegal, it should not be simply because improper parking is a crime but because of a deliberate assessment of the overriding importance of controlling parking.

Among other things, Prof Furmston opined that the court must draw distinctions between different sorts of statutory contraventions in coming to a conclusion as to whether the contract in question should be held unenforceable. As Prof Furmston suggests (at 283), it is in the end analysis a "delicate problem of balancing the desirability of deterring crime against that of upholding agreements" and that "some measure of flexibility seems essential to reach a satisfactory result in this type of situation".

20 In any case, the proposition that a party cannot enforce a contract he or she entered into with the *intent* of contravening a statute does not appear to be one which belongs to the realm of statutory illegality (as explained above at [13]). First, Devlin J's remarks applied to illegality without any distinction being drawn between statutory and common law illegality. Secondly, even if the illegal act was prohibited by statute, the analysis in this instance does not involve an ascertainment of either an express or implied Parliamentary intent in enacting that legislation. The proposition, to the extent to it exists, would in my view more properly be regarded as an aspect of common law illegality where the courts as a matter of public policy will refuse to enforce contracts tainted with illegality in certain circumstances. Among them are contracts to commit a crime, tort or fraud. But, as I will explain below, the refusal to enforce such contracts is not an inflexible rule. A court may still enforce a contract involving the contravention of a statute if the illegality is sufficiently remote or if there is no need for the enforcing party to rely on the illegality for the purposes of enforcement (see below, especially at [26]–[27] and [28]–[29] respectively). As a matter of logic, the same exceptions of remoteness and non-reliance on the illegality would have to apply whether one is confronted with a contract to commit a crime as such or a contract entered into with the intent that a statute will be contravened.

21 Professor R A Buckley ("Prof Buckley") in R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2nd Ed, 2009) at para 2.06, in his commentary on the case of *Shaw v Groom* [1970] 2 QB 504, suggests that the courts may render contracts unenforceable in order to give effect to the objectives of a statute without necessarily finding either an express or implied legislative intent as such. In *Shaw v Groom*, a landlord suing for rent was met with a defence of illegality raised by the tenant on the basis that the landlord had failed to supply a rent book as required by the statutory regulations in force, *viz*, the Rent Book (Forms of Notice) Regulations 1965. The English Court of Appeal held that on a true construction of the legislation, Parliament had not intended that the landlord be precluded from enforcing the contract. In the judgment of Sachs LJ (at 519D), it was highlighted that there was "not the slightest suggestion" that the landlord's breach of the regulations was "knowingly or wilfully committed". Prof Buckley (at para 2.06), noted that while this suggests that had the breach been deliberate, the result would have been different and the contract would have been held unenforceable, an analysis of Sachs LJ's statement only indicates that there are cases where "[i]t may well... be appropriate for the law of contract to discourage the anti-social conduct at which the statute is directed, without necessarily ascribing that result to the statute itself". A type of case envisaged by Prof Buckley, is one where, for example, there is a "combination of high potential profits, and fines that may have become absurdly low" such that there creates an "incentive to law-breaking".

22 The Defendant submitted that to uphold the present Option to Purchase would be to approve such deliberate acts of backdating among property buyers in the general market, and urged me to

declare it unenforceable as a form of deterrence.

23 I agree with Prof Buckley's observations that there may be circumstances where the courts will refuse enforcement in order to deter conduct proscribed by the statute. I note in passing that Prof Buckley's analysis is premised on the intention of the contracting party to contravene a statute being *a* relevant fact in determining unenforceability and is not in and of itself conclusive of that outcome. But I am not persuaded that the Option to Purchase in the present case should be rendered unenforceable on these considerations. Apart from the Plaintiffs' statement that they were told by Ong that there was a "common practice" in the market of backdating purchase dates to avoid the new loan regulations, and the evidence that the Defendant's son was told the same by Liew, there was no evidence put before me of how widespread such a practice was. This statement was, in any event, hearsay. Nor was there any evidence or submissions as to whether the existing sanctions, including those under s 71, were adequate and if not, whether it was then necessary for the civil court to intervene and whether such intervention had to extend to rendering not only the actual loan agreements unenforceable, but also the associated options to purchase as well.

