6-2023

The lack of a time bar: An injustice within unjust enrichment claims – Esben Finance Ltd and others v Wong Hou-Lianq Neil [2022] 1 SLR 136

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THE LACK OF A TIME BAR: AN INJUSTICE WITHIN UNJUST ENRICHMENT CLAIMS

Case Comment:
Esben Finance Ltd and others v Wong Hou-Lianq Neil

[2022] 1 SLR 136 / [2022] SGCA(I) 1
Court of Appeal of Singapore
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA,
Judith Prakash JCA, David Edmond Neuberger IJ, Arjan Kumar Sikri IJ
10 January 2022

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I. Introduction

1 Limitation periods refer to the period within which a claimant who has a right to claim against another person, *i.e.*, the defendant, must begin court proceedings to establish that right. Once that period has passed, the defendant can no longer be sued on that particular action. This is to prevent the threat of an action from continually hanging over the defendant such that once the limitation period has passed, the defendant can be sure that the claimant is no longer able to sue.[1]

2 To this end, section 6(1) of the Limitation Act 1959 (2020 Rev Ed) ("**LA**") imposes an explicit six-year limitation period for actions founded on contract or tort.[2] However, because section 6(1) remains silent regarding claims in restitution, there exists uncertainty as to whether such claims are subject to the time limitation under the LA.

3 From the Singapore Court of Appeal ("**CA**") decision in *Esben Finance Ltd and others v Wong Hou-Lianq Neil* ("***Esben Finance***") it appears that this uncertainty has since been resolved. In *Esben Finance*, the CA held that claims in unjust enrichment would not be covered by

[*] The author would like to thank the anonymous reviewers and editors for their insightful comments and help in publishing this article. All errors remain my own.

[1] Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 734.

[2] Limitation Act 1959 (2020 Rev Ed) section 6(1).

the LA and should remain free of any limitation period.[3] Although this position would run counter to notable case law and the opinions of leading academics, the CA found this decision to be justified based on the statutory wording of the LA and its legislative history which indicated that the LA was not intended to cover restitutionary claims in unjust enrichment.

4 Notwithstanding contentions behind the CA's reasoning and policy concerns necessitating a limitation period for unjust enrichment claims, this note argues that the CA's position in *Esben Finance* should ultimately still be adopted. In explaining its support for this position, this note will discuss the cases preceding *Esben Finance* as well as the positions of the various legal academics, and analyse why the views of Professor Graham Virgo and Professor Tang Hang Wu in favour of imposing a limitation period should be rejected.

II. Background facts and procedural history of *Esben Finance*

5 The appellants were related to the WTK Group of companies, which together with the appellants, were principally managed by one WKN until his death, whereupon effective control of the WTK Group and the appellants passed to WKN's brothers, WKY and WKC. The respondent, Wong Hou-Lianq Neil, was WKN's son.

6 Upon WKN's passing, WKY noticed that the appellants' bank accounts had lower balances than expected. Upon further investigation and inquiries with the appellants' bookkeeper, WKY discovered that between January 2001 and November 2012, a total of 50 payments had been made from the appellants' bank accounts to the respondent's personal bank account. The respondent claimed that of these 50 payments, 11 payments were "gifts" from WKN, three payments were for directors' fees and shareholder dividends to which he was entitled and/or were gifts from WKN, and the remaining 36 payments were made in connection with an alleged "practice" entered into by companies in and related to the WTK Group (including the appellants) with the object of evading Malaysian taxes. At trial, this practice was revealed to have taken place and was unlawful under the laws of Malaysia.[4]

[3] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [48], [75].
[4] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [217].

7 On 20 November 2017, the appellants sued the respondent for recovery of the 50 payments on the basis of unjust enrichment, dishonest assistance, knowing receipt, and unlawful means conspiracy. Of the 50 payments, 49 were made between January 2001 and October 2011, more than six years before the appellants' commencement of the action.

