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

[2021] SGHC 228

Suit No 1104 of 2019

Between

Millsopp, Michael Joseph

… *Plaintiff*

And

Then Feng

… *Defendant*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Misrepresentation]
[Equity] — [Conversion]
[Tort] — [Misrepresentation] — [Fraud and deceit]
[Restitution] — [Unjust enrichment]

TABLE OF CONTENTS

Millsopp, Michael Joseph
v
Then Feng

[2021] SGHC 228

General Division of the High Court — Suit No 1104 of 2019
Andre Maniam JC
17–20 August, 8 October 2021

28 October 2021 Judgment reserved.

Andre Maniam JC:

Introduction

1 It is a bold move for a defendant in a civil case to make a submission of "no case to answer": he gives up the right to call evidence. At the same time, though, the plaintiff is held to his claims, and the evidence before the court, at the close of the plaintiff's case. The parties thus stand or fall based on the court's assessment of *those* claims, on *that* evidence.

2 At the close of the case for the plaintiff ("Mr Millsopp"), the defendant ("Mr Then") made a submission of "no case to answer", coupled with the obligatory undertaking not to call evidence. Earlier on, Mr Then had taken the same course (unsuccessfully) in the trial of SIC/S 8/2020 ("SIC 8"): *The Micro Tellers Network Ltd and others v Cheng Yi Han and others and another suit* [2021] SGHC(I) 11 ("*Micro Tellers*").

3 Mr Millsopp's claims against Mr Then are based on an agreement between them (the "Agreement"), the terms of which are in dispute.

4 Mr Millsopp pleads that the Agreement was a foreign exchange agreement ("FX Agreement") whereby:

(a) Mr Millsopp would transfer British pounds ("GBP") 1,571,394,13 from Dubai to Mr Then in Singapore (the "Funds");

(b) Mr Millsopp would pay a fee of 5%, to be deducted from the Funds; and

(c) Mr Then would convert the balance of the Funds to US dollars ("USD") and remit the same to the UK.[1]

5 Mr Then pleads that the Agreement was not an FX Agreement; instead, it was for a *loan* to Ling Capital Pte Ltd ("Ling Capital", the fourth defendant), which received the Funds – Ling Capital was thus obliged to repay the loan in GBP (not USD), after deducting the 5% fee.[2] Mr Then acknowledges that he had a share in the fee, but maintains that he was merely an introducer who was not responsible for Ling Capital repaying the loan to Mr Millsopp.[3] Further, Mr Then pleads that at some point Mr Millsopp agreed that he would look to Mr Gaillard Frederic Willy ("Mr Gaillard", the second defendant) for the repayment of the loan.[4]

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1 Statement of Claim (Amendment No 2) ("SOC"), para 8.

2 Mr Then's Defence ("Defence"), paras 5–8.

3 Defence, paras 10, 11, 25.

4 Defence, para 22.

6 Mr Then further pleads that the Agreement came about because Mr Millsopp had said: he was managing certain funds on behalf of a client of his; the funds were in Dubai for tax purposes; the client wanted to move a portion of the funds to the UK but there was professional tax advice that the remittance should not be done directly.[5] Mr Then says he thus suggested that the transaction be structured as a loan to Ling Capital in Singapore, and Mr Millsopp agreed.[6]

7 In the event, Mr Millsopp caused his company in Dubai to transfer the Funds in the sum of GBP 1,571,394,13 to Ling Capital, and on 7 February 2019 Ling Capital received GBP 1,571,355.34 (net of bank charges).[7]

8 Nothing, however, was thereafter remitted to Mr Millsopp's account in the UK. Mr Millsopp thus sued Mr Then and others, for misrepresentation (for fraudulent misrepresentation, alternatively for relief under the Misrepresentation Act (Cap 390, 1994 Rev Ed)), breach of contract, conspiracy, conversion, a trust over the Funds, and unjust enrichment.

Procedural history

9 Mr Millsopp originally sued four defendants: Mr Then was the first defendant, Mr Gaillard was the second defendant, Mr Ling Hui Andrew ("Mr Ling") was the third defendant, and Mr Ling's company Ling Capital was the fourth defendant. Before the trial, however, Mr Millsopp reached settlements with all the defendants except Mr Then. Mr Millsopp withdrew his

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5 Defence, para 6.

6 Defence, paras 7–9.

7 AB 360, 362.

claims against the other defendants; he also withdrew his claims for conspiracy against all the defendants (including Mr Then).

10 Mr Gaillard paid Mr Millsopp the sum of GBP 523,798.04 pursuant to the settlement between them. Accordingly, Mr Millsopp reduced the principal sum claimed from GBP 1,571,394.13 to GBP 1,047,596.09. Mr Millsopp thus claims against Mr Then: a declaration that the FX Agreement has been validly voided or rescinded, or alternatively, rescission of the FX Agreement; return of the amount of GBP 1,047,596.09 by way of restitution; damages; a sum as the court thinks fit on the ground of unjust enrichment; interest; costs; further or other relief.[8]

"No case to answer" – principles

11 I note the following key principles relating to a submission of "no case to answer" in a civil case:

(a) a defendant who submits "no case to answer" must elect not to call evidence if the submission fails: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [70]; *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 ("*Ma Hongjin*") at [23], [31] and [33];

(b) the legal burden remains on the plaintiff to prove his claim on a balance of probabilities: *Ma Hongjin* at [24] and [27];

(c) when a submission of "no case to answer" is made, the plaintiff will discharge that legal burden if he establishes a *prima facie* case on each of the essential elements of his claim: *Ma Hongjin* at [32] and [33];

[8] SOC, prayers for relief.

