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

[2024] SGHC 100

District Court Appeal No 30 of 2023

Between

Lim Chee Seng

… *Appellant*

And

Phang Yew Kiat

… *Respondent*

In the matter of District Court Suit No 479 of 2022

Between

Phang Yew Kiat

… *Plaintiff*

And

Lim Chee Seng

… *Defendant*

JUDGMENT

[Civil Procedure — Pleadings — Claim on appeal inconsistent with case below — Whether prejudice caused to other party]
[Civil Procedure — Appeals — Claim on appeal inconsistent with case below — Whether prejudice caused to other party]
[Courts and Jurisdiction — Jurisdiction — Appellate — Appropriate degree of appellate intervention]
[Restitution — Failure of consideration — Total failure of consideration — Essential bargain between contracting parties — Whether benefits conferred were essential or incidental]
[Restitution — Failure of consideration — Whether failure of consideration total or partial — Whether incidental or collateral benefits can be disregarded]

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v
Phang Yew Kiat

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Goh Yihan J
27 February, 12 March 2024

12 April 2024 Judgment reserved.

Goh Yihan J:

1 This is the appellant's appeal against part of the learned District Judge Sim Mei Ling's ("DJ") decision in DC/DC 479/2022 ("DC 479"). The learned DJ's decision is published in *Phang Yew Kiat v Lim Chee Seng* [2023] SGDC 218 (the "Judgment"). In short, the learned DJ granted judgment in favour of the respondent for the sum of $200,000, together with interest at the rate of 5.33% per annum from the date of the writ in DC 479 to the date of judgment (see Judgment at [156]–[157]).

2 After taking some time to consider the matter, I dismiss the appeal. These are the reasons for my decision.

Background facts

3 I begin with the background facts. DC 479 involved the appellant, Mr Lim Chee Seng (as the defendant below), and the respondent, Mr Phang

Yew Kiat (as the plaintiff below). The appellant was a shareholder and director of Hearti Lab Pte Ltd (the "Company"). The Company was primarily in the business of proving proprietary software to insurance companies using technologies such as artificial intelligence and blockchain (see the Judgment at [2] and [9]). As for the respondent, he was the Chief Executive Officer of a Hong Kong listed company called Chong Sing Holdings FinTech Group Limited ("Chong Sing"). The parties were introduced to each other in January 2018 (see the Judgment at [10]).

4 At their meeting in January 2018, the parties discussed the possibility of the appellant selling his shares in the Company (the "Shares") to the respondent (see Judgment at [11]). The appellant was also interested in having the respondent be involved in the Company as its advisor and investor (see the Judgment at [11]). After this meeting, the parties continued to discuss the terms of the respondent's proposed investment (see the Judgment at [12]). Subsequent to exchanging comments on a draft agreement that the appellant had sent to the respondent on 7 April 2018, the parties entered into an agreement on 18 April 2018 (the "Agreement") (see the Judgment at [13]).[1] Their dispute in DC 479 was in relation to this Agreement.

5 The relevant terms of the Agreement are as follows:[2]

…

Amount of investment:	The Buyer [*ie*, the respondent] proposes to invest Singapore Dollars $200,000 (**Investment Amount**) by way of purchase of ordinary shares in the Company

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1 Record of Appeal ("RA") at pp 561–563.

2 RA at pp 561–562.

	(**Share**) from the Seller [*ie*, the appellant].
Share Price:	The Share Price to be transacted between the Buyer and Seller is SGD6.00 per share. On or after 15 January 2019, the Share Price will be determined by a valuation of 5 times Financial Year 2018 Gross Profits of the Company.
Performance Targets:	The forecast Gross Profits of the Company is [*sic*] expected to be: 1. SGD1 million as at the end of Financial Year 2018, and 2. SGD3 million as at the end of Financial Year 2019.
Option to Exit if Performance Targets Are Not Met:	The investor has an option on 1st 2 weeks of January 2020 to exit the Company with share [*sic*] Price determined by either of the below method, whichever is higher: 1. Investment Amount plus an annualised interest rate of 12% per annum 2. the Company's share price [*sic*] at the latest fund raise valuation, [*sic*]
Information made available	The Seller agrees to make quarterly financial statements available to investor within 15 calendars [*sic*] after the close of each quarter. In the event if financial statements are not made available to investor 60 days after quarter end [*sic*], the investor has the right to exercise option to sell back the shares to seller [*sic*].
Personal Guarantee	The Seller will place a Personal Guarantee with the Investor on the total Investment

Strategic Support from Investor	1. Investor has agreed to spend ½ day every quarter on strategy discussions for business improvements or to meet with potential investors. 2. Investor agreed for Hearti Lab Pte Ltd to publish investor details as a strategic investor in company [*sic*]. 3. Investor participation in Hearti Lab ICO plan will be separately discuss [*sic*].

…

[text in bold in original]

6 After the parties entered into the Agreement on 18 April 2018, the appellant on 19 April 2018 asked the respondent to transfer the sum of $200,000 to him (see the Judgment at [15]−[17]). The appellant also said that he "will arrange [*sic*] our corporate secretary to update [the Accounting and Corporate Regulatory Authority ("ACRA")] once proof of funds is sent to them" (see the Judgment at [15]). On 20 April 2018, the appellant again asked the respondent if he was "able to instruct a bank transfer today" (see the Judgment at [16]).

7 On 23 April 2018, the respondent transferred $200,000 to the appellant (see the Judgment at [17]). After the appellant acknowledged receipt of the funds on 24 April 2018, he indicated that he "will update [ACRA]" (see the Judgment at [18]). To do so, the appellant on 10 May 2018 asked the respondent for "a copy of [his] ID for [ACRA] updates". The respondent sent a copy of his identification document to the appellant on the same day (see the Judgment at [19]). However, it is not disputed that the Shares were never transferred to the respondent (see the Judgment at [20]). In this regard, the appellant claimed that the parties orally agreed on or around 10 May 2018 that he would hold the

respondent's shares on trust for him (the "Oral Trust Agreement") (see the Judgment at [20]).

8 While the respondent never received the Shares, the appellant claimed that he had various communications with the respondent in 2018 and 2019, including numerous phone conversations. According to him, the purpose of these communications was for the appellant to update the respondent on the Company, as well as to present the respondent with the Company's quarterly financial statements (see the Judgment at [21]). In particular, the appellant said that he had informed the respondent on 18 April 2019 that the Company had not met performance targets for 2018, and that he also informed the respondent in December 2019 that the Company would not be meeting the performance targets for 2019 (see the Judgment at [21]). However, the respondent denied that he was provided with any quarterly financial statements, even as he accepted that the appellant had informed him on 18 April 2019 that the Company could not meet the performance targets for 2018 (see the Judgment at [22]).[3]

9 The parties continued to correspond with each other from August 2020 to October 2021 (see the Judgment at [23]). During a call on 25 August 2020, the respondent allegedly requested to sell the Shares in the Company (see the Judgment at [21]). After this call, the respondent said that the appellant was trying to raise funds to repay him. However, the appellant asserted that he was only helping the respondent find ways to sell the Shares in the Company out of good will (see the Judgment at [23]). When these efforts did not come to fruition, the respondent's solicitors issued the appellant a letter of demand on 15 February 2022 for the sum of $200,000 plus contractual interest of 12% per

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[3] Certified Transcript dated 10 May 2023, p 85 line 23 to p 86 line 23.

annum (see the Judgment at [23]–[24]). The appellant's solicitors responded on 21 February 2022 to deny that the appellant owed any money to the respondent (see the Judgment at [24]).

10 In the end, the Company commenced voluntary winding up proceedings on 14 January 2022. According to the appellant, the Company has since been wound up as of 5 July 2023.[4] Unable to resolve their dispute amicably, the respondent commenced DC 479 on 3 March 2022.

