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# Restitution [2016]

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# 23. RESTITUTION

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## Introduction

23.1 In 2016, there were nine cases that substantively discussed the law of unjust enrichment and restitution. Most of the cases concerned a claim for restitution for unjust enrichment, with focus on the "unjust factor" inquiry. Two cases are of note. In *Singapore Swimming Club v Koh Sin Chong Freddie*[1] ("*Singapore Swimming Club*"), a claim in unjust enrichment was advanced on the basis of mistake of fact. As the case concerned an unincorporated association, the dispute belied a difficult issue concerning whose mistake was relevant and the further issue of attribution of state of mind. In *AAHG LLC v Hong Hin Kay Albert*[2] ("*AAHG*"), the High Court endorsed, without elaboration, "lack of consent", a controversial ground of restitution, as an unjust factor under Singapore law.

23.2 It is also noteworthy that three cases concerned benefits (payment and performance of services) conferred in anticipation of a contract that did not materialise. These anticipated contracts cases raised interesting issues concerning enrichment and the relevant unjust factor. In particular, the Court of Appeal in *Eng Chiet Shoong v Cheong Soh Chin*[3] ("*Cheong Soh Chin*") discussed the conceptual divide between the implied contract approach and the unjust enrichment analysis, bringing certainty to a complex area of the law.

## Contract and unjust enrichment

23.3 In *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd*,[4] the High Court affirmed that where a benefit has been conferred as a result of a valid and existing contract between the parties, no claim in unjust

1 [2016] 3 SLR 845.
2 [2017] 3 SLR 636.
3 [2016] 4 SLR 728.
4 [2016] SGHC 55.

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enrichment can arise.[5] This is because the law of unjust enrichment cannot be invoked to undermine the parties' contractual allocation of risks.[6]

23.4 For this reason, the law of unjust enrichment is said to be subsidiary to the law of contract.[7] Nevertheless, this is not to say, as a blanket rule, that contractual invalidity is a prerequisite to a claim in unjust enrichment. As Burrows has explained in *The law of Restitution*,[8] one must consider whether on the particular facts of the dispute, the contractual allocation of risks is *undermined* by the law of unjust enrichment. It may be that on the facts, there is no inconsistency between contract and unjust enrichment. In Burrows' analysis, this is readily illustrated by failure of consideration cases.[9]

## Terminology: *Quantum meruit*

23.5 In *Cheong Soh Chin*, the plaintiffs claimed for payment for services rendered to the defendants on the basis of an implied contract and, alternatively, in restitutionary *quantum meruit*. The Court of Appeal noted that the monetary award made on either basis would be a reasonable sum and such a quantum would, thus, be "*consistent with the literal meaning* of the term '*quantum meruit*', which translated from the Latin [*sic*] means 'as much as he has deserved'" [emphasis in original].[10]

23.6 The court observed that a claim for a reasonable sum for work done on the basis of an implied contract has been referred to as contractual *quantum meruit*.[11] However, the court went on to stress that contractual *quantum meruit* is conceptually distinct from restitutionary *quantum meruit*, a distinction that is well-established in Singapore case law. Having regard to leading commentaries on the subject, the court was of the view that the label "*quantum meruit*" would more appropriately describe the claim in unjust enrichment.[12] To avoid

5 *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd* [2016] SGHC 55 at [84]–[86].
6 *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd* [2016] SGHC 55 at [86].
7 See Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ch 6, at p 134.
8 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ch 14, at pp 328–329.
9 See especially *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; *Unjust Enrichment in Commercial Law* (Simone Degeling & James Edelman eds) (Thomson Reuters, 2008) ch 1; *cf*, Tang Hang Wu, "Unjust Enrichment within a Valid Contract: A Close Look at *Roxborough v Rothmans of Pall Mall Australia Ltd*" (2007) 23 *Journal of Contract Law* 201.
10 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [37].
11 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [37].
12 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [38] and [41].

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confusion, the "most practical and commonsensical approach", according to the court, is to focus on the substance of the claim, as opposed to the form.[13]

### Remuneration for work done: Implied contract *versus* restitutionary *quantum meruit*

23.7 The terminology of "contractual *quantum meruit*" and "restitutionary *quantum meruit*" was discussed at length in *Cheong Soh Chin* because the dispute concerned the basis of remuneration for work done where the parties had not executed a formal contract. The background facts and the High Court's ruling were examined in a previous review.[14] In essence, the plaintiffs and the defendants entered into a funds business joint venture, named the "WWW concept". There was an agreement between the parties for the payment of management fees by the plaintiffs to the defendants in respect of the initial PE funds. There was, however, no agreement made regarding the payment of management fees in relation to the additional PE funds as well as five direct investments, including one hotel project ("Project Plaza") undertaken by the defendants. The initial PE funds, the additional PE funds, as well as the direct investments were held through special purpose vehicles ("SPVs") controlled by the defendants but set up with the plaintiffs' funds.

