IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR DARUL EHSAN

APPEAL NO: 12BNCVC-91-10/2018

BETWEEN

ROBERT ONG THIEN CHENG
(NO. K/P: 720928-04-5317/A2400283) ... APPELLANT

AND

1. LUNO PTE LTD
   (NO. SYARIKAT SINGAPURA: 201209545R)

2. BITX MALAYSIA SDN. BHD.
   (NO. SYARIKAT: 1136927-A) ... RESPONDENTS

BEFORE

Y.A. TUAN GUNALAN A/L MUNIANDY

JUDGE, HIGH COURT

GROUNDS OF DECISION

[1] This is an appeal brought by the Appellant against the whole decision of the Learned Sessions Court Judge ('LSCJ') dated 9.10.2018, which allowed the Respondents'/Plaintiffs' claim with costs and dismissed the Appellant's counter-claim with costs ('the Judgment').

[2] The Respondents have premised their claim wholly and exclusively on Section 73, Contracts Act 1950 ('S. 73 CA'), in that they claim that the Appellant is liable to return 11.3 Bitcoins ('the Additional Bitcoins') that were allegedly transferred to the Appellant due to a technical error on their part.

[3] The Appellant's counter-claim against the 1st Respondent is for the tort of unlawful interference of trade when the Appellant suffered losses as a result of the suspension of his account with Bitfinex, which was allegedly at the behest of the 1st Respondent.

Background Facts of Plaintiffs' Claim

[4] A summary of the material facts relating to the claim from the Respondents' submission is as follows:

> "The 1st Respondent conduct its business as an online wallet and exchange of digital currencies, also known as cryptocurrencies

including Bitcoin under the trade name of 'LUNO' ('Luno'). Every registered customer of Luno will be allocated a Luno account known as 'LUNO Wallet' whereby they are able to buy, sell, send, receive and store cryptocurrencies.

The 1st Respondent wholly owns the 2nd Respondent and the 2nd Respondent acts as the intermediary regional operating centre of the 1st Respondent which holds the bank account that accept deposits from Luno customers in Malaysia.

After the customer deposits the sum to the account held by 2nd Respondent, the 2nd Respondent will then allocate the deposit to the customers' respective LUNO wallets for them to utilise the deposits to trade cryptocurrencies.

The Appellant has been registered user of Luno since 6.7.2017 and his Luno wallet address is '1FxCM896VFCKtUjP8HpdgkqiSHwYj6wrd' ('the said LUNO wallet').

On 30.10.2017, the Appellant deposited RM300,000.00 into the bank account held by the 2nd Respondent which was subsequently

transferred into the said LUNO Wallet and reflected therein accordingly.

At that juncture, the Appellant had a total of RM300,228.58 and 0.616814 Bitcoin in his said LUNO Wallet.

On 1.11.2017, the Appellant converted RM300,228.00 contained in the said LUNO Wallet into 10.70163257 units of Bitcoins, leaving the total number of Bitcoins in his said LUNO Wallet to be 11.31844657.

On the same day (i.e.: 1.11.2017), the Appellant requested for 11.3 Bitcoins to be withdrawn from the said LUNO Wallet to be to his Bitfinex e-wallet account at the address '1AbbJJzevwFFVBBKvZRtQHHFgrJyYTKaMw2' ('Bitfinex account') and his request was duly carried out.

The Appellant's Bitfinex account is managed and operated by iFinex Inc. (BVI) ('Bitfinex'), another third party cryptocurrency online trading platform unrelated to the Respondents.

On 1.11.2017, the 1st Respondent then mistakenly transferred an additional 11.3 Bitcoins ('the mistakenly transferred 11.3 Bitcoins')

into the Appellant's Bitfinex Account after having transferred the initial 11.3 Bitcoins on the same day.

The 1st Respondent's Chief Technology Officer ('CTO'), Timothy Stranex had notified the Appellant of the mistakenly transferred additional 11.3 Bitcoins on 2.11.2017 via email dated 2.11.2017 (see p. 789, Rekod Rayuan, Bahagian C, Jilid 3).

The Appellant acknowledged and admitted that he is required to return the additional 11.3 Bitcoins that were mistakenly transferred to him. In this regard, the Appellant had offered to pay the 1st Respondent cash of RM300,000.00 at the end of November 2017, about one (1) month after the mistaken transfer (see email dated 2.11.2017 at p. 790, Rekod Rayuan, Bahagian C, Jilid 3). However, this was not acceptable to the 1st Respondent as the value of Bitcoins fluctuates day-to-day.

