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Illegality and Non-
Contractual Claims:
Whether the Rule in
Foster v Driscoll
should be read with
the *Ochroid*
Trading framework

*Ang Jian Sheng Jonathan
and anor v Lyu Yan [2021]*
SGCA 12

9 March 2021

LEGAL
UPDATE

In this Update

The Court of Appeal in the recent decision of *Ang Jian Sheng Jonathan and anor v Lyu Yan* [2021] SGCA 12 upheld the High Court's decision in allowing the Respondent's claim against two Appellants for conspiracy and unjust enrichment.

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INTRODUCTION

The Court of Appeal in the recent decision of *Ang Jian Sheng Jonathan and anor v Lyu Yan* [2021] SGCA 12 upheld the High Court's decision in allowing the Respondent's claim against two Appellants for conspiracy and unjust enrichment.

BACKGROUND

The Respondent, a China national, wanted to remit money from her China bank account to her Singapore bank accounts and was introduced to the 1st Defendant to assist her with the remittance. The 1st Defendant in turn enlisted the help of the 2nd and 3rd Defendants (who were the 1st and 2nd Appellants in the appeal).

On 18 October 2018, the Respondent transferred money from her China bank account to China bank accounts nominated by the 1st Defendant (who, in turn obtained the accounts from the 1st and 2nd Appellants). The Respondent failed to receive the money in her Singapore bank accounts and chased the 1st Defendant for the money, who in turn, chased the 1st and 2nd Appellants.

The 2nd Appellant eventually told the 1st Defendant that his counterparty was one "Allan" and added the 1st Defendant to a WhatsApp group chat where "Allan" purported to give various assurances that he would make the transfers. "Allan" stopped communicating via WhatsApp on 22 October 2018.

THE HIGH COURT'S DECISION

The High Court allowed the Respondent's claims against the 1st and 2nd Appellants in conspiracy, negligence and unjust enrichment. The Appellants appealed to the Court of Appeal, making substantially the following same arguments before the Court of Appeal as they did before the High Court:

- (a) Allan exists and it was Allan who defrauded the Respondent of her money instead of them; and
- (b) the rule in *Foster v Driscoll* [1929] 1 KB 470 (which renders contracts that violate the laws of a foreign jurisdiction unenforceable even if the contract is otherwise lawful under its governing law) engaged to defeat all of the Respondent's non-contractual claims against them.

The High Court also found the 1st Defendant liable for breach of contract and in negligence as well as unjust enrichment, albeit not in conspiracy or for misrepresentation. The 1st Defendant did not appeal against the decision against him.

THE COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the appeal.

KEYPOINT

He who asserts must prove.

On the first issue, the Court of Appeal held that the Appellants bear the burden of proving that Allan exists as Allan's existence is a material fact pleaded by the Appellants to establish their defence.

It would be nearly impossible for the Respondent to prove a negative, *ie* that Allan does not exist.

The Appellants did not tender any positive evidence of Allan's existence. All they had was merely a bare assertion and that cannot suffice to discharge their burden of proof.

Having found that Allan is fictitious, the Court of Appeal held that the Respondent's claim in conspiracy and unjust enrichment succeeded.

The Court of Appeal noted that the essence of negligence is a failure to exercise due care and is quite different from an intention to defraud. While the Court of Appeal had doubts on whether the High Court was correct to allow the claim in negligence, the Court of Appeal acknowledged that the Respondent only needed to succeed in one cause of action. Since the Respondent had succeeded in her claim in conspiracy and unjust enrichment, there was no reason for the Court of Appeal to consider the Respondent's claim in negligence.

KEYPOINT

Non-contractual claims are not defeated by Foster v Driscoll

On the second issue, the Court of Appeal rejected the Appellant's argument and confirmed that the rule in *Foster v Driscoll* can only be used to defeat a claim in contract; it is not applicable in relation to non-contractual claims. This is notwithstanding that non-contractual claims may have the economic effect of enforcing a void and unenforceable contract. In any event, the Court of Appeal held that *Foster v Driscoll* only applies if the Appellants can show that the Respondent intended, or at the very least knew, that the transaction violated Chinese Law. While the Respondent knew she was prohibited from remitting money directly from her China bank accounts to her overseas bank accounts, she thought there was a

legitimate way around this problem. There was no evidence that the Respondent knew that the transaction violated Chinese law.

While the factual finding above was sufficient on its own to dispose of the issue, the Court of Appeal went on to consider the question as to whether the rule in *Foster v Driscoll* should be read together with the framework in *Ochroid Trading Ltd and another v Chua Siok Lui* [2018] 1 SLR 363. The former concerns the illegality of contracts under *foreign* law, and applies to disputes heard before the Singapore courts arising out of contracts regardless of their governing laws, while the latter concerns the general illegality of contracts (regardless of the law being violated), but only applies to contracts governed by Singapore law.

Under the former, non-contractual claims are generally permitted whereas under the latter, non-contractual claims are subject to the principle of stultification – they would be allowed only if the policy rendering the contract void and unenforceable is not stultified by allowing the non-contractual claims. If the rule in *Foster v Driscoll* was to be read with the *Ochroid Trading* framework for contracts governed by Singapore law, recovery for non-contractual claims would be narrower as compared to an identical contract that is not governed by Singapore law (since the principle of stultification under the *Ochroid Trading* framework would not apply to contracts which are not governed by Singapore law). The Court of Appeal expressed its concern with this anomaly, stating that there is no principled reason why recovery via non-contractual means should be narrower when the contract is governed by Singapore law, and broader when the contract is governed by foreign law. Nevertheless, as the Court of Appeal was not required, on the facts of this case, to decide on this issue, it ultimately chose to leave this question open.

COMMENTARY

This decision affirms the position that for contracts that are *not* governed by Singapore law and that violate the laws of a different foreign jurisdiction, recovery of benefits conferred pursuant to such contract via *non-contractual* means would generally be available, since neither the rule in *Foster v Driscoll* nor the *Ochroid Trading* framework would apply.

For contracts that *are* governed by Singapore law and that violate the laws of a foreign jurisdiction, on the other hand, the scope of non-contractual recovery remains unclear, since the question of whether the *Ochroid Trading* framework (and the stultification principle thereunder) applies remains unanswered. Much would depend on how a future court decides on the interface between the two cases. The Court of Appeal did point out that in both situations, the concept of *policy* serves as a limiting factor to ensure that the illegality involved does not *inflexibly* defeat recovery where such recovery is justified.

This case also serves as a timely reminder of the principle that the party who makes an assertion bears the burden of proving that assertion, regardless of whether that party is the plaintiff or the defendant in the action. Parties should therefore be careful to ensure that it has sufficient evidence to prove its assertions, or risk being unable to discharge this burden.

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If you have any questions or comments on this article, please contact:



Blossom Hing
Director, Dispute Resolution

T: +65 6531 2494
E: blossom.hing@drewnapier.com



Alphis Tay
Director, Dispute Resolution

T: +65 6531 2763
E: alphis.tay@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906

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