23.8 The joint venture failed to take off and the parties' personal and professional relationships broke down. The plaintiffs commenced proceedings to demand the defendants to transfer to them the investments and the control of the SPVs. The defendants counterclaimed for management fees and expenses incurred in relation to the investments over the years. The appeal before the Court of Appeal concerned the defendants' counterclaim for management fees. The defendants' counterclaim was substantially dismissed in entirety by the High Court. The High Court found that the parties had undertaken the WWW concept as joint risk-runners, expecting to receive rewards only when the joint venture came to fruition. As such, the defendants were not entitled to payment of management fees, beyond what the management fees that had been agreed in respect of the initial PE funds. In this connection, the High Court found that Project Plaza was part of the WWW concept.

23.9 The Court of Appeal, having carefully examined the evidence, disagreed with the High Court that Project Plaza was part of the WWW

13 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [41].
14 (2015) 16 SAL Ann Rev 593 at 595–600, paras 23.5–23.18.

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concept. It went on to find that the defendants had performed the work with "*an (accompanying) expectation … that they would be separately remunerated*" [emphasis in original] for Project Plaza.[15] As such, the issue was whether the defendants were to be remunerated on the basis of an implied contract or on a *quantum meruit* for an anticipated contract which did not materialise. The court was of the view that it would be artificial to find that there was an implied contract to pay on the facts,[16] as an implied contract will only be found to have arisen in "very limited circumstances based on necessity and having regard to the intentions of the parties".[17]

23.10 The court also distinguished between remuneration on *an implied contract* basis and remuneration on *an implied term* basis.[18] The latter concerns a scenario where there is an express contract between the parties that does not contain an express term on remuneration and the court is being asked to imply a term for payment of a reasonable sum. A term for payment of a reasonable sum will only be implied if it is necessary to do so by reference to the traditional tests on implication of terms. Further, it has been pointed out that in deciding whether remuneration should be made on an implied contract basis, courts should be alive to the commercial context.[19] When business people negotiate, they do not contemplate the formation of small, discrete contracts, but a *package contract* that governs all their rights and liabilities. As such, in cases where the main contract do not materialise, courts should not be overly ready to imply that a smaller, discrete contract (governing remuneration of work done) has been formed. The facts of *Cheong Soh Chin*, however, did not concern the non-materialisation of a main contract.

## Enrichment

23.11 To succeed in a cause of action in unjust enrichment, the plaintiff must show, amongst other elements, that the defendant has been enriched. This inquiry is straightforward where money is concerned, as it is the "quintessential example of an incontrovertible benefit".[20] It will be unreasonable or impossible for the defendant to dispute that he has been enriched by the receipt of money. He may, however, defend against the claim in unjust enrichment on other

15 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [86].
16 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [86].
17 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [29].
18 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [30].
19 See Man Yip & Yihan Goh, "Liability for Work Done where Contract is Denied: Contractual and Restitutionary Approaches" [2012] LMCLQ 289.
20 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [62].

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grounds, such as the lack of a recognised unjust factor or if relevant defences are applicable.

23.12 Whether the receipt of pure services *enriches* a defendant is less clear-cut. To be clear, pure services have market value but the law respects people's choices whether to pay for the service or not.[21] The same goes for things that have market value. As Pollock CB made clear in *Taylor v Laird*:[22]

> … Suppose that I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself …

23.13 In *Higgins, Danial Patrick v Mulacek, Philippe Emanuel*[23] ("*Higgins*"), the plaintiff claimed that he should be paid for the management of the defendants' aircraft on the basis of an implied contract and, alternatively, in unjust enrichment. The said management services comprised: "(a) private flight services; (b) pilot training; (c) aircraft management services; and (d) aircraft registration services".[24]

23.14 The High Court ruled that the private flight services, on the evidence, had been paid for and the claim must, therefore, fail.[25] In respect of the pilot training, the court held that where "a defendant informs a claimant that he does not wish to receive a benefit but the claimant nevertheless proceeds to confer the benefit anyway, the defendant is under no obligation to pay for it".[26] On the facts, the plaintiff informed one of the defendants via e-mail that he intended to send the pilot on a course and asked for a decision on the matter, failing which he would take the pilot off the course. The plaintiff did not receive an affirmative reply from the said defendant but he proceeded to put the pilot on the course. The court commented that there was no unjust factor for the claim. The claim could also be rejected on the basis that no enrichment was established because the defendant did not choose to pay for the service. The court further rejected the plaintiff's argument that he had "acted 'reasonably' in a situation of 'urgency'" as the case did not involve an emergency that would justify restitution for

21 See Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) ch 3, at p 53.
22 (1856) 25 LJ Ex 329 at 332.
23 [2016] 5 SLR 848.
24 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [55].
25 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [57].
26 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [58].

