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## **Restitution of Mistaken Enrichment under Section 73 of Malaysia's Contracts Act 1950: Pouring New Wine into an Old Bottle?**

Alvin W-L See \*

This article makes two main suggestions regarding the interpretation of s 73 of Malaysia's Contracts Act 1950, which sets out the right to recover a mistaken enrichment. The first suggestion is that the courts should have regard to the historical background against which the section was enacted, especially because the pre-enactment common law was a historical curiosity. This will dispel certain misconceptions about the nature of the statutory right by shedding light on its supposed affinity with contract and its relationship with the obsolete forms of action and the principle of unjust enrichment. The second suggestion is that the content of s 73 needs to be developed so as to enable it to better address complex cases. In undertaking the task of formulating the detailed rules and principles for the section, the courts should draw on the experience of other major common law jurisdictions. It shall be shown that the common law method of analysing issues of unjust enrichment could be usefully incorporated into the section's framework.

### **I Introduction**

The case of a mistaken enrichment is generally accepted as the paradigm example of unjust enrichment.<sup>1</sup> In Malaysia, the right to restitution of a mistaken enrichment is found in s 73 of the Contracts Act 1950 (Msia) (CA 1950), which states: 'A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it'. While the statutory recognition of such a right is much welcomed, there are a number of concerns regarding its interpretation that require serious attention. First, the historical background against which the section was enacted is often overlooked. This has led to the drawing of a false analogy between the statutory claim and a contractual claim, as well as an incorrect distinction between the statutory claim and a claim for money had and received. The consequences of such misconceptions must not be underestimated, hence warranting a greater emphasis on the study of the history of the law of unjust enrichment. Second, the section's wording, if left in its simple and general form, could not adequately address complex disputes, particularly those that involve competing interests. There is clearly a need to develop the section's content and it is argued that the most efficient approach is to draw on the experience of other major common law jurisdictions. A substantial portion of this

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<sup>1</sup> Professor Birks regarded the mistaken payment of a non-existent debt as the core case of unjust enrichment. See P Birks, *Unjust Enrichment*, 2nd ed, Oxford University Press, Oxford, 2005, p 3.

article is devoted to demonstrating the usefulness of incorporating the tested common law method of analysing issues of unjust enrichment into the framework of s 73. The ultimate aim of this article is to promote a principled approach in the application of s 73. A principled treatment of the law is, after all, the hallmark of a mature legal system.

## II The Importance of Legal History

The Indian Contract Act 1872 (Ind) (ICA 1872) was enacted 'to define and amend certain parts of the law relating to contracts'.<sup>2</sup> Despite its modest statement of purpose, the ICA 1872's coverage of the general contract law is fairly substantial. Its contents were drawn mainly from 19th-century English contract law modified to suit local circumstances.<sup>3</sup> This novel enactment was first extended to the Federated Malay States by the Contract Enactment 1899 (Msia) and later to the Unfederated Malay States by the Contracts (Malay States) Ordinance 1950 (Msia) in a revised form. Post-independence, in 1974, the latter was further revised and extended to the whole of Malaysia,<sup>4</sup> and was reenacted as the CA 1950.<sup>5</sup> Due to its historical roots, English and Indian case law, as well as Privy Council decisions that involved appeals from India and Malaysia, are highly persuasive in the interpretation of the CA 1950.<sup>6</sup>

Much has been said elsewhere about the extent to which English contract law has been adopted and departed from,<sup>7</sup> as well as the continuing interactions between the enactment and the common law.<sup>8</sup> What remains lacking,<sup>9</sup> however, is the equivalent level of comparative study with regard to Pt VI of the CA 1950 (ss 69-73)<sup>10</sup> which,

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<sup>2</sup> ICA 1872, Preamble.

<sup>3</sup> See H S Cunningham and H H Shephard, *The Indian Contract Act, No IX of 1872, Together with an Introduction and Explanatory Notes, Table of Contents, Appendix and Index*, 3rd ed, Higginbotham, Madras, 1878; W Stokes, *The Anglo-Indian Codes*, Vol I, Clarendon Press, Oxford, 1887, pp 491-534; F Pollock and D F Mulla, *The Indian Contract Act, With A Commentary, Critical and Explanatory*, Sweet & Maxwell, London, 1905; Rt Hon Sir G C Rankin, *Background to Indian Law*, Cambridge University Press, Cambridge, 1946, ch VII; A C Patra, 'Historical Background of the Indian Contract Act, 1872' [1962] *J Indian L Institute* 373.

<sup>4</sup> Contracts (Malay States) (Amendment and Extension) Act 1974 (Msia).

<sup>5</sup> This was carried out under the Revision of Laws Act 1968 (Msia) without going through the normal legislative process.

<sup>6</sup> In Malaysia, the right to appeal from the Federal Court to the Privy Council was abolished in 1985, after which the highest binding precedent comes from the Federal Court: Constitution (Amendment) Act 1983 (Msia).

<sup>7</sup> See works cited in n 3 above. See also V Sinnadurai, *Law of Contract*, 4th ed, LexisNexis, Petaling Jaya, 2011; A B L Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd Singapore and Malaysian ed, Butterworths Asia, Singapore, 1998; M F Cheong, *Contract Law in Malaysia*, Sweet & Maxwell Asia, Petaling Jaya, 2010; N Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts*, 14th ed, LexisNexis, New Delhi, 2012; R R Sethu, 'The History, Impact and Influence of the Indian Contracts Act 1872' (2011) 28 *JCL* 31.

<sup>8</sup> See eg MF Cheong, 'The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract' (2009) 25 *JCL* 244; J W Carter, 'Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)' (2011) 28 *JCL* 85.

<sup>9</sup> But see M F Cheong, *Civil Remedies in Malaysia*, Sweet & Maxwell Asia, Petaling Jaya, 2007, ch 7; D Fung, 'Restitution and Section 71 of the Contracts Act 1950' [1994] 2 *MLJ* lxxix.

<sup>10</sup> The Indian equivalent is the ICA 1872, Ch V (ss 68-72). The right to recover a mistaken enrichment is found in s 72, which is identical to the CA 1950 s 73.

under the heading 'Of Certain Relations Resembling Those Created By Contract', sets out certain quasi-contractual causes of action recognized by mid-19th century English law.<sup>11</sup> Today, most of these are best understood as based on the principle of unjust enrichment.<sup>12</sup>

The codification of these causes of action is a welcome development, especially because the common law prior to the enactment of the ICA 1872 was a historical curiosity. This was mainly due to the influence of the forms of action, which resulted in an overemphasis on form over substance. Unfortunately, the Malaysian courts have failed to capitalize on the opportunity to begin afresh, at least not to the full extent. Their unfamiliarity with the pre-enactment common law has allowed obsolete and incorrect conceptions to seep into legal thought, affecting the development of the modern law. In other words, legal development is impeded by the failure to learn from past mistakes.

It is helpful to begin by understanding the influence of the forms of action on the early development of the English law of unjust enrichment.<sup>13</sup> This would explain why it was not unusual in the 19th century for matters of unjust enrichment to be subsumed within works on contract.<sup>14</sup> The 16th century saw the creation of a new form of action known as *assumpsit*, which entailed an assertion that the defendant broke a promise to pay. It was the main form of action used to enforce a claim for breach of a contractual promise. By the later half of the 17th century, it was extended to enforce a number of non-contractual claims, most notably a claim to recover a mistaken payment.<sup>15</sup> To justify such use of *assumpsit*, the obligation to repay was treated as though having arisen from a contract. In *Moses v Macferlan*,<sup>16</sup> Lord Mansfield said:

If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu', as the Roman law expresses it).

It is important to understand that this statement was in response to the objection that 'no *assumpsit* lies, except upon an express or implied contract'.<sup>17</sup> Thus, although the

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<sup>11</sup> Pollock and Mulla, above, n 3, pp 238-50; Cunningham and Shephard, above, n 3, pp xlii-xlv, 199-211; Stokes, above, n 3, pp 533-4.

<sup>12</sup> See Law Commission of India, *Thirteenth Report (Contract Act, 1872)*, New Delhi, 1958, pp 11-13.

<sup>13</sup> See J B Ames, 'The History of Assumpsit' (1888) 2 *Harvard L Rev* 53; R M Jackson, *The History of Quasi-Contract in English Law*, Cambridge University Press, Cambridge, 1936; J H Baker, 'The Use of Assumpsit for Restitutionary Money Claims 1600-1800' in E J H Schrage, ed, *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, Duncker & Humblot, Berlin, 1995, p 31; AW-L See, 'An Introduction to the Law of Unjust Enrichment' [2013] 5 *MLJ* i.

<sup>14</sup> See eg S Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal*, Vol II, J Butterworth, London, 1807; J Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal*, S Sweet, London, 1826; S M Leake, *Elements of the Law of Contracts*, Stevens and Sons, London, 1867.

<sup>15</sup> *Lady Cavendish v Middleton* (1628) Cro Car 141; 79 ER 725.

<sup>16</sup> (1760) 2 Burr 1005 at 1008; 97 ER 676 at 678.

<sup>17</sup> *Moses v Macferlan* (1760) 2 Burr 1005 at 1008; 97 ER 676 at 678. Thus, Professor Birks described Lord Mansfield's statement as a 'brilliant and dangerous attempt to kill two birds with one alien stone, the appeal to the Roman phrase quasi ex contractu which seeks both to justify the action's form and to affirm its non-contractual nature'.

courts continued to refer to claims that were founded on quasi or implied contract,<sup>18</sup> it was generally understood that the reference to contract was not to be taken literally.<sup>19</sup> There was indeed a period when the fictitious contract was regarded as giving rise to matters of substance.<sup>20</sup> But this was severely criticised and was eventually rejected.<sup>21</sup>

The CA 1950 (and the ICA 1872) made no reference to the forms of action and related concepts since it postdated their abolition.<sup>22</sup> This was likely to be an intentional attempt to break away from past procedural complexities.<sup>23</sup> Unfortunately, Maitland's observation that the forms of action continue to rule us from their graves is as true today as it was a century ago.<sup>24</sup> Two examples would suffice.

In *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd (AmBank)*,<sup>25</sup> which concerned a claim to recover mistaken payments, the High Court held that s 73 only applies where there is a pre-existing contractual relation between the mistaken payer and payee. The court allegedly found support from the two statutory illustrations to the section, of which we shall only refer to the one concerning mistake.<sup>26</sup> Illustration (a) states: 'A and B jointly owe RM100 to C. A alone pays the amount to C, and B, not knowing this fact, pays RM100 over again to C. C is bound to repay the amount to B'. It is possible that this illustration was drafted to reflect a liability mistake; that is, an erroneous belief that one is liable to pay another. But even the requirement of liability mistake is not confined to a mistake as to contractual liability.<sup>27</sup> The plaintiff could, for example, be mistaken about his or her liability to pay tax or a judgment debt. The court's insistence on a contractual link must have stemmed from the misconception that s 73 is based on contract principles. It is, after all, found in a contract statute. History, however, has informed us that the affinity between contract and unjust enrichment was purely a result of historical accidents. Contract and unjust enrichment are conceptually distinct. A mistaken payee does not contract to repay the mistaken payer. To regard him or her as having done so, when in fact he or she did not, is to subscribe to the implied contract theory, which has long fallen out of favour. In *Badr-un-nisa v Muhammad Jan*,<sup>28</sup> Straight J of the Indian High Court observed that 'the

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<sup>18</sup> See eg *Jacob v Allen* (1703) 1 Salk 27; 91 ER 26; *Cock v Vivian* (1734) W Kel 203; 25 ER 569.

