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

[2024] SGHC 76

Originating Claim No 466 of 2023
(Registrar's Appeal No 32 of 2024)

Between

See Jen Sen (Xue Rensheng)

… *Claimant/Appellant*

And

Prudential Assurance Company Singapore (Pte) Ltd

… *Defendant/Respondent*

JUDGMENT

[Civil Procedure — Pleadings — Striking out]

See Jen Sen
v
Prudential Assurance Co Singapore (Pte) Ltd

[2024] SGHC 76

General Division of the High Court — Originating Claim No 466 of 2023
(Registrar's Appeal No 32 of 2024)
Choo Han Teck J
13 March 2024

18 March 2024 Judgment reserved.

Choo Han Teck J:

1 The claimant was an agent of the defendant who carries on the business as insurers. The claimant held the rank of an "agency leader" within the respondent's network of agents. He had worked for the respondent for 19 years before his agency agreement was terminated in March 2022. In this action, he is suing the defendant for wrongful termination, unjust enrichment ("UE claim") and a claim under the Unfair Contract Terms Act 1977 (2020 Rev Ed) ("UCTA claim"). The defendant applied to strike out the claimant's claim in its entirety, but the Assistant Registrar ("AR") only struck out the UE claim and the UCTA claim. This is the claimant's appeal against the AR's orders.

2 The respondent demurs and claims that the termination of the appellant's agency contract was lawfully made. Clause 13(c) of the agency agreement provides for either party to terminate the agreement by giving the other party

such notice. Pursuant to this clause, the respondent gave termination notice to the appellant, and his agency agreement was terminated on 21 March 2022.

3 Prior to the termination notice, the appellant was the subject of an inquiry by a compliance committee set up by the respondent. He was suspected of sending complaints, under various pen names, to the Monetary Authority of Singapore ("MAS") and the respondent's Chief Executive Officer. The complaints accused the respondent of malpractice in its business. In particular, launching misleading advertisements of insurance products that contravened MAS guidelines. These were referred to by counsel as "the whistleblowing" acts. The appellant did not deny that he was responsible for those complaints.

4 The appellant's first claim is that there was a breach of contract due to the wrongful termination of his agency agreement. He says that the termination was in fact grounded on his whistleblowing acts, and that is not a legitimate reason to terminate his contract. His second claim is that the respondent had been unjustly enriched by the financial benefits that it retained from terminating the appellant's agreement. These financial benefits referred to bonus payments that the appellant was entitled to under an incentive scheme called the "Agency Leader Long-Term Incentive Scheme" ("ALLTIS"), and bonus commissions under the scheme called the "Sell-Out scheme". The conditions for receiving these bonus payments and commissions are set out in documents entitled Agency Instruction, which are circulated to the agents. These conditions formed the basis of his third claim — that some of the conditions breached ss 3 and 11 of the UCTA.

5 I deal first with the UE claim. The AR found that the UE claim ought to be struck out as it is legally unsustainable. She noted that there must be a recognised unjust factor that gives rise to a claim under unjust enrichment, and

the appellant had not pleaded any unjust factor in his statement of claim. It was only in his affidavit that he stated that he is relying on the unjust factor of consideration. The AR held that there must be a total, not partial, failure of consideration to succeed on a claim of unjust enrichment. Given that the appellant was indeed paid in accordance with his agency agreement, it could not be said that there was a total failure of consideration in the present case.

6 The appellant says that the law should evolve to recognise a partial failure of consideration as an unjust factor. He cites the Court of Appeal's ("CA") decision in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 (at [53] and [54]):

> 53 Having identified the basis of the transfer, the next step is to determine whether that basis has failed. The prevailing position is that the failure must be total, not partial. The exception, if it can be called one, is where a contract is divisible such that it can be said that there has been a total failure of the consideration for/basis of a discrete part of that contract: see *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 at [24], citing *Fibrosa* at 77.
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> 54 It has been argued that the requirement of a total failure is artificial, and that the law should evolve to recognise *partial* failure of consideration/basis as a ground of restitution even in indivisible contracts. Prof Burrows in *The Law of Restitution* contends at pp 325–326 that *Rowland* and similar cases should be reinterpreted as allowing restitution of money for partial failure of consideration. Such arguments were not, however, raised by the parties in the present dispute, nor does it appear that they would make a difference in the result. We therefore proceed on the footing that the failure must be total, without necessarily foreclosing the possibility of future developments in this regard.

7 It is clear from the cited paragraphs that a total, and not partial, failure of consideration remains the law. But the CA did not foreclose the possibility of future developments on this issue. It may not preclude the issue, weak as it might be, from being argued in full at the trial, where the judge may examine it under a lens the scope of which would have been broadened and brightened by

evidence fully adduced. If the appellant were to proceed, he may be required to amend his pleadings which presently does not express what unjust factor he is relying on.