Illegality at common law

24 Illegality at common law is founded on the concept of public policy which is more fluid and harder to define. There are however two established situations of illegality at common law which are pertinent to the present case – contracts to deceive the public authorities and contracts to commit a crime, tort or fraud.

25 The Defendant argued that the backdating was an act of deception such that the Option to Purchase ought *ipso facto* to be declared unenforceable [note: 26] and emphasised that the 5 October Notice was one made in and for the public interest. [note: 27] I understood the Defendant's argument to be that a deception performed in the context of a matter affecting the public interest should lead to the Option to Purchase being unenforceable. I am not persuaded by this argument. First, any deception in the present case is not on the MAS, but on the Bank, which is a private entity. Although it might be argued that the Bank performs some functions of a quasi-public nature, there is nothing to suggest that the head of public policy covering the deception of public authorities ought to be expanded beyond public authorities to privately owned banks or other entities (*cf* the Malaysian Federal Court decision in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253). Secondly, and more importantly, the case law is clear that there is no automatic rule against enforcement of a contract merely because it is one which involves an illegality and this is regardless of whether the illegality takes the form of a deception of public authorities or the commission of a crime, tort or fraud.

26 I referred earlier to Toulson LJ's remarks in *ParkingEye* in which he refused to interpret Devlin J's *dictum* in *St John Shipping* as laying down an inflexible rule that a contract entered into with the intention to do something illegal rendered it unenforceable. Among the relevant factors which Toulson LJ considered in the final disposal of the matter, *viz*, in determining whether enforcement should be refused, was the "centrality of the illegality" (at [69] *et seq*). The case involved a contract to provide an automated monitoring and control system to some of the car parks owned or operated by the defendant Somerfield Stores Ltd. Somerfield Stores Ltd committed a repudiatory breach which was accepted by the claimant ParkingEye Ltd, who then sued for damages for lost revenue. The defendant raised illegality as a defence. It referred to letters which the claimant would send to recover "fines" from motorists who had defaulted on parking charges. Some of these letters falsely suggested that the claimant had the authority to and was intending to commence legal proceedings to recover the parking charges. The sending of the letters was held by the trial judge to have amounted to the tort of deceit. However, he found that the sending of the illegal letters was not one of the purposes of the contract, the most important of which was the installation of the system in car

parks. He therefore concluded that any illegality was too remote to render the agreement unenforceable. On appeal, Sir Robin Jacob (at [34]) and Toulson LJ (at [71]) agreed.

27 The centrality or degree of remoteness of any illegality as a consideration also featured in the English decision of *21st Century Logistic Solution v Madysen* [2004] 2 Lloyd's Rep 92 ("*Madysen*") which the Plaintiffs pointed me to. In that case, Field J in the High Court held that the fact that the supplier of computer processor units intended to defraud the revenue authorities was not a bar to it recovering the purchase price of the goods. The existence of the contract of sale provided the opportunity to the supplier to commit the fraud on the revenue authorities, but that was not something which it had done, since it was only obliged to account to the customs and excise authorities at the end of the relevant accounting period. It was held (at [21]) that the supplier's fraudulent intention was too remote from the contract to render it unenforceable. The contract was in the words of Field J (at [19]), "in and of itself" a lawful contract for the sale and purchase of goods.