(d) in this context, a *prima facie* case is one where the evidential burden has shifted to the defendant to "contradict, weaken or explain away the evidence that has been led": *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59]; *Ma Hongjin* at [28] and [30];

(e) in evaluating the evidence, the court may draw an adverse inference against the defendant "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it" (s 116, illustration (*g*) of the Evidence Act (Cap 97, 1997 Rev Ed); *Ma Hongjin v SCP Holdings Pte Ltd and another* [2019] SGHC 277 at [57], *Micro Tellers* at [85]–[86], but an adverse inference is not necessarily drawn simply because of a submission of "no case to answer": *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 at [208]–[209]; and

(f) a submission of "no case to answer" will succeed if the evidence at face value establishes no case in law, or the evidence is so unsatisfactory or unreliable that the plaintiff's burden of proof has not been discharged: *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 at [23].

Mr Millsopp's case

12 Mr Millsopp says the Agreement was an FX Agreement, whereas Mr Then says what was agreed was a loan.

13 From Mr Millsopp's statement of claim ("SOC"), all of his claims against Mr Then appear to be premised on the Agreement being an FX Agreement:

(a) his claim for misrepresentation – for fraudulent misrepresentation,[9] alternatively for relief under the Misrepresentation Act[10] – is based on representations all of which concern foreign exchange;[11] and he says that in reliance on the representations, he entered into the FX Agreement;[12]

(b) his claim for breach of contract[13] alleges non-performance of the FX Agreement – specifically, that the Funds were not converted from GBP to USD, and that nothing was remitted in USD to his UK account;[14]

(c) his claim for conversion[15] alleges wrongful withdrawal, application, and retention of the Funds contrary to the terms of the FX Agreement;[16] and

(d) his claim for unjust enrichment[17] is based on mistake (in that he mistakenly believed in the representations, which relate to foreign exchange) and/or total failure of consideration (because the FX Agreement has been rescinded for misrepresentation and/or Mr Then had caused the Funds to be wrongfully withdrawn and/or utilised or transferred and converted to his own use).

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9 SOC, paras 6–12 and 26–29.

10 SOC, para 13.

11 SOC, para 9.

12 SOC, para 10.

13 SOC, paras 30–31.

14 SOC, para 30.

15 SOC, paras 32–35.

16 SOC, para 33.

17 SOC, paras 36–40.

14 In oral closing submissions, Mr Millsopp's counsel confirmed that all of Mr Millsopp's claims against Mr Then are based on the Agreement being an FX Agreement, save for the claim in unjust enrichment – counsel argued that the unjust enrichment claim covered two alternatives:

(a) the Agreement being an FX Agreement; and

(b) the Agreement not being an FX Agreement, but instead a remittance agreement (for the Funds to be remitted to the UK in GBP).

15 I thus consider first whether the Agreement is an FX Agreement, and then the unjust enrichment claim.

Was the Agreement an FX Agreement?

The Agreement was an oral one

16 The Agreement was not in writing. It was discussed on a call in early February 2019 involving Mr Millsopp, Mr Then, and Mr Paul Atkins ("Mr Atkins"). Mr Atkins had introduced Mr Then to Mr Millsopp.

17 Mr Gaillard and Mr Ling testified on Mr Millsopp's behalf. However, neither Mr Gaillard nor Mr Ling was on the call between Mr Millsopp, Mr Then and Mr Atkins in early February 2019 when the Agreement was discussed – Mr Gaillard and Mr Ling were only involved later on. Moreover, in their subsequent interactions with Mr Then, Mr Then never portrayed the Agreement to them as an FX Agreement.

18 Mr Millsopp and Mr Atkins both gave evidence that the Agreement was an FX Agreement, as discussed on their call with Mr Then in early February 2019. Mr Then, the third person on the call, did not testify.

The contemporaneous WhatsApp messages are inconsistent with an FX Agreement

19 Nothing in the contemporaneous documents, in particular the WhatsApp chats between Mr Millsopp, Mr Then, and Mr Atkins in February 2019 indicates that the Agreement was an FX Agreement. There is no reference to the intended remittance to Mr Millsopp's UK account being in USD, and no reference to any GBP-USD exchange rate.

20 Indeed, the contemporaneous WhatsApp chats point to the Agreement *not* being an FX Agreement. The following extract is noteworthy:[18]

> [05/02/2019, 16:02:54] Paul Atkins: Feng hey buddy, sorry to disturb your NY again! Some more good news, not your Ferrari mike is in Dubai he leaves late morning tomorrow and wants to send you from a dubai account approx 1.5m GBP first thing. Is it possible to get this set up in time so Mike has an account he can send it to before leaving? If your not free I will call you first thing in the morning or reply to mike on here as he will be 3hrs ahead of me. Thanks
>
> [05/02/2019, 16:26:37] Mike Millsopp: Thanks Paul
>
> [05/02/2019, 18:33:52] Paul Atkins: Feng FYI Mike has been given authority by the bank of Emirates to make a one time payment so it's ready to go. Thanks
>
> [06/02/2019, 00:41:48] Feng Then New: Can you provide me details of the Sender?
>
> **[06/02/2019, 00:42:23] Feng Then New: We will provide a USD account as we do not have a GBP account now.**
>
> [06/02/2019, 00:45:54] Feng Then New: Need to know if it's a personal or corporate account.
>
> [06/02/2019, 05:28:04] Mike Millsopp: Funds will come from my 100 percent owned Dubai company
>
> [06/02/2019, 05:34:26] Feng Then New: Ok could you give me the company name please?
>
> [06/02/2019, 05:34:32] Feng Then New: I can provide you with an account.

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18 AB 7–8.

