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Restitution [2014]

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23. RESTITUTION

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Introduction

23.1 There were only a small number of cases dealing with the law of unjust enrichment and restitution in the year 2014. The most noteworthy case is the Court of Appeal's decision in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 ("*Chan Yuen Lan*") which elucidated upon the juridical basis of the resulting trust, a matter that remains rife in debate in other common law jurisdictions. The decision has significant implications for the divide between the law of unjust enrichment and the law of trusts, and these implications will need to be carefully measured and sorted out in future cases. The remaining cases mainly deal with the unjust factor inquiry, both generally as well as with reference to specific unjust factors, namely, mistake and free acceptance. These judgments generally echo the sentiments of the Court of Appeal in two major decisions handed down in 2013, *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*"). More than that, however, the 2014 judgments continue the theme of clarifying the "unjust" inquiry, thereby adding to the richness of the local jurisprudence as well as raising finer points of law for future consideration.

Unjust enrichment and contract

23.2 In *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 ("*Total English Learning Global Pte Ltd*"), the High Court dismissed a claim in unjust enrichment where the arrangement between the parties was governed by a valid and existing contract. The decision thus reaffirmed the well-established principle that a claim based on unjust enrichment will not be allowed if it would subvert the allocation of risks in a valid and existing contract between the parties: see *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308, discussed in (2013) 14 SAL Ann Rev 465 at 467, para 22.6. The facts of the case that are relevant to the restitutionary claim may be simply stated. The defendant franchisees had entered into franchise agreements pursuant to which they were allowed to run education centres in Singapore

offering the "I Can Read" ("ICR") system, a type of English literacy and phonics programme. The original franchisor later purportedly assigned the entire business, including the franchise arrangements in Singapore, to the plaintiffs. The validity of this assignment was contested by the defendant franchisees. These defendants also subsequently replaced the ICR system with another competitor programme, and the unused ICR materials were returned to the plaintiffs. These ICR materials had been purchased by the said defendants from the original franchisor pursuant to a sales arrangement that the franchisee would order the materials based on its specific needs and requirements without being under an obligation to purchase a requisite amount.

23.3 There were multiple claims and counterclaims raised between the parties in the two sets of proceedings that were heard together on appeal to the High Court. The cause of action in unjust enrichment was a counterclaim brought by the aforementioned defendant franchisees against the plaintiffs for the price of the returned ICR materials. The court found that this counterclaim faced two difficulties. First, as a matter of contract, the return of the unused ICR materials was one of the obligations which the franchisee had to fulfil upon the termination or expiry of the agreement under the elaborate termination procedure prescribed in the franchise agreements; however, the agreements did not stipulate for the franchisor to refund the price of the returned materials. The court thus ruled (at [136]), and very sensibly so, that the plaintiffs' receipt of the unused ICR materials "could not give rise to any claim in restitution". In other words, the court was saying that the contract between the parties had already allocated the risks and there was therefore no room for restitution. One might have thought that the defendants could have argued for an implied term of reasonable remuneration instead. However, such an argument would probably fail as well, in light of the elaborate prescription of the termination procedure that arguably rendered the lack of provision of refund as an intentional allocation of risks as opposed to a "gap" in the contract that should be plugged.

23.4 The second difficulty with the unjust enrichment claim relates to the failure to establish a relevant "unjust factor", a core ingredient of the claim. This will be discussed below at paras 23.21–23.24.

Unjust enrichment and trusts

23.5 In (2013) 14 SAL Ann Rev 465 at 476–477, paras 22.30–22.31, it was noted that in *See Fong Mun v Chan Yuen Lan* [2013] 3 SLR 685, the High Court, without deciding on the issue, offered some reflections on the debate as to the juridical nature of the resulting trust. Essentially, there are two competing schools of thought: (a) Robert Chambers'

"absence of intention" thesis; and (b) the "presumed intention" rationalisation, which is often attributed to Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708 ("*Westdeutsche*"). An appeal from this decision afforded the Court of Appeal in *Chan Yuen Lan* (above, para 23.1) an opportunity to revisit this jurisprudential debate that it did not conclusively resolve in the earlier case of *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*").