The learned DJ's decision

The parties' cases before the learned DJ

11 Before the learned DJ, the respondent's case for the sum of $200,000 plus interest from the appellant was premised on two grounds. First, the Agreement was a convertible loan of $200,000, which could be converted into shares in the Company in the event that the Company met certain performance targets set out in the Agreement (the "Performance Targets").[5] Since the Company did not meet the Performance Targets, the respondent claimed to be entitled to be repaid $200,000 plus contractual interest of 12% per annum. Second, there was total failure of consideration since the appellant never transferred the Shares to the respondent.[6] On that basis, the respondent claimed to be entitled to the restitution of the sum of $200,000 on the grounds of unjust enrichment based on a total failure of consideration.

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4 Certified Transcript dated 5 July 2023, p 145 lines 19–25 (RA at p 385).

5 Plaintiff's Closing Submissions in DC/DC 479/2022 dated 8 August 2023 ("PCS DC 479") at paras 14−18 (RA at pp 1047–1050).

6 PCS DC 479 at para 49 (RA at pp 1078–1079).

12 The appellant answered the respondent's claim on the following grounds. First, the Agreement was not for a convertible loan, but for the respondent's purchase of the Shares in the Company, with the option to sell those shares back to the appellant in the event that the Company did not meet the Performance Targets.[7] While the Company eventually did not meet those Performance Targets, the respondent failed to exercise his option to exit the Company within the contractually stipulated timeline.[8] Second, there was no total failure of consideration. The appellant did not transfer the Shares to the respondent because of the Oral Trust Agreement.[9] In any event, there was no total failure of consideration because, among other things, the appellant had provided the respondent with quarterly financial statements in the form of their periodic conversations about the Company, in fulfilment of that obligation under the terms of their Agreement.[10] As such, the appellant claimed that the respondent was not entitled to the sum of $200,000.

The learned DJ found that the Agreement was for the sale and purchase of the Shares

13 The learned DJ found for the respondent but only on the second ground that there was a total failure of consideration. To begin with, she disagreed with the respondent that the Agreement was a convertible loan agreement. Instead, after a careful evaluation of the evidence, the learned DJ concluded that the Agreement was as the appellant had characterised – that is, an agreement for the respondent to purchase shares in the Company, with the option to sell those

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7 Defendant's Closing Submissions in DC/DC 479/2022 dated 7 August 2023 ("DCS DC 479") at paras 26−44 (RA at pp 1098–1106).

8 DCS DC 479 at paras 94−97 (RA at pp 1125–1126).

9 DCS DC 479 at para 77 (RA at pp 1118–1119).

10 DCS DC 479 at paras 83−93 (RA at pp 1122–1125).

shares back to the appellant in the event that the Company did not meet the Performance Targets (see the Judgment at [31]−[62]). The learned DJ found that since the respondent had failed to exercise the option to sell the Shares in the first two weeks of January 2020, he was not entitled to a return of $200,000 plus contractual interest of 12% on that basis (see the Judgment at [89]−[101]). The respondent has not cross-appealed this finding of the learned DJ. As such, I will adopt the learned DJ's finding on this point, specifically that there was a valid contract for the sale and purchase of the Shares contracted between the parties in the form of the Agreement.

The learned DJ found that there had been a total failure of consideration

14 The learned DJ, however, agreed with the respondent that there had been a total failure of consideration. First, after a careful assessment of the evidence, she concluded that the parties had not orally agreed for the appellant to hold the Shares on trust for the respondent. In coming to this conclusion, the learned DJ found that the evidence did not support the appellant's claim that the Oral Trust Agreement existed for the following reasons:

(a) One, while the appellant claimed that the parties had orally agreed to the Oral Trust Agreement over an IDD call, there was no record of such a call on or around 10 May 2018 (see the Judgment at [115]).

(b) Two, while the appellant claimed that the parties entered into the Oral Trust Agreement so as to shield the Company from the bad press surrounding the respondent's company, Chong Sing, there were no messages between the parties where they discussed such a concern (see the Judgment at [116]). There was, in any case, no evidence about the alleged news articles and rumours about Chong Sing's fraudulent

practices around 10 May 2018, which had supposedly led to the concern for the potential bad press should the Shares be registered in the respondent's name (see the Judgment at [118]). There were also no messages between the parties where they had discussed the issue of a trust or the need to leave the respondent out as a registered shareholder of the Company to avoid any conflict of interest and regulatory reporting issues (see the Judgment at [116]–[117]).

(c) Three, the parties' conduct was inconsistent with the appellant holding the Shares on trust for the respondent. For example, the appellant never provided the respondent with the 2018 or 2019 audited financial statements. Yet, if the appellant was holding the Shares for the respondent, he ought to have done so (see the Judgment at [124(a)]). Also, there was no reason for the appellant to continue holding the Shares on trust for the respondent from August 2020, which was when the respondent started to ask for his money back. Also, as the respondent was no longer entitled to sell the Shares back to the appellant once the option to exit had expired, that could not afford a reason for the appellant to have held onto the Shares after that point in time either (see the Judgment at [124(c)]). Finally, even when the respondent's solicitors had sent a letter of demand to the appellant, the appellant never said that he was holding the Shares on trust for the respondent in his response (see the Judgment at [124(d)]).

15 Second, the learned DJ found that the appellant, contrary to the requirements in the Agreement, failed to provide quarterly financial statements in the form of actual documents to the respondent (see the Judgment at [131]). She held that, for the financial year 2018, the appellant only informed the respondent broadly of the Company's financial picture, which did not suffice

for the purposes of the Agreement, which required the provision of the actual financial statements themselves. As for the financial year 2019, she held that the respondent had provided no update on the Company's financial performance, whether in the form of written documents or otherwise (see the Judgment at [132]). In sum, the respondent did not enjoy any rights as a shareholder beyond having received some broad information on the Company's performance for the financial year 2018 (see the Judgment at [147]). As such, there was no consideration moving from the appellant to the respondent in the form of the former's fulfilment of his obligations under the Agreement to make such financial statements available to the latter.

16 In any event, the learned DJ concluded that, since the object of the Agreement was for the respondent to invest in the Company by way of the purchase of the Shares, the respondent never enjoyed the benefit of the Agreement that he had bargained for. There had therefore been a total failure of consideration and the respondent was entitled to a return of the sum of $200,000 (see the Judgment at [148]–[150]). However, since the basis of this return was the restitution of the $200,000 paid, the respondent was not entitled to the contractual interest of 12% per annum, which would only have been enforceable if the respondent had validly exercised his contractual right to exit the Company within the prescribed timeline (see the Judgment at [151]–[152]).

The parties' general cases on appeal

17 I come now to the parties' general cases on appeal.

The appellant's case

18 The appellant appeals only against the following aspects of the learned DJ's decision:

(a) that there was no Oral Trust Agreement for the appellant to hold the shares on trust for the respondent;

(b) that the appellant did not provide the respondent with the quarterly financial statements pursuant to the Agreement;

(c) that there had been total failure of consideration on the appellant's part under the Agreement; and

(d) that the appellant should return the respondent the consideration that was paid for the Shares, that is, the sum of $200,000 and interest of 5.33% from the date of the writ to the date of the Judgment.

19 The appellant first argues that he was indeed holding the Shares on trust for the respondent for the following reasons. One, the respondent's sole argument against the existence of the Oral Trust Agreement is a bare denial and that the Agreement was a convertible loan. Since the learned DJ found against the respondent on the latter point, the respondent has no positive defence against the appellant's assertion as to the existence of the Oral Trust Agreement.[11] Two, the respondent never enquired as to why the Shares were not transferred to him, nor did he ever ask for the Shares. The reason why the respondent never so enquired is because there was the Oral Trust Agreement between the parties.[12] Three, the learned DJ should not have considered the matters set out at [124] of the Judgment (which I have referred to at [14(c)] above). The parties did not deal with these matters at the trial and the appellant therefore never had the opportunity to respond to them. In any case, the appellant can explain

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[11] Appellant's Case dated 17 November 2023 ("AC") at para 12.

