IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 27

Civil Appeal No 119 of 2021

Between

Michael Joseph Millsopp

… *Appellant*

And

Then Feng

… *Respondent*

In the matter of Suit No 1104 of 2019

Between

Michael Joseph Millsopp

… *Plaintiff*

And

Then Feng

… *Defendant*

EX TEMPORE JUDGMENT

[Civil Procedure — No case to answer]

Millsopp, Michael Joseph
v
Then Feng

[2022] SGHC(A) 27

Appellate Division of the High Court — Civil Appeal No 119 of 2021
Woo Bih Li JAD, Quentin Loh JAD and Hoo Sheau Peng J
13 July 2022

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Woo Bih Li JAD (delivering the judgment of the court *ex tempore*):

1 This is the appellant's appeal against the decision of a judge of the High Court (General Division) ("the Judge") to dismiss all of his claims against the respondent for misrepresentation, breach of contract, conversion and unjust enrichment.

2 On or around 7 February 2019, the appellant had transferred a sum of £1,571,394.13 ("the Funds") to a Singapore bank account held by Ling Capital Pte Ltd. The transfer itself was not disputed but the nature of the agreement between the parties, pursuant to which the Funds were transferred, is disputed. In his pleaded case, the appellant, alleged that he had entered into a *foreign exchange services agreement* with the respondent ("FX Agreement"), under which the respondent was to convert the Funds into US dollars ("USD") within 48 to 72 hours after receiving them, and remit the same to a designated UK bank account after deducting the respondent's commission. The respondent denied

having entered into any FX Agreement with the appellant and contended that the Funds had instead been transferred as an *interest-free loan* to be repaid in British pounds ("GBP") to the appellant's UK bank account, and that the respondent was merely to coordinate this loan in return for a fee. In any event, the Funds or their equivalent were not returned to the appellant, and the appellant thus commenced proceedings against the respondent.

3 At the close of the appellant's case at trial, the respondent made a submission of "no case to answer" and gave the required undertaking not to adduce evidence. The respondent's "no case to answer" submission was upheld by the Judge, who found that all of the appellant's claims were premised on the agreement between the parties being an FX Agreement, and that the appellant had failed to prove the FX Agreement on the evidence before the court. Accordingly, the Judge dismissed the appellant's claims.

4 Having considered the parties' arguments before us, we are of the view that the appellant has not shown that the Judge had erred in his conclusion. In our judgment, the appellant's entire pleaded case is inextricably intertwined with his characterisation of his agreement with the respondent as an FX Agreement. This is an essential factual premise of the appellant's pleaded case.

5 This is not disputed for the appellant's claim based on breach of contract. Turning to the appellant's misrepresentation claim, this is premised on the respondent having made certain false representations which (as pleaded at paras 6, 7 and 9 of the appellant's Statement of Claim (Amendment No 2) dated 5 July 2021 ("the SOC")) centred around the respondent providing his foreign exchange services to convert the appellant's GBP to USD at a preferential rate. The appellant alleges that these representations induced him to enter into the FX

Agreement and transfer the Funds to the respondent. Hence, the appellant's misrepresentation claim is also premised on the existence of the FX Agreement.

6 The FX Agreement is also an essential premise of the appellant's conversion and unjust enrichment claims, as presented by the appellant. We note that in his Appellant's Case for the appeal, the appellant argues that the existence of the FX Agreement is pure background and is not a necessary legal element of an action in conversion (or unjust enrichment). However, the appellant's conversion claim *as pleaded* at para 33(b) of the SOC is premised on his having the right to immediate possession of the Funds due to the respondent acting in a manner repugnant to the terms of the FX Agreement by causing the wrongful withdrawal, utilisation or transfer of the Funds, and thereby terminating the FX Agreement. Importantly, this is reinforced by what the appellant's counsel admitted during his oral closing submissions before the Judge, when he said that the conversion claim was "based on the [t]ransaction being an FX Agreement".