> **[06/02/2019, 05:34:57] Feng Then New: The account will be in USD. I assume no issues?**
>
> [06/02/2019, 05:37:28] Mike Millsopp: Company name is DMN Services Ltd
>
> [06/02/2019, 05:54:20] Feng Then New: Where Dee send the funds to once received?
>
> [06/02/2019, 05:54:25] Feng Then New: Where do we
>
> [06/02/2019, 05:55:42] Feng Then New: Hi Mike will it be easier to chat now? Thanks.
>
> [06/02/2019, 05:56:41] Mike Millsopp: WhatsApp voice doesn't work in Dubai
>
> **[06/02/2019, 05:57:28] Mike Millsopp: I don't think I will be able to swap the funds out to USD. It's all GBP and will have to be sent as GBP.**
>
> **[06/02/2019, 05:59:12] Feng Then New: I'll ask if we can absorb the FX losses within the fees. But will need back to back FX contracts locked in.**
>
> [06/02/2019, 06:00:30] Feng Then New: Do you know where the funds will end up?
>
> [06/02/2019, 06:00:59] Feng Then New: Company or personal account? Back in the Uk?
>
> [06/02/2019, 06:01:06] Mike Millsopp: I actually haven't decided that but yet. Do you have a preference ?
>
> [06/02/2019, 06:02:00] Feng Then New: Will be easier to send it to a company account.
>
> [06/02/2019, 06:02:52] Mike Millsopp: Ok I can organise this . Are you able to hold the funds for an extra day or two whilst I organise this.
>
> **[06/02/2019, 06:03:08] Feng Then New: We can hold it for as Long as you want.**
>
> [06/02/2019, 06:03:18] Feng Then New: Usually 48 hours hold before we resend.
>
> [emphasis added]

21 It is inconsistent with the Agreement being an FX Agreement (for which Mr Millsopp says Mr Then offered a preferential GBP-USD rate) for Mr Then to say (in his 6 February 2019, 00:42:23 message), "[w]e will provide a USD

account as we do not have a GBP account now." If Mr Millsopp's Funds in GBP were transferred to a USD bank account, the bank would convert the Funds to USD. That is precisely what Mr Millsopp claims he was trying to avoid, for banks would convert currencies at a poor rate.[19]

22 Moreover, if the Funds were converted by the receiving bank to USD, they would already be in USD ready for payment to the UK. There would be nothing for Mr Then to do to convert the Funds from GBP to USD. Yet Mr Millsopp did not raise any objection to Mr Then's message that the Funds be sent to a USD account. Mr Millsopp did not even query why Mr Then did not have a GBP account to receive the Funds, when (according to Mr Millsopp) Mr Then had claimed he could undertake forex transactions at a preferential GBP-USD rate. Instead, Mr Millsopp simply said (in his 6 February 2019, 05:57:28 message), "I don't think I will be able to swap the funds out to USD. It's all GBP and will have to be sent as GBP." That shows that Mr Millsopp had considered whether he could himself swap the Funds from GBP to USD and send them in USD to the USD account to be provided by Mr Then – that indicates that the Agreement was not an FX Agreement (whereby Mr Then was to receive the Funds in GBP and convert them to USD).

23 Mr Then's reply (6 February 2019, 05:59:12) is likewise inconsistent with the Agreement being an FX Agreement: "I'll ask if we can absorb the FX losses within the fees. But will need back to back FX contracts locked in." The "back to back FX contracts" Mr Then referred to would be: (a) the bank converting the Funds from GBP to USD upon receipt; and (b) a further FX contract to convert the balance of the Funds from USD to another currency (in

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19 Transcript, 17 August 2021, pp 42–43, 62–64; p 87 line 17 to p 88 line 15; p 92 line 23 to p 94 line 13.

this context, GBP) before payment to the UK. If, as Mr Millsopp contends, the transaction entailed him receiving USD in the UK, there would be no need for "back to back FX contracts". The "FX losses" Mr Then referred to would be losses from currency conversion done twice over: from GBP to USD then back to GBP. If the objective were to remit USD to the UK, there would be no "FX losses" to speak of – the Funds in GBP would be converted by the Singapore bank upon receipt into USD, and that amount in USD (less the agreed 5% fee) could simply be remitted to the UK.

24 Mr Millsopp and Mr Atkins attempted to explain away these WhatsApp messages, but their explanations are unconvincing.[20]

25 Mr Millsopp says he thought Mr Then's lack of a GBP account was just a timing issue, but why did he not raise any issue with the suggestion that the Funds be paid into a USD account, if he was expecting Mr Then to convert them from GBP to USD at a preferential rate? Indeed, when Mr Then said, "[t]he account will be in USD, I assume no issues?" neither Mr Millsopp nor Mr Atkins raised any issues with that.

26 Mr Millsopp says he understood the "FX losses" and "back to back FX contracts" Mr Then was referring to, to be a reference to the bank converting the Funds from GBP to USD at a poorer rate (as compared to Mr Then receiving the Funds in a GBP account and giving Mr Millsopp a preferential GBP-USD rate for them). But this does not explain how Mr Then could still give Mr Millsopp a preferential GBP-USD rate for the Funds, after the bank had already converted them to USD at a poorer rate. There would be no currency

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[20] See Transcript 17 August 2021, p 100 line 19 to p 101 line 14; p 102, lines 2–17; p 103 line 11 to p 104 line 2; Transcript, 18 August 2021, p 215 lines 3–12.

conversion left for Mr Then to do; and in order to give Mr Millsopp a better rate, Mr Then would have to pay him USD out of Mr Then's own pocket.

27 Mr Atkins says he did not know what Mr Then meant by "back to back FX contracts" but he did not ask for clarification.

28 In the event, Mr Then provided a GBP account to receive the Funds, namely Ling Capital's GBP account with United Overseas Bank ("UOB").

