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

[2021] SGHC(A) 13

Civil Appeal No 48 of 2021

Between

United Petroleum Trading Limited

… *Appellant*

And

Trafigura Pte Ltd

… *Respondent*

EX TEMPORE JUDGMENT

[Civil Procedure] — [Striking out]
[Limitation of Actions] — [When time begins to run]

United Petroleum Trading Ltd
v
Trafigura Pte Ltd

[2021] SGHC(A) 13

Appellate Division of the High Court — Civil Appeal No 48 of 2021
Belinda Ang Saw Ean JAD and Chua Lee Ming J
23 September 2021

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Chua Lee Ming J (delivering the judgment of the court *ex tempore*):

1 In High Court Suit No 1055 of 2019 ("S1055"), the appellant alleges that three sums of money – US$4.4m, US$1.38m and US$2.5m – were paid to the respondent as initial margin pursuant to an agreement under which the respondent had agreed to trade futures contracts for gasoline on the appellant's behalf (the "alleged agreement"). The appellant sought recovery of the three sums on the grounds that the alleged agreement was void for illegality or, alternatively, that there has been a total failure of consideration because the respondent failed, omitted and/or neglected to trade on the appellant's behalf.

2 The respondent applied to strike out the claims pursuant to O 18 r 19 of the Rules of Court (2014 Rev Ed) (the "Rules"). The respondent denied the alleged agreement and said that the three sums were moneys owed to the respondent under a different agreement. However, for purposes of its application, the respondent was prepared to assume that the alleged agreement

was entered into, that the moneys were paid pursuant to the alleged agreement and that the alleged agreement was void. In other words, the basis for the respondent's application was that even if the appellant could prove its case as pleaded, the claims would still fail and therefore ought to be struck out.

3 The Assistant Registrar struck out the appellant's claims for the first two sums – US$4.4m and US$1.38m – on the ground that they were time-barred. The High Court Judge (the "Judge") dismissed the appellant's appeal against the Assistant Registrar's decision. This appeal is against the Judge's decision and concerns only these two sums.

4 It is not disputed that the appellant paid, and the respondent received, the sums of US$4.4m and US$1.38m on 25 September 2013 and 30 September 2013 respectively. The appellant commenced S1055 on 16 October 2019, more than six years after the payments were received by the respondent. If the claims for these two sums are time-barred, the claims would be legally unsustainable and ought to be struck out; the defence of limitation would defeat the claims even if all the facts alleged by the appellant are proved: *The "Bunga Melati 5"* [2012] 4 SLR 546 at [75].

5 In this appeal, the appellant concedes that in so far as its claims are based on the alleged agreement being void for illegality, the claims are time-barred. However, the appellant argues that its claims based on a total failure of consideration are not time-barred.

6 It is common ground that the appellant's claims based on a total failure of consideration are founded on contract and that, pursuant to s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed), the limitation period is six years from the date on which the cause of action accrued: *Ching Mun Fong (executrix of*

the estate of Tan Geok Tee, deceased) v Liu Cho Chit [2001] 1 SLR(R) 856 ("*Ching Mun Fong*") at [27].

7 The Judge was of the view that the cause of action accrued when the respondent received the moneys and that accordingly, the claims for US$4.4m and US$1.38m were time-barred. The Judge relied on *Ching Mun Fong* in which the Court of Appeal said at [27]:

> With respect to [the plaintiff's] claim for money had and received for a total failure of consideration, the judge held that the cause of action was founded on contract, and s 6(1)(*a*) of the Limitation Act (Cap 163) applied. As the money was paid to [the defendant] on or about 23 April 1981, the claim for the recovery of this sum had been barred by 22 April 1987. … We agree with him entirely.

8 The appellant makes three submissions in this appeal. First, the appellant submits that the cause of action accrued only when the failure of consideration occurred. The appellant relies on *Goff & Jones on the Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell and Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) in which the authors state as follows (at para 33-11):

> Limitation periods generally run from the date when the claimant's cause of action accrues, and a cause of action in unjust enrichment normally accrues at the date when the defendant receives a benefit from the claimant. This rule applies, for example, where the defendant has been paid the claimant's money in a transaction which the claimant did not authorize and to which he did not consent, where the claimant has transferred a benefit by mistake, where he has transferred a benefit on a basis that immediately fails, where he has paid money as tax that is not due, where he has discharged a debt for which he was only secondarily liable and for which the defendant was primarily liable, and where he pays money pursuant to a judgment that is later reversed. *However, this rule probably does not apply in cases where benefits are transferred on a basis that subsequently fails: here the cause of action is not complete until the failure of basis occurs, and so this is most probably the date at which time starts to run.* … [emphasis added]

9 We agree with the appellant's submission. The appellant's claims are claims in unjust enrichment. The three requirements of a claim in unjust enrichment are (a) enrichment of the defendant, (b) at the expense of the plaintiff, and (c) circumstances which make the enrichment unjust (*ie*, the presence of an "unjust factor"): *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*") at [45]. It is logical that such a cause of action would accrue only when all three requirements are satisfied. Where the unjust factor relied upon is a failure of consideration, which is also referred to as a failure of basis (see *Benzline* at [46]), the cause of action would not accrue before the basis has failed.

