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Restitution [2015]

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23. RESTITUTION

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Introduction

23.1 In 2015, there were only three cases that substantively discussed the law of unjust enrichment and restitution. This is not because restitutionary claims have grown unpopular; in fact, they had been advanced in a number of other cases. However, on these other occasions, the court (rightly) dismissed the claims without delving into the law, owing to the low prospects of success of the restitutionary claims in some cases and the success of the principal claims which rendered the alternative restitutionary claims unnecessary in others.

23.2 Only three cases notwithstanding, important restitutionary issues have been raised, including difficult topics such as risk-taking reasoning and subjective devaluation. In an area of the law that is steeped in contention and divides the common law world, the Singapore courts have made commendable efforts to clarify the complexity that has confounded practitioners by correcting misconceptions and highlighting the relevant doctrines that underpin the parties' arguments.

Unjust enrichment

Old forms of action

23.3 The Court of Appeal had on two recent occasions, *viz*, *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 ("*Alwie Handoyo*") and *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 ("*Anna Wee*"), explained the modern approach to the law of unjust enrichment. Two related matters are of paramount importance for purposes of bringing unjust enrichment claims. First, the Court of Appeal had in *Alwie Handoyo* highlighted that "common" counts of action such as an action for "money had and received" were historical forms of action that had been abolished; they do not disclose the underlying cause of action: *Alwie Handoyo* at [124]–[125]. Where the action is based in the law of unjust enrichment, the plaintiff is to plead unjust enrichment and establish the requisite elements by following the four-question framework of analysis:

(a) Has the defendant been enriched?

(b) Was the enrichment at the plaintiff's expense?

(c) Was the enrichment unjust?

(d) Are there any applicable defences?

In (2013) 14 SAL Ann Rev 465 at 465–467, paras 22.2–22.5, commenting upon the Court of Appeal's clarification, it was pointed out that there are claims based on unjust enrichment which have been historically pleaded under other counts in *indebitatus assumpsit*: for example, *quantum meruit* (value for services received by the defendant). Litigators continue to use this historical label instead of pleading the relevant cause of action. There are two problems with the continued reference to old forms of action. First, it has long been established under Singapore law that there are two types of *quantum meruit*: contractual or restitutionary: see, for example, *Rabiah Bee Bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [123], *per* Judith Prakash J. Where there is a contract, a *quantum meruit* claim for remuneration essentially means that the plaintiff is asking the court to imply a term into the agreement for reasonable remuneration to be paid. The focus is on the objectively ascertained intentions of the contracting parties: *Benedetti v Sawiris* [2014] AC 938 at [9]. A restitutionary *quantum meruit*, in contrast, is focused on the defendant's gains.

23.4 The second problem with the persistent use of historical labels is the risk that parties do not plead their unjust enrichment claims in accordance with the proper framework of analysis. Instead, they consider a cause of action having been made out by simply proving that services had been performed for the benefit of the recipient. This, in particular, obscures the unjust factor inquiry. This ties in the second matter to note in relation to advancing unjust enrichment claims. It was stressed by the Court of Appeal in *Anna Wee*: under Singapore law, claims in unjust enrichment must be based on a relevant "unjust factor" such as mistake, failure of consideration, *etc*: *Anna Wee* at [129]–[134]. The label *quantum meruit*, however, singularly focuses on the fact that services have been received by the defendant, but that fact alone does not justify payment. Nor does the fact that services have been performed for the defendant establish that there is an enrichment – the element of enrichment must be examined by reference to the recognised enrichment tests: see Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ch 4. As a result, parties bring ill-conceived unjust enrichment claims which neither advance their own interests nor facilitate the development of the law of unjust enrichment in Singapore.