The subsequent discussions of the payment to the UK indicate it was to be in GBP rather than USD

29 From 12 February 2019, Mr Millsopp, Mr Then, and Mr Atkins discussed the intended payment to the UK. By then, Mr Millsopp had decided that he wanted the payment to be made to his Barclays UK account, and he conveyed this to Mr Then in his 12 February 2019, 13:50:25 WhatsApp message: "Feng just so you know - I'm resident in Dubai but want these funds sending to my Barclays U.K. acct."[21]

30 Thereafter, on 15 February 2019 at 08:21:57, Mr Then represented, "[w]e submitted the payment order 30 mins ago."[22] But in his subsequent message of 19 February 2019, 04:02:59, Mr Then claimed that UOB's compliance department had asked for a notarised copy of Mr Millsopp's passport and proof of address in order to push the payment through.[23] In response, Mr Millsopp said in his 19 February 2019, 07:33:53 message, "[c]ould you just send the funds back to Dubai and I will wire them directly to my Barclays acct. I understand compliance can be a pain but I was lead to

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21 AB 171.

22 AB 172.

23 AB 173.

believe this was going to be simple and instead it's now harder than if I sent the funds directly myself."[24] There was no express reference in those messages to the currency of the intended payment to the UK, but Mr Then had represented that the payment was coming from UOB, the bank to which the Funds were sent in GBP (into Ling Capital's GBP account). Moreover, in asking if Mr Then could just send the funds back to Dubai, Mr Millsopp was evidently willing to receive monies in GBP: the Funds had originated from a GBP account in Dubai, and if they were sent back to that account (whether sent in GBP or USD) Mr Millsopp would end up with GBP (even if the payment were in USD, it would be converted to GBP by Mr Millsopp's company's bank on receipt in Dubai).

31 On 26 February 2019 at 07:37:12, Mr Then then said, "[h]i Mike, GBP 1,462,000 was debited on Monday so I expect this to come through in the next 1-2 days."[25] Neither Mr Millsopp nor Mr Atkins raised any issue with Mr Then's reference to a GBP amount rather than a USD amount – if the Agreement were an FX Agreement with the payment to the UK to be in USD, one would expect them to have queried Mr Then on this, but they did not.

32 Mr Then continued in similar vein. In his message on 28 February 2019 at 06:22:37, he said, "Mike – if the funds have yet to arrive, it is probably stuck at the GBP Correspondent Bank level."[26] That indicates that the supposedly pending payment was in GBP. Mr Then followed that by saying in his message of 28 February 2019 , 07:16:01, "[w]e have done no GBP transactions before. So this is not a good start. It is my understanding that Brecht [presumably,

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24 AB 173.

25 AB 175.

26 AB 176.

"Brexit"] is causing some issues as not many Asian banks now want GBP exposure ..."[27] Neither Mr Millsopp nor Mr Atkins queried Mr Then's reference to GBP rather than USD, nor indeed him saying, "[w]e have done no GBP transactions before" when (according to them) he had claimed to be experienced in carrying out FX transactions, and indeed was a licensed FX trader, who could offer a preferential GBP-USD exchange rate. Instead, Mr Millsopp commented in a jovial manner (on 28 February 2019, 07:19:33): "Asian banks should like GBP this week because it's hit a 21 month high. :-)".[28] Why was Mr Millsopp referring to GBP if the Agreement were an FX Agreement and he was expecting payment in USD?

33 In the course of those messages, Mr Then also said (on 28 February 2019, 07:15:16), "[i]f there are further delays, I will arrange for my own funds from the US to be sent to you first. Does that give additional comfort?"[29] Mr Millsopp did not, however, take him up on that. If Mr Millsopp truly preferred to receive USD over GBP, one would have expected him to say so then, but he did not.

34 From March 2019, Mr Gaillard became involved in providing Mr Millsopp with further excuses, and indeed, false documents, for the delay in payment to the UK. Two of the documents purported to be UBS "International payment" bank documents dated 12 and 23 March 2019,[30] which supposedly reflected payment instructions from an account of Mr Gaillard's to Mr Millsopp's UK account in the sum of GBP 1,486,195.95. Mr Millsopp

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27 AB 177.

28 AB 177.

29 AB 176.

30 AB 342–343.

raised no issue with the amounts being in GBP rather than USD. He says that by that time he was in "panic mode" and he wanted his money back, he did not care which currency it came back in, or indeed if it was returned in gold bars.[31] The tenor of the WhatsApp messages, however, does not indicate that Mr Millsopp was then in "panic mode".

35 On 18 March 2019, Mr Then provided an update that "[Mr Ling] did send the GBP to the remittance agent";[32] Mr Millsopp and Mr Atkins again raised no issue with GBP being the currency mentioned. On 20 March 2019, Mr Millsopp said, "Paul – me and you need to meet Feng and his business partner in Singapore please! I've now had enough mate! ..."[33] Mr Millsopp's demands escalated, but there was still no reference to the Agreement being an FX Agreement whereby he was to have received payment in USD.

36 On 28 March 2019, Mr Millsop then said, "[b]ottom line I want my GBP and I don't expect to have to pay 100k for any of this either. Not now!"[34] Mr Then responded on 29 March 2019, "Mike - will it calm the situation down if I got Fred to sign you an English law personal guarantee for the GBP in front of a notary? Just to give you piece of mind until it hits your account?"[35] On 23 May 2019 that purported guarantee was provided,[36] with Mr Gaillard acknowledging an obligation to pay Mr Millsopp the sum of GBP 1,571,394.13 or its equivalent in USD.

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31 Transcript, 18 August 2021, pp 22–26.

32 AB 180.

33 AB 181.

34 AB 184.

35 AB 185.

36 AB 356.

37 It is submitted on Mr Millsopp's behalf that the purported guarantee is some evidence that the Agreement was an FX Agreement to convert the Funds from GBP to USD.[37] I consider that it points the other way: that the primary obligation was to make payment in GBP, although Mr Gaillard could pay the equivalent in USD instead; this is especially since the context is that it was represented that Mr Gaillard had funds in USD.

Mr Millsopp and Mr Atkins only described the Agreement as an FX Agreement from May 2019

38 Although the contemporaneous documents through April 2019 do not support Mr Millsopp's contention that the Agreement was an FX Agreement, he and Mr Atkins took that position from May 2019:

(a) Mr Gaillard says that he did not know that the Agreement was an FX Agreement until he was told this by Mr Atkins in May 2019;[38]

(b) in his 25 July 2019 Commercial Affairs Department ("CAD") report,[39] Mr Millsopp said that the Agreement was an FX Agreement.