10 In Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011), the author expresses a similar view (at pp 607–608). This view also finds support in case authorities. In *Sami v Hamit* [2018] EWHC 1400 (Ch), the English High Court observed (at [37]) that "if the relevant basis failed after the date of receipt of the benefit, the cause of action only accrues when the basis failed". In *Guardian Ocean Cargoes Ltd and others v Banco do Brasil* [1994] 2 Lloyd's Rep 152, the English Court of Appeal held that certain moneys paid by the plaintiffs to a bank were dependent on a refinancing deal (that was being negotiated) so that if no deal transpired, the bank would have no right to retain the money. The court went on to hold that the plaintiffs' cause of action for their money arose when the negotiations finally failed.

11 In our view, where the claim is for the recovery of money on the ground of a total failure of consideration or basis, the cause of action cannot be said to have accrued until the failure of consideration or basis has occurred. It is only then that all of the requirements of the cause of action are satisfied. We therefore disagree with the Judge's conclusion that the cause of action in this case accrued when the two sums of money were paid to the defendant.

12 The occurrence of the failure of consideration may coincide with the date that the money was received, which was what happened in *Ching Mun Fong*. In that case, the claim was to recover money paid to the defendant for the purchase of the interest of the defendant's wife in a piece of property. The defendant's wife did not in fact have an interest in the property. Thus, there was failure of consideration at the time when the money was paid. The passage in *Ching Mun Fong* that the Judge relied on (see [7] above) has to be understood in this context. We agree with the appellant that *Ching Mun Fong* is distinguishable for this reason. However, this is not the end of the matter.

13 The consideration or basis in this case was the respondent's obligation to trade gasoline futures for the appellant. The critical question is when did this basis fail? The appellant says that the respondent agreed to trade futures contracts in gasoline on its behalf; no other term of the alleged agreement is pleaded. The appellant has pleaded that the respondent failed, omitted and/or neglected to trade on the appellant's behalf. However, the pleadings are silent as to when the respondent is alleged to have failed to perform its obligation. The pleadings do not even state when the respondent was to commence trading on the appellant's behalf. In short, there is nothing in the pleadings that shows that the total failure of consideration or basis (and hence, the accrual of the cause of action) occurred within the limitation period. If this matter goes to trial, the burden remains on the appellant to prove that its claims for the two sums fall within the limitation period: *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat and another appeal* [2020] 2 SLR 272 ("*IPP Financial Advisers*") at [37] and [41]. Even if the appellant proves the facts that it has pleaded, it will not have discharged its burden of proving that the claims for the two sums fall within the limitation period. In our view, the appellant's case, as pleaded, is clearly unsustainable.

14 In the Appellant's Case, the appellant submits (at para 28) that the basis failed when the respondent failed to perform its end of the bargain and that this is a matter that should be resolved at trial. We disagree. We refer again to *IPP Financial Advisers* which makes it clear that it is incumbent on the appellant, as the claimant, to plead the relevant facts which show that its claims fall within the limitation period.

15 The appellant's second submission is that two invoices (both dated 17 October 2013) issued by the respondent to the plaintiff for the two sums in question (the "Invoices"), constituted acknowledgements of its right of action to recover the two sums respectively and that, pursuant to s 26(2) of the Limitation Act, the right of action is deemed to have accrued on the dates of the Invoices. We agree with the Judge that the Invoices do not constitute acknowledgements of the appellant's claims for purposes of s 26(2) of the Limitation Act. For s 26(2) to apply, the respondent must acknowledge its liability for the appellant's claims; this is accepted by the appellant. It is clear that the Invoices do not contain any such acknowledgement. On the contrary, the Invoices required the appellant to make payment to the respondent.

16 The appellant's third submission relies on the fact that its claim for the third sum of US$2.5m (see [1] above) is not time-barred and is proceeding to trial. The appellant submits that since all three sums arise out of the same underlying facts, there is "no real value" in striking out the claims for the first two sums. We disagree. This submission is wholly unmeritorious. As the claims for the first two sums are clearly time-barred, it makes no sense for the claims to be tried, thereby wasting the court's and the respondent's time and incurring unnecessary costs.

17 For the above reasons, we dismiss the appeal. The appellant is to pay costs of the appeal to the respondent fixed at $30,000 all in. There will be the usual consequential orders.

Belinda Ang Saw Ean
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Alain Abraham Johns (Alain A Johns Partnership) for the appellant;
Tan Wee Kheng Kenneth Michael SC (Kenneth Tan Partnership) (instructed), Loh Wai Yue, Mohammad Haireez bin Mohameed Jufferie and Chan Ji Kin Thaddaeus (Incisive Law LLC) for the respondent.