23.5 This was what happened in *Cheong Soh Chin v Eng Chiet Shoong* [2015] SGHC 173 ("*Cheong Soh Chin*"). In that case, the plaintiffs entrusted substantial funds to the defendants for various investments which were held through a web of special purpose vehicles ("SPVs") controlled by the defendants. The investments were undertaken pursuant to the "WWW concept", a long-term investment plan that the parties had the common intention to work towards. The concept would combine the first defendant's industry knowledge and personal connections with the plaintiffs' capital and risk appetite. The plan was to find, fund and assist fledgling fund managers in the market to start a new fund each, and the parties would earn a proportion of each fund manager's total profits. Owing to the parties' "close personal relationship of trust and confidence", the court noted (at [16]) that they did not enter into any contract (oral, written or implied) to govern their relationship. Nevertheless, it was not disputed that the plaintiffs agreed to pay the first defendant a management fee of US$450,000 *per* annum in respect of the first five investments that were entered into to get the WWW concept off the ground but which were not part of the WWW concept. It was also not disputed that this agreement did not extend to the subsequent investments undertaken as part of the WWW concept.

23.6 The WWW concept proved unachievable, and the parties' relationship, both on the personal and professional levels, deteriorated and became ultimately unsalvageable. The plaintiffs commenced proceedings to ask for the transfer of the ownership and control of the investments and the SPVs, as well as for a full account to be taken on the defendants' management of the investments. The defendants counterclaimed against the plaintiffs for management fees and reimbursement of expenses incurred in respect of their management of the plaintiffs' investments. Of interest is the defendants' counterclaims for work done and expenses incurred in managing the plaintiffs' various investments which were said to be based on restitutionary *quantum meruit* because the court found that there was no agreement for payment on the facts.

23.7 From the judgment, it was clear that the defendants did not identify the relevant unjust factor. For unjust enrichment claims based on supply of services, the unjust factor would typically be failure of consideration, free acceptance or mistake, although it should be borne in mind that free acceptance has not yet been conclusively recognised as an unjust factor under Singapore law: see (2014) 15 SAL Ann Rev 473 at 480–481, paras 23.21–23.24. It should also be noted that these unjust factors have different requirements and therefore justify restitution for different reasons. Mistake and failure of consideration are concerned with a plaintiff's imperfect intention to confer the relevant enrichment. On the other hand, free acceptance, if accepted as an unjust factor, is focused on a defendant's unconscientiousness in accepting the

enrichment in circumstances knowing that it was not conferred by the plaintiff gratuitously and there was reasonable opportunity for return of the enrichment received: see (2014) 15 SAL Ann Rev 473 at 481, para 23.24.

23.8 Following from the defendants' failure to plead the relevant unjust factor, the court was unable to undertake the conventional analysis of determining if the pleaded unjust factor had been made out on the facts of the case. Instead, it resorted to risk-taking reasoning to explain its decision to deny restitution in the case. Based on the evidence, it concluded (at [51]) that the parties were "joint risk-runners working together towards the WWW concept". The court commented (at [87] and [101]) that the defendants performed their services with the anticipation of being compensated out of the profits from the WWW concept if it should succeed; thus, they took the risk that future compensation might not materialise. The risk-taking was supported by the fact that the defendants never attempted to ask for remuneration for work done that fell outside of the scope of the parties' agreement: at [89] and [98]. Indeed, the court stressed (at [88] and [100]) that the fact that there was a specific agreement for payment of certain services militated against the success of restitutionary *quantum meruit* claims in respect of other services rendered. Simply put, the court was suggesting that such claims would upset the parties' contractual allocation of risks: the plaintiffs' payment responsibility would be limited to what was provided for in the agreement. Finally, the court took note that the defendants did not furnish independent expert evidence of the relevant market practice that would justify their entitlement or quantification of management fees: at [90].

23.9 As for expenses incurred, the court applied essentially the same reasoning, highlighting that there was no agreement for reimbursement of the expenses claimed by the defendants. Instead, the parties had from time to time entered into specific agreements for specific expenses to be reimbursed and this fact foreclosed the possibility of non-contractual claims.