The 1st Respondent's CTO requested for 11.3 Bitcoins to be returned to the 1st Respondent as it was Bitcoins that were mistakenly transferred into the Appellant's Bitfinex Account. A series of correspondence issued between the 1st Respondent's

CTO and the Appellant (see pp. 789-801, Rekod Rayuan, Bahagian C, Jilid 3).

The Appellant, although admitting to receiving the additional 11.3 Bitcoins and acknowledging the need to return them, has failed, refused and/or neglected to do so. The Respondents have now initiated this action against the Appellant to recover the mistakenly transferred 11.3 Bitcoins.

The Appellant's Contentions

[5] According to the Appellant, the main thrust of its appeal vis-à-vis the Respondents' claim are:

(a) Based on the Respondents' own pleadings where they have hinged their claim solely on S. 73 CA, the Trial Judge had fallen into error when he based his decision on legal principles of unjust enrichment and equitable principles of constructive trust which were not pleaded;

(b) There was insufficient judicial appreciation pertaining to the nature of Bitcoins, as the Trial Judge failed to appreciate that

Bitcoins are not a 'thing' capable of being returned as envisaged under S. 73 CA;

(c) There was insufficient judicial appreciation pertaining to the evidence, or lack of evidence to show that the Additional Bitcoins were transferred to the Appellant due to a mistake, either as to fact or law, to avail the Respondents to a claim under S. 73 CA.

The Respondents' Contentions

(1) The Respondents submit that the learned Judge was correct in allowing the Respondents' claim and dismissing the Appellant's counterclaim.

(2) In this regard, an appellate court will not intervene unless the trial court is shown to have been plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence.

(3) The learned Judge was right in fact and in law in deciding that the Respondents have locus standi to initiate an action against the

Appellant for the recovery of the 11.3 Bitcoins where were mistakenly transferred to him.

(4) The learned Judge is correct in deciding that the Respondents' business and modus operandi are not illegal and not contrary to governmental and public policy. In this regard, the findings of the learned Judge are based on contemporaneous evidence that was led by the Respondents at the trial.

(5) The learned Judge was correct in deciding that the Risk Warning on the Luno exchange website does not apply in the current circumstances to enable the Appellant to refuse to return the 11.3 Bitcoins.

(6) The Respondents also submitted that Bitcoins ought to fall under the ambit and application of the term 'anything' under Section 73 of the Contracts Act, 1950 and therefore the Appellant is bound to return the same to the Respondents. In this regard, the term 'anything' is wide enough to cover Bitcoins.

(7) Mistaken transfer of the 11.3 Bitcoins was a result of a technical glitch and not due to a mistake of fact or law.

(8) The Appellant cannot raise the defence of bona fide change of position as he knowingly and intentionally utilized the additional 11.3 Bitcoins in his Bitfinex Account to purchase another type of crytocurrency and based on his own admission that he discovered something was 'amiss; (i.e.: extra Bitcoins in his account). Despite that, the Appellant proceeded to utilize the additional 11.3 Bitcoins.

(9) There was never any 'agreement' or 'acceptance' by the 1st Respondent and the Learned Judge was correct in rejecting the Appellant's contention of estoppel. Accordingly, the Appellant's ground of appeal that the Respondents are now estopped from claiming restitution falls flat.

(10) The Appellant failed to lead any evidence to show that there was such 'unlawful interference' as alleged. Also, there is no evidence before the Court below to substantiate the Appellant's allegation that the 1st Respondent had 'colluded' with Bitfinex and/or 'interfered' Bitfinex's decision in suspending the Appellant's Bitfinex Account that in turn resulted in his alleged losses of B2x CST futures.

Analysis of Issues and Contentions

[6] In support of its grounds of appeal, the foremost issue raised by the Appellant is the cardinal principle that parties to a civil claim are strictly bound by their pleading. Inter alia, reference was made to the Federal Court case of Pacific Forest Industries Sdn. Bhd. & Anor v Lin Wen-Chih & Anor [2009] 6 CLJ 430 where the principle was explained to mean "The fact pleaded will inadvertently be related to the legal principles that the party will be relying upon. It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves."