28 In her submissions, the Defendant referred me to the Singapore case of *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 ("*Hong Lam Marine*") at [67] for the proposition that the backdating of a contract for an illegal purpose (of deception) renders the contract unenforceable. [note: 28] What the Defendant appeared to overlook was the fact that in *Hong Lam Marine*, the backdating of a shipbuilding agreement, though illegal, was held by the Singapore Court of Appeal not to be a bar to its enforcement. Yong Pung How CJ, delivering the judgment of the court, distinguished the earlier cases of *Suntoso Jacob v Kong Miao Ming* [1985–1986] SLR(R) 524, *Alexander v Rayson* [1936] 1 KB 169 and *Palaniappa Chettier v Arunasalam Chettier* [1962] MLJ 143. Yong CJ held, *inter alia*, that in those three cases, the claimants had to reveal the illegal purpose in seeking the assistance of the courts to enforce the contract. In contrast, the claimants in *Hong Lam Marine* did not need to rely on the backdating to found their claim for the breach of a specific term in the shipbuilding contract. Yong CJ explained (at [67]):

> 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. [emphasis added]

29 This principle has been described as the "reliance principle" (see, *inter alia*, Law Reform Committee, Singapore Academy of Law, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at paras 7.2–7.6 and The Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Consultation Paper No 154, 1999) at paras 2.64–2.67), and is often traced to the case of *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65 ("*Bowmakers*"). In *Bowmakers*, the plaintiff had delivered machine tools under hire purchase agreements to the defendants in contravention of an order made by the Minister under the UK Defence (General) Regulations 1939. The defendants defaulted on the hire purchase agreements and sold the tools which were the subject of two of the agreements to a third party, and refused to redeliver the tools under the last agreement. The plaintiff sued in conversion and the court allowed the recovery of damages notwithstanding the illegality of the hire purchase transactions themselves. The case established the principle that where a party can seek recovery via an independent cause of

action which does not require him to rely on the illegality, recovery will be allowed.

30 The reliance principle was subsequently reaffirmed by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340. In that case, the plaintiff and the defendant, a lesbian couple, had pooled their monies together to purchase a house. However, the house was registered in the name of only the plaintiff, and this was so to enable the defendant to make false benefit claims on the UK Department of Social Security. When the parties fell out, the plaintiff sought to claim sole possession and ownership over the house. The defendant counterclaimed for a declaration that the house was held by the plaintiff in trust for the parties in equal shares. The counterclaim was allowed. The House held that a presumption of resulting trust arose in favour of the defendant, and that this was not affected by the illegality because she did not have to rely on the illegal transaction to establish this.

31 Although the reliance principle as derived from *Bowmakers* and *Tinsley v Milligan* was applied in those cases in relation to the assertion of proprietary rights, Quentin Loh J in the High Court in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd and another* [2011] 1 SLR 657 at [204] observed, on the basis of the Court of Appeal decisions in *Hong Lam Marine* and *Siow Soon Kim v Lim Eng Beng* [2004] SGCA 4 ("*Siow Soon Kim*") that the principle has found general application. I note that, in contrast, an earlier High Court decision in *Chee Jok Heng Stephanie v Chang Yue Shoon* [2010] 3 SLR 1131 at [42] preferred the narrower interpretation that it was applicable only in relation to proprietary rights. Given that the two Singapore Court of Appeal decisions in *Hong Lam Marine* and *Siow Soon Kim* applied the reliance principle outside the sphere of proprietary rights, I too accept that it is, as a matter of Singapore jurisprudence, a principle of general application and it is applicable to the present case.

32 There is a significant degree of overlap between (a) the centrality or degree of remoteness of the illegality and (b) the reliance principle in determining whether the illegality renders a contract unenforceable. While *ParkingEye* and *Madysen* (see above at [26] and [27] respectively) adopted the former approach, it would, on the facts in both cases, also have been unnecessary to rely on the illegality to establish the claims. Similarly, it is possible to regard the extent to which reliance on the illegality is required to establish the claim as one aspect of determining if the illegality is too remote for the court to deny enforcement.