A. Singapore International Commercial Court ("SICC") decision

8 Before the SICC, the respondent argued that the appellants' claims were time-barred under section 6 of the LA.[5] In particular, the respondents cited the Singapore High Court ("**HC**") case of *Ching Mun Fong v Liu Cho Chit* ("***Ching Mun Fong***") for the proposition that section 6 of the LA applied to unjust enrichment claims.[6] In response, the appellants' argued that the limitation period was postponed by virtue of section 29(1) of the LA.[7]

9 Accepting the application of section 6 of the LA to claims in unjust enrichment, Henry Bernard Eder IJ's decision focused on whether the limitation period should be postponed pursuant to section 29 of the LA. He eventually found in favour of the respondent, holding that 49 out of the 50 claims were time barred.[8] Only the claim in respect of the 50th payment could succeed because it was not time barred and the doctrine of illegality was inapplicable.[9] However, the SICC noted that had the plaintiffs' claims not been time-barred, the unjust enrichment claims for the 11 payments and the three payments would have succeeded.[10]

B. Court of Appeal decision

(1) The applicability of the LA to unjust enrichment claims

10 The appellants appealed against the SICC's judgment, arguing that the LA did not apply to claims in unjust enrichment. The CA agreed with the appellants and reasoned that neither the statutory wording of the

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5 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [93].
6 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [93(a)].
7 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [94].
8 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [128].
9 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [227]–[240].
10 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [240(c)].

LA nor its legislative history supported the application of section 6 to an unjust enrichment claim.

11 Regarding the statutory wording of the LA, the CA noted that the LA sets out limitation periods based on specified causes of action, which included actions founded in contract or in tort; restitutionary claims were not stipulated.[11] The CA also rejected the English position that restitutionary claims coincident with quasi-contractual claims were causes of action founded on a simple contract within the meaning of the LA for two reasons. First, the proposition that restitutionary claims were based on quasi-contract or an implied contract had clearly been rejected as the law of unjust enrichment developed over the past few decades in England as well as in Singapore.[12] Secondly, a claim in quasi-contract was conceptually different from a contractual claim as the former involved the use of a fiction where there was in fact no contract.[13]

12 The CA also rejected the respondent's initial argument that the appellants' claim in unjust enrichment was time-barred under section 6(7) of the LA as such a claim did not fall into any of the categories of "contract or tort or upon any trust or other ground in equity".[14] It was clear from the legislative history of the LA that claims in unjust enrichment were not envisioned in the drafting of the Act.[15] It also held that such claims did not fall within the ambit of claims founded on tort under section 6(1)(a) of the LA. Claims in unjust enrichment belonged to a distinct branch of obligations from the law of torts,[16] and liability in unjust enrichment could not be explained by reference to orthodox tort

11 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [52].

12 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [57]–[66], citing *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 1 AC 669 at 710; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561 at 603–604.

13 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [67]–[68], citing Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 735; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 606–607; Andrew McGee, *Limitation Periods* (Sweet & Maxwell, 8th Ed, 2018) at p 55–56.

14 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [76].

15 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [76].

16 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [77], citing *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [181].

theory given that the defendant, being a passive recipient, owes no duty to return a mistaken payment.[17]

13 Turning to the legislative history of the LA, the CA found that the law of restitution and unjust enrichment could not have been contemplated when the LA was drafted in 1959.[18] The LA, which was modelled after the Limitation Act 1939 (UK),[19] would not have contemplated claims in unjust enrichment as unjust enrichment was only recognised as an independent cause of action in the 1991 case of *Lipkin Gorman v Karpnale Ltd* ("***Lipkin Gorman***").[20] The fact that there had not been any major statutory overhaul of the law of limitation in Singapore since 1959 further strengthened this proposition.[21]

14 The CA also concurred with the appellants' submission that the equitable doctrine of laches did not apply to an unjust enrichment claim for common law relief. Under the doctrine of laches, a claim for equitable relief is barred where there is a substantial lapse of time, coupled with the existence of circumstances that makes it inequitable to enforce the claim.[22] Given that such a doctrine was entirely equitable in nature, the CA found that applying the doctrine of laches to unjust enrichment claims would necessarily blur the distinction between equitable and common law doctrines for relief,[23] since historically, flexible equitable doctrines were only developed in response to what was seen as the harsh rigidity of the common law.[24] The doctrine of laches would thus be confined in its application to equitable claims. Further, the CA noted that the injustice arising from a lack of a limitation period did not outweigh the injustice arising from the lack of legal certainty should laches be applied.[25] Thus, disallowing the doctrine of laches for common law claims would not unduly prejudice any claimant.

