



When does foreign illegality vitiate the enforcement of a trust arrangement?

Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others [2020] SGHC(I) 10 (“Chantal”)

1 In *Chantal*, the Singapore International Commercial Court (“**SICC**”) had the opportunity to consider whether certain false declarations made to the US courts by the settlor of a Singapore trust would void the trust for illegality.

2 Given the relative paucity of cases involving the doctrine of illegality in Singapore, *Chantal* is an important case adding to the growing Singapore jurisprudence on this subject.

Salient facts

3 In *Chantal*, the executor of a deceased’s estate commenced a suit against a Mr Weber for misappropriating funds that were allegedly subject to a trust. The executor asserted that Mr Weber was the trustee of a trust constituted by the deceased, Ms Chantal, at the material time, and that the funds were assets of the trust (save for a 5% fee payable to Mr Weber).

4 Mr Weber disputed that the funds belonged to Ms Chantal’s estate and that he was a trustee of the said funds. In the alternative, even if he was found to be a trustee, Mr Weber argued that the trust was void for illegality.

5 What had happened at the material time was as follows.

6 In 1980, Ms Chantal invented a chemical compound known as the “Ethocyn” compound, which was a key component for a skin product that was said to make the skin look younger and better toned. The finished skin products were sold over the counter and to cosmetic manufacturers who would incorporate the compound into their products. Ms Chantal assigned the intellectual property rights associated with the Ethocyn compound (“**Ethocyn IP**”) to her company, Chantal Pharmaceutical.

7 In 1996, an involuntary Chapter 11 bankruptcy petition was filed against Chantal Pharmaceutical, which was eventually converted to a voluntary debtor in possession Chapter 11 case.

8 The US Public Trustee then appointed a creditors’ committee, which in turn retained investment bankers and other professionals to locate a potential buyer for the Ethocyn IP. A prospectus was prepared and sent out to about 20 prospective buyers.

9 However, there was ultimately only 1 bidder: a New Zealand corporation named Renslade Holdings Ltd (“**Renslade NZ**”).

10 In 1999, Renslade NZ entered into an agreement with Chantal Pharmaceutical for the purchase of, *inter alia*, the Ethocyn IP. The US Bankruptcy Court subsequently granted the order approving the sale as there were no other bidders. It was later revealed that Ms Chantal was the prime mover behind Renslade NZ and had contributed the funds for the purchase of the Ethocyn IP (although all this was obscured behind a wall of opaque international corporate structures).

11 In 2000, the Ethocyn IP was transferred from Renslade NZ to Renslade Singapore Pte Ltd (“**Renslade SG**”). Mr Weber was the beneficial owner of Renslade SG. The US Bankruptcy Court again sanctioned this transaction.

12 Around this time, Ms Chantal engaged Mr Weber to assist her with various transactions involving the Ethocyn IP and to run her business. Over the next 15 years, she transferred significant funds to Mr Weber and/or his companies, allegedly on trust, for the purpose of exploiting the Ethocyn IP (the “**Trust Arrangement**”).

13 In 2015, Ms Chantal was diagnosed with colon cancer. From May 2016 until her death in October 2016, she repeatedly sought an account

of the trust assets which had been transferred to Mr Weber.

14 However, Mr Weber disagreed that the Trust Arrangement existed and claimed that he was offered and purchased the Ethocyn IP from Renslade NZ as a personal investment opportunity and the Ethocyn IP and all monies earned from them belonged to him and his companies. He also alleged that such a trust or arrangement would be illegal, void or unenforceable.

15 After Ms Chantal's death, the executor of her estate commenced this suit against Mr Weber and his companies for breach of trust, breach of fiduciary duties, conspiracy to injure and unjust enrichment.

SICC's decision

16 The SICC found that there was a Trust Arrangement and that Mr Weber was a trustee of the said funds under the trust. As such, by refusing to return the funds to the estate, he had acted in breach of trust.

17 What is more interesting for our purposes is the SICC's analysis of the illegality argument, i.e. that the Trust Arrangement was unenforceable because it was illegal or for an illegal purpose.

18 Mr Weber's argument on illegality was that Ms Chantal orchestrated Renslade NZ's purchase of the Ethocyn IP, provided the funds to acquire the same and arranged for Mr Weber to acquire the Ethocyn IP from Renslade NZ and hold the same and any income or proceeds generated from them on trust for her.

19 Mr Weber asserted that Ms Chantal made the following false declarations in support of the application to the US Bankruptcy Courts to approve the sale to Renslade NZ:

- neither she nor her companies were owners, officers or directors of Renslade NZ or its affiliates;
- she did not ask Renslade NZ to require that the Ethocyn IP be transferred as part of the sale; and

- Renslade NZ had an arm's length relationship with Chantal Pharmaceutical, and all terms and conditions contemplated under the sale had been fully disclosed and Renslade NZ was purchasing the assets in good faith.

20 Mr Weber further submitted that Ms Chantal's conduct in arranging for Renslade NZ to purchase the Ethocyn IP out of bankruptcy and to have them held on trust for her benefit, using funds secretly provided by her, was contrary to her declaration under oath to the US Bankruptcy Courts, which is a crime under U.S. law.

21 The SICC agreed with Mr Weber that Ms Chantal's declarations were false. It then went on to consider the effect of the false declarations on the enforceability of the Trust Arrangement under Singapore law pursuant to the principles set out in the recent Court of Appeal decision in *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)* [2018] 1 SLR 363 ("**Ochroid Trading**"). There, it was held that a two-stage test applies to whether an agreement may be enforceable due to illegality.