[12] AC at para 13.

the learned DJ's concerns on these matters away.[13] Four, the respondent did not raise any questions when the appellant informed the respondent on 23 October 2020 that he (the appellant) was arranging for "share buybacks". Since this implied that the Shares would be sold to a third party, the respondent should have raised the fact that he did not hold the Shares in the Company, if this were true at the time.[14]

20 As for the learned DJ's finding that there was total failure of consideration, the appellant argues that she erred because the appellant had provided various benefits under the Agreement to the respondent. These benefits are, broadly: (a) the opportunity to engage in strategy discussions on the Company's business; (b) quarterly financial statements of the Company (whether conveyed in written or oral form),[15] or at least some access to information about the Company's financial performance;[16] and (c) beneficial ownership of the Shares[17] (if the appellant succeeds in his appeal on the existence of the Oral Trust Agreement). In this regard, the appellant argues that the respondent's receipt of "any benefit under the Agreement" would preclude a finding of a total failure of consideration.[18] More specifically, the appellant makes the following arguments regarding the benefits allegedly conferred under the Agreement.

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13 AC at para 17.

14 AC at para 18.

15 AC at para 28; Appellant's Skeletal Arguments dated 20 February 2024 ("ASA") at paras 6(a) and 6(c).

16 AC at paras 31 and 38.

17 ASA at para 6(b).

18 ASA at paras 7 and 11−15; Minute Sheet dated 27 February 2024 ("MS") at pp 1−2.

21 One, even taking the respondent's case at its highest, which is (as the learned DJ found) that the appellant only informed the respondent broadly of the Company's financial performance, this would still constitute part performance of the Agreement. This is so since it is a term of the Agreement that the parties were to have quarterly strategy discussions on the Company's business.[19] There is thus no total failure of consideration.

22 Two, and in any case, the appellant argues that the learned DJ was wrong to find that he had not provided the respondent with the quarterly financial statements pursuant to the Agreement. In this regard, the appellant points out that the respondent is an experienced investor who had bargained for the provision of the financial statements. Thus, the respondent would not have let the appellant get away easily if the latter had not provided him with those statements in written form.[20] Rather, the respondent had accepted the appellant's provision of those statements in oral form through the meetings or calls that the parties had. Indeed, what matters is that the appellant provided the quarterly financial statements to the respondent in some form and at some time, and also held discussions about the Company's business, such that the respondent did receive some benefit from the Agreement.[21] In this regard, the learned DJ was wrong to hold that the respondent derived no benefit from these information or discussions because he was not a shareholder. This is because "the adequacy of the consideration or benefit received is irrelevant".[22] Accordingly, the respondent received at least some of the benefits contemplated under the

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19 AC at paras 23–24, 28 and 33.

20 AC at para 26.

21 AC at para 28.

22 AC at para 33.

Agreement and there was no total failure of consideration. The respondent is thus not entitled to a restitution of the $200,000 transferred based on there being a failure of consideration.

The respondent's case

23 The respondent has not cross-appealed against the learned DJ's finding that the Agreement was not a convertible loan agreement. He was content to abide by the learned DJ's other findings that ultimately led to the restitution of $200,000 to him. In urging me to dismiss the appeal, the respondent makes the following points.

24 First, on the alleged Oral Trust Agreement, the respondent submits that the learned DJ had carefully scrutinised the evidence and made several findings of fact. Therefore, this court, sitting on appeal, should not overturn these findings of fact too readily.[23] This is especially so since there is no documentary evidence of the alleged Oral Trust Agreement.[24] In any event, the alleged Oral Trust Agreement is clearly an afterthought on the part of the appellant since the very first mention of this account was in his Defence in DC 479, filed on 14 April 2022.[25] The appellant never brought up the existence of a trust in prior correspondence between the parties dating back to 2018.

25 Second, as for the provision of the quarterly financial statements, the respondent similarly submits that the learned DJ had made a finding of fact that the appellant had not provided these statements to the respondent. Thus, with

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23 Respondent's Case dated 18 December 2023 ("RC") at paras 16−18.

24 RC at para 19.

25 RC at para 23.

the lack of any documentary evidence or other evidence to the contrary, the respondent argues that this court should be slow to overturn the learned DJ's finding of fact in this regard.[26]

26 Third, as for the total failure of consideration point, the appellant never pleaded that there had been part performance of the Agreement.[27] In any event, the appellant is wrong that the periodic meetings between the parties constituted part performance of the Agreement. This is because to constitute part performance, there must be some benefit as part of the bargain to the party claiming total failure of consideration.[28] In the present case, the update meetings or strategic discussions for business improvements, or the meetings with potential investors, were the *respondent's obligations* under the Agreement (being stated as "Strategic Support from Investor") and cannot be construed as benefits to the respondent as part of the parties' bargain.[29] Ultimately, the consideration moving from the appellant to the respondent as contemplated in the Agreement was to be the Shares and the provision of the quarterly financial statements.[30] However, the appellant failed to provide either of these to the respondent. Hence, the appellant's appeal must be dismissed. But should this court find that there was no total failure of consideration, the respondent seeks damages to be assessed for the appellant's breach of the Agreement.

27 For completeness, the respondent mentioned that six suits were filed against the appellant during the period of September 2020 to November 2021,

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26 RC at para 30.

27 RC at para 31.

28 RC at paras 37–38.

29 RC at para 39.

30 RC at para 45.

four of which involved the Company. The respondent refers to these suits to show that the appellant has a propensity to renege on his promises and commitments. As I said to Mr Allister Lim, counsel for the respondent, it is not proper for the respondent to raise these points.[31] One, as a matter of law, these amount to similar fact evidence that must be admitted with proper justification, which is absent in the present case. Two, and generally speaking, cases are to be decided on their own terms and merits; it is not relevant that parties may be involved in other cases elsewhere.

The relevant issues

28 Ahead of the hearing with the parties, I asked the parties to address me on two preliminary issues that had not been canvassed below.

(a) First, is the respondent's primary case below, premised on the Agreement being a convertible loan agreement in which the Shares were not transferred because the Company did not meet the Performance Targets,[32] consistent with his "further" (and not stated to be alternative[33]) case that there was a total failure of consideration because the appellant "had neither repaid the … sum of $200,000.00 and interest accrued thereon at the rate of twelve percent (12%) per annum *nor transferred* the [S]hares in the Company to the [respondent] despite having received the said sum of $200,000.00 from the [respondent] in April 2018"

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31 MS at p 5.

32 Statement of Claim dated 3 March 2022 ("SOC") at paras 1 and 4 (RA at p 721).

33 SOC at para 8 (RA at p 721).

[emphasis added]?[34] If the respondent's primary case was inconsistent with his further case below, should the respondent be allowed to rely on the learned DJ's finding that the Agreement was, among other things, for the respondent to purchase the Shares from the appellant for the sum of $200,000, so as to advance his further case premised on a total failure of consideration arising from the *non-transfer* of the Shares? In this regard, I referred the parties to the Court of Appeal decision of *Huang Han Chao v Leong Fook Meng and another* [1991] 2 SLR(R) 471 ("*Huang Han Chao*"), as well as the English High Court decision of *Rotam Agrochemical Co Ltd and another company v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm).

(b) Second, assuming that the respondent can rely on the learned DJ's finding (and which neither party challenged on appeal) that there was a valid contract (in the form of the Agreement) between the parties, which specifically provided for when the respondent may resell the Shares in the Company, would it circumvent the parties' allocation of risk in that Agreement if this court were to uphold the learned DJ's decision that the respondent was entitled to restitution of the $200,000 based on a total failure of consideration? In this regard, I referred the parties to the Court of Appeal decision of *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*"), the Appellate Division of the High Court decision

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[34] SOC at para 8 (RA at p 721).

of *Carlsberg South Asia Pte Ltd v Pawan Kumar Jagetia* [2023] SGHC(A) 29 ("*Carlsberg*"), the High Court decision of *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 ("*Max Media*"), as well as Tang Hang Wu, "Unjust Enrichment Within a Valid Contract: A Close Look at *Roxborough v Rothmans of Pall Mall Australia Ltd*" (2007) 23(3) JCL 201 ("Unjust Enrichment Within a Valid Contract").

