

DIAMONDS IN BREACH OF LAW

*Dimpex Gems v. Yusoof Diamonds*¹

AN English court will not enforce a contract if a party to the contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country. Mere knowledge that the guilty party is embarking on such illegal adventure is not sufficient to render the contract of sale illegal. The first proposition, established in *Foster v. Driscoll*,² was adopted as being Singapore law in *Patriot Pte. Ltd. v. Lam Hong Commercial Co.*³ The second proposition, established in *Fielding & Pratt v. Selim Najjar** has now been applied in *Dimpex Gems v. Yusoof Diamonds*.⁴

The facts of *Dimpex* were simple. The plaintiffs sold on consignment a batch of diamonds and gems to the defendants. The diamonds and gems were for sale in Malaysia and they were aware that the defendants were proposing to take the goods into Malaysia without any declaration and payment of customs duties due to the Malaysian authorities. On an Order 14 application by the plaintiffs for the price of the goods, the defendants raised the defence of illegality. The Assistant Registrar held there was a triable issue and with this Thean J. agreed, albeit somewhat reluctantly.

The interest in this case would be lacking were it not for two things. First, the contract might have been a contract of "sale" on consignment. In such a contract, the consignee receives goods from the consignor as agent who undertakes to effect a sale directly from the consignor to the ultimate buyer. The only sale there will be is from the consignor to the ultimate buyer. The consignor does not sell to the consignee; so that the consignee never has title and the goods cannot be claimed in the event of insolvency by the consignee's creditors. Now the defendants deposed that they "went to the plaintiffs' premises, collected the diamonds and gems under consignment notes, and then brought them to Malaysia and sold them there, and that those which were unsold were returned to the plaintiffs, who would then invoice and bill the defendants only for those diamonds and gems which were sold." It may be possible to argue that what was transacted was a 'sale or return' contract. Such a contract bears a great functional resemblance to a consignment and consequently it may be quite difficult legally to distinguish one from the other. A crucial indicia of the 'sale or return' transaction is that title passes to the immediate buyer, subject to the option of returning the goods if the buyer does not sell them. Nevertheless if the buyer retains the goods, then after expiration of a reasonable time (if no time period for return is stipulated) he must pay for them. The fact that here the plaintiffs would bill the defendants only for those diamonds and gems which were sold (somewhat unconditional terms) might tilt the finding in favour of a consignment — as opposed to a "sale or return" contract.

¹ [1988] 1 M.L.J. 87.

² [1929] 1 K.B. 470.

³ [1980] 1 M.L.J. 135.

⁴ [1969] 1 W.L.R. 357.

If so, it would be difficult to see that "the sales and delivery took place in Singapore" and that "(t)hey were exported by the defendants to Malaysia". Rather, it was not the defendants who were liable to pay customs duties on the goods but the plaintiffs; for the goods were still the plaintiffs'. The situation would be different from the case of *Fielding & Pratt v. Selim Najjar* because there it was the defendants who were exigible to duty. One might argue that therefore the plaintiffs should not be regarded as implicated in the illegality unless (i) the contract itself contained a term that the English manufacturers were obliged to give a false invoice and (ii) that they had knowledge of the illegality and actively participated in it. But where title in goods remains in the plaintiffs and their agents without their knowledge commit a foreign illegality, they ought to be able to sue their agents for breach of contract. However, if they are aware of the proposed illegality and possess all the powers attendant upon ownership to prevent the illegality and yet permit the illegality to be perpetrated (or acquiesce in it), they should not be entitled to a suit on the contract.

The second comment is that the case is quite hard to reconcile with *Patriot Pte. Ltd. v. Lam Hong*. In that case, the plaintiffs opened a letter of credit in favour of a Taiwanese seller who shipped 3000 sets of rubber tyres to the Indonesian buyers who were the defendants. Instead of the plaintiffs being paid the full price of US\$228,305, they were made the beneficiaries of a letter of credit opened by the defendants for US\$47,000 and of a contract whereby the balance amount plus commission at 6% would be paid, the former within two months of the date of the import trust receipt. The plaintiffs obtained and signed a blank "Proforma Invoice" from the Indonesian embassy; but all the requisite details were filled in by the defendants. Most of the details were falsely declared for the purpose of evading the payment of customs duties, including the false price of US\$47,000. Rajah J. found that the "whole operation was designed expressly by the parties ... to evade Indonesian customs duties" and rejected the plaintiffs' claim on the ground that the contract between the parties was illegal and void. An appeal from Rajah J.'s judgment was dismissed by the Court of Appeal.

One may observe that the contract contained no obligation on the plaintiffs to state a false invoice; so no distinction can be taken between this case and the *Dimpex* case on this score. No doubt the plaintiffs' act in signing the proforma invoice and leaving it to the defendants to fill in the details facilitated the illegality. But that act alone, in the absence of a condition of the contract that an understated invoice should be issued and of evidence of common purpose, is incapable of supporting the necessary inference of a joint illegal effort. The plaintiffs would of course know that such an invoice could be used to deceive the Indonesia customs but they might have done what they did for a reason other than active participation, namely, so as to increase their goodwill with the defendants.⁵

Although neither Rajah J. nor the Court of Appeal alluded to its significance, it was a fact of the case that the plaintiffs contracted to act as agent for the defendants for the purchase of the tyres on consignment account for the defendants. This fact, it is suggested, is

⁵ See Kerr L.J. in *Euro-Diam Ltd. v. Bathurst* [1988] 2 W.L.R. 517

material and important in understanding the decision. There is a sound reason for denying an agent's claim where he has facilitated the perpetration of a foreign illegality by his principal.

One final observation and comment: both Thean J. in *Dimpex* and the Court of Appeal in *Patriot* applied the propositions in *Foster v. Driscoll* and *Fielding & Pratt v. Selim Najjar*. Rajah J. in *Patriot* grounded his judgment on this:

"A contract which contemplates the performance in a foreign and friendly country ... of some act which is inimical to the public welfare of that country is a breach of international comity and is regarded as illegal by our courts. It is unlawful to make an agreement in Singapore to do something in a foreign country which will violate the local law, which is what this case is all about."⁶

Rajah J.'s remarks are useful in highlighting the real reason for not enforcing contracts which contemplate a foreign illegality; namely, public policy based on international comity. This public policy principle (which incidentally does not require for its operation that the contract should have been made in the forum) must be kept quite separate from the rule in the *Ralli* case⁷ which has to do with supervening illegality at the place of performance. Cases like *Dimpex* and *Patriot* engage the public policy principle because at the outset both parties contemplate acting in an illegal way: Cf. *Toprak v. Finagrain** Such contracts will be unenforceable whatever may be their proper law. This explains why there was no necessity in *Dimpex* to ascertain the proper law of the contract of consignment.

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⁶ [1980] 1 M.L.J. 135, at p. 136.

⁷ [1920] 2K.B. 287.

⁸ [1979] 2 Lloyd's Rep. 98.

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