7 We turn now to the appellant's unjust enrichment claim, which is premised on two unjust factors: mistake of fact and total failure of consideration. The relevant mistake, as pleaded at para 38(a) of the SOC, was the appellant's mistaken belief in the truth of the respondent's representations. As we have noted, these representations centred around the alleged agreement between the parties being an FX Agreement. As for the aspect of the unjust enrichment claim based on failure of consideration, the appellant contends that para 38(b) of the SOC encompassed "two independent routes to liability", with one being dependent on the agreement between the parties being voidable and rescinded because of the respondent's fraudulent misrepresentation (such that it is the *absence* of the agreement that is a key factor), and the other being a free-

standing claim premised on the tort of conversion. Paragraph 38(b) of the SOC reads:

> There is a total failure of the consideration for the transfer of the Funds by the Plaintiff [*ie*, the appellant], because the FX Agreement is voidable and has been rescinded by the Plaintiff in consequence of the 1st Defendant's [*ie*, the respondent's] fraudulent misrepresentation, *and/or the 1st Defendant had caused the Funds to be wrongfully withdrawn and/or utilised or transferred and converted to his own use.*
>
> [emphasis added]

8 We are unable to accept the appellant's submission based on para 38(b) of the SOC. The words of this paragraph cannot be taken in isolation, and must instead be read in the context of the rest of the appellant's pleaded case on unjust enrichment. Even if the first "route to liability" depended on the absence of the FX Agreement (rather than its validity or continued existence), it would be premised on the Funds having been transferred by the appellant *on the basis of* the FX Agreement which then failed to materialise. Further, the difficulty with the second "route to liability" is that it rests on the appellant's conversion claim, which – for the reasons we have earlier explained – is itself premised on the FX Agreement and is not free-standing as argued. Thus, based on the way the appellant has presented his case in his pleadings, the FX Agreement is indeed an essential premise of the unjust enrichment claim.

9 Furthermore, the positive case advanced by the appellant regarding the nature and terms of the parties' operative understanding or arrangement in relation to the transfer of the Funds was based on the FX Agreement, and the appellant did not initially pursue any alternative version of events (or any alternative understanding) of why the Funds were transferred. It was only in the appellant's oral closing submissions before the Judge that his counsel raised the argument that, if the court was not satisfied that the agreement between the

parties' agreement was *prima facie* an FX Agreement, it could alternatively deal with the agreement as a pure remittance agreement which did not include any obligation for the respondent to convert the Funds from GBP to USD, and that the court should order the respondent to repay the Funds on this basis. We agree with the Judge that the appellant cannot now be permitted to rely on this alternative case, which was advanced only after the respondent had made his "no case to answer" submission at trial. The appellant refers to part of para 8(b) of the SOC to argue that he had pleaded an alternative claim based on a remittance agreement. However, para 8(b) refers to both a foreign exchange aspect and a remittance aspect, and it states that the respondent "would convert the Funds to USD (at a preferential rate which the [appellant] now cannot recall pending discovery and/or interrogatories in this action) *and* remit the same to the UK" [emphasis added]. Furthermore, we agree with the Judge that the appellant did not refer to a remittance agreement *simpliciter* in his pleadings or when he advanced his case below, up until his oral closing submissions before the Judge. If, as the appellant contends, the "central question" in this case is indeed whether the respondent had promised to remit the Funds to the appellant's UK bank account in *either* GBP or USD, then it is puzzling that this assertion was nowhere to be found in his own pleaded case.

10 Therefore, at the hearing below, the appellant did not advance the case that the FX Agreement was pure background for the claim on conversion. Nor did he argue that his claim on unjust enrichment was based on a free-standing allegation in conversion. It is too late for the appellant to now argue, at the appeal stage, that absent any loan agreement, the respondent's act of taking the Funds and benefitting from them is the gist of the tort of conversion and also the claim in unjust enrichment.

11 The case that the respondent had to meet was that there was an FX Agreement between the parties. It was in response to this assertion that the respondent made his submission of "no case to answer". The legal framework that applies in a civil case where a defendant makes a submission of "no case to answer" is generally not disputed by the parties, and was most recently clarified by the Court of Appeal in *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 ("*Ma Hongjin*"). The starting point is that the *legal* burden always lies on the plaintiff in a civil case to prove its case against the defendant on a balance of probabilities: *Ma Hongjin* at [24] and [27]. Where a defendant makes a submission of "no case to answer", the plaintiff's legal burden of proving its case on a balance of probabilities will be discharged if he satisfies the court that there is a *prima facie* case on each of the essential elements of his claim: *Ma Hongjin* at [32]–[33].