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17 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [78], citing Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at [01.053].

18 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [80].

19 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [83], citing the Law Reform Committee of the Singapore Academy of Law in its *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) (Chairman: Charles Lim Aeng Cheng).

20 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.

21 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [80].

22 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [113].

23 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].

24 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].

25 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [123].

(2) The merits of the unjust enrichment claims

15 Having concluded that all the appellants' claims except those in unjust enrichment for the 50 payments were time-barred,[26] the CA proceeded to analyse the merits of the unjust enrichment claims.

16 Before determining whether the appellants had made out a *prima facie* case of unjust enrichment for the 36 payments, the CA had to first determine whether the respondent was enriched at the appellants' expense by receiving the 36 payments and whether such enrichment was unjust.[27] The CA observed that the "practice" was a way by which companies in and related to the WTK Group, including the appellants, structured intercompany payments to avoid paying taxes under Malaysian law.[28] The 36 payments received by the respondent were made for services rendered by them to the other companies in the WTK Group. The appellants were neither the recipient nor the provider of the services in respect of which the 36 payments were made. Instead, they were used as intermediaries for channelling funds from some entities in or related to the WTK Group to the respondent personally.[29] Given that the appellants' own assets were never depleted or put at risk by the making of the 36 payments, the respondent was not enriched at the expense of the appellants with respect to the 36 payments.[30] If anything, it should have been the other entities who made the payments to mount the unjust enrichment claim.[31] Therefore, the appellants' unjust enrichment claims against the respondent in respect of the 36 payments failed *in limine*.[32]

17 The CA also observed that the Comity Unenforceability Principle laid down in *Foster v Driscoll* and the principle of stultification laid down in *Ochroid Trading Ltd v Chua Siok Lui* ought to apply to bar claims in unjust enrichment, just as with contractual claims.[33] It would be illogical as well as unprincipled to preclude a claim in contract and

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26 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [124].
27 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [146].
28 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [147].
29 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [148].
30 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [147], [155].
31 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [148].
32 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [159].
33 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [171]–[177].

yet permit a claim in unjust enrichment.[34] As for defences to unjust enrichment claims, the CA expressed similar views. Considerations of international comity applied with equal force to both claims and defences where the recognition of either would be equally repugnant to domestic public policy.[35] There is no difference in effect between rejecting a defence on the basis of its illegality or repugnance to public policy and rejecting a claim on the same basis.[36]

18 In relation to the remaining 14 payments, the CA analysed and recognised a lack of consent as an unjust factor for the purposes of an unjust enrichment claim.[37] As a novel unjust factor, the CA limited it to circumstances where the defendant was not entitled in law to retain property or value transferred and where no alternative and established cause of action was available to the plaintiff.[38] The CA held that the 14 payments were made without legitimate basis and thus enriched the respondent at the appellants' expense.[39] This enrichment was found to be unjust as the payments were not authorised by the appellants and this gave the appellants the right to retain property to the moneys transferred by the 14 payments.[40]

III. Cases preceding *Esben Finance*

19 Prior to *Esben Finance*, the applicability of the LA to a claim in restitution was in a state of flux where the Singapore courts were divided on this issue. The court in *Ching Mun Fong* first held that section 6(1) of the LA should apply to claims in restitution, which was then overturned in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* ("***De Beers***"). Doubt was later cast on *De Beers* in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* ("***OMG Holdings***") but the issue was ultimately left open by the CA in *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* ("***eSys Technologies***").

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34 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [173].
35 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [178]–[190].
36 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [189].
37 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195], [215]–[240].
38 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195], [251].
39 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195], [251].
40 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [192], [253].