Risk-taking reasoning

23.10 Owing to the defendants' ill-considered pleading, "risk-taking" reasoning was employed by the court in *Cheong Soh Chin* (above, para 23.5) as a direct bar against recovery. The precise role of risk in unjust enrichment reasoning is not immediately apparent from the modern framework of analysis (see para 23.3 above). The relevance and necessity to have recourse to risk-taking reasoning for the law of unjust enrichment has been a source of controversy, even though the language is clearly established in cases (notably, *Deutsche Morgan Grenfell v*

Inland Revenue Commissioners [2006] 1 AC 558 and *Yeoman's Row Management Ltd v Cobbe* [2008] 1 WLR 1752). Wilmot-Smith forcefully argues that risk-taking reasoning is "circular, ambiguous, inconclusive, incapable of explaining decided cases and unnecessary": see Frederick Wilmot-Smith, "Replacing Risk-taking Reasoning" (2011) 127 LQR 610. That a plaintiff is a risk-taker is no more than stating the conclusion. In his view, the courts should provide more transparent reasoning by closely analysing the relevant unjust factor. Others have defended risk-taking reasoning, suggesting its appropriateness as a bar against restitution: Paul S Davies, "Risk in Unjust Enrichment" (2012) 20 RLR 57 and James Goodwin, "Contract, Unjust Enrichment, and Risk" (2012) 128 LQR 503.

23.11 However, on any view, the unjust factor must be discussed and cannot be replaced by risk-taking reasoning. Not only is the unjust factor a constituent element of the cause of action, but it also directs attention to the proper questions to ask in each case and helps us better understand the interplay between risk and unjust enrichment. For example, had the defendants in *Cheong Soh Chin* pleaded failure of consideration as the relevant unjust factor, the parties' submissions as well as the court's focus would be on the *basis* underlying the defendants' performance of services. Even in the commercial context, one is not automatically a risk-taker simply for having performed unrequested services. If the type of service is one that recipients are commonly expected to pay for and the benefit has been received without protest, it is less likely that the service provider is a risk-taker. The availability of independent expert evidence on market practice is thus significant. The court must also inquire into the parties' shared understanding in relation to the performance of the services (that is, the basis) and it is in this light that the existence of specific agreements relating to other services, as well as attempts to seek payment, become relevant.

23.12 Only with more precise analysis of the circumstances by reference to the potentially applicable unjust factor will one be able to fully appreciate the various reasons put forward by the court in *Cheong Soh Chin* as to why the unjust enrichment claims were dismissed.

Subjective devaluation

23.13 In *Cheong Soh Chin*, the court also briefly discussed the principle of subjective devaluation. The plaintiffs, in defence against the defendants' counterclaim for management services in relation to a hotel fund, asserted that the services performed were worthless or were worth less than their market value to them: *Cheong Soh Chin* at [102]. The

court correctly pointed out that this is the defence of subjective devaluation which was introduced by the late Peter Birks. Whilst a recipient of money cannot argue that he was not enriched, a recipient of benefits in kind may argue that he does not value the benefit or he does not value the benefit to the extent of its market value: see Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at p 109. The court noted that this defence is now part of English law, citing *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561: *Cheong Soh Chin* at [104].

23.14 The court, however, rejected the plaintiffs' argument of subjective devaluation on the basis that it appeared to be "a self-serving afterthought": *Cheong Soh Chin* at [105]. It said that whilst the hotel fund project was "an abysmal commercial failure", its failure was largely due to the plaintiffs' decisions and choices: *Cheong Soh Chin* at [105]. It is not immediately apparent what the court meant by this. After all, subjective devaluation is not an argument based on hindsight, that is to say, it is to be made in the present case by reference to the success of the project to which the services had been directed or the causes of the project's failure. What the court probably meant was that it was not convinced that the plaintiffs genuinely did not value the defendants' services or valued them less than the market rate.

23.15 The leading authority on subjective devaluation is the UK Supreme Court's decision in *Benedetti v Sawiris* (above, para 23.3). The case concerned a claim in unjust enrichment for restitution of services performed. Although the Supreme Court used the language of "*quantum meruit*" to refer to the claim, it clearly analysed (at [10] and [11]) the matter based on the four-question framework of analysis (above, para 23.2). The only issue on appeal concerned the value of unjust enrichment in the case and it was in this context that the principle of subjective devaluation was canvassed.