<sup>19</sup> See eg Leake, above, n 14, pp 39-40; W D Evans, *A Treatise on the Law of Obligations, or Contracts: By M Pothier*, Vol I, Joseph Butterworth, London, 1806, Intro, p 85; H Maine, *Ancient Law*, John Murray, London, 1861, pp 343-4; W R Anson, *Principles of the English Law of Contract*, Clarendon Press, Oxford, 1879, pp 321, 324; F Pollock, *Principles of Contract at Law and in Equity*, Stevens and Sons, London, 1876, p 29.

<sup>20</sup> See eg *Sinclair v Brougham* [1914] AC 398 at 415, where the House of Lords declared that '[t]he fiction can only be set up with effect if such a contract would be valid if it really existed'.

<sup>21</sup> See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 69 ALR 577.

<sup>22</sup> The forms of action were abolished by the Common Law Procedure Act 1852 (UK).

<sup>23</sup> *State of West Bengal v BK Mondal & Sons* (1962) AIR SC 779 at 913.

<sup>24</sup> A H Chaytor and W J Whittaker, eds, *F W Maitland, Equity, also the Forms of Action at Common Law*, Cambridge University Press, 1910, p 296.

<sup>25</sup> [2012] 7 MLJ 364 at 375-6.

<sup>26</sup> The obligation to consider the illustrations was emphasised in *Mohamed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575 at 581.

<sup>27</sup> See section IV(d) below.

<sup>28</sup> (1880) ILR 2 All 671 at 674. See also Stokes, above, n 3, p 586: 'This gets rid of the English fiction of an implied contract and promise to repay'.

provisions of the Contract Act, chapter V, have superseded this fiction of implied contract and promise'. Similarly, in *Koh Siak Poo v Sayang Plantation Bhd (Koh Siak Poo)*,<sup>29</sup> the Malaysian Court of Appeal has explicitly rejected the implied contract theory. For these reasons, this aspect of the court's decision in *AmBank* was clearly incorrect.

The other example is the continued references to the obsolete forms of action without understanding what they really mean. In the context of mistaken payments, the courts almost never fail to speak of an action for money had and received. It was usually perceived as a wider claim that is distinct from the statutory claim encapsulated in s 73, although reference to the principle of unjust enrichment was often made in relation to both claims.<sup>30</sup> In truth, the action for money had and received was a sub-sub form of the action of *assumpsit* and was therefore only a procedural means by which a plaintiff in the past enforced his or her claim. It was not a cause of action.<sup>31</sup> In *Kelly v Solari*,<sup>32</sup> which Malaysian courts frequently refer to when addressing a case of mistaken payment, the plaintiff brought an action for money had and received. But the basis of the plaintiff's claim was the mistake in making the payment to the defendant, which rendered the defendant's enrichment unjust. In Malaysia, this claim is now embodied in s 73.<sup>33</sup> In overlooking these connections, the courts often ended up explaining the action for money had and received by resorting to broad, open-ended notions such as equity, conscience and natural justice.<sup>34</sup> However, as to be expected, the courts always arrived at the same conclusion for both claims. While this means that no direct harm is caused, the incorrect distinction is unnecessary and is liable to confuse. In fact, there is only one case, *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain (Siti Fatimah)*, where the court correctly identified the relationships between s 73, money had and received, and unjust enrichment.<sup>35</sup> Clearly, the way forward is to abandon references to the obsolete forms of action and instead emphasise the precise identification of the ground(s) for restitution.<sup>36</sup>

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<sup>29</sup> [2002] 1 MLJ 65 at 70.

<sup>30</sup> See *AmBank* [2012] 7 MLJ 364; *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262 (*Bank Bumiputra*); *Green Continental Furniture (M) Sdn Bhd lwn Tenaga Nasional Bhd* [2011] 8 MLJ 394 (*Green Continental Furniture*); *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787 (*Affin Bank*).

<sup>31</sup> See *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44 at [124]: '[A]lthough the Plaintiffs' claim ... was pleaded as money had and received, that, strictly speaking, is not a cause of action. The action of money had and received was a type of "common" count. Common counts were historical pleading devices that permitted the pleading of claims in general terms with specific details of the debt sought to be recovered left to the law of evidence'.

<sup>32</sup> (1841) 9 M & W 54; 152 ER 24.

<sup>33</sup> For similar interpretation of the ICA 1872 s 72, see *Mahabir Kishore v State of Madhya Pradesh* (1990) AIR SC 313; *Renusagar Power Co Ltd v General Electric Co* (1994) AIR SC 860.

<sup>34</sup> See section IV(d) below.

<sup>35</sup> [2011] 2 CLJ 545.

<sup>36</sup> *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA at [125]: 'Plaintiffs should be precise in elucidating the basis for their restitutionary claims. Identifying the precise underlying cause of action for a restitutionary claim has practical consequences in terms of affecting what the plaintiff needs to show in order to establish the claim'.

### III Developing Section 73

Like most statutory provisions, s 73 is expressed in clear and simple language. While this is usually beneficial, it also has the propensity to conceal complexities that may arise in cases of mistaken enrichment. For example, the section says nothing about the mistaken payee's interest, which is worthy of protection in certain situations.<sup>37</sup> To maximise the section's utility, it is necessary to expend effort on formulating its detailed rules and principles so as to enable it to adequately address complex disputes. The generality of the section's wording suggests that the drafters left room for developments. They could not have thought that the law on this topic could be comprehensively and accurately stated in so few words given the uncertain state of the pre-enactment common law. Moreover, s 17A of the Interpretation Acts 1948 and 1967 (Msia) requires the courts to adopt a purposive approach in statutory interpretation. The purpose of s 73 is surely to adequately address cases of mistaken enrichment, including the proper balancing of competing interests.

As said earlier, the right to recover a mistaken enrichment is based on the principle of unjust enrichment. Before proceeding to examine how s 73 could be developed by reference to this principle, it is necessary to make two important points. Both concern the need to ensure coherence and consistency in the law. First, it is important to understand that Pt VI of the CA 1950 does not purport to codify the entire law of unjust enrichment, which is a very ambitious task even for today.<sup>38</sup> As the Law Commission of India said in its *Thirteenth Report*: 'To enumerate the various principles which create obligations of this type, as has been done in the American Restatement of the law, is not the work of a legislator. To compress what is contained therein is an impossible task'.<sup>39</sup> In fact, outside Pt VI, the law of unjust enrichment continues to develop. The courts have long recognised total failure of consideration as a ground for ordering restitution.<sup>40</sup> The *Woolwich* principle,<sup>41</sup> which allows restitution in the case of ultra vires levy of tax by a public body, was also recently recognised.<sup>42</sup> As these common law developments also influence the general theme of the law of unjust enrichment, they must be taken into account in the interpretation of s 73. Thus, as argued earlier, the rejection of the implied contract theory in *Koh Siak Poo* should equally apply to s 73, notwithstanding that the case was concerned with a common law

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<sup>37</sup> In the absence of competing interests, the application of the section is fairly straightforward. See *Bank Bumiputra* [1998] 3 MLJ 262; *Siti Fatimah* [2011] 8 MLJ 394; *Green Continental Furniture* [2011] 8 MLJ 394; *Phileo Allied Bank (M) Bhd v Shahrul Bahthiar Tumpang* [2008] 9 CLJ 344.

<sup>38</sup> For restatements of this area of the law, see American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment*, ALI Publishers, St Paul, 2001; A Burrows, *A Restatement of the English Law of Unjust Enrichment*, Oxford University Press, Oxford, 2012.

<sup>39</sup> See Law Commission of India, above, n 12, p 13. Instead, the report proposed the insertion of a catch-all s 72B, which reads: 'In any case not coming within the scope of sections 68 to 72A, where there is no contract, but a person is unjustly benefitted at the expense of another person, the former is bound to restore the benefit to the latter or to make compensation therefor'. This suggestion was never adopted.

<sup>40</sup> *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2011] 1 MLJ 597; *LSSC Development Sdn Bhd v Thomas Iruthayam* [2007] 2 CLJ 441; *Koh Siak Poo* [2002] 1 MLJ 65; *Wong Lee Sing v Mansor* [1972] 2 MLJ 154.

<sup>41</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

<sup>42</sup> *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 825.

right to restitution on the ground of total failure of consideration. Another example, albeit concerning a different statutory provision, is *BP Exploration Co (Libya) Ltd v Hunt (No 2)*.<sup>43</sup> In that case, Robert Goff J explained that the principle underlying s 1(2) and (3) of the Law Reform (Frustrated Contracts) Act 1943 (UK) is the prevention of unjust enrichment and he went on to interpret the statutory provisions by drawing on the common law principles of unjust enrichment.<sup>44</sup>

Second, in formulating the detailed rules and principles for s 73, the courts must keep an eye on their potential impact on the other branches of the law. As a general rule, unjust enrichment shall not be allowed to contradict a considered position elsewhere. For example, an unjust enrichment claim shall be denied if it has the effect of redistributing a contractual allocation of risk, even if the requirements of the claim were satisfied.<sup>45</sup> However, it is also recognised that in certain situations unjust enrichment could offer an alternative claim to an existing one. Where money is paid away as a result of fraud, for example, the payer could sue the fraudster for the tort of deceit (fraud) or unjust enrichment on the ground that it was paid under an (induced) mistake.<sup>46</sup>

As to the main task of developing the content of s 73, it is suggested that the most efficient approach is to draw on the experience of other major common law jurisdictions. As the common law rules and principles are carefully crafted on a case-by-case basis and tested against a wide variety of problems, they are likely to be both principled and practically workable. This suggestion is likely to find favour with the courts given their fairly liberal treatment of s 73, as evidenced by three examples. The first two examples concern the interpretation of the section's wording. In *Chin Nam Bee Development Sdn Bhd v Tai Kim Choo*,<sup>47</sup> the High Court had to decide whether the narrow meaning of 'coercion' set out in s 15 of the CA 1950 should also apply to the same word used in s 73.<sup>48</sup> Following the decision of the Privy Council in *Kanhaya Lal v National Bank of India*,<sup>49</sup> the court held that the meaning of 'coercion' in s 15 is confined to the purpose of determining whether there is 'free consent' in the formation of a contract, as required under s 14 of the CA 1950.<sup>50</sup> For s 73, the ordinary meaning of the word 'coercion' shall apply.<sup>51</sup> The practical implication of this decision is that it would allow s 73 to apply in a wider range of situations, potentially whenever the

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<sup>43</sup> [1979] 1 WLR 783. See also A Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232 at 242-3.