A. Ching Mun Fong v Liu Cho Chit

20 In its first ever case dealing with the applicability of the LA to a claim in restitution, Woo JC (as he then was) held that a cause of action based on a total failure of consideration is founded on a contract for the purposes of section 6(1)(a) of the LA. In *Ching Mun Fong*, the appellant's husband, Mr Tan, had agreed to buy land from the defendant and the defendant's wife. In furtherance of this, Mr Tan paid the respondent a portion of the purchase price, amounting to US$642,451.04. However, no conveyance occurred and it was later discovered (almost seventeen years after the payment) that neither the defendant nor his wife had any interest in the land. The plaintiff, on behalf of her late husband's estate, claimed in restitution for the portion of the said amount. The defendant argued that the plaintiff's claim was time-barred under the LA.

21 Woo JC agreed with the defendant.[41] The plaintiff's claim for the moneys was premised on an oral contract,[42] and even if this oral contract was untenable, Woo JC found that the words "founded on a contract" under section 6(1)(a) of the LA were wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise.[43] This decision was subsequently upheld on appeal.[44]

B. Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd

22 In *De Beers*, the plaintiff De Beers, a subsidiary proprietor, intended to do some conversion works which required the permission of the defendant, the management corporation. The defendant imposed conditions for granting such permission, including the payment of sums of money. The plaintiff later claimed against the defendant for restitution of the said sums, on the basis that the conditions were *ultra vires* and that it had paid the sums under a mistake of law. In contrast to Woo JC in *Ching Mun Fong*, Prakash J (as she then was) held that section 6(1)(a)

41 *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [76].

42 *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [73].

43 *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [72]–[73].

44 *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 at [27].

of the LA did not apply to restitutionary claims since there was no contract between parties in such instances.[45] She then noted that "[u]ntil the Legislature intervenes, it would appear that there is no applicable limitation period for restitutionary claims which have no grounding in contract."[46]

23 This decision was later upheld on appeal where the CA held that a claim for unjust enrichment which was neither grounded in contract nor tort, and in which equitable relief was not sought, did not fall within the scope of the LA.[47] Interestingly, the CA seemed to have later applied the equitable doctrine of laches but found that the defence could not be granted.[48]

C. OMG Holdings Pte Ltd v Pos Ad Sdn Bhd

24 In *OMG Holdings*, the appellant sublicensed the exclusive right to use a system to the respondent. This was done through several sublicense agreements. Upon the expiry of the 2002 agreement, parties entered into the 2004 agreement where the respondent was to pay the appellant royalties for the revenue generated from the use of the licensed system. The appellant subsequently terminated the 2004 agreement after the respondent failed to pay the outstanding royalties. The appellant claimed against the respondent for those royalties and the respondent counterclaimed for the restitution of royalties paid during the interim period between the 2002 and 2004 agreements. The respondent argued that the appellant did not have any rights to sublicense during that period and was thus not entitled to retain those royalties.

25 The court in *obiter*[49] suggested that the respondent's claim in restitution could well be time-barred under section 6(1)(a) of the LA.[50] This was based on the English position which appeared to have given a

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45 *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2001] 2 SLR(R) 669 at [77].

46 *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2001] 2 SLR(R) 669 at [79].

47 *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers (CA)*") at [32].

48 *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [33]–[34].

49 The court addressed the issue of restitution in *obiter* because a claim for refund of royalties paid during the interim period was not a part of the respondent's counterclaim and was thus not addressed by the judge below. See *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [38].

50 *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [41].

broader meaning to section 2 of the English Limitation Act 1939 (UK) (equivalent of section 6 of the LA) to include quasi-contractual claims which in substance, would also "include the bulk of what are in essence restitutionary claims".[51]

D. eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd

26 Both *De Beers* and *OMG Holdings* were later considered in *eSys Technologies*. The CA, comprising Andrew Phang JA and Prakash J, observed that doubts appeared to have been cast on the position in *De Beers* in *OMG Holdings* where it was suggested that a claim in restitution "could well be time-barred under [section 6] of the Limitation Act".[52] The CA further noted that the "underlying thread" in *De Beers* (where the court appeared to apply the doctrine of laches to a common law claim for restitution) and *OMG Holdings* "appears to be that it would be contrary to both logic as well as public policy for there to be no applicable time constraint whatsoever to a claim founded on restitution as opposed to contract or tort".[53] Ultimately, given that neither the applicability of the doctrine of laches to a common law claim nor the applicability of section 6 of the LA to a restitutionary claim was argued before the court, the CA did not express any conclusive views on them.[54]