39 There was also a 19 June 2019 call between Mr Millsopp, Mr Then, and Mr Atkins,[40] when Mr Millsopp said, "I sent you just over 1 and a half million pounds and you were gonna send that to me via whatever means you were gonna do and you were gonna convert it to US dollars and that still didn't happen. And um the bottom line is Feng is this, you've had now what nearly 5 months in fact, to get those funds to me, and you haven't done it."

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37 Plaintiff's submissions, para 74.

38 Transcript, 20 August 2021, pp 6–10.

39 AB 488.

40 AB 312 (Transcript of an Audio Recording).

40 That reference by Mr Millsopp to conversion to USD does not however point to the Agreement being an FX Agreement. First, that reference was made after Mr Millsopp had said, "I sent you just over 1 and a half million pounds and you were gonna send *that* to me." [emphasis added] Moreover, this call took place after Mr Then and Mr Gaillard had given various excuses for not being able to effect the payment in GBP, and represented that they would seek to do so in USD instead.[41] That would be what Mr Millsopp was referring to; he was not saying there that the Agreement in the first place entailed payment to the UK in USD.

41 Mr Millsopp proceeded to demand that Mr Then pay him or provide security, and Mr Then said, "I can sign you a personal guarantee if that's what you want",[42] he also offered to provide security over his assets. The subsequent 19–22 June 2021 email exchange shows that Mr Then provided information about his assets, and he said he was prepared to stand as guarantor for Mr Gaillard's payment obligation. Mr Then maintained that he was not the recipient of the Funds; he claimed on the 19 June 2019 call that Mr Gaillard had taken the money. In the event, Mr Then did not provide a guarantee to Mr Millsopp, only Mr Gaillard did.

42 Mr Millsopp also relies on two aspects of Mr Gaillard's explanation to the CAD (which Mr Gaillard relayed to Mr Millsopp in a 29 July 2019 message):[43]

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41 AB 131–142.

42 AB 314 (Transcript of an Audio Recording).

43 AB 324–327.

(a) "Feng asked me to generate a payment order from UBS to show about 2 Mio USD that was supposed to be sent to an account in the UK under the name of Mike."

(b) "Then I started to speak regularly with Paul, and he then informed me that Feng told Mike that I've token [*sic*] his 1.45 Mio GBP as I was needing Pounds and will offset it in USD."

43 I do not regard these statements as evidence that the Agreement was an FX Agreement:

(a) The first statement does not amount to an acknowledgment by Mr Then that the Agreement was an FX Agreement involving payment back to the UK in USD, bearing in mind that Mr Gaillard's funds were supposedly in USD.

(b) The second statement is what Mr Gaillard said Mr Atkins said Mr Then had said to Mr Millsopp – it is hearsay as to what Mr Then told Mr Millsopp, Mr Gaillard's funds were supposedly in USD, and Mr Gaillard says he did not know the Agreement was an FX Agreement until Mr Atkins told him this in May 2019.

There was no agreement on any specific GBP-USD rate

44 Mr Millsopp's pleaded position is that Mr Then represented that he "would carry out the GBP to USD exchange of the Funds in Singapore at a preferential rate (which the Plaintiff now cannot recall pending discovery and/or interrogatories in this action)."[44]

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44 SOC, para 9(a).

45 That indicated that a specific GBP-USD rate had been represented by Mr Then to Mr Millsopp in February 2019, but that by the time Mr Millsopp sued in October 2019 he could no longer recall what that rate was.

46 Mr Millsopp expanded on this in his Affidavit of Evidence-in-Chief ("AEIC") at para 15(b): "… D1 would convert the Funds to USD at a preferential FX rate and remit the same to the UK after deducting D1's commission fee of 5% of the Funds. While I cannot recall what was the exact rate told to me, I remember that it was 2-3% better than the market exchange rate." Again, what is conveyed is that *some* rate, which was 2–3% better than the market exchange rate then, had been told to Mr Millsopp.

47 In his oral testimony, however, Mr Millsopp said that Mr Then had never mentioned any specific rate;[45] instead, he claimed that Mr Then had represented that he would "beat the market rate by about 2-3%". That is not what he pleaded or said in his AEIC.

48 The contemporaneous documents contain no reference to any specific rate, nor a preferential rate of 2–3% better than the market rate, nor indeed currency conversion. All this points against the Agreement being an FX Agreement.

[45] Transcript, 17 August 2021, pp 88–90.

The payment to the UK was intended primarily for a real estate development project in the UK

49 Mr Millsopp had mentioned that the monies to be paid to the UK were intended primarily for a real estate development project in the UK.[46] That too points to the intended payment being in GBP rather than USD.

Conclusion on the evidence

50 I find the evidence about the Agreement being an FX Agreement to be unsatisfactory and unreliable – it does not rise to the level where the evidential burden would shift to Mr Then. In particular, the contemporary WhatsApp messages in February 2019 indicate that the Agreement was *not* an FX Agreement, but rather one where the payment to the UK would be in GBP.

51 I thus find that Mr Millsopp has not proved that the Agreement was an FX Agreement.

Impact on Mr Millsopp's claims

Claims other than unjust enrichment

52 All of Mr Millsopp's claims, other that his unjust enrichment claim, are admittedly based on the Agreement being an FX Agreement. As he has not proved that the Agreement was an FX Agreement, it follows that his claims for misrepresentation, breach of contract, and conversion all fail, and I dismiss them. That leaves the unjust enrichment claim.

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[46] Transcript 17 August 2021, pp 25 and 70; 18 August 2021, pp 143 and 183–184.