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"expenses incurred in the unsolicited management of the affairs of another".[27]

23.15 As for the aircraft management services, most of the items overlapped with the items claimed under pilot training and private flight services and should, accordingly, be dismissed for the same reasons that those claims were unsuccessful.[28] The only item remaining was consultancy services and which the court swiftly dismissed too. The court considered the claim for consultancy services to be tantamount to seeking the recovery of remuneration under the oral alleged contract – the plaintiff's primary basis of recovery – that the court had already rejected. It said that the law of unjust enrichment is concerned with reversing benefits received by the defendant at the expense of the plaintiff; it is not concerned with enforcing a party's expectation interest as that lies in the realm of contract.[29] It is respectfully submitted that a contractual claim for remuneration which is unsuccessful does not automatically render a claim in unjust enrichment for remuneration to be unsuccessful too. Indeed, as recognised by the Court of Appeal in *Cheong Soh Chin* (discussed above at paras 23.5–23.6), both claims (also referred to as contractual *quantum meruit* and restitutionary *quantum meruit* respectively) are to seek recovery for "a reasonable sum" for work done. Indeed, in many cases, they are pleaded as alternative claims. The court should have gone on to explain why the restitutionary claim should also fail on the facts.

23.16 Finally, in respect of aircraft registration services, the court said that the defendant had not been enriched as the plaintiff's efforts "came to naught".[30] The background facts to this particular head of claim are fairly straightforward. The defendants' aircraft was originally registered in the US. Facing pressure from the US tax authorities in respect of the aircraft, the defendants accepted the plaintiff's proposal to fly the aircraft to Malaysia and have it registered in Malaysia instead. However, as it turned out, registration in Malaysia was not feasible in light of the costs and time the process would take. Efforts for registration in Malaysia were, thus, abandoned. The court acknowledged,[31] citing the case of *Brewer Street Investments Ltd v Barclays Woollen Co Ltd*[32] ("*Brewer Street*"), that enrichment may come in the form of a "pure service", without "the attainment of a particular result or end-product". In *Brewer Street*, the English Court of Appeal granted the plaintiff

27 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [59].
28 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [60].
29 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [60].
30 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [61]–[62].
31 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [63].
32 [1954] 1 QB 428.

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landlord's claim in unjust enrichment in respect of alterations made to the property requested by the defendants at the time the parties were negotiating the lease of the property, even though the defendants did not, ultimately, take up the lease.

23.17 In *Higgins*, the court was of the view that the defendants did not derive "any objective benefit" from the plaintiff's efforts in trying to register the aircraft in Malaysia for two main reasons. First, the court conceptualised the basis upon which the defendants undertook payment responsibility was that it was *necessary* for the aircraft to be re-registered in another jurisdiction.[33] However, the court found that it was unnecessary for the aircraft to be deregistered from the US registry. Moreover, the court pointed to the fact that the plaintiff made no inquiries on the feasibility of the registration of the aircraft in Malaysia prior to his advising the defendants to proceed with his proposed plan. Overall, one gets a sense from the judgment that the court considered it unfair to require the defendants to pay the plaintiff for a pure service that was unnecessary, recommended to the defendants with no due diligence undertaken beforehand and one which yielded no result.[34] To allow the plaintiff's claim would be tantamount to allowing the plaintiff to profit from his own default and lack of diligence.

23.18 In *Cheong Soh Chin*, the Court of Appeal dealt with the issue of quantification of enrichment. The court found that the defendants were entitled to restitutionary *quantum meruit* – a reasonable sum based on the principle of unjust enrichment – for work performed in anticipation of a contract which did not materialise.[35] The issue of quantification was substantially dependent upon expert evidence on what would be a reasonable sum in the circumstances.[36] Nevertheless, some principles may be extracted from the judgment.

23.19 First, the contest between the expert evidence tendered by both sides was centred on what would be the objective market rate of the work performed by the defendants. Second, the valuation of the work performed by the defendants must take into account the nature of the project (whether it was a standard project or a unique, complex project), the role played by the defendants, the fact that the project was a "stillborn", and that the project stretched beyond the projected period.