29 I had asked the parties to address me on these two preliminary issues because I was concerned that the respondent had advanced two inconsistent claims below, and that the appellant may not have been given the opportunity to properly respond to them. I also allowed the parties to file further written submissions on these two issues after the oral hearing before me. Depending on my decision on these two issues, the remaining issue that I will deal with is whether the learned DJ was correct to find that there was a total failure of consideration in the Agreement such that the respondent is entitled to restitution of the sum of $200,000. This, as I will explain, turns primarily on the learned DJ's findings of fact, as opposed to any question of law.

Whether the respondent is entitled to rely on the learned DJ's finding that the Agreement provided for the sale of the Shares to him to advance his case on appeal premised on a total failure of consideration

The parties' arguments

30 In his further written submissions, the appellant argues that the respondent is not entitled to rely on the learned DJ's finding[35] that the Agreement was an agreement for the respondent to purchase the Shares from

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[35] Appellant's Further Submissions dated 12 March 2024 ("AFS") at para 7.

the appellant, with an option to sell back the Shares if the Performance Targets were not met (see the Judgment at [87]), to advance his case on appeal. This is because the respondent mounted his entire case below – including his arguments as to a failure of consideration – on the basis that the Agreement was a convertible loan agreement.[36] Therefore, on the respondent's pleaded case, he would *not* have been entitled to have the Shares transferred to him,[37] and the parties would not have expected the Shares to be transferred.[38] In contrast, the respondent's case on appeal is now that, because the Agreement was a share purchase agreement (as the DJ found), the respondent *was entitled* to the transfer of shares upon payment of the $200,000 to the appellant. The appellant submits that the respondent should not be allowed to run his case in such an inconsistent manner.[39] As for the cases that I referred the parties to, the appellant submits that the situation here "is even more egregious than *Huang Hao Chao* [*sic*]", because unlike in *Huang Han Chao*, the respondent's pleaded case here had failed.[40]

31 The respondent, for his part, argues that he is entitled to rely on the learned DJ's finding that the Agreement was for the sale of the Shares to him, to advance his case on appeal. The respondent acknowledges that it is true that a plaintiff cannot ask for "a claim [on appeal] that is inconsistent with the specific relief he has sought in his pleading[s]".[41] However, there is a distinction

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36 AFS at para 4.

37 AFS at para 7.

38 MS at p 2.

39 AFS at para 7.

40 AFS at para 10.

41 Respondent's Supplemental Skeletal Submissions dated 12 March 2024 ("RFS") at para 2.

between the "relief" he seeks and the "*premise* on which the relief is sought" [emphasis added].[42] In this vein, the respondent argues that, as long as the relief sought by the plaintiff in the appellate court is the same as the relief sought in the plaintiff's pleadings, it is permissible for the premise on which that same relief is sought to differ.[43] This is because the standard prayer for "further and other relief" is broad enough to encompass a different premise for the relief sought.[44] Alternatively, even if the court rejects the foregoing argument, it should still allow the respondent to advance his claim for total failure of consideration based on the learned DJ's findings because this would not cause any injustice or irreparable prejudice to the appellant.[45] This is especially so in light of the concession by the appellant's counsel at the hearing before me on 27 February 2024, *viz*, that the appellant would not suffer any prejudice that could not be compensated by costs.[46]

My decision: the respondent is entitled to rely on the learned DJ's finding that the Agreement provided for the sale of the Shares to him to advance his case on appeal premised on a total failure of consideration

The applicable law

32 For the reasons that I will explain, I conclude that the respondent can rely on the learned DJ's finding on the Agreement to advance his case premised on a total failure of consideration. To begin with, it is clear that inconsistent pleadings give rise to a range of difficulties at trial and are thus generally looked

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42 RFS at paras 6−8.

43 RFS at paras 6−8.

44 RFS at para 8.

45 RFS at para 10.

46 RFS at para 11; MS at p 3.

upon unfavourably. The first problem posed by inconsistent pleadings (whether on appeal or otherwise) is the potential for injustice to the opposing party. This stems from the objective of pleadings, which is to set the boundaries of the parties' dispute and inform each party of the case they have to meet (see the Court of Appeal decision of *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*Nithia*") (at [34]−[36])), so as to "prevent surprises arising at trial" (see the Court of Appeal decision of *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [46]). The underlying objective of this rule is to promote procedural justice between the parties. Balanced against this, however, is the competing consideration that a court must eschew an "overly formalistic and inflexibly rule-bound approach" to pleadings which may result in injustice (see *SIC College* (at [46]), citing *Nithia* (at [39])). With this guidance in mind, I reject the respondent's suggestion that an inconsistency regarding the "premise" on which relief is sought is permissible. A shifting "premise" for relief sought on appeal could deprive the other party of the benefit of knowing in advance the case against him which he must answer, possibly resulting in procedural injustice.

33 Separately from the question of procedural fairness, however, inconsistent pleadings may also give rise to the problem of incoherence in a party's case in an appeal. For instance, the Court of Appeal held in *Huang Han Chao* that a plaintiff cannot pursue a claim which is inconsistent with the specific relief that he seeks in his pleadings (see *Huang Han Chao* at [10]; see also Jeffrey Pinsler, *Singapore Court Practice 2014* (LexisNexis, 2023) ("*Pinsler 2014*") at para 18/15/1). In that case, the plaintiff's statement of claim prayed for a declaration that the property in question was held on trust for him.

However, his only ground of appeal was that the property belonged to a partnership, of which he was a member (see *Huang Han Chao* at [5] and [9]−[10]). In such a situation, the plaintiff's case arguably becomes incoherent in the sense that he is appealing the trial judge's decision on grounds that were not even before the trial judge. To be fair, taking a step back, this problem of incoherence in a party's case is ultimately still related to the question of injustice to the opposing party. This is because, in such a case, a party may be allowed to amend his pleadings provided that injustice is not caused to the opposing party (see *Pinsler 2014* at para 18/0/1(d)). This could address the problem of incoherence in the party's case.

34 Finally, inconsistent pleadings might also attract the doctrine of approbation and reprobation. That doctrine "bars a person, having a choice between two inconsistent courses of conduct and having chosen one, from resiling from that position having taken some benefit from that chosen course" (see the Court of Appeal decision of *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2021] 1 SLR 342 ("*Recovery Vehicle 1*") at [100], citing the Court of Appeal decision of *BWG v BWF* [2020] 1 SLR 1296 at [102]). Indeed, even if the party did not benefit from its earlier position, such that the doctrine of approbation and reprobation does not strictly apply, its change of position could still "attract the circumspection and scepticism of the court" (see *Recovery Vehicle 1* at [102], citing the High Court decision of *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 at [61]). In the present case, since the respondent did not benefit from his position below that the Agreement was a convertible loan, the doctrine of approbation and reprobation is not engaged.

The appellant is ultimately not prejudiced even if the respondent's pleadings were inconsistent

35 With these principles in mind, I was concerned as to whether the appellant was prejudiced by how the respondent had pleaded his claim. Indeed, the appellant's pleaded defence, in response to the respondent's further case on total failure of consideration, was that the parties had entered into the Oral Trust Agreement.[47] This is consistent with the appellant's position that the Agreement was actually for the respondent to purchase the Shares from the appellant. Crucially, the respondent's reply to this defence was to deny the existence of the Oral Trust Agreement, and to repeat that the Agreement was a convertible loan agreement.[48] Taken together, the respondent's primary case appeared to have been that the appellant should return the sum of $200,000 because that sum was a loan amount that was *not* converted into Shares as the Company had not met the Performance Targets.