The unjust enrichment claim

The unjust enrichment claim – pleadings

53 Mr Millsopp relied on two unjust factors: mistake, and total failure of consideration. This was pleaded as follows in para 38 of his SOC:

> 38. The said benefits and/or enrichment received by the 1st Defendant is unjust because:-
>
> (a) The transfer of the Funds by the Plaintiff was effected under a mistake of fact, in that the Plaintiff had mistakenly believed in the truth of the 1st Defendant's Representations; and/or
>
> (b) There is a total failure of the consideration for the transfer of the Funds by the Plaintiff, because the FX Agreement is voidable and has been rescinded by the Plaintiff in consequence of the 1st Defendant'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]

54 Mr Millsopp's counsel accepted that the "mistake" aspect of the unjust enrichment claim was based on the Agreement being an FX Agreement, and rightly so, for the representations all related to foreign exchange. The first part of the "total failure of consideration" aspect was also admittedly based on the Agreement being an FX Agreement, as it was premised on the FX Agreement having been rescinded because of misrepresentation.

55 The argument thus focused on the portion of para 38(b) of the SOC underlined in the quote at [53] above. Did that, as Mr Millsopp's counsel contended, cover both:

(a) the Agreement being an FX Agreement; and

(b) the Agreement not being an FX Agreement, but instead a remittance agreement (for payment to the UK in GBP)?

56 Nowhere in his SOC did Mr Millsopp advance any alternative to the Agreement being an FX Agreement. In effect, his counsel's argument was that because there was no express reference to an FX Agreement in the phrase, "the 1st Defendant had caused the Funds to be wrongfully withdrawn and/or utilised or transferred and converted to his own use", that could also cover permutations other than the Agreement being an FX Agreement. The only permutation which was pleaded, though, was that the Agreement was an FX Agreement.

57 The commentary in *Atkin's Court Forms Singapore – Chapter X Pleadings* (LexisNexis, 2020) at para 3 states:

> If the factual case set up by the plaintiff is not supported by evidence adduced at the trial or is disbelieved by the trial judge, the general rule is that the action should be dismissed. However, in some circumstances, the plaintiff may be allowed, at the trial, to 'adopt' the defendant's version of the facts and the evidence the defendant has adduced in support thereof and to argue that his (the plaintiff's) claim should succeed (wholly or partly) even on the facts as set up in the defence and as accepted by the court. This is permissible only in exceptional cases where it can be said that 'the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleadings'.

58 Here, the alternative version of the facts put forward by Mr Millsopp's counsel in oral closing submissions was not Mr Then's version of the facts:

(a) Mr Then's version was, the Agreement was for a *loan* to *Ling Capital*, and as such, there was no restriction on the use of the Funds as received by Ling Capital – Ling Capital's obligation was to repay the balance amount (after deducting the 5% commission), but it was not constrained to make that payment out of the Funds in its GBP account;

(b) Mr Millsopp's alternative version was, the Agreement was a *remittance* agreement, for which *Mr Then* was obliged to make payment

to the UK *out of the Funds in Ling Capital's GBP account* (and not from any other source).

59 Mr Millsopp's alternative version of the Agreement being a remittance agreement is thus not found in either party's pleadings.

60 The phrase "wrongfully withdrawn and/or utilised or transferred and converted to his own use" in para 38(b) of the SOC cannot be read in isolation from the rest of the SOC. Mr Millsopp's conversion claim involved those very concepts:

(a) "[T]he 1st Defendant has committed *the tort of conversion* by *wrongfully withdrawing* the Funds in cash from the 4th Defendant's UOB Account and *applying the proceeds to his own use and/or keeping such proceeds*" [emphasis added] (para 32, SOC);

(b) "The Funds were *wrongfully withdrawn* by the 1st Defendant some time shortly after the Funds were received in the 4th Defendant's UOB Account" [emphasis added] (para 33(a), SOC); and

(c) "The 1st Defendant acted in a manner which was repugnant to the terms of the FX Agreement by causing the 3rd and 4th Defendants to *wrongfully withdraw* the Funds in cash and/or *utilise or transfer* the Funds, thereby terminating the FX Agreement ..." [emphasis added] (para 33(b), SOC).

61 Paragraph 33(b) of the SOC makes it clear that the withdrawal, utilisation, transfer, and conversion of the Funds in Ling Capital's GBP account is said to be wrongful because it was contrary to the terms of the FX Agreement.

As pleaded in para 30 of the SOC, the FX Agreement was allegedly breached because:

> (a) The 1st Defendant failed, refused and/or neglected to convert the Funds from GBP to USD after they were received in Singapore.
>
> (b) The 1st Defendant failed, refused and/or neglected to remit the Funds in USD to the UK within 48 to 72 hours after the Funds were received in Singapore.

62 In the context of the SOC as a whole, the allegation in para 38(b) that Mr Then had "wrongfully withdrawn and/or utilised or transferred and converted to his own use" the Funds in Ling Capital's GBP account is based on him not converting the Funds to USD, and not remitting the converted Funds (in USD) to the UK. That takes us full circle to the Agreement being an FX Agreement.

63 If Mr Millsopp had intended to claim on the alternative basis of the Agreement being a remittance agreement (rather than an FX Agreement), one would expect him to say so, especially after Mr Then filed his defence asserting that the Agreement was for a loan to be repaid in GBP. Instead, Mr Millsopp filed a reply that disputed Mr Then's version of the Agreement, without embracing any part of it (not even remittance in GBP) for an alternative claim. Mr Millsopp simply maintained that the Agreement was an FX Agreement.

64 Further, if Mr Millsopp had framed his unjust enrichment claim to cover two possibilities – FX Agreement, and remittance agreement – why did he not do likewise with his breach of contract and conversion claims (which are admittedly based on the Agreement being an FX Agreement)? After all, if the Agreement were a remittance agreement whereby Mr Then was to pay the balance of the Funds in Ling Capital's account to the UK:

(a) Mr Then would have breached that remittance agreement by not making that payment to the UK; and

(b) the withdrawal of the balance of the Funds (instead of their remittance to the UK) would have been conversion.