33 *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [67].
34 See especially *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 at [70].
35 See paras 23.7–23.10 above.
36 *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 at [87]–[92].

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23.20 Notably, before the Court of Appeal, neither the plaintiffs nor the defendants argued that the quantification ought to be different from the market rate, by the operation of either subjective devaluation or subjective re-evaluation. These arguments may, nevertheless, be relevant in other cases concerning payment for work done in respect of an anticipated contract.

## Unjust factor

### *Lack of consent*

23.21 In *AAHG*, the plaintiff claimed compensation against the defendant for conversion of company shares in which the plaintiff had a reversionary interest. The shares were originally held by a company known as DVI Inc ("DVI"). Alternatively, the plaintiff advanced a claim for restitution in unjust enrichment. In that case, the defendant had procured the transfer of shares to himself, purportedly in pursuance to the exercise of a right of pre-emption. Pursuant to resolutions passed at the board of directors' meeting, the shares held by DVI were cancelled and registered in the defendant's name. The defendant, subsequently, transferred the shares to another company.

23.22 The High Court found[37] that the alleged right of pre-emption did not arise on the facts as DVI had not issued a transfer notice required under the Articles of Association for the transfer of shares. The required transfer notice would have operated as an offer to sell from a shareholder proposing to sell his shares to any member or selected person and triggers the right of pre-emption.

23.23 The High Court concluded that the plaintiff could succeed on both conversion as well as its alternative claim in unjust enrichment. Of interest to this review is the High Court's endorsement of "lack of consent" as an unjust factor to ground the restitutionary claim.[38]

23.24 Notably, whilst aware of the Court of Appeal's hesitation to endorse this controversial unjust factor in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[39] ("*Anna Wee*"), the High Court was quick to embrace, without full analysis of ensuing consequences, the unjust factor. According to the High Court:[40]

37 *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [37].
38 *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [74]–[75].
39 [2013] 3 SLR 801 at [166]–[167].
40 *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [74].

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> There is much force in the argument (which the Court of Appeal noted in *Anna Wee* at [139]) that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. In my view, lack of consent ought to be recognised as an unjust factor.

23.25 The concerns of the Court of Appeal in *Anna Wee* had been discussed in a previous review.[41] In particular, it has been highlighted in that commentary that the recognition of "lack of consent" (alternatively known as "ignorance") as an unjust factor has the effect of moving towards recognising strict liability for receipt of property transferred in breach of trust or fiduciary duty that are traditionally dealt with in equity under the doctrine of knowing receipt.[42] Notably, in *Singapore Swimming Club*,[43] the Court of Appeal also cautioned against recognising new grounds of recovery too freely.[44]

23.26 The case of *AAHG* is going on appeal before the Court of Appeal. There is, therefore, opportunity to review this part of the High Court's ruling. In this connection, it is worthwhile to note that two recent Australian decisions have cast doubt on the authority of the High Court of Australia's ruling in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[45] as being set against recognising strict liability for receipt cases.[46] Indeed, in *Great Investments Ltd v Warner*,[47] the Full Federal Court of Australia held that in cases of receipt of corporate assets transferred without authority, the principles of knowing receipt do not apply. The Full Federal Court of Australia held that the liability of the recipient to make restitution is *strict*. Leave to appeal the decision to the High Court of Australia had been denied.

### *Mistake*

23.27 Two decisions in 2016 involved claims in unjust enrichment brought on the ground of mistake. The first was *Singapore Swimming Club*, a Court of Appeal decision, which raised issues such as what constitutes an operative mistake as well as whose mistake is relevant for the purpose of a claim in unjust enrichment. In that case, Koh Sin

41 (2013) 14 SAL Ann Rev 465 at 471–472, para 22.19.
42 See also (2013) 14 SAL Ann Rev 465 at 480–482, paras 22.41–22.44.
43 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845; see below at paras 23.27–23.38 for a discussion on this case.
44 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [93].
45 (2007) 230 CLR 89.
46 See *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 and *Great Investments Ltd v Warner* [2016] FCAFC 85.
47 [2016] FCAFC 85.

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Chong ("Koh"), the defendant, was the former president of the plaintiff, the Singapore Swimming Club ("Club"), an unincorporated association. He was previously sued by four members of the immediately preceding management committee for making defamatory statements against them. The Club's then management committee had passed a resolution stating that the Club would assume "all and any liability in the defen[c]e of and awards against any member" of the Club's management committee as a result of their discharge of duties and responsibilities as officers of the Club ("Indemnity Resolution").[48] The Club, accordingly, paid for the legal costs and expenses incurred in Koh's defence against the defamation suit. Subsequently, the Court of Appeal ruled in the defamation suit that Koh had made the defamatory statements with malice ("CA decision").

