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Unjust enrichment: Revolution and evolution in the Asia-Pacific

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UNJUST ENRICHMENT: REVOLUTION AND EVOLUTION IN THE ASIA-PACIFIC

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This article contrasts two approaches to the development of the law of unjust enrichment in Malaysia and Singapore, as evidenced by recent case law. While the Malaysian Federal Court has taken the bold step of steering Malaysian common law into the somewhat uncharted territory of "absence of basis" as a general justification for claims to reverse unjust enrichment, the Singapore Court of Appeal has been more cautious in taking incremental steps to build on the "unjust factor" approach.

A. INTRODUCTION

I am honoured to contribute to this special edition of the *Restitution Law Review* to celebrate the publication of the 50th anniversary edition of a very remarkable and highly revered book. My first encounter with this book occurred nearly three decades ago when, as an eager law undergraduate in the University bookshop, my eyes had fallen upon a handsome clothbound volume in two hues of blue. It was the third edition of *The Law of Restitution*.[1] I was intrigued by the title; I did not know what it was about at that time. I read the introduction and studied the table of contents. I have not since regretted my purchase. It inspired me to pursue the subject when I read for the Bachelor of Civil Law at the University of Oxford, where I was taught by the legendary Professor Peter Birks. It was also there that I first met the great Professor Gareth Jones during one of his guest appearances in the Oxford Restitution course. Thirty years on, the subject remains intriguing.

For nearly twenty years (1995–2013), I tracked developments for the *Restitution Law Review* as Regional Editor (Asia-Pacific). Asia-Pacific is geographically vast, and the survey by sheer logistical necessity focussed on a small number of countries. Starting with Hong Kong SAR, Malaysia, and Singapore, it was later expanded to include Brunei to take account of the important Privy Council decision in *Royal Brunei Airways Sdn Bhd v Tan*,[2] a case which remains influential today for the conceptual segregation of the two strands of the historical "constructive trustee" liability of strangers to a trust[3] into independent bases of liability (receipt and assistance) and its explication of the concept of objective dishonesty in the law. Since then, however, Brunei has kept under the international radar of the law of unjust enrichment. Hong Kong SAR has contributed in significant ways to the unjust enrichment jurisprudence, especially in areas overlapping with equity.[4] This article will, however, focus on developments in Malaysia and Singapore. Key recent

* Yong Pung How Chair Professor of Law, Singapore Management University. This article is based on a paper presented at the Bentham House Conference 2017 on the *Global Futures of Unjust Enrichment* at University College London on 21–22 April 2017. I am grateful for the support of UCL to attend the Conference and for the helpful comments of the participants. I am also grateful to my colleagues Associate Professor Yip Man and Assistant Professor Alvin See for pointing me to relevant materials.

1. R Goff and G Jones, *The Law of Restitution*, 3rd ed (Sweet & Maxwell, London, 1986).
2. [1995] 2 AC 378.
3. *Barnes v Addy* (1874) LR 9 Ch App 244.
4. See *eg Thanakharn Kasikorn Thai Chamkat (Mahachon) (also known as Kasikornbank Public Ltd Co) v Akai Holdings Ltd (in liquidation)* (2010) 13 HKCFAR 479 on equitable compensation for unconscionable receipt; *Tripole Trading Ltd v Prosperfield Ventures Ltd* [2006] 1 HKLRD 200 on causation in accounts of profits for breach of fiduciary duty; *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 on the recovery of deposits; and *Union Eagle*

developments in these two jurisdictions provide an interesting contrast: a revolutionary change in the fundamental thinking on the subject in Malaysia on one hand, and cautious incremental development in Singapore on the other.

B. REVOLUTION IN MALAYSIA

1. Relationship between statute and common law

In Malaysia, the Contracts Act 1950 not only codifies the law of contract, but also provides for reimbursement, repayment, restoration or compensation in respect of benefits conferred in various circumstances recognisable as what used to be treated in contract law textbooks as instances raising liability in quasi-contract. Essentially, they deal with the supply of necessaries;[5] discharge of another's obligation;[6] non-gratuitous conferment of benefits;[7] finding of another's goods;[8] and mistaken or coerced payment or conferment of benefits.[9] Malaysian cases have sometimes applied the common law to allow restitution for unjust enrichment outside of these provisions; sometimes they have treated these provisions as interchangeable with common law actions in unjust enrichment; and sometimes these provisions have been treated as distinct from common law principles.[10]

Two particular issues stand out for consideration. One concerns how the statutory provisions are sometimes interpreted to encapsulate superseded common law principles. For example, s 73 of the Act provides: "A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it". In the recent case of *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd*,[11] the Malaysian High Court held that the provision could not apply when there is no privity of contract between the claimant and the defendant. This requirement has been abandoned in the modern common law along with the implied contract theory.[12]

The second question concerns the relationship between common law causes of action in unjust enrichment and the legislative provisions. They have been assumed to co-exist in Malaysian case law.[13] The Federal Court (the highest appellate court in Malaysia) has recently, in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*,[14] made it very clear that the common law of unjust enrichment exists alongside and independently of the statutory provisions. In fact, in espousing absence of basis[15] as the founding principle of the law of unjust enrichment in Malaysia, the *Dream Property* case signifies a potential expansion in the Malaysian common law (and possibly equity) that could well render the unjust enrichment content in the statutory provisions practically nugatory.