IV. Commentary

27 There is good reason and perhaps, it is in the interest of justice to subject all claims, including claims in unjust enrichment, to a limitation period. It would be unfair that a defendant be subject to a claim hanging over him for an indefinite period,[55] and a plaintiff who does not

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51 *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [42]–[44].

52 *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [41].

53 *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [41].

54 *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [42].

55 Law Reform Committee of the Singapore Academy of Law in its *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) (Chairman: Charles Lim Aeng Cheng), at [41]; Tan Sook Yee & Tang Hang Wu, "Equity, Trust and Restitution" (2001) Singapore Academy of Law Annual Review 198 at [12.38]; Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 735; *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [41]; James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 385; Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 604.

act promptly to enforce his legal rights should lose his right to do so.[56] With the lapse of time, proof of a claim also becomes more difficult as documentary evidence may be destroyed and memories of witnesses may fade.[57] Leading academics in the law of restitution like Professor Virgo have argued that construing an unjust enrichment claim as being a form of quasi-contract to fit within section 5 of the Limitation Act 1980 (UK), though artificial, was better than not subjecting restitutionary claims to any limitation periods.[58]

28 However, the conclusive views of the CA in *Esben Finance* are timely hard truths that the LA is inapplicable to unjust enrichment claims, notwithstanding policy concerns arguing otherwise. The courts, as seen above, have struggled with the issue of whether unjust enrichment claims are subject to any limitation period, due to the lack of express statutory wording referring to such claims. *Esben Finance* reveals that neither the statutory wording of the LA nor its legislative history provides any support for the applicability of the LA to unjust enrichment claims. It would be ironic and internally inconsistent to ground a claim in restitution due to the lack of a contract, to only then characterise it as a quasi-contractual claim so as to come within the meaning of "founded upon a contract" under section 6(1)(a) of the LA.[59] Attempts to strain the construction of the statute would also be contrary to the principle that in the absence of a statutory limitation period, the action never becomes barred.[60] In recognising and defending the conceptual independence of unjust enrichment, the CA may have viewed "pragmatism" as a price worth paying.[61]

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56 Law Reform Committee of the Singapore Academy of Law in its *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) (Chairman: Charles Lim Aeng Cheng) at [41]; Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 605.

57 Law Reform Committee of the Singapore Academy of Law in its *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) (Chairman: Charles Lim Aeng Cheng) at [41]; Robert Goff & Gareth Jones, *The law of unjust enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 855; James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 385; Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 604–605.

58 Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 735.

59 See also Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 606–607.

60 Andrew McGee, *Limitation Periods* (Sweet & Maxwell, 8th Ed, 2018) at p 55–56.

61 Rachel Leow & Timothy Liau, "A Pyrrhic Victory for Unjust Enrichment in Singapore? *Esben Finance Ltd v Wong Hou-Lianq Neil*" (2022) 86(2) The Modern Law Review 518 at 524.

29 The reliance on the English position in *OMG Holdings* to suggest that a claim in restitution could be time-barred under section 6(1)(a) of the LA is, with respect, misguided. While cases like *Re Diplock* and *Kleinwort Benson Ltd v Sandwell Borough Council* ("***Kleinwort Benson***") may have given an extended meaning to section 2 of the English Limitation Act 1939,[62] it fails to consider the contrary position in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* and the more recent case of *Sempra Metals Ltd v Inland Revenue Commissioners*, which have rejected the quasi-contractual characterisation of unjust enrichment claims.[63] This is coupled with the English government's express decision not to reform the law of limitation by introducing a single, core limitation regime that applied to private law claims, including claims in unjust enrichment.[64] At best, the position in England was still unsettled then.