[See also CME Group Bhd. v Bellajada Sdn. Bhd. & Anor. Appeal [2018] 10 CLJ 147].

[7] The Federal Court again in RHB Bank Bhd. v Kwan Chew Holdings Sdn. Bhd. has also remarked that "... it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court

would be accused of making laws rather than applying them to the given set of facts."

[8] It was the Appellant's position that at paragraph 17 of the Statement of Claim, the Respondent has grounded their action against the Appellant solely on S. 73, Contracts Act ('CA') but the Trial Judge has gone on a frolic of his own when he found that the Appellant is liable not only under S73 CA but also under unjust enrichment and also under equitable principles of constructive trustee.

[9] As such, that the Trial Judge had made an error of judgment when he found the Appellant liable under the principles of unjust enrichment and constructive trust when these 2 principles were not even pleaded by the Respondents in their claim.

[10] It was also submitted that the LSCJ in deciding that the Appellant was liable under S.73 CA had applied the wrong test.

[11] For ease of reference, S. 73, CA provides:

> "73. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

[12] In respect of the liability under S. 73A, CA, the Appellant contended that:

> "Central to this issue is whether Bitcoins fall in the category of 'thing' which is capable of being returned.
>
> Bitcoins are cryptocurrency, it exists only in the world of computer – the internet, in the virtual world. It does not take any physical form, it is not tangible, it is intangible.
>
> The Trial Judge, whilst accepting that Bitcoins is not money, has found that crytocurrency is a form of commodity as 'real money is used to purchase the crytocurrency' and, therefore, he went on to decide that cyptocurrency, in fact and in law, fell within the category of 'thing' under S. 73 CA."

[13] Reference was made to various dictionary meanings of 'thing' or 'commodity', that it must refer to something tangible and encompasses only goods on chattels. Also to the Court of Appeal case of Malayan Banking

Bhd v. Charanjeet Kaur Kang Sukhbir Singh & Anor [2017] 6 CLJ 617, where it was pronounced:

> "[48] It was clear that in the Oriental Bank case the Court of Appeal (Federation of Malaya), after referring to the decision of the Court of Appeal (Straits Settlement) in Official Assignee etc v. Overseas Chinese Bank [1934] 1 LNS 77; [1934] MLJ 76, accepted that a cheque (a physical item) is a chattel, its value being the value attached to it.
>
> [49] In the case before us, the "thing" that was said by the plaintiff to have been converted by the defendants was the amount that was transferred to Emdad on 28 June 2012 by electronic means but which the plaintiff failed to debit from the FCA account.
>
> [50] The learned trial judge, particularly after referring to the judgment of the House of Lords in OBG Limited and others (Appellants) v. Allan and others (Respondents) as reported in [2007] UKHL 21, came to the conclusion that the tort of conversion applied only to goods/chattels and not to the subject matter of the plaintiff's claim.

[51] The majority of the House of Lords in OBG Limited held that the tort of conversion only applied to the misappropriation of chattels. They declined to extend the scope of the tort to choses in action or to the misappropriation of intangibles."

[14] However, the Respondents, on the other hand, rightly contended that while cryptocurrency is not 'money' (i.e.,: legal tender) as we know in the traditional sense, it has been recently defined as a form of 'security' by Section 3 of the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 (supra) which is reproduced as follows:

"3. (1) A digital currency which:

(a) is traded in a place or on a facility where offers to sell, purchase, or exchange of, the digital currency are regularly made or accepted:

(b) a person expects a return in any form from the trading, conversion or redemption of the digital currency or the appreciation in the value of the digital currency; and

(c) is not issued or guaranteed by any government body or central banks as may be specified by the Commission.

is prescribed as securities for the purposes of the securities laws."

[15] The Respondents were also correct that it cannot be disputed that it is a form of 'commodity' as real money is used to purchase the cryptocurrency. In this regard, there is indeed value attached to the Bitcoin in the same way as value is attached to 'shares'.

[16] I also agree with the view that the Contracts Act, 1950 having been drafted some 7 decades ago ought to be construed to reflect changes in modern technology and commerce.

[17] Hence, rightfully Bitcoins ought to fall under the ambit and application of the term 'anything' under Section 73 of the Contract Act 1950 and therefore, the Appellant is bound to return the same to the Respondents if the circumstances warrant it. In this regard, the term 'anything' is plainly wide enough to cover Bitcoins.