23.16 If the benefit in question is services, *Benedetti v Sawiris* confirmed (at [14]) that the court is to evaluate the value of the services themselves and not any end-product or subsequent profit earned by the defendant. Lord Clarke, delivering the majority judgment, stated (at [15]) that the starting point of valuation of enrichment is objective market value, and the market value refers to "the price which a reasonable person in the defendant's position would have had to pay for the services": at [17]. The objective market value is, however, open to downward adjustment by subjective devaluation. Lord Clarke further explained (at [19]) that subjective devaluation embodies the "fundamental need to protect the defendant's autonomy". He said (at [17]) that:

> … although a court must ignore a defendant's 'generous or parsimonious personality', it can take into account 'conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position' as the defendant.

Disagreeing with Lord Reed, Lord Clarke said (at [26]) that the defendant's genuine subjective opinion of the value of the claimant's services could be taken into account to reduce the value of the enrichment in circumstances where the defendant had not freely accepted the benefit. In other words, Lord Clarke's conceptualisation of subjective devaluation is applicable to both establishing the existence of the enrichment as well as the valuation of the enrichment.

23.17 Lord Reed, who agreed that subjective devaluation is concerned with the protection of the defendant's autonomy, was of the contrary view that subjective devaluation does not apply to the valuation of enrichment: at [122]–[135]. This means that if the defendant has chosen the benefit, the valuation is strictly based on market value; it is not dependent upon the recipient's idiosyncratic and subjective valuation of the benefit. As such, on Lord Reed's understanding of subjective devaluation, it only applies to establish the existence of the enrichment. Lord Reed's justification for such an approach is two-fold: (a) "value", in its economic sense, is assessed by reference to the market instead of personal valuation; and (b) the objective of unjust enrichment is to restore the plaintiff to the financial position of the services which he has performed. Given that the appeal before the UK Supreme Court did not raise issues of freedom of choice, it was unnecessary to determine which approach was appropriate. Lord Neuberger thought that the two approaches will yield the same outcome in a great majority of the cases; any difference would be one of procedural analysis: at [189].

23.18 The decision in *Benedetti v Sawiris* therefore raised many difficult issues for consideration and should indeed be referred to on the next occasion an argument of subjective devaluation is made before the Singapore courts. In particular, the argument of subjective devaluation should be raised and assessed within the four-question structural framework of analysis for any claim in unjust enrichment. This is because the argument can be defeated in some circumstances: for example, where the benefit in question is an incontrovertible benefit or where the defendant has freely accepted the benefit. Moreover, making an argument of subjective devaluation within the context of determining whether the defendant has been enriched enables more nuanced issues to be examined: for instance, whether valuation of enrichment is dependent upon the defendant's subjective opinion; and whether the particular issue of protection of the defendant's autonomy should be addressed within the "enrichment" inquiry, the "unjust factor" inquiry or defences. Accordingly, in order for the law of unjust enrichment to

develop in a principled and coherent manner in Singapore, courts should not allow parties to bypass the "enrichment" inquiry or indeed any of the other questions in the framework of analysis by mere reference to *quantum meruit*.

Restitution for wrongs

Restitution for wrongs versus *restitution for unjust enrichment*

23.19 Notwithstanding the Court of Appeal's clarification in *Alwie Handoyo* (above, para 23.3) that restitution for unjust enrichment is to be distinguished from restitution for wrongs (see (2013) 14 SAL Ann Rev 465 at 466, para 22.4), litigators continue to be confused by the terminology. In *ARS v ART* [2015] SGHC 78, the court noted that the plaintiff's submissions on its unjust enrichment claim was "puzzling" because whilst the submissions referred to the requirements for an unjust enrichment claim, they went on to consider cases for restitution for wrongs and concluded by stating that their case was an appropriate one for the award of *Wrotham Park* damages on the basis of the first defendant's tortious wrongdoing: *ARS v ART* at [276].