33 In the present case, regardless of which principle is applied, the illegality is not an obstacle to enforcement. As regards remoteness, there was no illegality *per se* in the grant and exercise of the Option to Purchase. The illegal manner in which the financing was intended to be procured by the Plaintiffs was a matter which was merely incidental to the contract constituted by the Option to Purchase and is therefore too remote to render the Option to Purchase unenforceable. As regards the reliance principle, there is similarly no need in the present case for the Plaintiffs to rely on the backdating to found their claim against the Defendant. Although the Option to Purchase had a date printed on it which was not the actual date of the agreement, that was not something the Plaintiffs had to point to in seeking to enforce it. This was not a case where the Option to Purchase provided that it was to expire within a stipulated timeframe from the date of the agreement, and there was a dispute as to when it expired which required the Plaintiffs to explain why it was dated 4 October 2012 and not the actual date of 13 October 2012. The Option to Purchase expressly set out instead a specific date and time for its expiry, namely "at 4:00pm on the 25th day of October 2012", which was not determined by reference to the date of its signature. [note: 29]

34 I should add that the decision in *Hong Lam Marine* is also demonstrative of the fact that Devlin J's *dictum* in *St John Shipping* (see above at [17]) cannot be regarded as articulating an absolute rule that a contract entered into with intent to commit a breach of a statutory provision will automatically be unenforceable. In *Hong Lam Marine*, it was common ground that the shipbuilding agreement was

backdated with the intent to avoid compliance with reg 13F of the Prevention of Pollution of the Sea Regulations (at [63]). The backdating could be regarded as an abetment of a breach of that regulation as well as an abetment of a deception on the Registrar of Ships, in a manner similar to the present case. But the outcome was one where the shipbuilding contract was nevertheless held to enforceable.

Conclusion on illegality and public policy

35 For the foregoing reasons, I am unable to accept the Defendant's assertion that the Option to Purchase is unenforceable for illegality, whether that illegality is statutory or based on common law.

The doctrine of *locus poenitentiae*

36 I would add a few words about the doctrine of *locus poenitentiae* (*viz*, "a place for repentance") in the context of the present case. Before me, counsel also argued quite extensively over whether the Plaintiffs could avail themselves of the *locus poenitentiae* doctrine. The Plaintiffs argued that they had "repented" from the illegality when they offered to seek financing in accordance with the loan-to-value ceiling established by the 5 October Notice. They argued that having brought themselves within the *locus poenitentiae*, the Option to Purchase was no longer illegal and was thus enforceable. [note: 30]

37 It would appear that counsel might not have fully understood the operation of this doctrine. The doctrine, as understood in this context, applies where a party is seeking to recover benefits (money or property) conferred on the other party under an *illegal* contract (see the explanation of it in *The Law of Contract in Singapore* at para 13.155 and Nelson Enonchong, *Illegal Transactions* (LLP Reference Publishing, 1998) at p 333). This would be relevant, for example, if the Option to Purchase was held to be unenforceable, and the Plaintiffs were seeking to recover the $36,800 option fee paid to the Defendant (as was the case in *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865). The issue of whether a contract is legal or illegal is therefore a logically anterior one. In the present case, I have found that the contract is not unenforceable for illegality. Accordingly, the issue of whether the Plaintiffs have brought themselves within the *locus poenitentiae* does not come into play.

Specific performance

38 In addition to arguing that the contract was unenforceable for illegality, the Defendant also contended that the Plaintiffs were not entitled to an order for specific performance for the same reason, *viz*, the alleged illegality as discussed above. [note: 31] The Defendant relied on the maxim 'he who comes to equity must come with clean hands'. But if a contract is not void and not unenforceable at law, I can see no reason why it should nevertheless not be specifically enforceable in equity. In this regard, Page Wood VC in *Aubin v Holt* (1855) 2 K & J 66 at 70 explained thus:

> The agreement must be legal or illegal, and it is not within the discretion of the Court to refuse specific performance because an agreement savours of illegality.

This is especially so given that in Singapore, law and equity are administered by the same courts, as they are in England today. It would be odd if the court were, on the one hand, to reject arguments of illegality and find a contract enforceable but, on the other, deny specific performance of it on the basis of the very same arguments.