65 Mr Millsopp did not frame his breach of contract and conversion claims on the alternative basis of the Agreement being a remittance agreement, because he had not put forward that alternative basis at all – not even for his unjust enrichment claim.

66 Mr Then says he understood Mr Millsopp's claims to be premised on the Agreement being an FX Agreement; and that Mr Then's decision to submit "no case to answer", his cross-examination, and indeed his entire strategy, was based on that.

67 If I were to allow Mr Millsopp to claim on the alternative basis of the Agreement being a remittance agreement (belatedly mentioned for the first time in oral closing submissions), that would be prejudicial to Mr Then. In the circumstances, I hold Mr Millsopp to his pleaded case that the Agreement was an FX Agreement, which I have found he has failed to prove.

The unjust enrichment claim – evidence

68 If, however, Mr Millsopp were allowed to pursue his unjust enrichment claim on the alternative basis of the Agreement being a remittance agreement, was that supported by the evidence?

69 Mr Millsopp and his witnesses (in particular Mr Atkins) gave no evidence that the Agreement was a remittance agreement. Nor was this what

Mr Then had pleaded the Agreement was, such that Mr Millsopp could rely on any admissions in that regard.

70 Mr Millsopp did say that the use of the Funds in Ling Capital's GBP account was restricted, but that restriction was said to be in relation to the Funds having to be converted to USD and then remitted to the UK, *ie*, on the basis that the Agreement was an FX Agreement. Moreover, that is an unusual restriction – it would mean that Mr Then had to convert the very Funds in Ling Capital's GBP account to USD. If Mr Then had USD on hand, he could not simply remit that to Mr Millsopp – on Mr Millsopp's case, that would be a breach of the FX Agreement: Mr Then had to convert *the Funds* in Ling Capital's GBP account to USD, he could not pay Mr Millsopp the USD equivalent from another source. It is strange for a party seeking to get USD in return for his GBP, to care whether the USD he receives was converted from his GBP, or comes from another source. Mr Millsopp never explained why this should matter to him.

71 On Mr Millsopp's case, it would be a breach of the FX Agreement (or remittance agreement) if the Funds in Ling Capital's account were used for any purpose other than to perform the Agreement. Yet the contemporaneous WhatsApp messages do not show Mr Millsopp checking on whether the Funds were still in that account; he simply sought to check on the remittance to the UK.

72 Mr Millsopp acknowledged under cross-examination that it did not need to be Ling Capital making the payment to the UK – payment could come from a third party, or indeed, multiple third parties:[47]

> Mike, I just want to clarify, when you sent the sterling to Ling Capital, what was your understanding as to how the US dollars

[47] Transcript, 17 August 2021, p 119 line 2 to p 120 line 16.

> would reach your Barclays account in the UK? Were you going to receive the US dollars from Ling Capital, were you going to receive the US dollars from a third-party account, or were you going to receive the US dollars from multiple third-party accounts in the aggregate amount of the agreed US dollars?
>
> A. My understanding was it could be any of the above. We were going to determine how that was going to happen. I -- I wasn't -- I wasn't bothered how. It was – that was all to be controlled by you.
>
> Q. Got it. So you didn't -- so it was not -- it was not the case where you had -- you had sent the money to Ling Capital and you had expected Ling Capital to send the money back. You were more than happy for third-party payments from a single or multiple sources in the aggregate amount of the US dollars that were supposed to be received, correct?
>
> A. Yeah, because that was -- you were going to determine that. It didn't bother me. What -- what you did at your business end was up to you. I wasn't concerned with that.
>
> Q. Okay, that's helpful, because that -- that was my understanding, that you were not looking purely at Ling Capital to return the sterling to you. If you could just look on 1BA 107, at the bottom of the page, the text message that I sent on 13 February.
>
> A. Yeah.
>
> Q. I guess the key bit was: "Look forward to any comments before we finalise the entity to use on our side."
>
> A. Yeah.
>
> Q. So it's -- you know, there is no confusion here, right? You had agreed with me that you would be -- that you would receive -- that you would receive the US dollar -- you would receive the funds from any third party. It didn't necessarily have to be from Ling Capital?
>
> A. Correct.

73 In establishing those points in cross-examination, Mr Then had posed some questions to Mr Millsopp about payment in USD, but that was no admission by Mr Then that the Agreement was an FX Agreement. Mr Then's focus there was on Mr Millsopp being amenable to accepting payment to his

UK account from parties other than Ling Capital. Mr Then had earlier made his position plain – that the Agreement was not an FX Agreement.[48]

74 The 13 February 2019, 12:22:10 message Mr Then highlighted to Mr Ling is also significant – they were then discussing the preparation of some document by Mr Millsopp in relation to the transaction:[49]

> [13/02/2019, 12:21:21] Mr Then: This is the form of the agreement we will submit to the Bank should they query the transaction.
>
> [13/02/2019, 12:21:36] Mr Then: A separate release Letter will be executed immediately after.
>
> [13/02/2019, 12:21:56] Mr Then: Mike - could you fill in any missing details and also provide a passport copy should this be requested for?
>
> [13/02/2019, 12:22:10] Mr Then: **Look forward to any comments before we finalise the entity to use on our side. Thanks.**
>
> [13/02/2019, 12:50:02] Mr Millsopp: Thanks will sort now
>
> [emphasis added]

75 If the payment to the UK was to come from the Funds in Ling Capital's account, one would expect Mr Millsopp to have taken issue with Mr Then saying he had yet to finalise the entity to use. Mr Millsopp did not; as he said under cross-examination, he was not bothered or concerned, and what Mr Then did on his end was up to him.