<sup>44</sup> The Malaysian equivalent is the Civil Law Act 1956 (Msia) s 15(2) and (3).

<sup>45</sup> In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 166, Lord Goff warned that 'serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract'. See also C Mitchell, P Mitchell and S Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed, Sweet & Maxwell, London, 2011, ch 3 (Goff & Jones); J Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Inquiries in Law* 83.

<sup>46</sup> See section IV(d) below.

<sup>47</sup> [1988] 2 MLJ 117. See also *Naested v State of Perak* [1925] FMSLR 10.

<sup>48</sup> 'Coercion' is defined in the CA 1950 s 15, as 'the committing or threatening to commit any act forbidden by the Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement'.

<sup>49</sup> (1913) ILR Cal 598.

<sup>50</sup> [1988] 2 MLJ 117 at 119-20.

<sup>51</sup> [1988] 2 MLJ 117 at 119-20.



plaintiff's intention to enrich the defendant is vitiated by illegitimate pressure. It also lends support to the view that s 73 has no affinity with contract. The second example concerned the question of whether s 73 allows the recovery of a payment made under a mistake of law. In *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi*<sup>52</sup> (*Prasad Singh*), the Privy Council observed that s 72 of the ICA 1872 makes no distinction between mistake of fact and mistake of law, and thus declined to follow the then prevailing position under English common law which denied recovery for mistake of law.<sup>53</sup> This approach was subsequently affirmed by the Supreme Court of India<sup>54</sup> as well as the Federal Court of Malaysia.<sup>55</sup> The third example, which will be explored further in s V(e), is the courts' recognition that certain common law defences are available to defeat or limit a claim based on s 73 even though these were not expressly provided for in the section.

The remaining parts of this article will set out to show how the common law unjust enrichment analysis could be usefully incorporated into the framework of s 73. This will provide a principled framework for assessing and developing the section's content, thus allowing the courts to better identify the issues and address them with coherent solutions. For this purpose, we will refer mainly to English common law given their strong influence on Malaysian law. But the laws of other major common law jurisdictions would also be referred to where appropriate.

## **IV Incorporating the Common Law Unjust Enrichment Analysis into the Framework of Section 73**

### **(a) General Framework**

The general proposition that a person shall not be unjustly enriched at the expense of another is not a definitive legal principle by itself in the sense that it does not offer 'a sufficient premise for direct application in particular cases'.<sup>56</sup> Instead, as Deane J of the High Court of Australia explained in *Pavey & Matthews Pty Ltd v Paul*:<sup>57</sup>

[Unjust enrichment] constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part

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<sup>52</sup> 1949) AIR PC 297, affirmed in *Sales Tax Officer, Banaras v Kanhaiya Lal Mukundlal Saraf* (1959) AIR SC 135 (Sales Tax Officer); *Tilokchand and Motichand v H B Munshi* (1970) AIR SC 898; *Mafatlal Industries Ltd v Union of India* (1997) 5 SCC 536.

<sup>53</sup> *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448. The mistake of law bar under English law was only abolished at the end of the century: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. In Australia, the abolishment occurred earlier in 1992: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; 109 ALR 57 (*David Securities*).

<sup>54</sup> *Sales Tax Officer* (1959) AIR SC 135; *Tilokchand and Motichand v H B Munshi* (1970) AIR SC 898; *Mafatlal Industries Ltd v Union of India* (1997) 5 SCC 536.

<sup>55</sup> [2012] 3 CLJ 606. See also *Bank Bumiputra* [1998] 3 MLJ 262; *Green Continental Furniture* [2011] 8 MLJ 394.

<sup>56</sup> *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at 665; 247 ALR 412 at 434; [2008] HCA 27 at [85] (*Lumbers v Cook*).

<sup>57</sup> (1987) 162 CLR 221 at 256-7; 69 ALR 577 at 604. See also K Mason, J W Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia*, 2nd ed, LexisNexis Butterworths, Sydney, 2008, pp 7-10 (*Mason & Carter*); *Goff & Jones*, above, n 45, p 6.

of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

Guided by this organising concept, the courts and scholars have gradually worked out the detailed rules and principles of unjust enrichment. Under the prevailing common law approach, a right to restitution arises where: (a) the defendant is enriched; (b) it is at the plaintiff's expense; and (c) it is unjust.<sup>58</sup> This is, of course, to state the issues at a very general level. Each element of the claim requires further examinations as they may raise difficult or even unresolved issues. This framework of analysis would ensure some degree of certainty, thus preventing the availability of restitution from being determined by one's subjective evaluation of what is unjust enrichment.<sup>59</sup>

The Malaysian courts often refer to the elements of an unjust enrichment claim when dealing with s 73. This is the correct approach for the statutory right which is based on the principle of unjust enrichment. Moreover, as shall be shown, the elements of an unjust enrichment claim are either inherent in or could be easily read into the section's framework. Unfortunately, however, the courts have sometimes taken a broad-brush approach in the treatment of these elements. Particularly, there is a tendency to approach the elements of the claim restrictively where they think that the facts of the case do not justify restitution, and vice versa. This is best demonstrated by the case of *AmBank*.<sup>60</sup> There, a fraudster purchased from the plaintiff bank (the bank) three cashier's orders made payable to the defendant, a firm of moneychangers (the moneychanger). The cashier's orders were paid for using forged cheques. Before the fraud was discovered, the fraudster approached the moneychanger to purchase a large sum of foreign money and paid using the cashier's orders. Upon receiving payment, the moneychanger delivered the foreign money to the fraudster. After the fraud was discovered, the bank sought to recover the money from the moneychanger on the ground that it was paid under a mistake, relying on s 73. The High Court held that the requirements of s 73 were not satisfied, specifically because the moneychanger was not enriched, and that there was no mistake. As shall be explained later, this is incorrect. However, as the court correctly held that the moneychanger could raise a change of position defence, the court's finding in favour of the moneychanger was unquestionably right.<sup>61</sup> The point is that, given the court's recognition that the moneychanger has the opportunity to raise a defence, it is unnecessary to be overly restrictive in approaching the elements of the claim.<sup>62</sup> Take, for example, a case

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<sup>58</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

<sup>59</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 578 per Lord Goff: 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right'. This was cited with approval in *Fernrite Sdn Bhd v Perbadanan Nasional Bhd* [2011] 6 CLJ 1 at 12-13. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 185.

<sup>60</sup> [2012] 7 MLJ 364.

<sup>61</sup> Whether such importation of restitutionary defences is justified will be examined in section IV(e).

<sup>62</sup> See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 581 per Lord Goff: '[T]he recognition of change of position as a defence should be doubly beneficial. It will enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in

identical in all aspects to *AmBank* except that the defendant has not changed his position. A restrictive approach towards the elements of the claim would result in the deserving plaintiff's claim being defeated, which would be absurd. Instead, the balancing of competing interests should be left mainly to the defences. The question of whether the defendant is ultimately required to make restitution should therefore be analysed in two stages.<sup>63</sup> Upon satisfying elements (a) to (c), the plaintiff obtains a prima facie right to restitution.<sup>64</sup> The burden then shifts to the defendant to raise a defence to defeat or limit the plaintiff's prima facie right. If the defendant fails to do so, the prima facie right crystallises into an absolute one. This two-stage analysis was adopted in *Siti Fatimah*, where the High Court found that there was a mistaken payment but went on to consider whether the defence of change of position applies.<sup>65</sup>

A final point before proceeding further is that the word 'restitution' does not appear anywhere in the CA 1950. This may be because the term had yet to gain currency in legal usage in the mid-19th century.<sup>66</sup> However, when used in reference (either expressly or implicitly) to a benefit, the terms 'restore', 'return', 'repay' and 'compensate' shall be regarded as the equivalent of 'restitution'. The phrase 'repay or return' in s 73 also indicates that the court could either award restitution of the value of the enrichment (personal restitution) or restitution of the enrichment itself (proprietary restitution). But the issue of proprietary restitution, which is widely regarded as the most difficult area in the law of unjust enrichment, has yet to be considered by the Malaysian courts.<sup>67</sup> Due to its complexities, its examination is best undertaken elsewhere.

### (b) Is the Defendant Enriched?

Section 73 refers to two types of enrichment: 'money' and 'things'. Most, if not all, cases in which s 73 was applied or considered concerned mistaken payments. The term 'money' usually refers to corporeal money, that is, coins or banknotes, but is also wide enough to include incorporeal or bank money. In an age of electronic banking, most cases concern the latter. Where the plaintiff pays money into the defendant's bank account, the defendant acquires a contractual right to demand payment of that amount from his or her bank.<sup>68</sup> The defendant's enrichment is the value of that contractual right. The term 'things' is more difficult. Its natural meaning is wide enough to include objects that could be measured by money and those where monetary measurement is impossible or unthinkable. But the law of unjust enrichment is concerned only with the former.<sup>69</sup> In *Peter v Beblow*,<sup>70</sup> McLachlin J of the Canadian Supreme Court said that

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appropriate cases, available'.

<sup>63</sup> See *Barclays Bank Ltd v WJ Simms Sons & Cooke (Southern) Ltd* [1980] QB 677 at 695.

<sup>64</sup> The reference to a prima facie obligation or liability to make restitution could be found in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662; 78 ALR 157.

<sup>65</sup> [2011] 2 CLJ 545.

<sup>66</sup> The term 'restitution' was first referred to extensively in Abbot's review of Keener's treatise: E V Abbot, 'Keener on Quasi-Contracts. II.' (1897) *Harv L Rev* 479.

<sup>67</sup> In *The Royal Bank of Scotland Bhd v Seng Huah Hua* [2013] 9 MLJ 681 (*Royal Bank of Scotland*), the plaintiff's claim for a constructive trust over the mistaken payment was not allowed by the court.

<sup>68</sup> D Fox, *Property Rights in Money*, Oxford University Press, Oxford, 2008, ch 5.

<sup>69</sup> Birks, above, n 1, pp 50-2; *Goff & Jones*, above, n 45, p 82.

for the element of enrichment the law adopts a 'straightforward economic approach'. Indeed, it is doubtful whether the law of unjust enrichment has any role to play in a situation where a person seeks restitution of blood or an organ donated by mistake. The word 'things' is also problematic for another reason. It tends to imply tangible objects. The modern law, however, has since recognised many other types of enrichment, whether tangible or intangible, so long as they have monetary value.<sup>71</sup> Examples include services, discharge of debt, use value, etc.<sup>72</sup> Unless the courts are prepared to stretch the term 'things' beyond its natural meaning, the limitation could only be addressed by legislative reform.

