FACV No. 12 of 2015

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL APPEAL NO. 12 OF 2015

(ON APPEAL FROM CACV NO. 164 OF 2013)

BETWEEN

RYDER INDUSTRIES LIMITED (formerly SAITEK LIMITED)	*Plaintiff* *(Respondent)*
and	
CHAN SHUI WOO	*Defendant* *(Appellant)*

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CIVIL APPEAL NO. 13 OF 2015

(ON APPEAL FROM CACV NO. 165 OF 2013)

BETWEEN

RYDER INDUSTRIES LIMITED (formerly SAITEK LIMITED)	*Plaintiff* *(Respondent)*
and	
TIMELY ELECTRONICS COMPANY LIMITED	*Defendant* *(Appellant)*

THE APPELLANTS' SUPPLEMENTAL CASE

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CONTENTS

A. Compromise……………………………………………….……….................. 3

B. Nature of the 4th Illegality......…………....……………………......................... 3

C. Reliance…………………......……………………........………………...... 4

D. Ascertainment of the Tainted STC Costs 6

E. Foreign Illegality ....……..... 7

A. COMPROMISE

RECORD

Part/Tab/Page(s)

1. The Respondent's cause of action against Timely in this case is in breach of contract for failing to pay the amount due under the 2005 Agreement as varied by the 2 supplemental agreements: see para. 5(a) of the Amended Statement of Claim. — B/3/28

2. It is clear from the terms of the 2005 Agreement, even as varied, that the parties' obligation of payment was governed by clause III B & C of the 2005 Agreement and the obligation was to pay for the various items set out therein. The fact that the parties had subsequently adopted the payment method of a running account was merely for administrative convenience. Put at its highest, the sum claimed was no more than an "account stated", which is still liable to be reopened on the ground of, inter alia, illegality: see Camillo Tank Steamship Co v. Alexandria Engineering Works [1921] 10 Lloyd's LR 307 (HL) at 315. — B/19/167-168

B. NATURE OF THE 4th ILLEGALITY

3. Timely's case at the trial was that the 2nd and 4th Illegalities contravened Article 37 of the Customs Law of China, which has a legislative status above the Measures in Chinese Law. This, together with the penalty provisions under Regulation 18 of the Regulations of the PRC on the Implementing of the Customs Administration Punishment, was the evidence of Saitek's expert — B/38/294; B/45/342-344; B/14/153-154;148

(Mr. Jin) and agreed to by Timely's expert (Mr. Lin) in their reports. B/15/162

4. The punishment in Regulation 18 for contravening Article 37 of the Customs Law (as cited by Mr. Jin's Expert Report) was serious. Similar laws are also found in Hong Kong, the breach of which has serious consequences: see e.g. ss. 12, 28A, 29, 46, 48 & Schedule 2 of the Dutiable Commodities Ordinance (Cap. 109). B/14/148

C. RELIANCE

5. The true basis of the reliance test is that *"a party cannot rely on his own illegality in order to prove his equitable right, [or his right to recover], and not that a party cannot recover if his illegality is proved"* – see Lord Lowry in Tinsley v Milligan [1994] AC 340 at 368G. Thus in Tinsley's case, the majority of the House of Lords allowed the defendant's counterclaim to give effect to the resulting trust of the property arising from the defendant's contribution towards the purchase of the property. The majority took the view that the resulting trust arose out of the presumed intention of the parties when the property was purchased, and not from any contractual obligation of the parties (see Lord Browne-Wilkinson at 371C). Thus, the defendant there could simply rely on her equitable interest in the property without relying on her illegality. Likewise in Hounga v Allen [2014] 1 WLR 2889, even though the claimant could not be lawfully employed, her claim against her employer for unlawful

discrimination in relation to her dismissal could still be allowed because her claim was an independent cause of action and was not for the enforcement of the unlawful employment contract. By contrast, it is important to note that the Supreme Court would appear to endorse the view that her claim for unfair dismissal, being a claim for the enforcement of the contract of employment, could not be allowed (see § 24, 44 & 59). **It is thus submitted that the true test is whether the substance of the plaintiff's claim is for the enforcement of the contract tainted with illegality or the enforcement of a completely independent right.**

6. In the present case, the true nature of the Respondent's claim is the contractual right arising from the Respondent's illegal performance of the Agreement. To determine "reliance" on illegality here, we submit that the illegality is one which necessarily follows from, or leads to, facts crucial to the Respondent's claim: see Peconic Industrial Development Ltd & Ors v. Choi Ho Cheong & Ors HCA 16255/1999, para. 537. Significantly, what was to be performed under the contract was "Processing Materials for Foreign Client" work ("**PMFC work**"), which involved import, export, and customs compliance work. We submit that these matters are part of the crucial facts. B/19/168

7. Even though the Respondent could rely on Timely's admissions to prove the performance of its obligation to justify its entitlement for payment, it is clear that the performance was tainted by illegality. Thus the Respondent could not get over the reliance on

illegality.

8. The proposition that it is a condition of a contract that the performance of a contract must be lawful at the place it is performed is well supported by authorities: see Ralli Brothers case, p.295; Chatenay v. The Brazilian Submarine Telegraph Co Ltd [1891] 1 QB 79, at 82, 83 (CA).