36 In other words, the respondent's consistently pleaded position below was that the parties *expected* that the Shares would *not* be transferred because the Company did not meet the Performance Targets. This explains why, as the respondent complains in his closing submissions for this appeal, the appellant "had not pleaded to the [r]espondent's claim under total failure of consideration that there had been part performance by the [a]ppellant of the Agreement".[49] It appears to me that the appellant never so pleaded because the respondent's consistently pleaded position below, even on his further case that there was total

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47 Defence (Amendment No 1) dated 6 July 2023 at paras 3 and 10 (RA at pp 724 and 726).

48 Reply to Defence (Amendment No 1) dated 12 July 2023 at para 12 (RA at pp 730–731).

49 RC at para 31.

failure of consideration in the Agreement, was premised on the Agreement being a convertible loan agreement. Thus, the appellant's defence rightly was to challenge this characterisation of the Agreement by pleading that it was instead a share purchase agreement, and that the Shares were held on trust for the respondent. Indeed, even in his closing submissions below, the appellant's focus was on the proper characterisation of the Agreement, and how the respondent did not exercise his option to exit the Company within the stipulated timeline. The appellant only dealt with part performance of the Agreement as an answer to the respondent's case on total failure of consideration in two short paragraphs of his closing submissions below.[50] In sum, I find that the respondent's further (and not alternative) case that there had been a total failure of consideration arising out of an omission to transfer the Shares is inconsistent with his primary case that the Agreement was a convertible loan agreement.

37 Despite my concerns above, I am satisfied that the appellant was ultimately not prejudiced by the inconsistent manner in which the respondent had pleaded his primary and further cases. This is for three reasons. First, the appellant did not rely on any inadequacy in the respondent's pleading as a ground of appeal before me. While an appellate court can exceptionally, of its own motion, raise issues not canvassed by the parties to ensure the fair resolution of an appeal (see *Nithia* at [38]−[40] and [60]–[61], as well as the Court of Appeal decision of *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [22]–[28] as an example), the fact that the appellant did not rely on any inadequacy in the respondent's pleading to ground his appeal suggests that he did not see it as significant to his case, or giving rise to any material prejudice to him. In the present case, it is

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[50] DCS DC 479 at paras 92 and 114 (RA at pp 1125 and 1132).

noteworthy that the appellant not only did not raise this (potential) procedural irregularity as a ground of his appeal, he also fully engaged with the arguments on total failure of consideration on their merits in his written submissions before me.

38 Second and relatedly, the appellant responded substantively to the respondent's case on total failure of consideration, which is premised on the Agreement not being a convertible loan agreement. In fact, the appellant devoted about half of his written submissions to the issue. This shows that the appellant had ample opportunity to respond on appeal to the respondent's case on total failure of consideration (on the basis of a failure to transfer the Shares). The appellant thus was not prejudiced by any confusion or surprise caused by the manner in which the respondent had pleaded his further case on a total failure of consideration. In this regard, I take guidance from the Court of Appeal decision of *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 ("*Liberty Sky*"). *Pinsler 2014* observes (at para 18/0/1(b)) that, in *Liberty Sky*, the plaintiff claimed rescission for misrepresentation, but the defendant did not plead the impossibility of rescission in his defence. However, in the circumstances of the case, the plaintiff was fully aware of the defence and in fact addressed it. Therefore, the omission by the defendant to plead the defence did not take the plaintiff by surprise. As a result, the Court of Appeal affirmed the High Court's decision to consider the defence (see *Liberty Sky* at [14]–[17]). In comparison, the appellant in the present case was even less surprised on appeal because the respondent's case before me largely followed the learned DJ's reasoning in her Judgment, of which the appellant had advance notice and, in consequence, he had a fair opportunity to respond thereto.

39 Third, the appellant managed to elicit the relevant evidence that goes towards substantiating his case that the Agreement was partly performed. Once again, the appellant has not complained that he was unable to elicit the relevant evidence because of the manner in which the respondent had pleaded his case. Indeed, from the appellant's written submissions, it appears that he has based his arguments on ample evidence drawn from the trial. Further, the appellant has not complained that he would have run his defence in a different way and hence elicited evidence differently had the respondent pleaded in the alternative that the Agreement was for the sale and purchase of the Shares instead.

40 Accordingly, for all these reasons, I find that the appellant is ultimately not prejudiced by the manner in which the respondent had pleaded his case on a total failure of consideration. The respondent is therefore entitled to rely on the learned DJ's finding, that the Agreement was for a sale of the Shares, to advance his case on appeal premised on a total failure of consideration.

Whether the existence of a valid contract between parties precludes the operation of restitutionary principles in the present case

The parties' arguments

41 The appellant argues that there is no room for restitutionary principles to apply in the present case because restitutionary remedies should only operate in the absence of a valid and subsisting contract.[51] The appellant observes that there was a contractual allocation of risk in the Agreement, in that the parties agreed that the respondent was only entitled to sell the Shares back to the appellant under certain circumstances, pursuant to the "option to exit" clause.[52]

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51 AFS at para 14.

52 AFS at paras 18−19.

Pursuant to that clause, the respondent was entitled to sell the Shares back only if: (a) the Performance Targets were not met,[53] *and* (b) the respondent exercised his option to exit within the first two weeks of January 2020.[54]

42 The respondent argues that restitutionary principles can apply in the present case. The starting point is that where money has been paid out under a contract that is, or has been rendered, ineffective, the payor may recover the money if the consideration for the payment has totally failed, provided that the payment has not been contractually stipulated to be irrecoverable.[55] In the present case, there was no express or implied term providing for the payment to be irrecoverable.[56] While there was the option for the respondent to exit the Company, the right or ability to exercise this option presupposes that the Shares were transferred to the respondent in the first place, so that it would even be possible for him to sell the shares (back).[57] As the Shares were never transferred to the respondent, this option was illusory or non-existent.[58] Therefore, to allow restitution in the present case would not upset the allocation of contractual risks between the parties.[59]

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53 AFS at para 21.

54 AFS at para 20.

55 RFS at para 14.

56 RFS at paras 15−16.

57 RFS at para 18.

58 RFS at para 19.

59 RFS at para 21.

My decision: the existence of a valid contract between the parties does not preclude the operation of restitutionary principles in this case

The applicable law

43 At the outset, although the law of unjust enrichment ranks next to contract and tort as a distinct part of the law of obligations (see the Court of Appeal decision of *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [181]), a claim in unjust enrichment can operate only if there is no valid contract between the parties, save in exceptional cases (see the Court of Appeal decision of *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 ("*Esben Finance*") at [249]–[250]). The rationale for this is that "the law of restitution should not redistribute the risks which the parties have, by contract, already allocated" (see *Max Media* at [24]; see also the decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [104] and [109]).

44 The recognised exception to this general position is where there has been a total failure of consideration (see the Appellate Division of the High Court decision of *Carlsberg* at [83], citing *Benzline* at [53]–[54]). As the Court of Appeal explained in *Benzline* (at [46]), citing Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at para 12–01, the core idea underlying the recognition of failure of consideration as an unjust factor in the law of unjust enrichment is that:

> … a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. …

Or, as Prof Andrew Burrows (as Lord Burrows then was) put it in *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*") (at p 319):

> … there has been a failure of what the claimant was promised (which can be taken to include what the claimant was reasonably led to expect) in return for rendering the benefit to the defendant … this constitutes an unjust factor precisely because the *basis* for the claimant's conferral of the benefit has been undermined or, put another way, the *condition* upon which the benefit was conferred has not been satisfied …
>
> [emphasis in original]

45 As can be seen from these passages, the notion of a total failure of consideration may *not* actually be an exception to the parties' contractual arrangement. After all, a total failure of consideration can only be found if the very basis or essence of the parties' agreement has failed or disappeared. And had the parties known that the consideration or basis would fail, the contractual obligation to render the benefit would not have arisen (see *Burrows* at p 329). Therefore, strictly speaking, total failure of consideration as a ground for restitution could arguably be entirely consistent with, and thus not an "exception" to, the general subordination of restitutionary claims to contract.