30 Various academics, such as Lord Goff, Lord Burrows, and Justice Edelman,[65] alongside a slew of recent English cases,[66] have taken the position that section 5 of the Limitation Act 1980 (UK) applies to unjust enrichment claims. The common denominator is the English case of *Kleinwort Benson*, which held that the expression "simple contract" under section 5 should be understood as including quasi-contracts.[67] This was based on the debate on the English Limitation Act 1939 (UK), the precursor of the 1980 Act, whereby the Solicitor-General communicated his intention to implement the recommendations of the

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62 *Re Diplock* [1948] Ch 465 at 514; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890.

63 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] 1 AC 32 at 62–64; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 1 AC 669 at 710; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561 at 603–604.

64 Robert Goff & Gareth Jones, *The law of unjust enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 855.

65 Robert Goff & Gareth Jones, *The law of unjust enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 857–858; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at p 145; Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 607; James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 387–388.

66 *Investment Trust Companies (In liq.) v HMRC* [2015] EWCA Civ 82 at [23]; *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38 at [25], followed in *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah, His Exalted Highness the 8th Nizam of Hyderabad* [2016] EWHC 1465 (Ch) at [135]–[137].

67 *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at p 942–943.

Fifth Interim Report of the Law Revision Committee, and in particular, the recommendation "that the period for all actions founded in tort or simple contract (*including quasi-contract*) … should be six years".[68] However, this interpretation is doubtful. The final wording of section 2 of the 1939 Act being "actions founded on simple contract or on tort" and without the words "including quasi-contract", reflects the English parliament's ultimate decision to exclude quasi-contracts from the Limitation Act. It therefore follows that the above authorities, which have grounded their reasoning in *Kleinwort Benson*, are on tenuous grounds.

31 Professor Virgo, in support of his proposition that section 5 of Limitation Act 1980 (UK) applies to unjust enrichment claims, argued that this was consistent with section 3 of the Limitation Act 1623 (UK), which provided a limitation period of six years for all assumpsit claims.[69] This view is untenable for two reasons. First, "assumpsit" is defined as an express or implied promise by which one person undertakes to do some act or pay something to another.[70] Specifically, the word "assumpsit" does not extend to cover obligations which are described as quasi-contractual or viewed as a debt—*indebitatus assumpsit*.[71] Historically, it did not create a new substantive right but was merely a form of procedure.[72] Secondly, even if "assumpsit" can cover quasi-contractual claims, the fact that the Limitation Act 1623 (UK) was replaced with the English Limitation Act 1939 (UK) clearly shows Parliament's intention to confine the application of the LA to an action "founded on simple contract".[73]

32 It is interesting to see how Prakash J's views in *De Beers*, some two decades ago, and the CA's observations in *eSys Technologies* (comprising Andrew Phang JA and Prakash J among others), had culminated in the conclusive view in *Esben Finance* that the LA does not apply to claims in unjust enrichment. The fact that there is no catch-

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68 *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at p 942–943 (emphasis added).

69 Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 735.

70 *Black's Law Dictionary* (8th Ed, 2004) at p 379–380.

71 Charles Herman Kinnane, *A First Book on Anglo-American Law* (Bobbs-Merrill, 2nd Ed, 1952) at p 633–634.

72 James Barr Ames, "The History of Assumpsit. I. Express Assumpsit." (1888) 2 Harvard Law Review 1 at p 17.

73 English Limitation Act 1939 (c 21) (UK), section 2(1)(a); Robert Goff & Gareth Jones, *The law of unjust enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 857.

all provision imposing a general limitation period for all other claims not expressly specified in the LA itself strongly suggests that the Legislature only intended the specified claims to be so limited.[74] As statutory limitation periods are creatures of statute, the onus to update the LA to cover restitutionary claims, if the need to arises, must fall on the Legislature.[75]

33 With a lapse of time, the memories of witnesses may fade and become unreliable, and the court may alternatively dismiss the plaintiff's claim for failing to satisfy the balance of probabilities. However, this would be an unsatisfactory solution to the problem at hand for two reasons. First, it misleadingly shifts the focus away from the defendant's lack of certainty and security of receipt to the unreliability of the plaintiff's evidence. Secondly, the prejudice suffered by the defendant remains unaddressed where the plaintiff's evidence is otherwise reliable and thus admissible. Therefore, the Legislature is best placed to address the issue at heart.