Having examined what may constitute enrichment, a more important question is whether the defendant has been enriched and, if so, to what extent.<sup>73</sup> In *AmBank*, the court held that the moneychanger was not enriched because it did not retain the benefit of the payments.<sup>74</sup> This is incorrect for the focus is on receipt, not retention. The defendant is enriched upon receiving the enrichment.<sup>75</sup> Indeed, s 73 requires only that the defendant be a person 'to whom money has been paid, or anything delivered'. Whether a defendant who no longer retains the enrichment should be relieved from making restitution is a matter to be determined at the defence stage. On the question of valuation, it is necessary to draw a distinction between money and benefits in kind (or 'things', using the language of s 73). As money is the universally accepted measure of value, the receipt of money is incontrovertibly enriching.<sup>76</sup> A defendant who has received a ten-dollar note cannot realistically argue that he or she is not enriched or is enriched to a lesser sum. Benefits in kind are different in this respect. A particular thing is objectively enriching if it has a market value. But the defendant may not be a person who is willing to pay for the thing, or who would not have paid as much for it. Thus, in respecting the defendant's freedom of choice and individuality of value, the law allows him or her to subjectively devalue the benefit.<sup>77</sup> This is, of course, subject

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<sup>70</sup> [1993] 1 SCR 980 at 990.

<sup>71</sup> As Professor Birks expresses, '[e]nrichment received is the generalisation of money received'. See Birks, above, n 1, p 50.

<sup>72</sup> See *Goff & Jones*, above, n 45, ch 5. See also *Benedetti v Sawiris* [2013] 3 WLR 351; [2013] UKSC 50, where the UK Supreme Court laid down the principles for valuing enrichment in the form of services.

<sup>73</sup> *Sempra Metals Ltd v IRC* [2008] 1 AC 56; [2007] UKHL 34 at [119] per Lord Nicholls: 'What is ultimately important in restitution is whether, and to what extent, the particular defendant has been benefitted'.

<sup>74</sup> [2012] 7 MLJ 364 at 376. See also *Kum Wah Sdn Bhd v RHB Bank Bhd* [2009] 9 MLJ 490 at 500 (*RHB Bank*).

<sup>75</sup> *Benedetti v Sawiris* [2013] 3 WLR 351; [2013] UKSC 50 at [14] ('[I]t is clear that the enrichment is to be valued at the time when it was received'); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 386 ('It is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment'); *David Securities* (1992) 175 CLR 353 at 385; 109 ALR 57 at 80-1 ('From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched').

<sup>76</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799 per Goff J: 'Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefitted; and ... the loss suffered by the plaintiff is generally equal to the defendant's gain, so that no difficulty arises concerning the amount to be repaid'.

<sup>77</sup> P Birks, *An Introduction to the Law of Restitution*, Oxford University Press, Oxford, 1985, ch V.

to certain bars. For example, if the defendant refuses to return something that is readily returnable, he or she is not entitled to argue that it is of no value to him or her.<sup>78</sup>

### (c) Is It at the Plaintiff's Expense?

Section 73 makes no explicit reference to the requirement of 'at the expense of'. It is therefore unsurprising that the requirement has received little attention from the courts. However, it is important to regard this requirement as inherent in the section for it establishes the necessary link between the plaintiff and the defendant, more specifically between the plaintiff's loss and the defendant's enrichment.<sup>79</sup> In a two-party case where the plaintiff mistakenly pays money to the defendant, the latter is clearly enriched at the former's expense. There is a transfer of value from the plaintiff to the defendant.<sup>80</sup>

The position is less clear in a multiple-party case; for example, where P mistakenly pays X, and X then pays an equivalent sum to D. The question of whether P may leapfrog X to recover from D becomes especially important where X is no longer to be found, is insolvent, or is protected by a defence. The traditional view is that P cannot recover from D, the explanation being that there is no direct transfer of value between them.<sup>81</sup> D's enrichment is provided directly by X, and only indirectly by P. This prohibition against leapfrogging is sometimes explained as part of the element of 'at the expense of'. In other words, a defendant is only enriched at the expense of the direct provider of the enrichment.<sup>82</sup>

However, this view has been increasingly questioned. It is possible to regard D as having been enriched at the expenses of both P and X, so long as we keep an eye on the issue of double recovery.<sup>83</sup> The preferable view is that the 'at the expense of' requirement could be satisfied on a mere but-for causal test; that is, D would not have been enriched but for P's mistaken payment to X, while recognising that there may be policy reasons to deny P's claim nonetheless.<sup>84</sup> In other words, where leapfrogging is denied, it is better regarded as based on specific policy concerns as opposed to the non-fulfilment of the requirement of 'at the expense of'. For now, it remains beneficial to discuss the issue of leapfrogging under the present heading.

The issue of leapfrogging arose on the facts of *AmBank* but was overlooked by the court. There, although the moneychanger received the money from the bank, the value of its enrichment came directly from the fraudster and only indirectly from the bank. This is because the bank paid the moneychanger only pursuant to its contractual

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<sup>78</sup> See eg *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2774; [2004] EWCA Civ 47, where the defendant was held to have been enriched by choosing to retain the cherished car registration number 'TAC 1', which was mistakenly transferred to him when he bought the plaintiff's car.

<sup>79</sup> See Burrows, *The Law of Restitution*, 3rd ed, Oxford University Press, Oxford, 2011, pp 68-9.

<sup>80</sup> Burrows, above, n 79, p 66.

<sup>81</sup> See Burrows, above, n 79, pp 69-85; G Virgo, *The Principles of the Law of Restitution*, 2nd ed, Oxford University Press, Oxford, 2006, pp 105-6.

<sup>82</sup> J Edelman and E Bant, *Unjust Enrichment in Australia*, Oxford University Press, Melbourne, 2006, pp 138-41.

<sup>83</sup> See C Mitchell, 'Liability Chains' in S Degeling and Edelman, eds, *Unjust Enrichment in Commercial Law*, Lawbook Co, Sydney, 2008, pp 131, 135-8.

<sup>84</sup> *Goff & Jones*, above, n 45, pp 142-62; Birks, above, n 1, pp 89, 93-8.

obligations owed to the fraudster, who was the purchaser of the cashier's orders.<sup>85</sup> The question is whether the bank may leapfrog the fraudster to claim from the moneychanger, or more precisely, whether there is any good reason to forbid leapfrogging. There are a number of cases directly on point. In *Lumbers v Cook*, the Lumbers entered into a contract with Sons to build them a house.<sup>86</sup> Without the Lumbers' knowledge the work was subcontracted to Builders. Builders completed the work but were not paid in full. Builders then sought to recover the balance from the Lumbers by an unjust enrichment claim. The High Court of Australia rejected the Lumbers' claim, mainly because to allow it would interfere with the contractual allocation of risk that the parties had assumed. In the words of Gummow, Hayne, Crennan and Kiefel JJ, it would 'constitute a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed'.<sup>87</sup> *Lumbers v Cook* was followed by the English Court of Appeal in *MacDonald, Dickens & Macklin v Costello*.<sup>88</sup> There, the defendants, who owned some land, engaged the plaintiff builders to construct a number of houses on it. The contract was entered into between the plaintiff and a company wholly owned and run by the defendants. Dispute later arose when the defendants complained about the quality of the work and refused to pay. The plaintiff sued both the company and the defendants. The focus was on the claim against the latter, which was based on unjust enrichment. Etherton LJ recognised that the defendant's enrichment came only indirectly from the plaintiff but did not reject the claim on this basis. Instead, the claim was rejected based on a number of overlapping policy concerns, particularly to prevent the plaintiff from escaping the risks that they assumed by contracting with the company.<sup>89</sup> Both cases were recently followed by the Singapore Court of Appeal in *Alwie Handoyo v Tjong Very Sumito*.<sup>90</sup> For the same reasons, leapfrogging should be denied in the case of *AmBank*.

However, matters would be entirely different if the contracts between the bank and the fraudster were void,<sup>91</sup> rescinded<sup>92</sup> or terminated<sup>93</sup> before the money was paid to the moneychanger.<sup>94</sup> In such case, the payments to the moneychanger would not be pursuant to contractual obligations owed to the fraudster. Since there is now direct transfers of value between the bank and the moneychanger, there will be no issue of

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<sup>85</sup> See Birks, above, n 1, pp 87-8.

<sup>86</sup> (2008) 232 CLR 635; 247 ALR 412; [2008] HCA 27.

<sup>87</sup> (2008) 232 CLR 635 at 674; 247 ALR 412 at 442; [2008] HCA 27 at [126].

<sup>88</sup> [2011] 3 WLR 1341; [2011] EWCA Civ 930, noted M Yip [2011] *OUCLJ* 217; AW-L See [2012] *RLR* 125.

<sup>89</sup> See also *Goff & Jones*, above, n 45, pp 69-73.

<sup>90</sup> [2013] SGCA 44 at [103]-[109].

<sup>91</sup> For example, for common mistake of fact that is essential to the agreement: CA 1950 s 21.

<sup>92</sup> For example, for fraud, misrepresentation, coercion or undue influence: CA 1950 ss 15-20.

<sup>93</sup> The statutory right to terminate a contract is set out in the CA ss 40, 54 and 56(1). The wider common law right to terminate a contract is likely to be preserved by the CA 1950 s 1(2). See Carter, above, n 8.

<sup>94</sup> Termination of the contract after the money has been paid away will not suffice. Since the effect of termination is only to discharge the parties from their future obligations, obligations that arose before termination remains valid. See *Johnson v Agnew* [1980] AC 367; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. Both cases were affirmed by the *Federal Court of Malaysia in Berjaya Times Square* [2011] 1 MLJ 597.

leapfrogging to begin with. The case would revert to a two-party situation.

In *AmBank*, the contracts between the bank and the fraudster were voidable for fraud.<sup>95</sup> However, although both the CA 1950 and the Specific Relief Act 1950 (Msia) are silent, it is accepted by case law that the right to rescission is subject to the usual equitable bars.<sup>96</sup> Of relevance here is the third party rights bar to rescission. The core case is where P sells goods to X induced by X's fraud, and before the fraud is discovered X resells the goods to D. The traditional assumption is that if D purchased the goods in good faith and for valuable consideration, and P sought to exercise his or her right to rescind his or her contract with X only after the resale to D, rescission will be denied.<sup>97</sup> In *AmBank*, the moneychanger purchased the money from the fraudster for valuable consideration and had no notice of the fraud. Since the bank did not seek to rescind the contract before the moneychanger's bona fide purchase, the right to rescission would appear to be lost.<sup>98</sup>

The third party rights bar, however, has been increasingly doubted. While it finds support in a few well-known obiter dicta,<sup>99</sup> it has never actually been applied.<sup>100</sup> It is even doubtful whether the bar is necessary to achieve its purported function of protecting D's security of receipt. That D's bona fide purchase for value gives him or her a clear title in the property purchased, free from any adverse title-based claim by P, is undisputed. Whether rescission of the contract between P and X would necessarily affect this position to D's prejudice is open to question. In the sale of goods context, title in goods may pass upon the completion of the contract of sale without the need for delivery.<sup>101</sup> Since the contract is the mode of conveyance, rescission of the contract would have the effect of pulling back the title in the goods from D to be revested in P.<sup>102</sup> In balancing the interests of P and D, the law decides that where D has purchased the goods for value and in good faith before P's attempt to rescind the contract, P will be disallowed from rescinding the contract, which has the effect of pulling back title in the goods.<sup>103</sup> Beyond the sale of goods context, however, a contract does not by itself pass title. If P agrees to lend D money thereby creating a contractual debt, title in the

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<sup>95</sup> CA 1950 s 17.