23.28 Three months after the CA decision was delivered, more than 500 members of the Club requisitioned an extraordinary general meeting ("EGM") to be held, in order to pass resolutions to the effect that: the Club was to seek the return of all moneys paid for Koh's defence; no Club moneys should be authorised to pay for legal costs, expenses, and damages in respect of the defamation suit (and appeal); and the members of the Club had no confidence in Koh. Further payments were made by the Club pursuant to the Indemnity Resolution after the requisition but before the EGM was held. At the EGM, the resolutions were passed and from that point onwards, the Club stopped making further payments for Koh's legal costs and damages.

23.29 The Club commenced proceedings to claim for sums which the Club had paid for Koh's defence in the defamation suit and appeal. Its claim was dismissed by the High Court.[49] On appeal, notwithstanding the Club's unsatisfactory submissions, the Court of Appeal identified two core issues: (a) whether the Indemnity Resolution was void or voidable and, therefore, invalid; and (b) whether the Club paid for Koh's legal costs and damages under a mistake of fact and should, thus, be entitled to restitution for unjust enrichment. In respect of issue (a), in short, the court found that the Indemnity Resolution was valid.[50]

23.30 Turning to the unjust enrichment claim, the court said that the law of unjust enrichment is focused on the plaintiff's "loss or deprivation", instead of the recipient's fault.[51] Taken on its own, the statement appears peculiar as the law of unjust enrichment is concerned

48 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [17].
49 See (2014) 15 SAL Ann Rev 473 at 478–480, paras 23.15–23.18 for a discussion on the same case.
50 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [84].
51 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [92].

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with the defendant's gains. Given the court's endorsement of the orthodox analytical framework of a claim in unjust enrichment,[52] the court probably meant that the law of just enrichment is focused on the recipient's gains which correspond to the plaintiff's loss or deprivation.[53]

23.31 The court rightly said that the appeal on the unjust enrichment claim turned on the "unjust factor" inquiry. The Club relied on mistake of fact in the case. It argued that it had paid for Koh's legal costs and damages under the mistaken belief that Koh had been "sued as a result of the discharge of his duties and responsibilities for and on behalf of the Club".[54] The court said that the principles relating to mistake are as follows:[55]

> (a) First, the claimant must prove, as a threshold matter, that he had made a mistake, in that he had believed that it was more likely than not that the true facts (or the true state of law where mistake of law is pleaded) were otherwise than they in fact were.
>
> (b) Second, the claimant's belief must have caused him to confer the benefit on the defendant. In other words, the mistake must be causative.
>
> (c) Third, even if a causative mistake can be shown, the claimant may be denied relief if he had responded unreasonably to his doubts, and had thus unreasonably ran the risk of error.
>
> (d) Fourth, a claimant who had doubts may be denied relief on the distinct grounds that he has compromised or settled with the defendant, or on the basis that he is estopped from pleading the mistake.

23.32 In light of principle (a), a mistake must relate to an incorrect positively held belief and as such, mere ignorance would not suffice. This provides welcome clarification, as the High Court had thought that "sheer ignorance of something relevant to the transaction at hand" may constitute a mistake.[56]

23.33 The court was satisfied on the facts of the case that the Club was labouring under a causative mistake of fact, prior to the release of the CA decision, in paying for Koh's legal costs and damages. It pointed to the strong reaction of the Club members to the CA decision as evidence of the Club's incorrectly held belief.[57] The CA decision revealed that Koh was making the defamatory statements with malice and was not acting

52 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [90].
53 See also (2013) 14 SAL Ann Rev 465 at 468, para 22.11.
54 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [95].
55 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [94].
56 See (2014) 15 SAL Ann Rev 473 at 478–480, paras 23.15–23.18.
57 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [97].

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in good faith in the discharge of his duties and responsibilities for and on behalf of the Club.[58] Accordingly, Koh's defence of the defamatory suit (and the appeal) fell outside the scope of the Indemnity Resolution.