46 More broadly, one outstanding question is whether the existence of a valid and subsisting contract between the parties acts as a bar to a claim in unjust enrichment for failure of consideration. Prof Tang Hang Wu in his learned treatise, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) ("*Tang*"), suggests (at paras 06.021−06.022) that there is such a bar. The Court of Appeal in *Esben Finance* also seemed to endorse such a bar, while at the same time acknowledging the possibility of "exceptional cases" where the unjust enrichment principle may still apply notwithstanding the existence of a valid contract (see *Esben Finance* at [250]). Put another way, any subsisting contract must be invalid for a court to find a total failure of consideration. On

the other hand, Prof Burrows takes the view that contractual invalidity is *not* a necessary prerequisite for finding a total failure of consideration, for two alternative reasons. The first is that (see *Burrows* at pp 328−329):

> … while contractual invalidity is a general requirement, it is not a necessary requirement because, on particular facts, there may be no undermining of the risks undertaken by the parties – and at root no inconsistency between contract and unjust enrichment – if one were to allow restitution for failure of consideration. This explanation treats the problem of inconsistency as real but argues that the law can and should respond to the problem without resort to a blunt absolute rule. Exceptions to the general rule should be permitted.

The second reason is that (see *Burrows* at p 329):

> … the very need to establish a failure of consideration – that the condition for the benefit has failed – is sufficient to prevent unwarranted subversion of contract by unjust enrichment. Restitution for failure of consideration does not contradict the contract (and hence the parties' risk allocation) because, had it been known that the consideration would fail, the contractual obligation to render the benefit would not have arisen. The failure of consideration means that there is no contractual obligation to render the benefit as well as meaning that there can be restitution in respect of the benefits rendered. Consistency between contract and unjust enrichment is therefore ensured by the very notion of failure of consideration.

47 In my respectful view, any difference between Prof Burrows's views above and the Court of Appeal's observations in *Esben Finance* may be more apparent than real. After all, on both the logic of *Esben Finance* and Prof Burrows's treatise, the existence of a valid contract does not create an *absolute* bar to a finding of total failure of consideration. Rather, it seems to me that the correct approach is not to focus on the existence of a valid contract *per se*, but to consider whether (and how) the parties have allocated their risks in their contract so as to preclude restitutionary relief. Rather than simply asking whether a valid contract exists *at all*, the more salient question is what the intended *effect* of that contract was, and whether the intended allocation of

contractual risks would be supplanted if restitution were permitted on the facts of a particular case. If the latter question is answered in the affirmative, the principles of unjust enrichment cannot prevail over the intended effect of that contract. In any event, even if a valid contract operates as a bar against restitutionary relief, the Court of Appeal has held in *Esben Finance* that exceptions thereto may be permissible (see *Esben Finance* at [250]). In this regard, I note that the view of the majority of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68 ("*Roxborough*") might represent one such exception (see *Burrows* at pp 329−330) – *ie*, where payments are made under a subsisting contract but there has been a failure of a distinct and severable part of the consideration for those payments (see, *eg*, *Roxborough* at [14]–[27]) – although I also acknowledge that this view is not without controversy (see generally, Unjust Enrichment Within a Valid Contract; see also the dissenting opinion of Kirby J in *Roxborough* at [165]–[173]).

The respondent's claim for restitution is not inconsistent with the Agreement

48 Turning to the facts, I am satisfied that the respondent is entitled in principle to restitution for a total failure of consideration despite the learned DJ's finding that there was a valid contract in the form of the Agreement between the parties. To begin with, as I have just explained, I do not regard the existence of a valid contract to be an absolute bar to finding a total failure of consideration. Even if there is such a bar, that bar is clearly not absolute, and I find that the present case is an "exceptional case" within the meaning of *Esben Finance* (at [250]) for the reasons which I will now explain.

49 Indeed, on the present facts, there is no inconsistency between the respondent's claim for restitution and the parties' allocation of risk in the

Agreement. This is because while the Agreement does expressly provide for the conditions under which sale back of the Shares is unavailable (through the "Option to Exit if Performance Targets Are Not Met" clause), that clause is only effective if the Shares had been transferred to the respondent in the first place. Thus, if the learned DJ was correct in finding that the Shares were never "transferred" in that there was no Oral Trust Agreement, then it follows that the applicability of this contractual option to exit was never engaged to begin with. After all, the respondent would have had no shares to sell back to the appellant. The Agreement would therefore not preclude restitutionary relief by having provided that the $200,000 was irrecoverable. In other words, the parties' contractual allocation of risk in the Agreement does not preclude restitutionary relief on the facts of the present case because that allocation is dependent on the Shares actually having been transferred in the first place. Since the learned DJ (as I will explain below, correctly) found that the Shares were never transferred, the parties' allocation of risk in the Agreement never applied in such a situation. As such, despite the existence of the Agreement as a valid contract between the parties, restitutionary relief is not barred in the present case as a matter of principle.

50 Thus, whether the respondent is entitled to restitutionary relief does not turn on a matter of principle, but on the learned DJ's finding of fact that there was a total failure of consideration. I turn now to consider this issue, which had been the main point of contention between the parties on appeal before I asked them to address these preliminary issues.

Assuming that the respondent is not precluded in principle from seeking restitution due to the presence of a valid contract between the parties,

whether a total failure of consideration was demonstrated on the facts of the present case

The applicable law

The elements of failure of consideration as an unjust factor

51 There are two aspects of law that are applicable here. The first aspect is the elements of failure of consideration as an unjust factor. *Benzline* (at [46]) has set out a two-step framework to analyse whether total failure of consideration has been made out in a given case:

(a) identify the basis for the transfer in respect of which restitution is sought; and

(b) decide whether that basis has failed.

52 When undertaking the first step of the analysis, a few points are instructive. First, the concept of total failure of consideration as an unjust factor must be differentiated from the notion of consideration which is required for a valid contract. Failure of consideration, when used in the context of unjust enrichment, refers to "a failure of basis" of the enrichment (see *Tang* at para 06.003; see also [44] above). Second, not every expectation which a party has in making a transfer forms part of the basis of that transfer (see *Benzline* at [51]). Third, a transfer may have more than one basis (see *Benzline* at [52]). Fourth, as I elaborate below at [74], this basis need not be a (direct) benefit to the claimant.

53 As for the second step of the analysis, it is generally accepted that the failure must be total and cannot be partial (see *Benzline* at [53]). In this regard,

a key point is that, contrary to the appellant's assertions,[60] the mere receipt of any benefit under the contract is not necessarily inconsistent with a total failure of consideration. Rather, in deciding whether the receipt of any given benefit precludes a finding of total failure of consideration, the court must identify the "essential purpose of the contract" (see the English High Court decision of *Giedo Van Der Garde BV and another v Force India Formula One Team Ltd (Formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) ("*Force India*") at [285]), or in other words, "what the claimant was paying for" (see *Burrows* at p 322). With this in mind, it becomes clear that even if a contract confers on a party the right to receive various benefits, the mere receipt by that party of any one of those benefits does not necessarily preclude a finding that there has been a total failure of consideration. Instead, the real question is whether the benefit or benefits received "are the whole or part of the main benefit expected or bargained for or merely incidental or collateral thereto" (see *Force India* at [285]).

54 It is in this context that the Court of Appeal's statement in *Ooi Ching Ling v Just Gems Inc* [2003] 1 SLR(R) 14 ("*Ooi Ching Ling*") (at [43]) (as cited by the appellant[61]) – that "[f]ailure of consideration occurs when one party has not enjoyed the benefit of any part of what it bargained for" – must be interpreted. Indeed, the Court of Appeal also emphasised in that case that it is "vitally important not to lose sight of what was the object of the transaction" (see *Ooi Ching Ling* at [58]). In that vein, the Court of Appeal has also observed in a later case that the basis underlying the benefit conferred should be "fundamental to the transaction, or otherwise obvious to an objective observer"

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60 ASA at paras 7 and 12−15.