<sup>96</sup> *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 3 CLJ 231 at 239; *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 at 248.

<sup>97</sup> See eg *Whittaker v Campbell* [1984] QB 318 at 327 per Robert Goff LJ: 'The effect of rescission of a contract induced by a misrepresentation is that property in goods transferred under it may be revested in the transferor (the misrepresentee). But this may not be possible if the goods have been transferred to a third party, for the intervention of third party rights may preclude rescission'.

<sup>98</sup> That the bank failed to rescind the contract in time could be inferred from the fact that it did not cancel the cashier's orders.

<sup>99</sup> See *White v Garden* (1851) 10 CB Rep 919; 138 ER 364; *Cundy v Lindsay* (1878) LR 3 App Cas 459; *Phillips v Brooks Ltd* [1919] 2 KB 243; *Lewis v Averay* [1972] 1 QB 198.

<sup>100</sup> See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission*, Oxford University Press, Oxford, 2009, pp 475-8.

<sup>101</sup> Sale of Goods Act 1957 (Msia) ss 19-23.

<sup>102</sup> See *Load v Green* (1846) 15 M & W 216; 153 ER 828; *Car & Universal Finance v Caldwell* [1965] 1 QB 525. See B Häcker, 'Rescission of Contract and Revesting of Title: A Reply to Mr Swadling' [2006] *RLR* 106, cf W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 *LQR* 123.

<sup>103</sup> See Sale of Goods Act 1957 s 29: 'Where the seller of goods has obtained possession thereof under a contract voidable under section 19 or 20 of the Contracts Act 1950, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title'.

money does not pass to D until delivery. That the contract and the transfer are analytically distinct is further demonstrated by the fact that the contract procuring the transfer need not be between P and D. In *AmBank*, for example, the bank's payments to the moneychanger were pursuant to contracts between the bank and the fraudster, to which the moneychanger was not a party. Since the contract did not pass title, rescinding the contract should not have the effect of revesting title in P.

Rescission is therefore better understood as entailing the exercise of two analytically distinct rights: the right to unwind the contract, and the right to revest title.<sup>104</sup> Since the two rights are not tied to each other, there should be no objection to the exercise of one without the other. Faced with D's bona fide purchase for value, the right to revest title is unquestionably lost. But this should not affect P's right to unwind the contract with X. While allowing the plaintiff to unwind the contract may have an indirect effect of allowing P to circumvent the problem of leapfrogging, any protection that should be afforded to D against P's claim is best addressed at the defence stage.<sup>105</sup> Importantly, disallowing P from rescinding his or her contract with X may prevent P from bringing certain claims against X (provided of course that X is found).<sup>106</sup> For example, allowing the contract to stand would prevent P from bringing an unjust enrichment claim against X since the contract acts as a 'justifying factor' for the transfer.<sup>107</sup> While in some cases P may be able to terminate the contract for breach, thus allowing him or her to bring an unjust enrichment claim against X,<sup>108</sup> there may be other cases where termination is not possible; for example, where X's representation was not incorporated as a term of the contract. For these reasons, the third party rights bar to rescission is best abandoned.

The fact that multiple parties are involved, however, does not necessarily mean that an issue of leapfrogging would arise. For example, in a number of mistaken payment cases, the fraudster caused the plaintiff bank to transfer money to the defendant moneychanger by forging signature on the payment or remittance form.<sup>109</sup> Since the payment by the plaintiff to the defendant is direct, in the sense that it is not pursuant to any contractual obligation owed to the fraudster, the defendant is clearly enriched at the bank's expense. This is essentially a two-party situation as explained at the outset.

#### (d) Is It Unjust?

As noted earlier, Malaysian courts often approach the 'unjust' inquiry by resorting to broad, open-ended notions of equity, conscience and natural justice. A good example is *Bank Bumiputra*, where the court so explained the basis of the duty to repay a

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<sup>104</sup> Fox, *Money*, above, n 68, p 218.

<sup>105</sup> See Section IV(e)(ii) below on whether the bona fide purchase defence applies to an unjust enrichment claim.

<sup>106</sup> See B Häcker, *Consequences of Impaired Consent Transfers*, Mohr Siebeck, Tübingen, 2009, ch VII.

<sup>107</sup> See *Goff & Jones*, above, n 45, ch 3.

<sup>108</sup> In *AmBank* [2012] 7 MLJ 364, the plaintiff could terminate the contract with the fraudster for non-payment and claim restitution on the basis of total failure of consideration.

<sup>109</sup> *Royal Bank of Scotland* [2013] 9 MLJ 68; *Affin Bank* [2011] 9 MLJ 787; *RHB Bank* [2009] 9 MLJ 490; *Bumi Cash Sdn Bhd v Bumiputra-Commerce Bank Bhd* [2006] 8 CLJ 49 (*Bumi Cash*).



mistaken payment.<sup>110</sup>

[I]t is not right for the [defendant] to keep the money. He is bound by the ties of natural justice and equity to refund the money to the [plaintiff] ... He would be unjustly enriched at the [plaintiff's] expense if the [plaintiff] could not recover from him.

Such vague notions simply do not provide sufficiently certain criteria for determining when restitutionary relief should be available. A century ago, in *Baylis v Bishop of London*,<sup>111</sup> Hamilton J said:

To ask what course would be ex aequo et bono to both sides never was a very precise guide ... Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'.

Under the prevailing common law approach, which could be traced as far back as to the time of Lord Mansfield,<sup>112</sup> the 'unjust' inquiry is determined by reference to an established list of factors that the law recognises as calling for restitution.<sup>113</sup> These are commonly known as 'unjust factors'. Section 73 has clearly spelt out two unjust factors: mistake and coercion. Both belong to the category of intent-based unjust factors, which has a primary focus on the defects in the plaintiff's decision-making process. In the case of mistake, the plaintiff argues that he or she has acted on the wrong data and therefore there was no real intention on his or her part to benefit the defendant.<sup>114</sup> The law's response of allowing restitution could be explained by its 'liberal commitment to individual free choice' in the control of one's resources.<sup>115</sup>

The term 'mistake' is not defined in s 73 and is therefore open to interpretation. The editors of *Goff & Jones* define 'mistake' as 'an incorrect belief or assumption about a past or present state of affairs'.<sup>116</sup> It follows that mere ignorance, which does not involve any conscious belief or tacit assumption, is not mistake.<sup>117</sup> The definition also excludes mere misprediction, which entails a speculation about a future event which does not turn out as expected.<sup>118</sup> The future event cannot be presently ascertained to be

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<sup>110</sup> [1998] 3 MLJ 262 at 272.

<sup>111</sup> [1913] 1 Ch 127 at 140.

<sup>112</sup> See *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681; *Isaak Mattos v Parker* (1756) LI Harrowby MS doc 17 at 35.

<sup>113</sup> See *David Securities* (1992) 175 CLR 353 at 379; 109 ALR 57 at 60; *Farah Constructions* (2007) 230 CLR 89 at 185; 236 ALR 209 at 257; [2007] HCA 22 at [150].

<sup>114</sup> See *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 671 at 696 per Lord Sumner: '[T]here was no real intention on the [plaintiff's] part to enrich [the defendant]'.

<sup>115</sup> H Dagan, 'Mistakes' (2001) 79 *Texas L Rev* 1795 at 1798-9.

<sup>116</sup> *Goff & Jones*, above, n 45, p 245. See also H W Tang, 'Restitution for Mistaken Gifts' (2004) 20 *JCL* 1; D Sheehan, 'What is Mistake?' (2000) 20 *LS* 538.

<sup>117</sup> See *Pitt v Holt; Futter v Futter* [2013] 2 WLR 1200 at 1235-7; [2013] UKSC 26 at [104]-[108], [113] (although the case actually concerned equitable mistake).

<sup>118</sup> *Pitt v Holt; Futter v Futter* [2013] 2 WLR 1200 at 1237-9; [2013] UKSC 26 at [109]-[113]. See also *Dextra Bank and Trust Co v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at 202-203 (*Dextra Bank*). For discussion, see *Goff & Jones*, above, n 45, pp 245-50; Birks, above, n 77, p 147.

correct or incorrect, and the plaintiff's conscious risk-taking in relation to this uncertainty also shows that his or her decision-making process is not impaired.

As to what is actually required to trigger restitution, the courts should refrain from adopting an overly restrictive approach. As said earlier, the balancing of competing interests is best left to the defences. The Privy Council in *Prasad Singh* was therefore correct in rejecting the illogical distinction between mistake of fact and mistake of law for the purpose of s 72 of the ICA 1872, which would have limited the right to restitution.<sup>119</sup> However, the court went on to say:<sup>120</sup>

Payment 'by mistake' in s. 72 must refer to a payment which was not legally due and which could not have been enforced: the 'mistake' is thinking that the money paid was due when in fact it was not due.

The court was referring to the requirement of liability mistake; that is, an erroneous belief on the part of the plaintiff that he or she is liable to pay the defendant.<sup>121</sup> This statement was cited and emphasised in *Bank Bumiputra*, although the facts of the case did not really turn on this; there was a liability mistake.<sup>122</sup> The requirement of liability mistake has been abandoned in most major jurisdictions. In *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd*,<sup>123</sup> Robert Goff J undertook a comprehensive examination of the relevant authorities and came to the conclusion that the requirement of liability mistake was inconsistent with a number of decisions of the House of Lords<sup>124</sup> and another Privy Council decision.<sup>125</sup> Instead, the cases support the view that a simple causative mistake is sufficient. The plaintiff only needs to show that he or she would not have enriched the defendant but for the mistake (but-for test).<sup>126</sup> This approach was later adopted by the House of Lords,<sup>127</sup> the High Court of Australia<sup>128</sup> as well as the Privy Council.<sup>129</sup> It is also consistent with the approach adopted in the American Law Institute's *Restatement (Third) of Restitution and Unjust Enrichment*.<sup>130</sup> The Malaysian courts should follow suit as there is really no reason to restrict the availability of restitution to situations involving liability mistake.

A more restrictive approach to the requirement of mistake is, however, justified

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<sup>119</sup> (1949) AIR PC 297.

<sup>120</sup> (1949) AIR PC 297 at 302.