23.6 Chambers' "lack of intention" analysis was affirmed to be the "more sensible basis for the principled yet pragmatic development of this equitable doctrine": *Chan Yuen Lan* at [44]. The Court of Appeal was, nevertheless, mindful that accepting such an account of the resulting trust could potentially blur the distinctions between unjust enrichment claims and claims based on resulting trust, and that this could adversely affect third parties' rights and the security of commercial transactions. It was also clarified that *Westdeutsche* was cited in *Lau Siew Kim* for the limited purpose of setting out the situations in which a resulting trust would arise: *Chan Yuen Lan* at [43]. Taken in totality, therefore, the judgment in *Chan Yuen Lan* rejects Chambers' wider thesis that the resulting trust is a vehicle of proprietary restitution; or, in other words, that it could be explained by the law of unjust enrichment: see Rachel Leow & Timothy Liau, "Resulting Trusts: A Victory for Unjust Enrichment" (2014) 73 Camb LJ 500.

23.7 *Chan Yuen Lan*'s pronouncement in this regard is consistent with the judicial trend under Singapore law to keep unjust enrichment and equity separate. In *Anna Wee* (above, para 23.1), the Court of Appeal said (at [182]–[184]) that a remedial constructive trust will not be imposed on the mere proof of a cause of action in unjust enrichment; fault is required (discussed in (2013) 14 SAL Ann Rev 465 at 474–476, paras 22.24–22.29). Moving beyond trusts, in the context of knowing receipt, the Court of Appeal in the same case cautioned against recognising an unjust enrichment liability regime, whether concurrently or as a substitution for the present fault-based regime: see (2013) 14 SAL Ann Rev 465 at 480–482, paras 22.41–22.44. The underlying concern in all three branches of the law is clearly the need for commercial certainty.

23.8 These recent developments then leave us with an interesting query on whether Singapore law would ever recognise a trust arising over a mistaken payment. The possible candidates are the constructive trust and the resulting trust. In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 ("*Chase Manhattan*"), Goulding J found that a constructive trust had arisen over a mistaken payment at the point of receipt by the receiving bank. In *Westdeutsche*, although agreeing with the result in *Chase Manhattan*, Lord Browne-Wilkinson disagreed with Goulding J's reasoning and instead opined

that the constructive trust only arose at the later point when the recipient bank had knowledge of the mistake: *Westdeutsche* at 714–715. It is apparent that Lord Browne-Wilkinson was referring to an institutional constructive trust. However, the ingredients of a successful cause of action in unjust enrichment coupled with the recipient's knowledge of the mistake could give rise to a remedial constructive trust under Singapore law, based on the Court of Appeal's *obiter* comments in *Anna Wee*. To also recognise an institutional constructive trust following Goulding J's reasoning in *Chase Manhattan* would undoubtedly render the remedial constructive trust in the context of mistaken payment otiose. Indeed, the ratio in *Chase Manhattan* has not been followed in any Singapore decision. Quite to the contrary, the local courts have noted that it stands at odds with Lord Browne-Wilkinson's reinterpretation in *Westdeutsche*: see *Public Prosecutor v Intra Group (Holdings) Co Inc* [1999] 1 SLR(R) 154 ("*PP v Intra Group*") at [46]; *Re Pinkroccade Educational Services Pte Ltd* [2002] 2 SLR(R) 789 at [15]–[22].

23.9 As for the possibility of awarding a proprietary remedy through the resulting trust, *Chan Yuen Lan* would certainly pre-empt such an argument. It is also noteworthy that the House of Lords in *Westdeutsche* had overruled the earlier English decision in *Sinclair v Brougham* [1914] AC 398, a case in which a proprietary remedy was awarded for a payment made in pursuance to a mistake of law. The remedy, as explained by Viscount Haldane in the same case (with whom Lord Atkinson agreed), was "in the nature of a resulting trust, with no active character": *Sinclair v Brougham* at 421. The English developments were noted locally in *PP v Intra Group* whereby the Court of Appeal agreed that *Sinclair v Brougham* was a difficult decision. The court in fact went as far to suggest that even if the case was correct in result, it might be better reasoned as giving rise to a remedial constructive trust: *PP v Intra Group* at [46].