34 The equitable doctrine of laches is also unlikely to help defendants in unjust enrichment claims. There are two reasons for its inapplicability to unjust enrichment claims.

35 First, laches, being an equitable doctrine, should only apply where the plaintiff is seeking an equitable remedy such as an account of profits.[76] In contrast, claims in unjust enrichment are common law claims for common law reliefs.[77] They are based on the vindication of an identifiable legal right, and not whether it is fair and/or just in the circumstances to grant such relief.[78] Bearing in mind the historical fact that flexible equitable doctrines were developed in response to what was seen as the harsh rigidity of the common law,[79] the inapplicability of equitable doctrines to common law claims is on largely firm ground in Singapore.[80] While *De Beers (CA)* appeared to apply the equitable

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74 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [84].
75 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [84].
76 *Orr v Ford* [1989] 167 CLR 316 at p 340.
77 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].
78 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122], citing *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at p 578.
79 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].
80 *Scan Electronics (S) Pte Ltd v Syed Ali Redha Alsagoff and others* [1997] 1 SLR(R) 970 at [19]; *Syed Ali Redha Alsagoff v Syed Salim Alhadad bin Syed Ahmad Alhadad* [1996] 2 SLR(R) 470 at [47]; *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [47]–[50].

doctrine of laches to a common law claim for restitution, its implied recognition of the applicability of the equitable doctrine of laches to common law claims is strictly *obiter dicta*.[81] Laches was not made out on the facts and the decision not only failed to consider the contrasting position in earlier cases,[82] but also failed to provide reasons for why laches should apply to an unjust enrichment claim.

36 Both Professor Virgo and Professor Tang share similar views that where the unjust factor is an equitable one like undue influence or unconscionability, the restitutionary claim is equitable and laches thus applies.[83] They rely mainly on the decision in *Allcard v Skinner*.[84] However, this note argues that an equitable unjust factor does not affect the common law nature of unjust enrichment claims. *Allcard v Skinner* is outdated for it precedes *Lipkin Gorman*, which recognised unjust enrichment claims as an independent cause of action. An equitable unjust factor also does not alter the common law character of a restitutionary claim which is founded on the reversal of the defendant's unjust enrichment. The unjust factor merely goes towards the justification for why the defendant's enrichment ought to be reversed.

37 Secondly, the equitable doctrine of laches, which considers the facts of the case rather than a fixed time bar,[85] should not be applied to unjust enrichment claims as it results in uncertainty for the claimant. Common law claims like those in unjust enrichment, are based on the vindication of identifiable legal rights where claimants seeking to enforce such legal rights ought to be certain of when such rights effectively expire.[86] They ought not to be subject to an amorphous time bar that is decided on an *ex post facto* basis.[87] Given that legal certainty is one of the fundamental tenets of the rule of law,[88] the injustice from a lack of a prescribed limitation period does not outweigh the need for claimants to know when their legal rights expire.[89] If anything, the fallback on laches is an unsatisfactory solution for it merely shifts the

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81 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].
82 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122].
83 Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 735; Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at [12.004].
84 *Allcard v Skinner* [1887] 36 Ch D 145.
85 *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [33].
86 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [123].
87 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [123].
88 *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [95].
89 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [123].

injustice arising from the absence of a time bar, from the defendant to the claimant.

38 With both the LA and the equitable doctrine of laches being inapplicable to restitutionary claims, the regrettable and inevitable consequence is that claims for unjust enrichment are not subject to any limitation period.

V. Lack of consent as an unjust factor

39 Notably, the CA in *Esben Finance* also recognised a lack of consent as a factor for the purposes of an unjust enrichment claim.[90] Consistent with the preceding line of Singapore HC cases,[91] this was to prevent defendants who have received stolen property or value from benefitting from a windfall.[92] In so doing, the CA preferred "lack of consent" over alternative formulations like "ignorance", "want of authority", and "powerlessness".[93]

40 "Ignorance" was rejected as an unjust factor because it failed to account for cases where the plaintiff had knowledge of the transfer but did not consent to it.[94] "Want of authority" was also unsatisfactory as it artificially implied an agency relationship between the owner of the property transferred, and the transferor of the property.[95] It did not account for situations involving a theft of property where the victim is usually unaware of the taking or helpless in preventing it.[96] "Powerlessness" was also rejected as a "proliferation of grounds" was thought to be undesirable.[97]

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90 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195].