<sup>121</sup> In *Aiken v Short* (1856) 1 H & N 210 at 215; 156 ER 1180 at 1182, Brambell B said: 'In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money'.

<sup>122</sup> [1998] 3 MLJ 262 at 268.

<sup>123</sup> [1980] QB 677 at 689-94.

<sup>124</sup> *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 671.

<sup>125</sup> *The Colonial Bank v The Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84.

<sup>126</sup> *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695. See also *Larner v London County Council* [1949] 2 KB 683; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 962-4.

<sup>127</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

<sup>128</sup> *David Securities* (1992) 175 CLR 353 at 376-8; 109 ALR 57 at 73-5; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 at 671-2; 78 ALR 157 at 160-1.

<sup>129</sup> *Dextra Bank* [2002] 1 All ER (Comm) 193 at 202.

<sup>130</sup> ALI, *Restatement (Third)*, above, n 38, §5(2)(a).

where there are special interests that the law regards as worthy of protection and the required protection could not be sufficiently provided by the defences. A good example is a payment made pursuant to a contract mistakenly entered into. Section 21 of the CA 1950 provides that a contract is void if it is entered into as a result of a common mistake of fact that is essential to the agreement. Sections 22 and 23, however, state that neither a mistake of law nor a unilateral mistake of fact renders a contract void. Since a valid contract acts as a justifying ground for any transfer of enrichment, it is only in the first situation, where the contract is void, that restitution is allowed.<sup>131</sup> It was once argued that the same restrictions should apply to s 73 and therefore money paid under a mistake of law should not be recoverable. In Prasad Singh, the Privy Council rejected this argument, finding no inconsistency in allowing a contract to remain valid although entered into under a mistake of law while allowing recovery of a non-contractual payment made under a mistake of law.<sup>132</sup> Although the court did not elaborate further, there is a ready explanation as to why recovery of a mistaken payment made pursuant to a contract should be subjected to stricter treatment. Such a case involves special concerns, specifically the need to uphold the sanctity of contract and to protect the security of bargain.<sup>133</sup> Another possible example is the case of mistaken gifts.<sup>134</sup> As Professor Tang argues, gifts engender social bonds such as love and trust so as to give rise to a moral economy, which is as important to protect.<sup>135</sup>

Before proceeding further, it is also useful to explain why s 73 of the CA 1950 applies in a case of fraud when its wording refers only to mistake. Inherent in a claim for misrepresentation (including fraud) is an allegation of induced mistake. Whether one is dealing with a case concerning induced mistake or a case concerning spontaneous mistake, the focus is similarly on the defect in the plaintiff's decision-making process, which is what renders the enrichment unjust.<sup>136</sup> There is, however, a possible advantage if the plaintiff could prove that his or her mistake was induced by the defendant. It may be that causation could be established by merely showing that the mistake had an influence on the plaintiff's decision to enrich the defendant, regardless of whether he or she would have acted otherwise but for the misrepresentation (contributory cause test).<sup>137</sup> The main justification for this liberal approach is that there is no need to be concerned about the defendant's security of receipt given his or her blameworthiness in inducing the mistake.<sup>138</sup>

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<sup>131</sup> *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695. See also *Goff & Jones*, above, n 45, ch 3.

<sup>132</sup> (1949) AIR PC 297 at 302.

<sup>133</sup> Edelman and Bant, above, n 82, pp 183-8; *Mason & Carter*, above, n 57, p 139; Häcker, above, n 106, pp 113-19; Burrows, above, n 79, pp 218-19; Virgo, above, n 81, pp 153, 179 (who attributed the requirement of fundamental mistake in some of the older non-contractual cases to the obsolete implied contract theory).

<sup>134</sup> See *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at 592; [2006] UKHL 49 at [87] per Lord Scott.

<sup>135</sup> See Tang, above, n 116. Cf Burrows, above, n 79, pp 214-17.

<sup>136</sup> *Goff & Jones*, above, n 45, p 275: 'The law of unjust enrichment will relieve a mistake, whether spontaneous (uninduced) or induced'. See also *Whittaker v Campbell* [1984] QB 318 at 327.

<sup>137</sup> *Edgington v Fitzmaurice* (1885) 29 Ch D 459. See also Birks, above, n 77, pp 168-9; *Goff & Jones*, above, n 45, p 266; Virgo, above, n 81, pp 160, 169-70.

<sup>138</sup> Birks, *Introduction*, above, n 77, pp 169-70.

However, as the cases demonstrate, the contributory cause test is mostly ignored since the but-for test is almost always sufficient to establish liability. Having laid down the basic principles relating to mistake, we now turn to the Malaysian case law. There are two instances where the courts have applied the simple causal test to find an operative mistake. In *Siti Fatimah*, the High Court held that the causal test was satisfied since 'no such moneys would have been made available or paid over if the plaintiff bank had known about the mistake or the fraud'.<sup>139</sup> Similarly, in *Affin Bank*, the High Court held that there was mistake as it was 'clear that had the true facts been known, such payment would not have been made'.<sup>140</sup> Two other cases are worthy of mention, mainly for the purpose of showing what went wrong. In *AmBank*, the court distinguished between the bank's acts of issuing the cashier's orders and its subsequent acts of paying the moneychanger by honouring the cashier's orders. It held that the bank's mistake was only in relation to the former acts and that there was no mistake in making the payments.<sup>141</sup> This decision could be criticised on two grounds. First, the court failed to identify a policy reason for insisting on such subtle distinction, especially when it is not at all apparent from the wording of s 73. Second, as a matter of fact, the bank issued and honoured the cashier's orders for the same reason; that is, it was under the mistaken belief that the cashier's orders were properly paid for. The causal requirement was satisfied since the bank would not have paid the moneychanger but for its mistake. In *RHB Bank*, the fraudster applied for cashier's orders from the plaintiff bank by forging the signatures on the application forms. The cashier's orders were paid to an unknowing moneychanger as the purchase price of a sum of foreign money. The court held that there was no mistake because the moneychanger received the payment in good faith and had given valuable consideration by paying the foreign money to the fraudster.<sup>142</sup> This is incorrect, for the allegation of mistake focuses solely on the plaintiff's impaired intention to benefit the defendant. The causal requirement was clearly satisfied since the bank would not have paid the moneychanger if it had known about the forgery. The moneychanger's bona fide purchase for value is relevant only at the defence stage.

Finally, something shall be said about s 66 of the CA 1950, which sets out the restitutionary consequence following the rescission of a contract: 'any person who has received any advantage under the ... contract is bound to restore it, or to make compensation for it, to the person from whom he received it'. Where a contract is rescinded for misrepresentation (including fraud), the right to restitution could be explained as based on unjust enrichment, independent of any alternative cause of action in tort.<sup>143</sup> As explained earlier, the unjust factor is induced mistake. Where the plaintiff bases his or her claim on unjust enrichment, the right to restitution under s 66 is essentially the same as the right to restitution under s 73. However, in *Badiaddin bin*

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<sup>139</sup> [2011] 2 CLJ 545 at 557.

<sup>140</sup> [2011] 9 MLJ 787 at 811.

<sup>141</sup> [2012] 7 MLJ 364 at 375.

<sup>142</sup> [2009] 9 MLJ 490 at 500.

<sup>143</sup> See *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok* [1997] 3 MLJ 211, where the Court of Appeal held that a deposit paid pursuant to a contract induced by fraud was recoverable on the basis of unjust enrichment. See also *Siti Fatimah* [2011] 2 CLJ 545 at 555-6: 'money paid under a mistake induced by fraud can also be recovered as money had and received apart from recovery based on a defendant's tortious act under a separate tort of deceit'. [2011] 2 CLJ 545 at 555-6.

*Mohd Mahidin v Arab Malaysian Finance Bhd*, the Federal Court held that s 66 applies only where the plaintiff and the defendant were both parties to the rescinded contract.<sup>144</sup> This means that s 66 will not apply in a case like *AmBank*, where the moneychanger was only a third party to the contracts between the bank and the fraudster. One explanation given by the court is that the doctrine of privity applies.<sup>145</sup> This is clearly incorrect, for a contractual concept should have no relevance where s 66 is triggered by a cause of action not based on contract. This is also contrary to Indian law, which imposes no such restriction for its equivalent of s 66.<sup>146</sup> However, the practical implication of this decision is insignificant, for the plaintiff could nevertheless rely on s 73.

## (e) Defences

### (i) Recognition of restitutionary defences

In *Moses v Macferlan*, Lord Mansfield said that the defendant who is faced with an action for money had and received 'may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it'.<sup>147</sup> In fact, many of the existing restitutionary defences have a long history although they may not have been known by their modern names until much later. An early statement of the change of position defence could be found in *Brisbane v Dacres*.<sup>148</sup> There the captain of the vessel HMS *Arethusa* was ordered by his admiral to carry on board bullions that belonged to private individuals and to deliver them from Jamaica to England. The captain received remuneration for the delivery and paid part of it to the admiral. It turned out that he was not legally obliged to pay the admiral. He sought to recover the money on the ground that it was paid under a mistake. The majority disallowed his claim for a number of reasons, but of particular relevance is Sir James Mansfield CJ's judgment:<sup>149</sup>

... I think it would be most contrary to aequum et bonum, if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expences, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it!

There were also early traces of the bona fide purchase defence. A good example is

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<sup>144</sup> [1998] 1 MLJ 393.

<sup>145</sup> [1998] 1 MLJ 393 at 431-2.

<sup>146</sup> *Girraj Bakhsh v Kazi Hamid Ali* (1887) ILR 9 All 340.

<sup>147</sup> (1760) 2 Burr 1005 at 1010; 97 ER 676 at 679. See also *Sadler v Evans* (1766) 4 Burr 1984 at 1986; 98 ER 34 at 35 per Lord Mansfield: 'It is a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action'.

<sup>148</sup> (1813) 5 Taunt 143; 128 ER 641.

<sup>149</sup> (1813) 5 Taunt 143 at 162; 128 ER 641 at 649. Similarly, in *Buller v Harrison* (1777) 2 Cowp 565 at 568; 98 ER 1243 at 1245, a case of mistaken payment, Lord Mansfield found it proper to consider 'whether any prejudice had happened to the defendant by means of this payment'.

*Price v Neal*.<sup>150</sup> There the defendant was an endorsee for value of a bill of exchange drawn on the plaintiff. It transpired that the bill was forged. As the rogue responsible for the fraud had been hanged, the plaintiff sought to recover from the defendant on the ground that it was paid under a mistake. The claim was rejected. As Lord Mansfield explained:<sup>151</sup>

[I]t can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid, without the least privity or suspicion of any forgery.