Unjust factors

Identifying a recognised unjust factor

23.10 Echoing the observations by the Court of Appeal in *Anna Wee* (above, para 23.1) at [130] and [134] regarding the nature of the unjust inquiry in an unjust enrichment claim (discussed at (2013) 14 SAL Ann Rev 465 at 471, para 22.17), the High Court in *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240 ("*Freddie Koh*") reiterated that "the court does not order restitution based on broad notions of what is fair or just", nor is restitution awarded based on "a defendant's wrongdoing": *Freddie Koh* at [209]. It clarified in very simple terms that the injustice lies in the deprivation of "a claimant of a benefit that he has

conferred upon the defendant": *Freddie Koh* at [209]. The defendant's wrongdoing might well be the cause of the deprivation but it is not the focus of the law of unjust enrichment, nor is that a requisite ingredient of the claim. As such, a mistaken conferral of benefit provides a basis for restitution because the claimant has no intention to enrich the recipient had he known the true state of facts, leaving the recipient with an unjustified windfall: see *Freddie Koh* at [210]. It does not matter that the claimant's mistake is self-induced, or even a *careless* one: see *Kelly v Solaris* (1841) 152 ER 24.

23.11 It also follows that identifying the basis for reversing the enrichment is crucial to the success of a claim in unjust enrichment. In (2013) 14 SAL Ann Rev 465 at 465–466, para 22.3, it was noted that the Court of Appeal in *Alwie Handoyo* (above, para 23.1) stressed that the old form of "money had and received" did not state a cause of action, and that many actions pleaded under this form would now be understood as part of the law of unjust enrichment. As such, the Court of Appeal instructed that claimants "should be precise in elucidating the basis of their restitutionary claims": *Alwie Handoyo* at [125]. This means that claimants should identify the constituent ingredients of their unjust enrichment claims: (a) enrichment; (b) "at the expense of"; and (c) a recognised unjust factor.

23.12 The High Court in *Lo Man Heng v UBS AG* [2014] SGHC 134 ("*Lo Man Heng*") and *Khor Liang Ing Grace v Nie Jianmin* [2014] 4 SLR 1197 ("*Khor Liang Ing Grace*") gave further guidance on identifying a recognised unjust factor. In *Lo Man Heng*, the plaintiffs, who were the former customers of the defendant bank, claimed that the defendant had wrongfully paid the balances in the plaintiffs' accounts to a third party when the plaintiffs' accounts were closed. The defendant contended that the payments were authorised by the plaintiffs. In the event that the defendant was found liable to the plaintiffs, as a fallback, the defendant sought to be reimbursed by the third party on the basis of unjust enrichment. Judith Prakash J ultimately ruled that the plaintiff's claim was to be dismissed as the payments were indeed authorised by the plaintiffs. Nevertheless, Prakash J went on to express her views on the other issues that were submitted before the court. In respect of the unjust enrichment claim, she was of the view that it would have succeeded on the basis that the defendant had paid the third party under a causative mistake that it was acting under the plaintiffs' instructions. The claim would have been successful notwithstanding that the pleading was "somewhat sparse": *Lo Man Heng* at [83]. Although every claim in unjust enrichment must be based on a specific "unjust factor", as a matter of pleading, Prakash J iterated the well-established rule in civil procedure that the plaintiff is only required to (*Lo Man Heng* at [81]):

> … plead material facts on which it relies for its claim and does not need to plead the evidence by which those facts are to be proved or the legal basis of the claim.

In this regard, the defendant's pleadings which clearly supported a claim based on "want of authority" – an unjust factor that was rejected by the Court of Appeal in *Alwie Handoyo* – was found to be sufficient to imply a mistaken payment.

23.13 In *Khor Liang Ing Grace*, the executor of the deceased's estate sought to remove a caveat filed by N against a grant of probate. N had lodged a caveat on the basis that she had made a loan to the deceased before he passed away, and she was claiming the alleged sum from the deceased's estate. N claimed that she had only made the loan to the deceased pursuant to her husband's assurance that the deceased was financially sound and would repay the money. In considering the issue of whether N had a caveatable interest against the deceased's estate, the court considered, amongst other arguments, N's claim in unjust enrichment. The court ruled that having failed to identify a recognised unjust factor, a bare assertion that an enrichment was received by the deceased at N's expense was unjust would be insufficient to sustain the claim.