- Under the first stage, the court will ascertain whether the contract, as opposed to the conduct of the parties, is prohibited by statute, an established head of common law public policy; or if the contract, while not unlawful *per se*, is tainted by illegality in that they involve the commission of a legal wrong in their formation, purpose or manner of performance. In a shift from the traditional common law approach of refusing to enforce such "tainted" contracts, the Court of Appeal affirmed the principle in *Ting Siew May v Boon Law Choo* [2014] 3 SLR 609 ("**Ting Siew May**") that such enforcement is subject to the limiting principle of proportionality. This is a fact-centric inquiry taking into account the following factors:

- whether allowing the claim would undermine the purpose of the prohibiting rule;
- the nature and gravity of the illegality;

- the remoteness or centrality of the illegality to the contract;
 - the object, intent and conduct of the parties; and
 - the consequences of denying the claim.
- If the contract is not prohibited following the inquiry above, then it may be enforced. But if it is prohibited, then the court will undertake the second stage of the inquiry to ascertain whether, notwithstanding the fact that there can be no recovery pursuant to the (illegal) contract, there might nevertheless be restitutionary recovery of the benefits conferred thereunder (as opposed to recovery of full contractual damages).

22 On the facts, the SICC held that the Trust Arrangement was not prohibited under any Singapore statute or any established heads of common law public policy.

23 The SICC noted that a Singapore court will not enforce a contract if its object or purpose would involve doing an act in a foreign and friendly state which would violate the law of that state. However, the SICC found that the object of the trust arrangement was not unlawful as there was nothing wrong with Ms Chantal arranging for Mr Weber to hold intellectual property and attendant rights on trust for her with Mr Weber being remunerated from the proceeds generated from those rights.

24 The SICC rejected Mr Weber's argument that the object of the Trust Arrangement was to keep trust assets out of creditors' reach because there were no other buyers interested in the Ethocyn IP despite the best efforts of the creditors' committee. If Ms Chantal had not made the false statements, it would, in all probability, only result in the creditors attempting to obtain a better price for the Ethocyn IP. Whether Ms Chantal would have agreed to pay more, or whether the deal would have collapsed, was pure speculation.

25 Further, the SICC held that the false declarations pre-dated the Trust Arrangement, so

they cannot be said to have formed the object and purpose of the Trust Arrangement.

26 Although there was some suggestion by Mr Weber that the purpose of the Trust Arrangement was to evade taxes, the SICC stated that it would not consider this issue because it was not pleaded.

27 Nonetheless, the SICC held that while the Trust Arrangement was not unlawful *per se*, it was *tainted by illegality* because Ms Chantal had made false representations to the US Bankruptcy Courts, and the corpus of the trust was obtained partly through such false declarations.

28 However, the SICC found that it was *disproportionate* to refuse enforcement of the Trust Arrangement because:

- The nature and gravity of the false declarations were not so severe as to weigh against enforcement of the trust arrangement. There is no prohibition against a debtor in bankruptcy proceedings buying back its own assets. The only difference is that the courts will apply a higher level of scrutiny to ensure that the sale is fair.
- On the question of whether the bankruptcy sale was fair, there was an active creditors' committee which hired investment bankers and other professionals to market the Ethocyn IP to 20 potential buyers. In spite of the creditor committee's best efforts, no other offers were forthcoming.
- The false declarations were remote from the Trust Arrangement. As the declarations were made about 2 months before the Trust Arrangement had been set up, there was no overt step in carrying out any unlawful intention as the said unlawful act had been carried out by the time of the Trust Arrangement. Further, the false declarations were not the only bases on which the US Bankruptcy Courts approved the sale. This approval was also some 20 years prior to the present proceedings, and from 2002 to 2015, parties abided by the arrangements in managing the trust assets. Hence, the false

declarations had no strong or central connection to the Trust Arrangement.

- Mr Weber stood to benefit from Ms Chantal's work over the last two decades if the Trust Arrangement is voided, when he was a trustee who had acted in flagrant breach of his duties by attempting to misappropriate trust properties.

29 In light of the above, the SICCC found the Trust Arrangement to be valid and enforceable, and that Mr Weber had breached his fiduciary duty to Ms Chantal by failing to provide an account of the trust and the trust funds.

Commentary

30 *Chantal* is an interesting case because it demonstrates the extremely fact sensitive nature of cases involving the illegality doctrine. It also sheds light on the manner in which the Singapore courts apply the principle of proportionality as first espoused in *Ting Siew May* and *Ochroid Trading*. This is an important development and is likely to assist lawyers and parties in navigating the challenges that inevitably accompany contracts that may be tainted by illegality.

If you would like more information on this area of the law, please contact:



Zhuo Jiaxiang, Director
(jiaxiang@providencelawasia.com)

Jiaxiang is a specialist in handling complex commercial disputes. He has handled disputes stemming from diverse industries such as energy, telecommunications, oil and gas, steel, commodities, pharmaceuticals, water and chemical processing, signal and defence technology.



Danny Quah, Counsel
(danny@providencelawasia.com)

Danny is a commercial litigator specialising in tax disputes, insolvency & civil fraud matters. He was recently recognised as an up-and-coming litigator by the Singapore Academy of Law and completed attachments with UK "magic circle" barrister sets Fountain Court Chambers and Pump Court Tax Chambers.