76 As I noted above (at [33]), on 28 February 2019 Mr Then offered to arrange for his own funds from the US to be sent to Mr Millsopp, if the remittance supposedly from UOB to Mr Millsopp's UK account were further

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48 Transcript, 17 August 2021, p 90 line 18 to p 91 line 2.

49 AB 171–172.

delayed. Again, Mr Millsopp did not say that it would be a breach of the Agreement if the payment came from a source other than the Funds in Ling Capital's account.

77 Similarly, when Mr Gaillard entered the picture in March 2019, and both Mr Gaillard and Mr Then told Mr Millsopp that he could expect payment from Mr Gaillard, Mr Millsopp did not object to that arrangement, although on his case it would be a breach for him to be paid from a source other than the Funds in Ling Capital's account.

78 In truth, Mr Millsopp did not care about the source of the payment back to the UK. The evidence does not establish that the same Funds in Ling Capital's account had to be paid back to the UK (whether in USD or GBP).

79 There is evidence that Mr Then was involved in what became of the Funds after they were transferred to Ling Capital, but that does not advance Mr Millsopp's case unless Mr Millsopp can establish that any use of the Funds other than to perform the Agreement (on his case, an FX Agreement) would be wrongful.

80 For completeness, I briefly review the evidence on this. Mr Ling's evidence was that the whole amount was either taken by Mr Then, or paid out at his direction. It is common ground between Mr Ling and Mr Then that S$1.7m was withdrawn in cash from the Hougang MRT branch of UOB, when they were both present. Mr Ling took a photograph of Mr Then leaving with the green bag containing the cash, which Mr Ling says Mr Then handed to one Mr Daniel Ng. The evidence also includes a photograph of the cash in the bag (which Mr Ling opportunistically used to fend off his own creditors). These photographs are reproduced below:

81 Mr Gaillard gave evidence that Mr Then had told him the cash was used to pay one Mr Huang, a client of Mr Then's.[50]

82 Mr Then's position, however – as put by him in cross-examination of Mr Ling – is that Mr Ling was the one who eventually left with the cash in the bag, and that Mr Then only held the bag for a short while at Mr Ling's request.

83 It is unnecessary for me to make specific findings as to what became of the money in Ling Capital's account. That may yet be the subject of future proceedings.

84 For present purposes, what matters is that Mr Millsopp's alternative claim on the basis of the Agreement being a remittance agreement is unpleaded;

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50 Transcript 20 August 2021, p 89 line 18 to p 91 line 8.

and it is also unsupported by the evidence. Mr Then was entitled to undermine Mr Millsopp's claims by defeating the "FX Agreement" allegation; Mr Then was not obliged to anticipate and rebut an unpleaded alternative, nor to challenge the allegations as to how the Funds had been used. It would not be right for the court to regard Mr Then's "no case to answer" submission as having been made in relation to the unpleaded "remittance agreement" case. Had Mr Millsopp pleaded that alternative, Mr Then may have approached his cross-examination, indeed, his entire strategy, differently – he might even have decided not to submit "no case to answer", but instead to lead evidence to prove that the Agreement was for a loan, that Mr Millsopp agreed that he would look to Mr Gaillard for the repayment of the loan, and what became of the Funds in Ling Capital's account.

85 Mr Millsopp relies on an authority he describes as highly analogous: *Lyu Yan v Lim Tien Chiang and others* [2020] SGHC 145 (*"Lyu Yan*"), affirmed on appeal (*Ang Jian Sheng Jonathan and another v Lyu Yan* [2021] 1 SLR 1091).

86 There, the court found that there was an agreement between Ms Lyu and one Joseph whereby (among other things):

(a) Joseph would provide Ms Lyu with a quotation of the exchange rate for the day;

(b) Ms Lyu would confirm the amount of Renminbi ("RMB") she wished to remit, and Joseph would provide her with details of Chinese bank accounts to remit the funds to;

(c) the equivalent amount in USD, based on the agreed exchange rate, would be remitted from Joseph's counterparty's Hong Kong bank

account to Ms Lyu's Singapore bank account in the afternoon of the same day; and

(d) the funds in USD would be credited to Ms Lyu's Singapore bank account in two days (see [3] and [12] of the judgment).

87 *Lyu Yan* differs from the present case:

(a) the court in *Lyu Yan* found that there was an FX Agreement, based on a specific exchange rate, for funds to be deposited in RMB, and the equivalent amount to be received in USD; here, there was no specific exchange rate, and I find that Mr Millsopp has not proved that the Agreement was an FX Agreement;

(b) the agreement in *Lyu Yan* involved RMB being deposited into certain Chinese bank accounts, and the USD equivalent thereof being received from a Hong Kong bank account – there was no assertion that the RMB that was deposited had itself to be converted to USD and remitted back to Ms Lyu, whereas here Mr Millsopp alleged (and failed to prove) that the same Funds he deposited into Ling Capital's account had to be converted to USD and remitted to the UK.

88 Most pertinently, the court found that Ms Lyu had proved the terms of the agreement she relied upon (save for the alleged Escrow Agreement that Joseph was not to release her funds in RMB until after she had received the equivalent amount in USD) – see [3] and [12] of the judgment – which itself shows that Ms Lyu was not expecting the very RMB she deposited to be converted to USD and remitted to her; she was expecting the USD equivalent of her RMB from another source). Here Mr Millsopp has failed to prove the Agreement on which his claims against Mr Then are based.

89 It does not help Mr Millsopp to say that in another case, another plaintiff made similar claims which she succeeded in proving, if in this suit he has failed to do likewise.

Conclusion

90 I thus dismiss Mr Millsopp's claims against Mr Then. Mr Millsopp's case is that the Agreement was an FX Agreement. That is what Mr Then had to meet, and that is what he successfully submitted "no case to answer" to. I will hear the parties on costs.

Andre Maniam
Judicial Commissioner

Julian Tay, Anthony Wong and Linus Lin (Lee & Lee)
for the plaintiff;
Defendant in person.