39 Much time was also spent by counsel at the hearings before me on the issue of whether the

Plaintiffs, to use the evocative language employed, had "washed their hands" before coming to the court to seek relief in equity. As I have come to the conclusion that there is no reason to deny the Plaintiffs an order for specific performance, I do not need to make any findings in this regard.

Conclusion

40 I accordingly declare that the Option to Purchase is valid and binding on the Defendant.

41 Aside from the arguments on illegality which I have rejected above, the Defendant did not dispute the Plaintiffs' entitlement to the relief of specific performance in the present case. In any event, this was not a case where, on the facts disclosed, the usual position that an order for specific performance should be granted for contracts for the sale of land should be departed from. In the premises, I order that the Option to Purchase is to be specifically performed by the Defendant.

42 Costs are to follow the event and are to be taxed if not agreed.

[note: 1] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at pp 19–20.

[note: 2] MAS Notice 632 at para 17(p) (found at Annexure to Defendant's Second Written Submissions dated 11 June 2013).

[note: 3] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at p 22.

[note: 4] MAS Notice 632 at para 2 read with para 17(n)(5A) (found at Annexure to Defendant's Second Written Submissions dated 11 June 2013).

[note: 5] MAS Notice 632 at para 2 read with para 17(n)(3) (found at Annexure to Defendant's Second Written Submissions dated 11 June 2013).

[note: 6] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at paras 14 and 15; Affidavit of Ting Siew May, sworn on 1 March 2013 at para 4.

[note: 7] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at paras 11 and 15.

[note: 8] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at p 20.

[note: 9] 3rd Affidavit of Boon Lay Choo, affirmed on 22 April 2013 at para 13.

[note: 10] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at para 11.

[note: 11] 3rd Affidavit of Boon Lay Choo, affirmed on 22 April 2013 at para 15.

[note: 12] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at pp 28–33.

[note: 13] Affidavit of Ting Siew May, sworn on 1 March 2013 at para 7.

[note: 14] Affidavit of Ting Siew May, sworn on 1 March 2013 at para 5.

[note: 15] Affidavit of Ting Siew May, sworn on 1 March 2013 at para 9.

[note: 16] Affidavit of Ting Siew May, sworn on 1 March 2013 at para 11.

[note: 17] Affidavit of Ting Siew May, sworn on 1 March 2013 at para 12.

[note: 18] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at p 28.

[note: 19] Affidavit of Ting Siew May, sworn on 1 March 2013 at p 35.

[note: 20] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at pp 53 and 54.

[note: 21] 2nd Affidavit of Boon Lay Choo, affirmed on 2 April 2013 at para 10; 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at pp 58–59.

[note: 22] Defendant's Second Written Submissions dated 11 June 2013 at para 8.

[note: 23] Defendant's Second Written Submissions dated 11 June 2013 at para 9.

[note: 24] 3rd Affidavit of Boon Lay Choo, affirmed on 22 April 2013 at para 6 and pp 8–17.

[note: 25] MAS Notice 632 at para 2 (found at Annexure to Defendant's Second Written Submissions dated 11 June 2013).

[note: 26] Defendant's Second Written Submissions dated 11 June 2013 at para 9.

[note: 27] Defendant's Second Written Submissions dated 11 June 2013 at para 8; Defendant's Third Written Submissions dated 21 June 2013 at para 2.

[note: 28] Defendant's Second Written Submissions dated 11 June 2013 at paras 9–10.

[note: 29] 1st Affidavit of Boon Lay Choo, affirmed on 10 December 2012 at p 28.

[note: 30] Plaintiff's First Written Submissions dated 12 April 2013 at paras 24–25.

[note: 31] Defendant's First Written Submissions dated 12 April 2013 at para 7; Defendant's Second Written Submissions dated 11 June 2013 at para 20(1).