12 We are cognisant of the principle that, in assessing whether the plaintiff has established a *prima facie* case, "the court will assume that any evidence led by [the plaintiff is] true, unless it [is] inherently incredible or out of common sense" (*Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*") at [24]). However, as the Court of Appeal explained in the same case, the test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is "so unsatisfactory or unreliable that its burden of proof has not been discharged" (*Lena Leowardi* at [23]; see also *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 at [206] and [209]). The appellant suggested that these two parts of *Lena Leowardi* raised two different approaches and that the latter was part of the submissions from a party. Hence, the court should adopt the former approach. However, the latter is indeed part of the Court of Appeal's decision in *Lena Leowardi*, in which both "approaches" are mentioned

at [23]–[24] without distinction. In other words, even though a court will assume that any evidence led by the plaintiff is true in evaluating a submission of "no case to answer", this is subject to the qualification that his evidence is not inherently incredible, out of common sense, unsatisfactory or unreliable. Furthermore, at [24] of *Lena Leowardi*, the Court of Appeal cited with approval the case of *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ("*Relfo*") at [20], where again both "approaches" are mentioned without distinction. *Relfo* also cites *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2006 Reissue) ("*Halsbury's*") at para 120.025 which states that the evidence is subjected to a minimal evaluation, as opposed to a maximal evaluation. Again, *Halsbury*'s mentions that evidence that is manifestly unreliable should be excluded. The court must therefore consider all the evidence before it in determining whether the plaintiff has succeeded in establishing a *prima facie* case.

13 In the present case, based on all the evidence before the Judge, the appellant has not shown that the Judge erred in finding that his evidence was unsatisfactory and unreliable so that he had failed to establish a *prima facie* case that there was any FX Agreement between the parties. For example, the WhatsApp messages between the relevant individuals from February to June 2019 do not support, and indeed are inconsistent with, the appellant's case. None of these messages indicate that the original agreement or understanding between the parties was that the Funds would be transferred by the appellant to the respondent for the latter to convert them from GBP to USD before sending them back to the appellant's UK bank account. Nor was there any indication that the appellant had intended and expected all along to eventually receive the Funds in USD. Although there are some messages which refer to the Funds being converted to USD, it seems to have been only in April 2019, when the

appellant had yet to receive the Funds after nearly two months, that the appellant suggested that the Funds be remitted in USD instead. Likewise, when the appellant's reference – in his telephone call with the respondent on 19 June 2019 – to the respondent "convert[ing] [the Funds] to US dollars" is viewed in the light of the parties' preceding messages, it seems clear to us that what the appellant meant was that even after the respondent had said he would convert the Funds to USD *in lieu of performing his primary obligation of transferring the Funds in GBP*, this payment still was not made.

14 Accordingly, the Judge did not err in concluding that the appellant's evidence was "unsatisfactory and unreliable" and did not rise to the level where the evidential burden would shift to the respondent to show that the Agreement was *not* an FX Agreement. The appellant has therefore not discharged his burden of proof. In these circumstances, where the appellant has failed to establish his own positive case even on a *prima facie* basis, the Judge was under no obligation to fill in the gaps in the appellant's case.

15 As for the appellant's argument that an adverse inference should be drawn against the respondent for not giving evidence, this is not a valid argument as the respondent is entitled to make a submission of "no case to answer" in the circumstances. If the appellant had established a *prima facie* case against the respondent, the appellant would not have to urge the court to draw an adverse inference against the respondent.

16 There is one other point we would like to mention. The appellant's case was advanced on the basis that because the respondent's allegation of a loan was untrue, it would follow that the appellant's allegation of the FX Agreement was true. However, it was not a binary choice: a trier of fact is not bound to prefer one of the parties' assertions, and where the state of the evidence is

unsatisfactory, the court may simply find that the plaintiff has failed to discharge his burden of proving his case on a balance of probabilities (see *Tan Chin Hock v Teo Cher Koon and another and another appeal* [2022] SGHC(A) 15 at [31]–[33]). In other words, the court does not have to accept either allegation or make a finding as to what the actual agreement between the parties was.

17 The burden of proof is still on the appellant to prove the FX Agreement. Thus, although there was evidence that the respondent had taken the Funds in Singapore dollars and in cash, or had played an active role in the withdrawal of the Funds from the bank account of Ling Capital Pte Ltd, the appellant is bound by the way he has advanced his case.

18 For these reasons, we dismiss the appeal against the Judge's decision. We order the appellant to pay the respondent $2,500 for his disbursements in the appeal. There is no order on costs as such as the respondent is not legally represented. The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

Tay Wei Loong Julian and Wong Wai Keong Anthony
(Lee & Lee) for the appellant;
The respondent in person.