[18] In relation to the Appellant's contention that the 1st Respondent lacks the locus standi to initiate an action for the recovery of the 11.3

Bitcoins, it was on the basis that the LSCJ had erred in law when he ruled that the Respondents do have the requisite locus standi to initiate an action for recovery of the 11.3 Bitcoins.

[19] From the evidence, it could not be denied that up until the point the Bitcoins are assigned to a specified user, it is just a pool of Bitcoins that Luno has full custody and control of. Hence, it was incorrect to suggest that the Respondents were not the legal and beneficial owners of the 11.3 Bitcoins. It followed, therefore, that the LSCJ was right in fact and in law in deciding that the Respondents have the requisite locus standi to initiate an action against the Appellant for the recovery of the 11.3 Bitcoins where were mistakenly transferred to him.

Decision

[20] Upon duly considering the grounds in support of the appeal, the facts and evidence before the trial Court, the grounds of decision of the Learned Session Court Judge ('LSCJ'), the contentions of counsel and the law and principles applicable to the issues in dispute, the Court finds as follows:

[21] It is trite law that an Appellate Court will only interfere with the decision and primary findings of fact of a trial Court where the Judge had seen and heard the witnesses in rare and exceptional circumstances or where a clear error of law and/or principle is demonstrated by the Appellant.

[22] The crux of this appeal turns on the correct interpretation of Section 73 of the Contracts Act, 1952 ('C/A') and the application of Section 73 to the instant facts.

[23] Having perused the clear and explicit terms of Section 73 and the reasoning of the LSCJ as to the applicability of Section 73, it is the considered view of this Court that there was no error of law or principle in the LSCJ's interpretation of Section 73 of the C/A, particularly that the present claim is within the purview of Section 73, which is of wide application. Its terms are plainly wide enough to be invoked for the return of the 11.3 Bitcoins wrongly or mistakenly transferred into the account of the Appellant. It is erroneous for the Appellant to contend that Section 73, C/A is inapplicable in respect of the Respondents' claim on the grounds advanced which are briefly that :

(a) cryptocurrency is not 'money' or 'thing' within the meaning of Section 73, C/A.

(b) The mistaken transfer of the said 11.3 Bitcoins, being the result of a technical glitch' cannot be considered as a mistake of fact or law; and

(c) The additional Bitcoins were radically changed and lost, which the LSCJ found as a fact had not been proven by the Appellant.

[24] Similarly, the LSCJ had not erred in law in rejecting the contention that the Respondents' cryptocurrency online exchange is illegal and/or contrary to public policy and not accorded protection under the law. There was no material or evidence before the Court below that, although cryptocurrency is not recognised as legal tender in our jurisdiction, the Respondents' whole operation is illegal and cannot sustain the claim for restitution.

[25] In regards to the Appellant/Defendant's counter claim premised on the tort of unlawful interference, the LSCJ, had duly considered the onus of proof on the Defendant to prove the essential elements of this tort, in this case, inter alia that the 1st Respondent had deliberately caused Bitfinex to breach its contractual obligations to the Defendant. The LSCJ had properly

considered the totality of the evidence before the Court and stated his reasons for arriving at his finding of fact that the Defendant had failed to prove on a balance of probabilities that Bitfinex had breached its contractual obligations to the Defendant and that the Respondents had unlawfully interfered in the contract causing the alleged breach. It was the LSCJ's clear and categorical finding that the Defendant's aforesaid allegation had not been substantiated on the proven facts and evidence.

[26] It was on the whole not demonstrated that the LSCJ had misdirected himself on the facts or law or failed to apply the correct standard of proof in arriving at his decision on the counter-claim.

[27] For these reasons, inter alia, the Court upholds the Respondents' contention that the Appellant's appeal on both the claim and counter claim is without basis and devoid of merits. This appeal is, therefore, dismissed with costs.

[28] Costs of RM7000.00 to Respondents subject to allocatur.

Dated: 31 August 2019

(GUNALAN A/L MUNIANDY)

Judge

High Court of Malaya

Shah Alam

COUNSEL:

For the Appellant	:	Puan Shariza binti Shukor together with Mr. Aaron Lee Cheen Yee Messrs Aaron KC Ng & Partners Petaling Jaya, Selangor
For the Respondent s	:	Mr. Maximilian Tai Kim Sen together with Miss Dephne Rethual Messrs Moideen & Max Kuala Lumpur

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