8 I deal next with the UCTA claim. The appellant claims that the conditions of payment under the ALLTIS contravene ss 3 and 11 of the UCTA. Those conditions are found in Clause 5.1 of the respondent's Agency Instruction No. 006(A)/18 and Agency Instruction No. 006(A)/19. They state that:

> [a]gency leaders are required to hold a valid … agency agreement at [the] point of payment. Agency leaders without a valid … agency agreement will not be entitled to any payment.

9 The appellant says that the second contractual term that contravenes ss 3 and 11 UCTA pertains to the Sell-Out scheme. Under the Sell-Out scheme, agents are allowed to "sell" their agency unit comprising the financial consultants under their supervision to another agency leader for an agreed price. This is possible upon the termination of their agency agreement with the respondent, subject to the respondent's approval. Once approved, the agency leader could continue to receive commissions for policies sold by their agency unit for up to 72 months after the termination of their agency agreement.

10 This scheme is set out in the respondent's Agency Instruction AI005/14, of which Clause 4.4 states that:

> Notwithstanding any provision in this [Agency Instruction] an Agency Leader shall not be permitted to participate in the Sell-Out scheme unless the [respondent] at its sole discretion give its approval for such participation…

11 The appellant's counsel argues that Clause 5.1 and Clause 4.4 of the relevant Agency Instructions are in breach of ss 3 and 11 of the UCTA. The AR held that Clause 5.1 does not fall within the ambit of s 3 of the UCTA because

it is not an exception clause. The clause merely provides that agency leaders such as the appellant must hold valid agency agreements at the time of payment, and does not exclude or restrict liability on the part of the respondent. As for Clause 4.4, she found that it subjects the appellant's application to participate in the Sell-Out scheme to the respondent's approval and is not accordingly an exception clause to which s 3 of the UCTA applies.

12 The appellant's counsel submits that a clause that does not expressly state that it is an exception clause may still be interpreted as an exception clause. He cites *Dathena Science Pte Ltd v Justco (Singapore) Pte Ltd* [2021] SGHC 219 ("*Dathena*") in support of his position. The court in *Dathena* found Clause 2(c) of the agreement in question to be in breach of ss 3 and 11 of the UCTA. I reproduce the relevant clause here:

> (c) [JustCo] reserves the right to replace [Dathena's] Allocated Office Space, if any, with another Allocated Office Space of comparable size at [OCBC CE] or any other of [JustCo's] operating premises in the event where this may be necessary due to the operational requirements of [JustCo] for the provision of the Services and/or Additional Services.

13 But *Dathena* is not entirely on point. In my view, Clause 2(c) falls afoul of s 3 of the UCTA not because it was construed as an exception clause under s 3(2)(a). Rather, it falls within the ambit of s 3(2)(b)(i) of the UCTA.

14 I set out, in full, section 3 of the UCTA:

> **3.**—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
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> (2) As against that party, the other cannot by reference to any contract term —
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> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

> (b) claim to be entitled —
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
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> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

15 Although the judgment in *Dathena* does not specify the particular subsection of s 3 of the UCTA that was applicable to Clause 2(c), I am of the view that it was not s 3(2)(a) of the UCTA. It appears that s 3(2)(b)(i) is the applicable provision in that case because Clause 2(c) gives one party the power to render the performance of the agreement substantially different from what was expected of that party. That is, the power to replace the allocated office space with another allocated office space or any other operating premises where necessary.

16 Thus, in my view, it is s 3(2)(b) of the UCTA that may be applicable to Clauses 5.1 and 4.4 of the relevant Agency Instructions. Although the AR was right to hold that the clauses do not fall within the ambit of s 3(2)(a) of the UCTA, the relevance of s 3(2)(b) was not argued and, therefore, not determined. The appellant had, in fact, pleaded in his statement of claim at [32], that the respondent is "not entitled to … render a contractual performance substantially different from that which was reasonably expected of them and/or rendering no performance at all of their contractual obligations". These arguments would fall squarely within s 3(2)(b) of the UCTA, and although a case for striking out this claim is arguable, but like the UE claim, it is best left to the trial judge who has to hear the claim for wrongful termination in any event. That part of the claim was not struck out by the AR. It is thus best not to fetter the trial judge's hands, for, in order to do justice in full, he must be allowed to decide what reliefs or remedies a claimant seeks. The court hearing interlocutory matters should as far

as possible, not enfeeble the powers and discretion of the trial judge, presenting him a *fait accompli*. The trial judge may ultimately agree with the AR's decision, but the issues here ought to be ventilated as part of the full narrative at trial.

17 For the above reasons, this appeal is allowed with costs here and below reserved to the trial judge.

- Sgd -
Choo Han Teck
Judge of the High Court

Ragbir Singh s/o Ram Singh Bajwa (Bajwa & Co) for the claimant/appellant;
Joleen Wong Ying (JWS Asia Law Corporation) for the defendant/respondent.