23.20 In an effort to resolve the confusion, the court proceeded at length to cite from leading commentaries to demonstrate the distinction between restitution for unjust enrichment and restitution for wrongs: *ARS v ART* at [278]–[279]. Restitution for wrongs raises a remedial issue: whether gain-based remedies should be available for civil wrongdoing. The cause of action is made out based on the relevant species of wrongdoing: for example, breach of contract or torts. Restitution for unjust enrichment, on the other hand, is concerned with reversing transfer of benefits from the plaintiff to the defendant. Unjust enrichment is a separate cause of action which requires the plaintiff to show that the defendant has received an enrichment at the expense of the plaintiff and there is a relevant unjust factor to justify restitution. Going forward, it is hoped that lawyers will pay serious heed to the judicial guidance on the subject.

23.21 The ill-considered pleadings and submissions notwithstanding, the court had no difficulty in dismissing the plaintiff's restitutionary claim without even having to decipher the nature and kind of claim that was brought: *ARS v ART* at [281]. Restitution for wrongs was hopeless on the facts of the case given that the plaintiff failed to establish the underlying tortious wrongdoing. Restitution for unjust enrichment was unsuccessful because there was no unjust factor to support the cause of action. As the court highlighted, "tortious conduct" on the part of the first defendant is not a recognised unjust factor (see the list of unjust factors set out by the Court of Appeal in *Anna Wee* (above, para 23.3)

at [132]–[133]): *ARS v ART* at [281]. In some cases, the defendant's wrongdoing which caused the transfer of the benefit from the plaintiff to the defendant may be said to be based on the highly controversial unjust factor "ignorance" (also known as "lack of consent") or "want of authority". However, neither "ignorance" nor "want of authority" has been accepted as a recognised unjust factor under Singapore law: see (2013) 14 SAL Ann Rev 465 at 471–472, paras 22.19 and 22.20. Moreover, in this case, the underlying "tortious conduct" had not been established.

Wrotham Park *damages*

23.22 It is interesting to note that the plaintiff's submissions in *ARS v ART* assumed that *Wrotham Park* damages are restitutionary in nature. Given that its claim was wholly unsuccessful, this issue did not warrant the court's discussion. However, the issue is one that deserves some attention should a dispute with the right facts come before the Singapore courts. The label "*Wrotham Park* damages" was derived from the case *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*"), where the English High Court awarded substantial damages in lieu of an injunction for breach of a restrictive covenant attaching to land. In Brightman J's words, the award was (*Wrotham Park* at 815):

> … [a] sum of money as might reasonably have been demanded by the plaintiffs from [the defendant] as a *quid pro quo* for releasing the covenant.

23.23 For some time, there had been debate in English law whether *Wrotham Park* damages should be treated as restitutionary or compensatory in nature: see *Attorney General v Blake* [2001] 1 AC 268 at 282–284. On one view, the damages are restitutionary because it was awarded, by reference to the defendant's gain, for the wrongdoing. On another view, the damages are compensatory, being awarded to compensate for a lost opportunity to bargain for the relaxation of the restrictive covenant/release from relevant obligations. It appears that the English authorities are presently in favour of the compensatory account of *Wrotham Park* damages: see *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 at [59]. Indeed, the compensatory principles were recently discussed by the English High Court in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 ("*CF Partners (UK) LLP*"). Hildyard J explained that the *Wrotham Park* damages approach determines the quantum of compensation based on a hypothetical bargain negotiation between the parties: *CF Partners (UK) LLP* at [1196] and [1197]. However, Hildyard J acknowledged that the hypothetical bargain approach is "artificial" and necessarily involves "a question of impression": *CF Partners (UK) LLP*

at [1199]. In *CF Partners (UK) LLP*, there was "an enormous disparity in the parties' respective views as to what would have been their negotiating positions" which makes the exercise even more difficult: *CF Partners (UK) LLP v Barclays Bank plc* at [1200]. In *Wrotham Park*, the court expressly found that the claimants would never have agreed to the relaxation of the restrictive covenant, thereby rendering the hypothetical bargain approach clearly fictitious.