23.34 It has been argued that the mistake in *Singapore Swimming Club* should be characterised as one involving both mistakes of fact and law.[59] According to Daniel YM Tan ("Tan")'s article on restitution for mistake, whether Koh acted with malice in the analysis of the defence of qualified privilege to the defamation suit as well as whether he acted within the scope of his duties were "at best mixed questions of law and fact". Be that as it may, Tan acknowledged that both mistakes of fact and law are recognised grounds for restitution. Importantly, nothing on the case turned on a distinction between the two kinds of mistakes, even though differentiating them may be crucial in other cases. Further, it appears that the court was referring to the mistake as to the "state of the mind of [Koh] *at the time* he was making those defamatory remarks" [emphasis in original].[60] It clearly characterised the finding of malice in the CA decision as a finding of fact.[61] Simply put, the court's interpretation of the scope of the Indemnity Resolution is that if Koh had acted in bad faith, he could not be said to be discharging his duties and responsibilities for and on behalf of the Club.

23.35 The court further considered the question as to whether the Club could be said to be mistaken if some of its members – specifically, members of the Club's management committee which passed the Indemnity Resolution – had knowledge of the true nature of Koh's conduct.[62] It, nevertheless, concluded that the breach of duty exception (derived from the case of *Re Hampshire Land Co*)[63] would apply to prevent the knowledge of such members from being attributable to the Club.[64] As the court explained, the breach-of-duty exception is based on public policy and is only applicable as against an agent who is in breach of his duty to the principal, or a third party who is complicit in the breach of duty.[65] The court also noted that "[t]here is nothing to indicate that the general body knew of the surrounding circumstances leading to the making of the defamatory statements by [Koh]".[66]

58 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [104].
59 See Daniel YM Tan, "Restitution for Mistake in Singapore: Treading Water?" [2016] RLR 172 at 174–175.
60 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [108].
61 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [110].
62 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [114]–[117].
63 [1896] 2 Ch 743.
64 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [117].
65 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [116].
66 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [114].

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23.36 Tan astutely pointed out that the dispute belied a question of *whose mistake* is relevant in the context of an unincorporated association.[67] He observed that the court in *Singapore Swimming Club* "seemed implicitly to suggest" that it is the mistake of the "general body" of the Club that grounded restitution.[68] An unincorporated association is set up via an agreement between its members; it has no separate legal personality. Tan suggests that the relevant mistake should be that of the Club's management committee because the management committee is vested with the management of the Club and is empowered to set and decide on all policies and matters relating to the Club.[69] In Tan's words, "the management committee acted as activating agent to the general body as principal".

23.37 State of mind, in the less explored context of unincorporated associations, is a complex issue. Reference to legislation that discusses offences committed by unincorporated associations where state of mind is relevant may be helpful. In this regard, s 12U of the Consumer Protection (Fair Trading) Act[70] provides that the state of mind of an employee or agent of the unincorporated association shall be taken to be the state of mind of the unincorporated association. As such, Tan's analysis is meritorious. However, the Court of Appeal in *Singapore Swimming Club* may be interpreted as refusing to attribute the agent's (management committee's) state of mind to the Club where the agent acted in breach of duty. The issue of state of mind of an unincorporated association (outside of statutory context) certainly awaits further elucidation by the Singapore courts.

23.38 The Court of Appeal in *Singapore Swimming Club* further held that the Club was no longer labouring under a mistake when the CA decision was released.[71] The post-CA decision payments were, thus, not recoverable on the basis of mistake of fact. The court also dismissed Koh's defences of estoppel *simpliciter*, estoppel by convention, and change of position on the ground that he always knew that he was acting maliciously in making the defamatory statements and that he would, thus, not have been entitled to be indemnified by the Club if it knew of the true state of affairs.

67 See Daniel YM Tan, "Restitution for Mistake in Singapore: Treading Water?" [2016] RLR 172 at 175.
68 Daniel YM Tan, "Restitution for Mistake in Singapore: Treading Water?" [2016] RLR 172 at 176.
69 Daniel YM Tan, "Restitution for Mistake in Singapore: Treading Water?" [2016] RLR 172 at 176.
70 Cap 52A, 2009 Rev Ed.
71 *Singapore Swimming Club Koh Sin Chong Freddie* [2016] 3 SLR 845 at [119].

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23.39 The second case on mistake is *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd*.[72] In essence, the plaintiff supplied certain products ("Product A") to the defendant, which were not requested by the defendant but which were required for use with the other products requested by the defendant ("Product B"). However, the plaintiff only invoiced the defendant for Product B but not Product A. The plaintiff brought a claim in unjust enrichment against the defendant for payment of the supply of Product A.

23.40 In respect of the unjust factor for the claim, the High Court said as follows:[73]

> … The enrichment was unjust because this was a commercial transaction in which parties were dealing with each other commercially as buyer and supplier, and in such a situation, the supply of goods is made for consideration and not for free. The failure to bill the defendant for the CV Couplings was a mistake of fact on the part of the plaintiff's staff.

