

Spread Betting: Debts Arising from Gambling Contracts are Uncollectable in the UAE

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Al Tamimi & Company successfully defended the Defendant in this case which was filed by a provider of spread betting, forex and other forms of trading (the Claimant).

The agreement between the parties involved speculation on movements in international share and stock prices. The Defendant would speculate on one of the markets concerned closing at a certain level and, if that figure or sum were achieved, the Claimant would pay the Defendant an amount based on the formula set out in the agreement. If the figure or sum was not achieved (i.e. the market failed to reach the level predicated by the Defendant), the Defendant would pay the Claimant.

The question was whether this was a contract for spread betting or not.

It was argued by the Claimant that the contract was a commission-based agency contract, because it related to assets (stocks, shares and currencies) being traded, it was not a contract for gambling. The Court of Appeal however held that there was no proof of shares or securities being traded between the parties, it was strictly a case of spread betting where predictions were made on the prices of shares and stocks that were not acquired by or transferred to either party. Since betting is prohibited under UAE Law (Article 1021 of the UAE Civil Code), being a contract of hazard (gharar), the subject matter of a spread betting contract is unlawful and renders the contract void for contravening public policy and morals.

The Claimant was therefore unable to recover the debt that accrued under the spread betting contract.

Background Facts

The Defendant entered into an agreement (and opened an online trading account) with the Claimant. The dealings between the parties involved speculation on movements in international share and stock prices where one of the parties speculates on one of the markets concerned closing at a certain level and, if that figure or sum is achieved, the other party pays the speculator an amount based on the formula set out in the agreement. If the figure or sum is not achieved i.e. the market fails to reach the level predicated by the speculator, the speculator pays the other party.

On the 9 October 2008, the Claimant suspended the Defendant's account for an unrecovered debt in the amount equivalent to AED 2,573,439.

The Court of First Instance

The Claimant filed proceedings before the Dubai Court of First Instance for the unrecovered debt and asserted that his role was that of an agent akin to a stock market agent/broker. The Defendant argued that

the nature of the agreement was not an agency (which requires at least three parties). The Defendant argued that the contract was void on public policy grounds, pointing out that the Claimant had deliberately failed to produce a copy of the contract for the court's review with the hope that the Court of First Instance would not be able to ascertain that the agreement was a gambling contract known in English as a 'spread betting contract' which involves speculation on price movements. Such a contract is an explicit form of gambling forbidden under Islamic Law.

Expert Report

The Court of First Instance appointed an accounts expert who concluded in his report that the Defendant had opened an account with the Claimant (with a password) to perform online transactions and trades that allowed him to speculate on price movements. The expert established from an accounting standpoint that the Defendant engaged in betting activity based on price movements through the account in question. According to a printout of a statement of account from the Claimant's accounting system showing the Defendant's transactions, the Defendant's account had a debt balance of AUS 389,950 due to fluctuations in Standard & Poor's 500 index. The expert thus confirmed the Claimant's right to claim that amount without interest.

Both parties exchanged comments on the expert report with both parties objecting to the report. Both parties requested that the original expert be reappointed to undertake the following:

- Provide the Court of First Instance with a detailed explanation of the nature of the transaction; and
- Determine whether any assets (shares, stocks) were traded between the parties or whether it was only a matter of betting, prediction, and speculation without the transfer of any assets.

The Claimant submitted a report issued by a consultant in the UK with the aim of showing that the transaction in question was of the sort offered by UAE banks, and therefore the parties' agreement would be permissible under UAE Law.

The Court of First Instance subsequently ordered that the Defendant pay to the Claimant a sum of AUS 389,950 or its UAE Dirham equivalent, plus 5% interest per annum.

The Court of Appeal

The Defendant appealed the Court of First Instance's decision. The Defendant argued that the Court of First Instance had erred because it had misinterpreted the nature of the transaction and the parties' relationship by concluding that the contract was a commission-based agency contract and presuming that assets (stocks, shares, currencies) were traded when in fact the contract was based on (prohibited) betting among speculators where no assets were traded and wagers/predictions were made with respect to the prices of shares and stocks. The Defendant sought dismissal of the action on public policy grounds (Articles 1012 -1021 of the Civil Code). It was argued that the transaction was a type of gambling and requested that an Islamic finance expert be appointed to determine the nature of the contract and whether such activity (spread betting) was permissible under Islamic law or prohibited under Articles 1012 - 1021 of the Civil Code.

The Defendant also submitted documents obtained from the UK confirming that this type of transaction would not be regulated by the rules of the Financial Services Authority (FSA). These transactions are regulated by the UK Gambling Commission and any complaints relating to this type of transaction are referred to the Betting Adjudication Service.

The Defendant also highlighted that the Claimant described the activity as spread betting on its website as follows:

"[the Claimant's website allows you] to trade on the price movements of thousands of financial markets, including indices, shares, currencies, forex, commodities and more. With a spread bet, you can speculate

on price movements on both rising and falling markets. This is known as 'going long' (when you buy) or 'going short' (when you sell). For example, you may know that a company is about to release quarterly results and have an opinion on whether the figures will have a negative or positive affect on its share price. Based on that opinion, you can place a spread bet to go long (buy) or go short (sell) the company share price and take advantage of any price moves."

A request for the reappointment of the expert was made in order to consider issues such as: the nature of the transaction, whether any assets were traded and to examine documents that were allegedly tampered with

Accordingly, the original expert was reappointed to examine the Defendant's objections. The expert filed a report in which he concluded that, based on the parties' documents, it was conclusively clear that the parties conducted spread betting transactions strictly among themselves without the involvement of any other party or company in the investment.

The expert added that neither party had provided him with proof of share or securities trading between the parties and that it was strictly a case of spread betting where predictions are made on the prices of shares and stocks that are not acquired by or transferred to either party.

The Court of Appeal ruled that if the subject matter of an obligation is a thing, that thing must exist or be able to exist at the time of creation of the obligation. If the subject matter of an obligation is an act or omission, it must be possible. And if the subject matter of an obligation in either case is impossible then no obligation shall arise and the contract is void. The subject matter of an obligation must be certain or capable of being rendered certain. The subject matter of an obligation must also be capable of being disposed of. That might not be the case due to its nature (for example, sun, air) or its designated purpose (such as property with a particular public interest). That would also not be the case if disposing of the thing is unlawful either by operation of law or on public policy or morality grounds. If the subject matter is inherently capable of being disposed of but the contract is made for an objective contrary to public policy or morality, then as long as the other side is aware of such objective the contract would be void, not because the subject matter is unlawful but because its objective is unlawful for public policy or morality considerations.

It follows that if the subject matter is inherently capable of being disposed of, the issue of the validity depends on the validity of the contract's objective. In this case, the transaction is void because the objective is unlawful rather than the subject matter. Accordingly the contract is invalid on the basis of UAE Public policy grounds.

Comment

This judgment highlights that spread betting is prohibited in the UAE and is against public policy. The court will ultimately examine and discover the nature of the activity even if it is not inherently clear or described as something else. If determined to be a form of gambling, the contract will be deemed null and void and any debts that arise from these transactions are not recoverable.

The criterion for the validity of a contract is that it must be made over a lawful subject matter, and it must have a valid and existing lawful purpose. If one of these essential pillars is not established, then the contract will be void and the judge may so rule of his own motion. Such a contract will not have any effect, nor may it be ratified, and any person concerned may rely on it being void. Contracts involving speculation risk being deemed a form of gambling and being found void.