9. As the illegally performed PMFC work did generate (a) the STC Costs, and (b) revenue, both were tainted by the illegally performed PMFC work and unenforceable: see Archbolds (Freightage) Ltd v. S. Spanglett Ltd [1961] 1 QB 374 at 388.

D. ASCERTAINMENT OF THE TAINTED STC COSTS

10. It was admitted by the Respondent's witness, Ms. Wang Hong **("Wang")**, that the total processing fees of goods could be ascertained by reverse-calculation from the sharing percentages of Saitek and Timely. Tables 2 & 3 were produced unchallenged.

B/42/332-334

B/25/218 & 219

11. The reason why Timely had to adopt a broad-brush approach (by referring to a **correlation between fees and costs**) to work out the tainted STC Costs is because (as the Respondent says) the STC operation was conducted as one operation and the Respondent was responsible for accounting matters in the STC operation: para. 39 of the Respondent's Case. As such, the evidence on fees and costs must have been within the exclusive knowledge of the

B/49/356

Respondent, yet it has not adduced such evidence.

12. The Respondent is now seeking to rely on certain documents in support of its argument that there was no correlation between the revenue and the STC costs. These documents were never commented upon by Counsel for the Respondent at trial, nor did any witness speak on any of those documents beyond what was stated. Had the matter been raised in the CFI, it would have at least been possible for Timely's witnesses to tell the court how the costs were linked to the prices at similar, if not identical, ratio for all the phones. We submit that this "no correlation point" based on the documentary evidence the Respondent now relies upon cannot be raised under the "Flywin" principle in Flywin Co Ltd v. Strong & Associate Ltd (2002) 5 HKCFAR 352, paras. 37 to 39 on the ground of fairness.

B/9/64

B/26-36/220-289

13. The Appellants never claimed that the correlation between fees and costs is exact. It is a rough and ready yet sufficiently accurate way to show that a very substantial part of the STC Costs are tainted by the 4th Illegality. What is crucial is not the *exact* amount of the STC-Costs tainted by the 4th Illegality, so long as the court could be sure that such amount would be in excess of the Respondent's claim. Where the court is sure, it is submitted that the Respondent's claim should be dismissed.

E. **FOREIGN ILLEGALITY** (paras. 49 to 84 of the Respondent's Case)

14. We reiterate that the amount claimed here is compensation in

respect of a repudiatory breach of contract which was accepted by the Respondent. As such, the contract ceases to exist: para. 7 of the Amended Statement of Claim. See Johnson v. Agnew [1980] AC 367 at 393 F to 394D, 399 D-E.

B/3/29

15. Even though one may say that Timely or the Respondent (as the case may be) may lawfully make payment in Hong Kong, this does not assist the Respondent's case. Insofar as its right to be paid is based on its illegal performance under the 2005 Agreement, it is prevented from recovering because to do so it would have to prove its rights under the contract, thus relying on its own illegal act: see Archbolds (Freightage) Ltd v. S. Spanglett Ltd [1961] 1 QB 374 at 388. This serves to distinguish the present case from the series of cases relied on by the Respondent such as **Kleinwort, Toprak etc. which are concerned with contracts to make payments when the *obligation to pay* did not arise and was not dependent on any illegal performance of any party to the contract**. In Kleinwort, Libyan Arab Foreign Bank's and Toparks, all 3 defendants could under the contracts meet their payment obligations from alternative sources or means which would have been perfectly legal. It was thus not surprising that the Court in each case held that the defence of illegality failed.

16. In paras. 54(1), 58, 59 and 61 of the Respondent's Case, it is argued that in the case of foreign illegality, the agreement of 2 or more persons to do the illegal act was a precondition for invoking the illegality defence. This is wrong and would mean a guilty

claimant could enforce an illegal foreign contract in Hong Kong by relying on the innocence of the defendant. It cannot be right. And see Fielding & Platt Ltd. v. Selim Najjar [1969] 1 WLR 357 at 361 D-G, 362 A (CA); and Royal Boskalis Westerminster N. V. & Ors. v. Mountain & Ors [1999] QB 674 at 692 D-F (CA).

17. In paras. 76 to 84 of the Respondent's Case, it argues, in substance, that the foreign illegality defence should only apply if the act in question is shown to be contrary to public policy or morality in: (1) the relevant foreign country in which the contract is to be performed, or was performed; (2) **as well as** in Hong Kong; as in the case of Lemenda v. African Middle East (where the court considered both the public policy of Qatar as well as England in refusing to enforce a commission agreement). This is analogous to the "double actionability" test in the conflict of laws in tort law which, though mostly abolished in England since 1995, still applies in Hong Kong.

18. This point was not raised in the CFI or in the CA below. If allowed, this may represent a major development of the law and should not be raised in the CFA without argument in the CA: see Flywin, para. 39.

19. Even if the argument is allowed to be raised, we repeat our submissions under "**B. Nature of the 4th Illegality**" hereinabove. Given that there exists in Hong Kong laws in the form of ss.12, 28A, 29, 46, 48 & Schedule 2 of the Dutiable Commodities Ordinance, (Cap. 109), it would make no difference to the

outcome of this case.

20. In any event, the 4th Illegality involved the Respondent committing an act of dishonesty in deceiving the Chinese Government. Thus, it is against the public policy of Hong Kong as well.

Dated this the 6th day of November 2015

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