23.41 It is respectfully submitted that the mistake identified by the High Court to ground restitution in the case requires fuller consideration. As the Court of Appeal has pronounced in the case of *Singapore Swimming Club*,[74] the mistake must have *caused* the transfer of benefit from the plaintiff to the defendant. It cannot be said that the plaintiff's failure to invoice for Product A caused the supply of Product A to the defendant. If the claim were to be based on mistake of fact, the relevant mistake might be characterised as the plaintiff's mistaken belief that the defendant had understood that the plaintiff did not supply Product A gratuitously.

23.42 Another possible unjust factor, not argued by the plaintiff, is free acceptance. Free acceptance occurs when a recipient chooses to accept a benefit which he knows is not conferred gratuitously by the plaintiff, notwithstanding the opportunity to return it. The idea is that the recipient is a risk-taker. This unjust factor has sparked much controversy, as noted by the Court of Appeal in *Anna Wee*.[75] In *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd*,[76] without addressing the more fundamental question of whether this unjust factor

72 [2016] SGHC 104.
73 *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2016] SGHC 104 at [131].
74 See para 23.31 above.
75 See (2013) 14 SAL Ann Rev 465 at 471, paras 22.17–22.18 for a discussion on this case.
76 [2014] SGHC 258.

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should be recognised, the court treated the unjust factor as being applicable under Singapore law.[77]

## Pre-contract deposit

23.43 The High Court in *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd*[78] ("*Supercars*") faced a claim for the repayment of a pre-contractual payment paid ahead of the parties entering into an exclusive dealership agreement but the agreement was not, ultimately, entered into. Of interest to this review is the court's analysis of the nature of such a pre-contractual payment, also commonly known as a "deposit".

23.44 The court, following *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd*,[79] held that the pre-contractual payment was recoverable on the basis of failure of consideration. It found on the evidence that the payment was made on the basis that an exclusive dealership agreement would be entered into.[80] It explained that such pre-contractual payments can be commercially useful in the context where parties expect a contract to be executed shortly and the payment is made as a signal of serious intent to complete the contract negotiations and enter into a binding agreement.[81]

23.45 The basis that an agreement would be entered into was, in fact, a basis of a future event which the defendant did not promise its occurrence. That is, the basis was a "non-promissory contingent condition".[82] The fact that the failure of a "non-promissory contingent condition" amounts to a failure of consideration to ground restitution is well-recognised in other common law jurisdictions.[83]

## Public policy

23.46 In *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard*,[84] the plaintiff moved in with her daughter and son-in-law, the defendants, after her husband passed away. The parties jointly purchased a property and the

77 See (2014) 15 SAL Ann Rev 473 at 480–481, paras 23.21–23.24 for a discussion on this case.
78 [2016] SGHC 281.
79 [2003] 1 SLR(R) 791.
80 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [43].
81 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [39].
82 See Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ch 14, at p 320.
83 See, *eg*, *Chillingworth v Esche* [1924] 1 Ch 97, *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516.
84 [2016] 5 SLR 302.

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plaintiff contributed some money towards the purchase price. However, the parties' relationship, subsequently, soured. The plaintiff commenced proceedings to seek a declaration of her interest in the property as well as an order for sale in lieu of partition of her share in the property. The defendants contended that they were entitled to all or part of the plaintiff's share in the property on various bases. They submitted that the plaintiff had promised, in exchange for the defendants' maintenance and care, that she would hold her interest in the property for the defendants and leave them her other assets on her passing ("alleged agreement"). Should the plaintiff's claim be allowed, the defendants counterclaimed in unjust enrichment for the expenses they incurred in maintaining and caring for the plaintiff. This discussion shall focus on the counterclaim in unjust enrichment.

23.47 The High Court dismissed the defendants' counterclaim, which was grounded on failure of consideration (failure of the alleged agreement). It was of the view that the alleged agreement did not exist and it followed that the basis of the enrichment did not fail.[85]

23.48 The High Court further doubted that the expenses incurred for the maintenance of an elderly parent living with a family, in the absence of clear evidence of representation of promise, could constitute an enrichment for the purpose of establishing a claim in unjust enrichment.[86] The High Court's analysis is clearly based upon public policy reasoning. As the High Court explained:[87]

> … This is not a presumption against such a claim, but simply a recognition that expenditure for the care, welfare and enjoyment of an elderly parent is a normal incidence of family life that is encouraged and expected in society …

23.49 In this connection, the court noted that the defendants conceded that they would have continued to maintain the plaintiff, in the absence of any promise or agreement.[88] As such, the court was reinforced in its view that the enrichment was not unjust.