Since the recognition of restitutionary defences predated the ICA 1872, it is rather curious that none was included in Ch V. Neither were they added into Pt VI of the CA 1950 when the enactment was revised and reenacted. If we recall, the statutory duty to restore a mistaken enrichment is stated in absolute terms: 'must repay or return it'. This is problematic as there are bound to be cases where to insist on restitution would result in unfairness to the defendant. Suppose that the defendant received a mistaken payment from the plaintiff and then paid it away to a charity in good faith.<sup>152</sup> To require the defendant to repay would leave him or her financially worse off, which is intuitively unfair. As between the two innocent parties, a fair balance must be struck between the plaintiff's interest in recovery and the defendant's interest in not being made worse off.

Fortunately, the Indian courts have recognised a number of exceptions to the statutory right to recover a mistaken enrichment under s 72 of the ICA 1872. In *Prasad Singh*, the Privy Council qualified the right to restitution by saying: '[Not] every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise'.<sup>153</sup> In *Nagorao Govindrao v The Governor-General in Council*,<sup>154</sup> the High Court of Nagpur relied on this statement to extend the list of exceptions. There a rogue approached the manager of a temple and said that he wanted to fulfil a vow to feed 1000 Brahmins. He then purchased three money orders from a post office, altered the monetary figures to appear larger, and caused them to be sent to the temple. He appeared again at the temple and collected the money orders from the manager on the excuse that they would go together to the market to make the necessary purchases. Along the way, the rogue escaped with the money orders. The Governor-General in Council, on behalf of the post office, sought to recover the claim on the ground that it was paid under a mistake by relying on s 72 of the ICA 1872. The court rejected the claim and explained:<sup>155</sup>

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<sup>150</sup> (1762) 3 Burr 1354; 97 ER 871.

<sup>151</sup> (1762) 3 Burr 1354 at 1537; 97 ER 871 at 872.

<sup>152</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579 per Lord Goff.

<sup>153</sup> (1949) AIR PC 297 at 302.

<sup>154</sup> (1951) AIR Nag 372.

<sup>155</sup> (1951) AIR Nag 372 at 374 per Rao J. This reasoning was accepted and applied by the High Court of Calcutta in *United Bank of India Ltd v AT Ali Hussain & Co* (1978) AIR Cal 169 at 174 per Dutt J: '[S]o long as the status quo is maintained and the payee has not changed his position to his detriment he must repay the money back to the payer. If however, there has been a change in the position of the

If the reason for the rule that a person paying money under mistake is entitled to recover it is that it is against conscience for the receiver to retain it, then when the receiver has no longer the money with him or cannot be considered as still having it as in a case when he has spent it on his own purposes ... different considerations must necessarily arise.

However, in *Sales Tax Officer*, the seven-member bench of the Supreme Court of India disagreed: 'No such equitable considerations can be imported when the terms of Section 72 of the Indian Contract Act are clear and unambiguous'.<sup>156</sup> This appeared to be self-contradictory since the court also agreed with the Privy Council in *Prasad Singh* that estoppel is an available defence to the statutory claim.<sup>157</sup> The matter was revisited by the Supreme Court in *Mafatlal Industries v Union of India*, where the nine-member bench held that its previous holding in *Sales Tax Officer* on the issue of defences was incorrect, and that change of position is available as a defence to the statutory claim. Reddy J, who delivered the main judgment, explained: 'Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision'.<sup>158</sup>

The Malaysian courts have similarly accepted that certain common law defences are available to defeat or exclude the statutory right to recover a mistaken enrichment.<sup>159</sup> Worthy of special mention is the case of *Siti Fatimah* where the court justified the importation of the change of position defence by drawing a connection between s 73 and unjust enrichment.<sup>160</sup> It may, of course, be argued that this amounts to rewriting s 73, which is not warranted even by the purposive approach required by s 17A of the Interpretation Acts 1948 and 1967.<sup>161</sup> However, aside from this technical concern, there is unlikely to be any serious objection so long as the existence of the defences and their governing rules and principles are made clear. Due to the constraint of space, this article will consider only two restitutionary defences that frequently arise in the context of mistaken enrichment: change of position and bona fide purchase.

## (ii) Principles and application

In *Lipkin Gorman v Karpnale Ltd*, Lord Goff refrained from stating the change of position defence any less broadly than that '[it] is available to a person whose position

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payee who acting in good faith, parts with the money to another without any benefit to himself before the mistake is detected, he cannot be held liable ... When there is no question of unjust enrichment of the payee by reaping the benefit of an accidental windfall he should not be made to suffer, for he would be as innocent as the payer who paid the money acting under a mistake'.

<sup>156</sup> (1959) AIR SC 135 at 144.

<sup>157</sup> (1959) AIR SC 135 at 143.

<sup>158</sup> (1997) 5 SCC 536 at 634.

<sup>159</sup> See *AmBank* [2012] 7 MLJ 364; *Siti Fatimah* [2011] 2 CLJ 545; *Affin Bank* [2011] 9 MLJ 787; *RHB Bank* [2009] 9 MLJ 490; *Bumi Cash* [2006] 8 CLJ 49.

<sup>160</sup> [2011] 2 CLJ 545.

<sup>161</sup> *Mills v Meeking* (1990) 169 CLR 214; 91 ALR 16, cited in *Tenaga Nasional Bhd v Ong See Tong* [2010] 2 CLJ 1 at 9-10. See also Y H Goh, 'A Comparative Account of Statutory Interpretation in Singapore' (2008) 29 *Statute LR* 195, where the author examined the equivalents of s 17A in Singapore and Australia.

has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full'.<sup>162</sup> This was to avoid inhibiting the development of the defence, leaving its detailed elements to be worked out on a case-by-case basis. As Lord Goff also emphasised, 'where recovery is denied, it is denied on the basis of legal principle'.<sup>163</sup> The change of position defence has since undergone significant developments and its elements could be briefly stated.<sup>164</sup> First, as a general rule, the defendant must have been disenriched; that is, his or her enrichment must be reduced or eliminated.<sup>165</sup> Although the possibility that a non-disenriching change of position could give rise to a defence has been left open, there is yet to be any case law example and the only available judicial guidance is that it must be 'sufficiently significant, precise or substantial'.<sup>166</sup> Second, there must be a sufficient causal link between the mistaken enrichment and the disenrichment.<sup>167</sup> The defendant must at least show that the disenrichment would not have occurred but for the receipt of the enrichment.<sup>168</sup> An example is where a defendant, who receives a mistaken payment from the plaintiff, goes on to spend it in a way that he or she would not have had he or she known that the money was not his or hers to keep.<sup>169</sup> Although detrimental reliance usually exists, as in the above example, it is not a requirement. The but-for test is equally satisfied where the enrichment is stolen or destroyed immediately after its receipt due to natural or third party intervention.<sup>170</sup> It is also useful to explain the notion of 'extraordinary expenditure', which is sometimes said to be required of the defendant.<sup>171</sup> This is best understood as turning on the issue of causation. As Professor Mitchell explained, 'the question whether a defendant has incurred extraordinary expenditure does not turn on the type of transactions he has entered, but on the question whether he would have entered them at all, but for his

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<sup>162</sup> [1991] 2 AC 548 at 580. This is similar to the expression used in American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts*, ALI Publishers, St Paul, 1937, §142(1).

<sup>163</sup> [1991] 2 AC 548 at 578. See also *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at 828 per Robert Walker LJ: '[T]he court must proceed on the basis of principle, not sympathy'.

<sup>164</sup> See generally E Bant, *The Change of Position Defence*, Hart Publishing, Oxford and Portland, Oregon, 2009; Goff & Jones, above, n 45, ch 30; Burrows, above, n 79, pp 524-50; Virgo, above, n 81, pp 689-714; Mason & Carter, above, n 57, ch 24; C Mitchell, 'Change of Position: The Developing Law' [2005] *LMCLQ* 168; J Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 *Boston UL Rev* 1009.

<sup>165</sup> Birks, above, n 1, pp 208-12; Burrows, above, n 79, pp 526-7.

<sup>166</sup> *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 at [40] per Mummery LJ (*Commerzbank*). See also Bant, above, n 164, ch 5, who sought to explain the defence as based on a wider concept of 'irreversibility', which will include non-disenriching change of position.

<sup>167</sup> *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 827; *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at 827; *Commerzbank* [2003] EWCA Civ 1663 at [41]-[44], [58]-[59].

<sup>168</sup> *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at 827.

<sup>169</sup> 169 In this example, we could say that the defendant's disenrichment is 'unjust' as it was caused by his or her mistaken belief that the payment was his or hers to keep. See Edelman, above, n 164, who argued for such a requirement to ensure that the defendant's autonomy is as equally protected as the plaintiffs.

<sup>170</sup> This 'wide view' of the defence was affirmed in *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at 827; *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 at [54]. See also Burrows, above, n 79, pp 529-30.

<sup>171</sup> See eg *Dextra Bank* [2002] 1 All ER (Comm) 193 at [28].



enrichment at the claimant's expense'.<sup>172</sup> Third, the change of position could be anticipatory; for example, where the defendant incurred expenditure in the expectation that he or she will receive the money from the plaintiff, which he or she did in fact receive later on.<sup>173</sup> Fourth, the defendant must have acted in good faith.<sup>174</sup> If the defendant knew about the event that would render his or her enrichment unjust, such as the plaintiff's mistake, or suspected the same but failed to make any inquiry, he or she will be barred from relying on the defence.<sup>175</sup> In *Dextra Bank*,<sup>176</sup> the Privy Council rejected the concept of relative fault as a determinant of this issue as it would be inconsistent with the principle established in *Kelly v Solari* that a mistaken payer may recover 'however careless [he] may have been'.<sup>177</sup> This was affirmed by the High Court in *Siti Fatimah*.<sup>178</sup> Once triggered, the change of position defence operates to absolve the defendant from the duty to make restitution to the extent that he or she has changed his or her position, that is, has been disenriched. Correspondingly, to ensure fairness to the plaintiff, the defendant must make restitution to the extent that he or she remains enriched.

Convenient to be examined alongside the change of position defence is the defence of bona fide purchase for value, the elements of which could be briefly explained.<sup>179</sup> First, the word 'purchase' is given a wide meaning such that money could be the subject matter of a purchase.<sup>180</sup> Second, the defendant must have given valuable consideration in exchange. The adequacy of the consideration is not investigated but its sufficiency is.<sup>181</sup> Executory consideration, it seems, is not sufficient.<sup>182</sup> Third, the defendant must have acted in good faith. This requirement is satisfied if he or she has no actual notice of or suspicion about the defect in the fraudster's interest in the property.<sup>183</sup> The mere fact that there are means of discovering this is irrelevant.<sup>184</sup> Fourth, it is sometimes said that the defence applies only where the defendant is an indirect recipient of the property.<sup>185</sup> When P makes a mistaken payment to X, who in

<sup>172</sup> Mitchell, above, n 164, at 170-1.

<sup>173</sup> *Dextra Bank* [2002] 1 All ER (Comm) 193; *Commerzbank* [2003] EWCA Civ 1663 at [36]-[38], [60]-[64].

<sup>174</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580. See also *Siti Fatimah* [2011] 2 CLJ 545 at 555, 558; *Affin Bank* [2011] 9 MLJ 787 at 809.