23.14 In sum, therefore, counsels are well advised to take the Court of Appeal's observations on the law of unjust enrichment in *Alwie Handoyo* seriously. The pleadings must be carefully crafted to disclose the constituent elements of the claim; pleading old forms of action such as "money had and received" will not be sufficient.

Mistake

23.15 In *Freddie Koh* (above, para 23.10), the High Court explained the nature and kind of mistake that is required for a claim in unjust enrichment on the basis of mistake to succeed. It endorsed (at [211]) the principles stated in *Goff & Jones: The Law on Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 8th Ed, 2011) at para 9-31, essentially, that a claimant must show that he had made a mistake in relation to a state of facts or law which is causative of his transfer of the benefit to the defendant, and that "he has not responded unreasonably to his doubts or unreasonably [run] the risk of error". The claim will, however, be disallowed if there has been a compromise or settlement between the parties, or if the claimant is estopped from pleading the relevant mistake.

23.16 The court further clarified that an actionable mistake is not confined to positively held beliefs which are incorrect, but can also include "sheer ignorance of something relevant to the transaction at

hand": *Freddie Koh* at [212], citing the High Court of Australia's decision in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 133 ("*David Securities*") at 369. Indeed, *David Securities* concerned ignorance. In that case, the plaintiff company made payments pursuant to a contractual provision that was rendered void by an Australian taxation legislation. The plaintiff company, in seeking restitution of the payments, claimed that the payments were made in *ignorance* of the legislation. The High Court of Australia ruled, in principle, that ignorance could amount to an actionable mistake and remitted the case to the trial court to determine, amongst other matters, if the mistake was a causative one. However, it could be argued that the ignorance in *David Securities* contributed to a genuine mistake: the plaintiffs' ignorance of the legislation resulted in it incorrectly believing that payments were due to the defendant: see Weeliam Seah, "Mispredictions, Mistake and Unjust Enrichment" [2007] RLR 93 at 96.

23.17 The facts of *Freddie Koh*, however, clearly involved an active mistake in the form of incorrectly held beliefs. The nub of the defendant's restitutionary claim was that payments had been made to the plaintiff under a mistake as to the latter's entitlement to be indemnified by the defendant in respect of damages and his legal costs. The indemnity was sourced in a resolution passed by the management committee of the defendant ("the Resolution") but the defendant argued that the scope of the indemnity only covered liability arising from a proper discharge of duties. As it turned out, the plaintiff's liability in the defamation suit was ultimately held by the Court of Appeal (in separate proceedings) to be based on malice. After carefully examining the intention behind the Resolution, the High Court was not satisfied that there was a causative mistake.

23.18 Accordingly, it remains to be seen whether the Court of Appeal would endorse all forms of ignorance as actionable mistake. The matter is certainly not a settled one. It is noteworthy that the UK Supreme Court has recently considered this issue in *Pitt v Holt* [2013] 2 AC 108 in the context of applying the law of rescinding a voluntary disposition. Lord Walker, delivering the unanimous judgment of the Supreme Court, opined (at [108]) that mere ignorance, even if causative, will not suffice, unless the court is able to infer a conscious belief or a tacit assumption. But as admitted by Lord Walker (at [108]), the line between mere ignorance and genuine mistakes is a very fine one, and could be incredibly difficult to draw in practice, as demonstrated by the case itself. As far as English law is concerned, principled exercise of judicial discretion will have to be relied upon to tackle this difficult task. Difficulties aside, Häcker has pointed out that the English concept of "mistake" is helpful in disposing "a number of more unsavoury gift hypotheticals" that have been canvassed in academic literature: see Birke Häcker, "Mistaken Gifts after *Pitt v Holt*" (2014) 67 Current Legal

Problems 333 at 361. One example cited is that discussed by Peter Birks: a homophobic uncle had made a gift to his nephew who is gay, unbeknownst to the uncle who had never considered the nephew's sexual orientation before: see Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at pp 149–150. Another strength of the English concept of "mistake" is that it better protects the recipients' interest in the security of their receipts, given that ignorance (which includes forgetfulness and inadvertence) is a commonplace occurrence. There has been suggestion, however, that protection could be afforded through the change of position defence instead: see James Edelman & Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) at p 171.