## Change of position

23.50 The defendant in *Supercars* raised the defence of change of position as it had paid the money to a third party.[89] The court rejected

85 *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard* [2016] 5 SLR 302 at [99].
86 *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard* [2016] 5 SLR 302 at [100].
87 *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard* [2016] 5 SLR 302 at [100].
88 *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard* [2016] 5 SLR 302 at [100].
89 See paras 23.43–23.45 above.

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the defence. It said, citing *Haugesund Kommune v Depfa ACS Bank*[90] ("*Haugesund Kommune*"), that "where the basis has been found to have failed, change of position is not made out as a defendant in such a position would know that flowing from such failure, repayment would follow".[91]

23.51 It is, however, important to note that in *Haugesund Kommune*, the failure of consideration occurred at the time the moneys were paid to the recipient defendants.[92] Accordingly, at the time of receipt, the defendants knew that the money would need to be repaid to the transferor. On Graham Virgo's analysis in *The Principles of the Law of Restitution*, this is "a question of risk-allocation".[93] As Virgo explained, the defendants in *Haugesund Kommune*, knowing that they had to repay the money at the time of receipt, "had taken the risk that they would not be able to do so".[94]

23.52 It is worth noting that *Haugesund Kommune* concerned a case of initial failure of consideration. *Supercars*, on the other hand, concerned a case of subsequent failure of consideration. On the evidence, the basis failed in May 2014 when the defendant decided not to appoint the plaintiff as the exclusive sub-dealer.[95] On the plaintiff's evidence, negotiations were still ongoing in April 2014.[96] According to the defendant's evidence, it paid the money away to a third party sometime in April 2014.[97] As such, technically, the defendant's change of position occurred prior to the failure of basis. Nevertheless, the defendant would still fail in arguing the change-of-position defence because the benefit (that is, the pre-contractual payment) was provided on a *conditional* basis. The defendant would only be entitled to retain the benefit if the plaintiff was appointed as the exclusive sub-dealer. Before such a decision was made, the defendant ran the risk of not being able to repay the plaintiff if the defendant spent the money or paid it away to a third party.[98]

90 [2010] EWCA Civ 579.
91 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [79].
92 *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579 at [125].
93 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ch 25, at p 694.
94 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ch 25, at p 695.
95 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [11].
96 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [11].
97 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281 at [25].
98 See further Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) ch 7, at pp 197–198.

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**Restitution for wrongs: The user principle**

23.53 The user principle has been well-visited in recent Singapore decisions.[99]

23.54 In 2016, the user principle was invoked in the case of *Heinrich Pte Ltd v Lau Kim Huat*.[100] The High Court rightly clarified that the user principle is a measure of damages, and not a *right* to compensation in itself.[101] In other words, there must be a relevant cause of action (for example, conversion, trespass, detinue, or infringement of intellectual property rights) to justify the invocation of this measure of damages.

23.55 The High Court said that the Court of Appeal in *ACES System Development Pte Ltd v Yenty Lily*[102] ("*Yenty Lily*") had recognised that "a claim based on the user principle is a restitutionary claim."[103] Whilst the Court of Appeal did discuss in great detail the restitutionary account of the user principle in *Yenty Lily*, it decided to defer "arriving at a conclusive or definitive view", as the dispute was resolved by recourse to the compensatory principle.[104] In relation to the jurisprudential nature of the user principle, one should take note of Kelvin FK Low's recent contribution to the debate in a Singapore Academy of Law Journal article.[105]

23.56 Further, it appears that the High Court confused the language used for restitution for unjust enrichment with that for restitution for wrongs. It stressed that "some unjust factor must be made out, in the form of a tort, whether for detention of goods or infringement of an intellectual property."[106] The language of unjust factor is only relevant to restitution for unjust enrichment. Where restitution for wrongs is concerned, the plaintiff needs to establish a relevant cause of action in order to succeed in claiming the remedy of restitution.

99 See, *eg*, *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 and *Paul Patrick Baragwanath v Republic of Singapore Yacht Club* [2016] 1 SLR 1295.
100 [2016] SGHC 116.
101 *Heinrich Pte Ltd v Lau Kim Huat* [2016] SGHC 116 at [120].
102 [2013] 4 SLR 1317.
103 *Heinrich Pte Ltd v Lau Kim Huat* [2016] SGHC 116 at [121].
104 *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [54].
105 Kelvin F K Low, "The User Principle: *Rashamon* Effect or Much Ado about Nothing?" (2016) 28 SAcLJ 984.
106 *Heinrich Pte Ltd v Lau Kim Huat* [2016] SGHC 116 at [121].

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