<sup>175</sup> *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] All ER (Comm) 705.

<sup>176</sup> [2002] 1 All ER (Comm) 193.

<sup>177</sup> (1841) 9 M & W 54 at 59; 152 ER 24 at 26 per Parke B. Affirmed in *Bank Bumiputra* [1998] 3 MLJ 262; *Green Continental Furniture* [2011] 8 MLJ 394; *Royal Bank of Scotland* [2013] 9 MLJ 681.

<sup>178</sup> [2011] 2 CLJ 545 at 555.

<sup>179</sup> See generally K Barker, 'Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement' [1999] *RLR* 75; *Mason & Carter*, above, n 57, ch 25.

<sup>180</sup> *De La Chaumette v Bank of England* (1831) 2 B & Ad 385; 109 ER 1186; *Raphael v Bank of England* (1855) 17 CB 161; 139 ER 1030. Cf Sale of Goods Act 1957 s 2, where 'goods' means 'every kind of movable property other than actionable claims and money', 'buyer' means 'a person who buys or agrees to buy goods', and 'seller' means 'a person who sells or agrees to sell goods'.

<sup>181</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 581.

<sup>182</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 562, 577. See also *Hardingham v Nicholls* (1745) 3 Atk 304; 26 ER 977.

<sup>183</sup> See *London Joint Stock Bank v Simmons* [1892] AC 201 at 221; *Jones v Gordon* (1877) 2 App Cas 616 at 629. See also Fox, *Money*, above, n 68, pp 289-91.

<sup>184</sup> *Bank of Bengal v Fagan* (1849) VII Moo PC 61; 13 ER 802; *Raphael v Bank of England* (1855) 17 CB 161; 139 ER 1030.

<sup>185</sup> Burrows, above, n 79, pp 574.

turn uses the money to buy something from D, D is clearly an indirect recipient and purchaser of the money. But what if, instead of paying X, P directly pays D under X's instruction? It is argued that there should be no analytical difference between the two cases.<sup>186</sup> The restriction, it seems, only meant to emphasise that the defence does not apply to a contract between P and D.<sup>187</sup> Upon the satisfaction of these requirements, the defendant obtains a clear title in the property, free from any title-based claim by the plaintiff (for example, conversion or proprietary ownership claim). But whether the defendant's bona fide purchase for value also protects him or her from an unjust enrichment claim for personal restitution has been a matter of dispute. In *Foskett v McKeown*, Lord Millett suggested that it does not.<sup>188</sup> However, in the earlier case of *Price v Neal*, the defence was successfully invoked against an action for money had and received, a money count.<sup>189</sup>

There are two cogent arguments for extending the defence. The first argument is based on the need to avoid conflicting positions in the laws of property and unjust enrichment. As a creature of property law, the defence is justified by mercantile convenience. In the case of money used as currency, for example, the bona fide purchaser is given a clear title so as to protect the security of the transaction and to facilitate the wider goal of efficient circulation of money.<sup>190</sup> Allowing the plaintiff's unjust enrichment claim to succeed would undermine this policy choice made by property law.<sup>191</sup> Thus, in situations where bona fide purchase for value clears titles and extinguishes title-based claims (which is a matter of property law), it would also protect the defendant against an unjust enrichment claim for personal restitution. The defence supported by this argument, however, is a narrow one. This is because even in

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<sup>186</sup> See eg ALI, *Restatement (First)*, above, n 162, p 53: 'it applies also where the subject matter is received directly from the transferor at the direction of the other party to the transaction' (§13, comment (a)). See also pp 53-4: 'By fraud A purchases goods from B who at A's request, transfers the goods directly to C who has contracted to purchase them from A. C pays A therefor without notice of A's fraud. B is not entitled to restitution from C' (Illustration 3 to §13). See also Barker, above, n 179, at 174: 'there is nothing necessarily significant about the physical route which the property has taken, which could, after all, be simply a matter of chance'.

<sup>187</sup> See Burrows, above, n 79, p 580: '... the bona fide purchase defence in unjust enrichment applies only to where the defendant has received a benefit from a third party (ie, the defendant is an indirect recipient). It does not apply where the claimant was induced to enter into a contract with the defendant (a direct recipient) induced by the conduct of a third party ...'. See also Barker, above, n 179, at 79: '... there is nothing necessarily significant about the physical route which the property has taken, which could, after all, be simply a matter of chance. More significant is the fact that there have been two transactions, to the second of which D is a party and P is not'.

<sup>188</sup> [2011] AC 102 at 121: 'a claim in unjust enrichment is subject to a change of position defence ... An action like the present is subject to the bona fide purchaser for value defence, which operates to clear the defendant's title'. Followed in *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156 at 185-7; [2012] EWHC 10 (Ch) at [99]-[105]. See also P Key, 'Bona Fide Purchase as a Defence in the Law of Restitution' [1994] *LMCLQ* 421 at 425-7; Virgo, above, n 81, pp 656, 714; W Swadling, 'Restitution and Bona Fide Purchase' in W Swadling, ed, *The Limits of Restitutionary Claims: A Comparative Analysis*, BIICL, London, 1997, p 79.

<sup>189</sup> (1762) 3 Burr 1354; 97 ER 871. The money count only entitles the plaintiff to personal (or monetary) restitution. In *Longchamp v Kenny* (1778) 1 Doug 137 at 138; 99 ER 91 at 91, Lord Mansfield said: 'It is certain, that, where the demand is for a specific thing, an action cannot be maintained in this form'.

<sup>190</sup> Fox, above, n 68, chs 2 and 8.

<sup>191</sup> Barker, above, n 180, at 78-9; Birks, above, n 1, p 242.

property law there is no general defence of bona fide purchase for value. The defence only operates in limited situations; for example, where the defendant obtains goods under a resale, or receives payment in the form of money used as currency, bills of exchange or similar negotiable instruments, etc. Beyond these situations, allowing an unjust enrichment claim would not result in any conflict with property law. The second argument is based on the need to prevent unjust enrichment from subverting the contract to which the defendant is a party (with X).<sup>192</sup> This argument supports a wider defence because it is no longer tied to the situations in which bona fide purchase for value operates to clear title and extinguish title-based claims. The choice between the two approaches would require further examination of the interactions between property, contract and unjust enrichment. It is unnecessary to say anything conclusive for now, at least for the purpose of s 73, since the relevant cases all concerned receipt of money used as currency.

The change of position defence and the bona fide purchase defence are clearly different creatures, given their separate rationales and effects. While the change of position defence operates pro tanto to prevent the defendant from being made worse off, bona fide purchase for value operates as a complete defence.<sup>193</sup> This practical difference is best illustrated by the facts of *AmBank*.<sup>194</sup> There, the moneychanger purchased foreign money from elsewhere for RM1.07 million and sold it to the fraudster for RM1.075 million. The moneychanger's disenrichment is the cost of purchasing the foreign money: RM1.07 million.<sup>195</sup> The change of position defence will only exempt the moneychanger from repaying this amount. The remaining RM5000, which represents the moneychanger's extant enrichment, must be repaid. However, the court held that the change of position defence exempted the moneychanger from repaying the entire amount. The court's explanation was that the RM5000 represents a normal profit margin which the moneychanger would have made in any regular currency exchange transaction.<sup>196</sup> But this is not a relevant inquiry for the change of position defence. Instead, the conclusion is better justified by applying the bona fide purchase defence. The moneychanger purchased the money from the fraudster in good faith and gave valuable consideration in the form of the foreign money. This gave the moneychanger a complete defence to the bank's claim. The bona fide purchase defence was applied in two other cases of similar facts, *Bumi Cash*<sup>197</sup> and *RHB Bank Bhd*,<sup>198</sup> to absolve the moneychangers from the duty to repay the banks. The defence was also implicitly accepted in *Royal Bank of Scotland*, again of similar facts, only to be rejected because the moneychanger failed to adduce sufficient evidence to show that the foreign money was paid to the fraudster.<sup>199</sup>

An example where the court's failure to properly apply the defences has resulted

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<sup>192</sup> Burrows, above, n 79, pp 577-80; *Goff & Jones*, above, n 45, pp 719-20.

<sup>193</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580-1.

<sup>194</sup> [2012] 7 MLJ 364.

<sup>195</sup> However, where there is a saturated market such that the moneychanger could have sold the foreign money to other customers for RM1.075 million, his disenrichment should be valued at that amount.

<sup>196</sup> [2012] 7 MLJ 364 at 378.

<sup>197</sup> [2006] 8 CLJ 49.

<sup>198</sup> [2009] 9 MLJ 490.

<sup>199</sup> [2013] 9 MLJ 681.

in an incorrect decision is the case of *Affin Bank*.<sup>200</sup> The facts are again similar. The moneychanger, having received the mistaken payment from the plaintiff bank, paid to the fraudster foreign money pursuant to a contract. The court clearly accepted that there are exceptions to the statutory right to recover a mistaken payment, even citing *Lipkin Gorman v Karpnale Ltd* as authority for the change of position defence.<sup>201</sup> However, it held in favour of the bank on the ground that the moneychanger had not changed its position.<sup>202</sup> How the court arrived at this finding is a matter of curiosity, especially since the basic elements of the change of position defence were not considered. On the facts, the moneychanger would not have paid away the foreign money to the fraudster, thereby disenriching itself, but for the receipt of the mistaken payment. Since the court also found that the moneychanger has not acted in bad faith,<sup>203</sup> the change of position defence should have been available to the moneychanger. Moreover, as in the cases cited earlier, the moneychanger should be entitled to rely on the bona fide purchase defence.

## V Conclusion

This article has put forward a number of suggestions as to how the courts should approach the statutory right to recover a mistaken payment. First, it is important that the statutory right is interpreted against its historical background so as to avoid certain misconceptions. In section II, we have seen how ignorance of legal history has led the courts to draw false analogy between the statutory claim and a contractual claim, and illogical distinctions between the statutory claim, an unjust enrichment claim and a claim for money had and received. Second, there is a need to develop the content of the statutory right so as to enable it to adequately address complex disputes. The most efficient method is to draw from the experience of other major common law jurisdictions. In section IV, it was demonstrated that the prevailing common law unjust enrichment analysis could be usefully incorporated into the statutory framework of s 73. The central theme that flows through these suggestions is the importance of first principles. Clearly, the Malaysian courts have yet to fully grasp the intricacies of the law of unjust enrichment, as evidenced by their occasional broad-brush treatment of s 73 and its recognised exceptions. Given how frequently issues of unjust enrichment arise, it is of utmost importance that the courts translate their enthusiasm for the subject into approaching it in a principled manner.

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<sup>200</sup> [2011] 9 MLJ 787.

<sup>201</sup> [2011] 9 MLJ 787 at 808-10.

<sup>202</sup> [2011] 9 MLJ 787 at 810.

<sup>203</sup> [2011] 9 MLJ 787 at 810.