61 ASA at para 7.

(see *Benzline* at [67]). Therefore, while there is a requirement that the failure of consideration must be "total", the court, in deciding which benefits preclude a finding of failure of consideration, must determine the main benefit or benefits bargained for under the contract by considering its main essence or object, while disregarding benefits that are incidental or collateral thereto.

The level of appellate intervention in relation to findings of fact

55 The second aspect of law that is applicable concerns the level of appellate intervention in relation to findings of fact. Having set out the elements of failure of consideration, it remains to be considered if the learned DJ's findings of fact that go towards proving these elements were satisfied on the evidence before her.

56 As the High Court observed in *Lian Tian Yong Johnny v Tan Swee Wan and another* [2023] SGHC 292 (at [20]), an appellate court will generally be slow to overturn factual findings, especially if the trial judge was better placed to assess the credibility of the witness. This applies unless the trial judge's assessment is "plainly wrong or manifestly against the weight of the evidence" (see the Court of Appeal decision of *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [18]). However, this high threshold for appellate interference applies only to *findings of fact*, rather than *inferences of fact* (see the High Court decision of *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [34]–[38] and the Court of Appeal decision of *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [32]).

57 Additionally, the general proposition that an appellate court should be slow to overturn a trial judge's findings of fact is subject to several

qualifications that have been developed in the case law. In the Court of Appeal decision of *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16, the court drew a distinction between the trial judge's findings of fact based on the credibility of the witness and an inference of fact based on the objective evidence. The court concluded that, regarding the former, the appellate court asks whether the trial judge's findings on the credibility of the witness were "plainly wrong", whereas regarding the latter, the question is whether the trial judge's assessment was "plainly against the weight of the objective evidence" (at [54]).

58 Also, in the decision of *Tan Meow Hiang (trading as Chip Huat) v Ong Kay Yong (trading as Wee Wee Laundry Service)* [2023] SGHC 218 (at [20]–[26]), the High Court set out in greater detail the applicable principles regarding the threshold of appellate intervention, which I summarise here:

(a) An appellate court should be reluctant to overturn findings made by the trial judge as they, unlike the trial judge, have not had the benefit of hearing the evidence of the witnesses and observing their demeanour.

(b) However, the appellate court should not shy away from overturning findings of fact when necessary. This will be the case where: (i) the trial judge's assessment is plainly wrong or against the weight of evidence; or (ii) the appellate court can refer to documentary evidence instead of the evidence of witnesses during cross-examination.

(c) Further, an appellate court is in as good a position as a trial court to assess the veracity of a witness's evidence in two situations: (i) where the assessment of the witness's credibility is based on

inferences drawn from the internal consistency in the content of the witness's evidence; or (ii) where the assessment of the witness's credibility is based on the external consistency between the content of the witness's evidence and the extrinsic evidence.

59 In summary, as to findings of facts based on a witness's testimony (see the Court of Appeal decision of *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [37]–[41]), the trial judge is generally better placed to assess the veracity and credibility of witnesses, and the appellate court should only overturn such findings where the trial judge's assessment is "plainly wrong or against the weight of the evidence". Nevertheless, an appellate judge is in as good a position as the trial judge to assess a witness's credibility where such assessment is based on inferences drawn from the internal consistency of the witness's testimony and the external consistency between the witness's evidence and extrinsic evidence. As to *inferences of fact*, the appellate court is entitled to engage in a *de novo* review. This is because an appellate judge is as competent as any trial judge to draw the necessary inferences of fact from the objective material.

My decision: there was a total failure of consideration for the transfer of the $200,000

60 With these principles in mind, I affirm the learned DJ's finding that there was a total failure of consideration. I conclude as such for the following reasons, which I elaborate on below:

(a) The respondent did not obtain legal or equitable title to the Shares, and therefore the transfer of title could not constitute the basis for the transfer of the $200,000 by him.

(b) The various other benefits allegedly received by the respondent were incidental to the essence of the commercial bargain between the parties under the Agreement, and hence also do not constitute a basis for the transfer of the $200,000 by him.

The respondent did not obtain the legal or equitable title to the Shares sold under the Agreement

61 I conclude that the respondent did not obtain any legal or equitable title to the Shares, because I agree with the learned DJ that there was no Oral Trust Agreement between the parties.

62 To begin with, for all the appellant's arguments on what the respondent ought to have done, the evidential and legal burden rests on the appellant to prove that the Oral Trust Agreement exists. As the Court of Appeal explained in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855, the legal burden of proof, which refers to the "obligation to persuade the trier of fact that … the fact in dispute exists … *never shifts* in respect of any fact" [emphasis added] unless a legal presumption operates (at [58]). The legal burden is a "permanent and enduring burden" (at [60]). In contrast, the "evidential burden" is merely a burden to produce evidence so as to keep alive the question of the existence of a particular fact (at [58]). The evidential burden is first placed on the party seeking to prove the existence of that fact, and only shifts after some evidence, that is not inherently incredible, is adduced to prove that fact (at [60]).

63 Therefore, even if the appellant were correct that the respondent has no positive defence at all, this would simply not matter if the appellant has not discharged his evidential burden at the outset. In this regard, the appellant's main argument is that his failure to transfer the Shares, and the respondent's

failure to demand the same, suggests that there must have been an Oral Trust Agreement.[62] However, as the learned DJ rightly pointed out, this argument is not correct as there could be other reasons why the Shares were not eventually transferred (see the Judgment at [112]). It is for this reason, and others which I explain below, that I conclude that the appellant has not adduced enough evidence to even shift the evidential burden of proof regarding the existence of the Oral Trust Agreement to the respondent.

64 First, I agree with the learned DJ that while the appellant claims that the Oral Trust Agreement was reached over an IDD call over the phone on or around 10 May 2018,[63] he has not produced any record of such a call. Nor has he explained why he could not produce such a record. Indeed, in the parties' WeChat messages on or around 10 May 2018,[64] there was no mention of the supposed Oral Trust Agreement. While the appellant explained in cross-examination that this was because the trust was not the main subject in the parties' transaction (which he maintained was the purchase of the Shares),[65] this is not objectively believable. After all, the respondent must surely have been interested in how the Shares were being held after having purchased them. This makes the absence of any recorded discussion, on the Oral Trust Agreement between the parties in the various messages exchanged, telling. I agree with the learned DJ that the correct inference to draw is that the Oral Trust Agreement does not exist.

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62 AC at para 13; ASA at paras 29−31.

63 Certified Transcript dated 5 July 2023 at p 43 lines 9–18 (RA at p 283).

64 RA at pp 429–430.

65 Certified Transcript dated 5 July 2023 at p 48 lines 1–14 (RA at p 288).

65 Second, the appellant advanced the reason that the Oral Trust Agreement arose so as to distance the Company from Chong Sing (which the respondent had been the Chief Executive Officer of). In this regard, the appellant submits that, for various reasons, "[i]t is … likely that rumours relating to concerns with Chong Sing would have arisen by 10 May 2018".[66] It is not necessary for me to examine the underlying reasons for this assertion. This is because, even if I accept that the rumours had started by 10 May 2018, it makes no sense for the appellant to have asked the respondent, *on 10 May 2018 itself*, to (a) provide a copy of his identification for "ACRA updates" and (b) "to be our senior advisor for SURETY.AI project".[67] In other words, if it were true that the appellant was already aware of these rumours on 10 May 2018 and had genuinely wanted to shield the Company from being associated with the respondent himself,[68] then it would make no sense for the appellant to still ask the respondent, *on 10 May 2018*, for the latter's identification to update ACRA in relation to the transfer of the Shares (*ie*, to formally effect the transfer of the Shares). Likewise, if the appellant was already aware of the said rumours on 10 May 2018, it is inexplicable why he would, *on 10 May 2018*, ask the respondent to be a "senior advisor" for the Company's SURETY.AI platform, an insurance platform that facilitates insurers, brokers, and ecosystem partners in creating and managing insurance products.[69] Thus, the purported reason behind the Oral Trust Agreement, which was to shield the Company from the respondent and Chong

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66 AC at para 14.