23.24 As such, whether the dominant view in English law regarding the true nature of *Wrotham Park* damages ought to be adopted in Singapore law is a matter for debate.

The user principle

23.25 In *Paul Patrick Baragwanath v Republic of Singapore Yacht Club* [2016] 1 SLR 1295 ("*Paul Patrick Baragwanath*"), the High Court was faced with an appeal on the quantification of damages arising from a vessel's trespass into a marina. In considering the issue of quantification of damages, the court touched upon the much-debated "user principle". The user principle allows for awards of damages based on the reasonable hire of the property that has been unlawfully detained or used by the defendant. Whilst the principle is well established, it remains contentious as to whether the principle is restitutionary or compensatory in nature. The nuances of the debate was canvassed in great detail in (2013) 14 SAL Ann Rev 465 at 477–480, paras 22.33–22.40. The local authority on the user principle is the Court of Appeal decision in *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 ("*Yenty Lily*"). In that case, the Court of Appeal declined to conclusively decide on the jurisprudential debate concerning the true nature of the user principle, but it expressed tentative preference, in *obiter*, for a restitutionary account. Notably, in *Yenty Lily*, the Court of Appeal upheld the High Court's award for loss of rental by reference to the conventional compensatory measure. In (2013) 14 SAL Ann Rev 465 at 479, para 22.39, it was suggested that by acknowledging a compensatory principle that is independent of the user principle, the Court of Appeal had practically resolved in *obiter* that the user principle is restitutionary in nature.

23.26 Returning now to *Paul Patrick Baragwanath*, the court noted that the debate concerning the nature of the user principle remains a live one under Singapore law: *Paul Patrick Baragwanath* at [19]–[22]. However, it declined to comment further on the matter because the conventional compensatory principle was applicable to the dispute. This is notwithstanding the court's acknowledgment that an argument might be made in the case that the marina owner suffered no loss because the berths were "largely unoccupied" and there might be no hirers even if

there had not been a trespass by the vessel: *Paul Patrick Baragwanath* at [24]. The court cited Romer LJ's observation in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 AB 246 ("*Strand Electric*") for the proposition that compensation would be awarded even if the owner might not have found a hirer of its property. The court could have directly relied on *Yenty Lily* for the same proposition instead of referring to the English case of *Strand Electric*, especially given the diverse routes of reasoning in *Strand Electric*. For instance, Denning LJ proceeded upon a restitutionary analysis for the award made in *Strand Electric*. In *Yenty Lily*, the plaintiff failed to prove that the property could have been hired out during the period of detention by the defendant. Yet, the Court of Appeal found that the plaintiff was entitled to compensation under the conventional compensatory principle because she suffered the loss of being deprived of the use of her property for the purpose of her business: *Yenty Lily* at [60]. The court in *Paul Patrick Baragwanath* could have adopted the same reasoning in the view that the case similarly involved property that was being applied for commercial hire.

23.27 One may then ask: When might recourse to the user principle be necessary, given the applicability of the compensatory principle to a great majority of cases? According to the Court of Appeal in *Yenty Lily*, the user principle – on a restitutionary analysis – might be employed to yield a substantial award for the plaintiff in cases where there is a proven benefit but no proven loss: *Yenty Lily* at [48]. *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 was such a case. The plaintiffs, the lessees of a dock which was going to shut down, sued the defendant for trespass by reason of his refusal to remove his floating pontoon that was stored at the dock, notwithstanding numerous requests for its removal. Lord Denning MR found that the plaintiffs suffered no financial loss because they were intending to shut down the dock and would not have earned from the hire of its berths.

23.28 It seems, therefore, the occasion for a conclusive determination of the nature of the user principle under Singapore law must wait for a dispute which calls for its application to come before the Singapore courts.