23.19 Under Singapore law, at least, there is a further and more nuanced consideration. In *Anna Wee* (above, para 23.1) (discussed in (2013) 14 SAL Ann Rev 465 at 476, para 22.19), the Court of Appeal reserved conclusive opinion on whether "ignorance" ought to be recognised as an independent unjust factor under Singapore law. The discussion took place within the context of considering whether Singapore law should recognise a strict liability regime for cases of receipt of property transferred in breach of trust or fiduciary duty. Singapore law is presently disinclined from doing so. Mere causative ignorance (on the part of the claimant) is, however, not usually found in these cases as it is the errant trustee/fiduciary's misappropriation that caused the receipt of the benefit. To seriously consider whether ignorance and what form of ignorance amounts to actionable mistake is thus imperative.

23.20 Finally, turning to reflect upon the effect of the judgment in *Lo Man Heng* (discussed above at para 23.12), should the Court of Appeal decide to follow the English concept of "mistake", pleadings based on "ignorance" may not necessarily permit an inference of a claim based on mistake.

Free acceptance

23.21 In *Total English Learning Global Pte Ltd* (above, para 23.2), the High Court had the opportunity to decide an unjust enrichment claim based on "free acceptance", a controversial concept that is rarely discussed in local case law. The facts of the case have been summarised above at paras 23.2–23.3. The defendant franchisees' counterclaim in unjust enrichment was based on "free acceptance". In short, the defendants argued that the plaintiffs were liable to pay the price of the returned ICR materials because the plaintiffs had "freely accepted" the said materials, knowing that the materials were not handed over to them gratuitously. As discussed above at para 23.3, the claim failed because

the matter was governed by contract. Independently of the contractual reason, the court was not satisfied that the plaintiffs had *freely* accepted the returned materials. In this connection, credence was given to the fact that there was a letter preceding the return of the materials on the same day stating that if the plaintiffs refused to accept the return of the ICR materials, they would be charged with the cost of storage of such materials and other incidental charges. In the court's view (at [137]), therefore, the plaintiffs "had little choice" in accepting the returned ICR materials.

23.22 Although the outcome was correct, the court's reasoning warrants fuller consideration. Crucially, it is not beyond dispute that "free acceptance" should be accepted as an unjust factor. This controversy was indeed noted (tangentially in the discussion of the nature of an unjust enrichment claim) by the Court of Appeal in *Anna Wee* (discussed in (2013) 14 SAL Ann Rev 465 at 471, paras 22.17–22.18). The Court of Appeal refrained from determining this debate conclusively until an appropriate occasion was to arise in the future, and one would have thought that *Total English Learning Global Pte Ltd* was such an occasion. Nevertheless, it did not appear that counsels had argued this anterior and more fundamental issue. An opportunity was thus missed.

23.23 Even if the court were to accept that "free acceptance" is a recognised unjust factor under Singapore law, the real and more substantial reason for the plaintiffs' acceptance of the returned ICR materials was the existing contractual arrangement between the parties, quite apart from the contractual arrangement operating as a bar to preclude a restitutionary claim. For this reason, it might be said that the plaintiffs had no choice but to take in the materials. It also follows that the threat in the letter of charging storage and related costs to the plaintiffs in the event of their refusal to take delivery had real bite to it. In fact, the plaintiffs would have no realistic choice of rejecting the materials, even in the absence of a threat of being charged such costs. Had there not been an existing contractual arrangement, the threat would have been an empty one and a commercial party would probably not have taken it seriously, as well as decline accepting the goods.

23.24 In other words, tying in neatly with the contractual bar reasoning, the contractual arrangement between the parties justified both the defendants' delivery of the unused ICR materials and the plaintiffs' acceptance of the same without having to pay the defendants. There is nothing unconscientious in the plaintiffs' conduct in this case, even if the court had accepted Birks' concept of "free acceptance" based on unconscientiousness: see Peter Birks, "In Defence of Free Acceptance" in *Essays on the Law of Restitution* (Andrew Burrows ed) (Oxford: Oxford University Press, 1991) at p 105.