67 RA at p 430.

68 Certified Transcript dated 5 July 2023 at p 45 line 16 to p 46 line 2 (RA at pp 285–286).

69 RA at p 480.

Sing, falls away when considered against the appellant's own messages to the respondent on 10 May 2018.

66 As such, for these reasons, I agree with the learned DJ's finding that there was no Oral Trust Agreement between the parties. There is therefore no need for me to rely on the points that the appellant says the learned DJ ought not to have raised on her own accord.

While the respondent received various incidental benefits, these do not amount to a basis for the transfer of the $200,000

67 Next, I consider the various benefits which the appellant alleges that the respondent received. Apart from the beneficial interest in the Shares, which I have concluded did not pass to the respondent, these alleged benefits were: (a) quarterly financial statements of the Company, or at least some financial information about the Company;[70] and (b) the opportunity to engage in strategy discussions on the Company's business.[71] Regarding (a), I agree with the learned DJ that the respondent was not in fact provided with the quarterly financial statements. In any event, I am of the view that both (a) and (b) are benefits which were incidental to the essence of the parties' bargain and thus do not constitute a basis for the transfer of the $200,000. I consider each of these putative benefits in turn.

(1) The provision of financial information

68 First, I agree with the learned DJ that the appellant did not in fact provide the respondent with quarterly financial statements (see the Judgment at

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70 AC at paras 27 and 31.

71 AC at para 28; ASA at paras 6(a) and 6(c).

[132]). In this regard, the appellant's main argument is that he was entitled to provide the quarterly financial statements orally and was not obliged to provide the quarterly financial statements in writing. To begin with, I agree with the learned DJ that the use of the expression "quarterly financial *statements*" [emphasis added] in the "Information made available" clause of the Agreement reasonably connoted a requirement that they needed to be in documentary form.[72] If so, then it is undisputed that the appellant has not provided the statements in such a format.[73]

69 But even if the parties had agreed that the quarterly financial statements could be provided orally, I agree with the learned DJ that the appellant had not done so. In this regard, the learned DJ concluded, after a careful assessment of the evidence, that the appellant had not provided the respondent with quarterly financial statements, even orally, for the financial year 2019 (see the Judgment at [132]−[143]). I see no reason, nor has the appellant provided any on appeal,[74] to disagree with the learned DJ's finding in this regard. Accordingly, I conclude that the appellant had simply not provided the quarterly financial statements as required under the Agreement.

70 Further, I disagree with the appellant that there was no total failure of consideration just because the respondent had received *some* financial information relating to the Company. As I have explained at [53], what the court is concerned with is the essential purpose of the contract, and not mere incidental or collateral benefits (see *Force India* at [285]). However, although

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72 RA at p 562.

73 AC at paras 26−27.

74 AC at paras 25–31.

the point was not fully argued before me, had the appellant provided the quarterly financial statements as required under the Agreement, I might have found that benefit to not be merely incidental or collateral to the main benefit bargained for in the Agreement. This is because such information arguably comprises part of the essential bargain thereof in that it enables the respondent to decide meaningfully whether to exercise his option to exit the Company. As against this, however, there still remains the argument that no option to exit (and therefore, any benefit facilitating that option) could have been meaningful if the Shares had not been transferred in the first place. In any event, I need not decide this point because the appellant did not provide the quarterly financial statements as required. The provision of just some financial information, in the absence of the financial statements themselves, does not enable the respondent to decide meaningfully whether to exercise his option of exit.

71 Taking a step back, the Agreement was for the sale and purchase of the Shares. Therefore, the essence of the bargain was that the respondent paid $200,000 to receive the Shares (see the Judgment at [148]). As such, the provision of *some* financial information on the Company and the strategy discussions thereon[75] were merely incidental or collateral to that essential bargain. The result is that the respondent's receipt of some financial information on the Company is not a bar to my finding that there has been a total failure of consideration.

72 For completeness, I reject the appellant's attempt to draw an analogy between the facts of the present case and those of *Force India*.[76] The appellant

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75 AC at paras 31 and 36–37.

76 ASA at paras 14−15.

argues that in *Force India*, the main purpose of the contract was for the defendant to provide Mr Van der Garde (one of the claimants) with the opportunity to test, practise, or race a Formula One racing car for a minimum of 6,000km. Yet, the court found that Mr Van der Garde's other rights under the contract, such as (a) to be nominated as the defendant's Friday practice driver in each of the Grands Prix in the 2007 season, and (b) to be the defendant's reserve driver, could not be disregarded.[77] The court therefore held (at [374] and [560]) that the performance of these obligations defeated a claim in unjust enrichment for total failure of consideration. Thus, the appellant submits that *Force India* stands for the proposition that "regard ought to be had to the contingent benefits conferred under the contract".[78]

73 However, contrary to the appellant's argument, the facts of *Force India* are clearly distinguishable from those in the present case. *Force India* made clear that "the essential commercial purpose of the Service Agreement was to provide [Mr Van der Garde] with experience driving a Formula One car for a Formula One Team" (at [331]). I find it rather self-evident that the rights to Friday practice driving and reserve driver status were not collateral to the essential bargain contracted for (at [366]), *ie*, to gain experience driving a Formula One car for a Formula One team. Indeed, counsel for the claimants in *Force India* had conceded that point (at [366]). Furthermore, the appellant also fails to point out that, in *Force India*, all the other benefits apart from those just mentioned were considered to be collateral benefits, including advertising and sponsorship rights (at [326]), travel expenses, paddock passes (at [337]), and assisting Mr Van der Garde in establishing his eligibility for a certain licence

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77 ASA at para 14.

78 ASA at para 14.

(at [338]). In my view, the additional benefits pleaded by the appellant in the present case are more akin to the benefits that were identified as being collateral to, rather than part of, the essential bargain in *Force India*. Therefore, the appellant's reliance on *Force India* is misplaced.

(2) The opportunity to engage in strategy discussions

74 Finally, I address the question of the strategy discussions. As a starting point, I reject the respondent's argument that the strategy discussions can be disregarded solely because they were obligations imposed on the respondent rather than benefits that the respondent derived from the Agreement.[79] The problem with this argument is that, regardless of whether participation in the strategy discussions constituted obligations on, or benefits to, the respondent, the respondent has failed to prove (or argue) that the strategy discussions were *not* also obligations on the *appellant*. This is significant. After all, it is clear from the House of Lords judgment of *Stocznia Gdanska SA v Latvian Shipping Co and others* [1998] 1 WLR 574 ("*Stocznia*") that the fulfilment of the obligations on a promisor can be a valid basis for the purposes of finding against a total failure of consideration: "the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due" (see *Stocznia* at 588; see also *Tang* at para 06.035 and *NTUC Income Insurance Co-operative Limited v Thiam Hay Wah* [2007] SGMC 17 at [33]). As a result, because the respondent has failed to address the possibility that the strategy discussions are also obligations on the appellant (thereby potentially constituting a valid basis for the respondent's payment), I am unable to accept the argument that the strategy

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[79] RC at paras 38−39.

discussions can be disregarded simply on the ground that they are obligations on the respondent, or that the respondent received no benefit therefrom.

75 However, despite the foregoing, I still conclude that there was a total failure of consideration. For the reasons that I have explained at [71] and [73] above, I view the opportunity to engage in strategy discussions as a benefit that was merely incidental to the essential bargain under the Agreement, with the result that its provision to the respondent does not undermine my finding that there was total failure of consideration.

76 For all the reasons above, I agree with the learned DJ that there was a total failure of consideration. I therefore dismiss the appeal against the learned DJ's ultimate conclusion that the respondent is entitled to the restitution of $200,000 on the basis of a total failure of consideration.

Conclusion

77 In conclusion, I dismiss the appeal for all the reasons I have explained above.

78 Unless the parties are able to agree, they are to submit their respective written submissions on the appropriate costs order for this appeal and the hearing below, limited to seven pages each, within seven days of this decision.

Goh Yihan
Judge of the High Court

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