91 *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636; *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819; *Compania De Navigacion Palomar, SA v Koutsos, Isabel Brenda* [2020] SGHC 59.

92 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [240], [251].

93 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [208].

94 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [206].

95 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [207]; *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308.

96 Michael Bryan, "No intention to benefit" in *Research Handbook on Unjust Enrichment and Restitution* (Elise Bant, Kit Barker & Simone Degeling eds) (Cheltenham: Edward Elgar, 2020) at p 368.

97 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [206].

41 As a novel unjust factor and one that seemingly traverses the same ground as more established causes of action such as in the law of property,[98] the CA was not prepared to give the factor of lack of consent a "*blanket* and *unattenuated* recognition". Instead, the CA limited it to circumstances where the defendant was not entitled in law to retain property or value transferred and where no alternative and established cause of action was available to the plaintiff.[99] This was to prevent unjust enrichment from encroaching on or making otiose established areas of the law or denuding them of their legal significance;[100] whilst serving as a gap filler to avoid unjust results in specific cases.[101]

42 The CA was right to limit the application of lack of consent as an unjust factor. Aside from the reasons given in *Esben Finance*, the unjust factor of lack of consent is potentially too general and vague to be applied with legal clarity. Unlike other unjust factors like misrepresentation and mistake which are undergirded by specific legal concepts, it is unclear how lack of consent should be applied as an independent unjust factor. This is akin to *BOM v BOK* where the CA faced difficulties in applying the concept of "unconscionability".[102] By limiting the application of lack of consent while not rejecting it entirely, this allows for the court to incrementally define the unjust factor's contours when the appropriate facts arise.

VI. Implication of the factor of lack of consent on the limitation period issue

43 By limiting the application of the factor of lack of consent to circumstances where the claimant has no other alternative causes of action, the concern regarding the lack of a time bar for unjust enrichment claims could become more apparent than real. Assuming the claimant has an alternative cause of action in contract or tort, the time limitation under section 6(1) of the LA would apply in force for the claimant's

98 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [232], [244]–[248].

99 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195], [251].

100 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [247], [251].

101 *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [247]; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335 at [75].

102 *BOM v BOK* [2019] 1 SLR 349 at [119]–[126]; *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [245]–[246].

contractual/tortious claim, and the claimant's action remains time-barred in any case; the unjust enrichment claim becomes irrelevant. As such, the inapplicability of the LA to unjust enrichment claims as discussed above takes a backseat.

44 Nevertheless, the concerns of a lack of a time bar for unjust enrichment claims remain real and relevant for the rare, but not implausible situation where the claimant has no alternative causes of action except for that in unjust enrichment based on a lack of consent. Further, where a claim is premised solely on unjust enrichment, the absence of a limitation period continues to be a thorny problem, which must be quickly addressed by the Legislature.[103]

VII. Conclusion

45 *Esben Finance* provides a conclusive stand on Singapore's legal position regarding the applicability of the LA to unjust enrichment claims. It is necessary as it comes at a time when *De Beers (CA)* has been increasingly doubted in cases such as *OMG Holdings* and *eSys Technologies*. The position reached in *Esben Finance* is indeed an unhappy and concerning one,[104] and urgent legislative intervention is needed. Until such steps are taken, unjust enrichment claims are not restricted by a period of limitation and defendants continue to be prejudiced by the lack of certainty and security of receipt. Thus, it remains to be seen if Singapore's apex court will exercise its judicial creativity to subject unjust enrichment claims to a limitation period outside of the mechanism of the LA. For now, at least, defendants to potential unjust enrichment claims have no choice but to take shelter and wait for help.

[103] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [85], [123].
[104] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [85].