Ltd v Golden Achievement Ltd [1997] 1 AC 514 (Hong Kong PC) on the possibility of the court's ordering restitution of all or part of the retained purchase price in lieu of relief against forfeiture.

5. Contracts Act 1950, s 69.

6. Contracts Act 1950, s 70, discussed in A See, "Recovery of Non-Gratuitously Conferred Benefit Under Section 70 of the Indian Contract Act 1872", ch 11 of A Robertson and M Tilbury (eds), *Divergences in Private Law* (Hart, Oxford, 2016), 201.

7. Contracts Act 1950, s 71, discussed in A See, "Restitution of Non-Gratuitously Conferred Benefit in Malaysia: A Case for Sowing the Unjust Enrichment Seed" (2016) 11 AJCL 141.

8. Contracts Act 1950, s 72.

9. Contracts Act 1950, s 73, discussed in A See, "Restitution of Mistaken Enrichment under Section 73 of Malaysia's Contracts Act 1950: Pouring New Wine into an Old Bottle?" (2014) 31 JCL 206.

10. For a recent overview of Malaysian law, see A See, "An Introduction to the Law of Unjust Enrichment" [2013] 5 Malayan LJ i.

11. [2012] 7 Malayan LJ 364.

12. See *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677.

13. See *eg AmBank* [2012] 7 Malayan LJ 364 in considering the common law action for money had and received for mistaken payments outside s 73.

14. [2015] 2 Malayan LJ 441.

15. P Birks, *Unjust Enrichment*, 2nd ed (OUP, Oxford, 2005).

2. Absence of basis

In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*,[16] the purchaser had entered into a sale and purchase agreement to buy land from the seller. As the purchaser had been anxious to start building a shopping mall on the land, the seller allowed the purchaser to take possession to commence construction after the payment of 10% of the purchase price, and also granted the purchaser a power of attorney to facilitate working on the land pending completion. Eventually, however, the seller refused to complete the sale, claiming that the contract had been terminated following the purchaser's repudiatory breach in failing to pay the remaining purchase price in time. Construction of the mall continued during the litigation, and the mall's success surpassed all expectations. Ten years after the conclusion of the sale and purchase agreement, the issue was finally settled in the seller's favour. The High Court, Court of Appeal and the Federal Court all held that the seller was entitled to recover possession of the land after lawful termination of the contract. All three courts were also unanimous in holding that the purchaser was entitled to payment from the seller in respect of the improvement to the land. The High Court and the Court of Appeal allowed the purchaser to recover RM 124m, which represented the construction cost of the mall. The Federal Court, however, awarded a sum to be assessed on the basis of the current value of the mall, less the value of the land without the mall at the date of its judgment. The mall was said to have an estimated current market value of RM 387m, though it is not clear whether the estimate included the value of the underlying land.

The Federal Court approached the purchaser's claim using the oft-stated four-step approach: (1) whether the seller was enriched? (2) whether the enrichment was at the purchaser's expense? (3) whether the enrichment was unjust? and (4) whether the seller had a defence?

The Federal Court viewed it as an objective fact that the seller had been enriched.[17] It was content to distinguish between the enhancement of market value and the cost of improvement as benefit (restitution) and loss (compensation) respectively,[18] and it did not ask the question whether the benefit could or should properly be assessed on the basis of (the seller's) saved expense. The Federal Court adopted the approach taken in Australian cases that the restitutionary measure should reflect the enhancement to the market value of the land resulting from the claimant's labours;[19] and it did so without considering the English decision in *Cobbe v Yeoman's Row Management Ltd*,[20] where, following the failure of a joint land development venture, an award was made for the market value of the services rendered by the claimant which had enhanced the value of the land. While it may be argued that in the English case the defendant had not bargained away the land together with its development potential,[21] in *Dream Property*, the development potential was inherent in the land which ultimately never left the legal ownership of the seller.[22]

More fundamentally, after considering the comparison between civilian (and some mixed systems) and common law approaches to the law of unjust enrichment offered in the eighth edition of *Goff & Jones: The Law of Unjust Enrichment*,[23] the Federal Court chose to adopt the "absence of basis"[24] approach for the Malaysian common law for the reason that "it would

16. [2015] 2 Malayan LJ 441; noted F Wilmot-Smith, "A Dream Case?" (2016) 132 LQR 196; A See, "Restitution for the Mistaken Improver of Land" [2016] Conv 60.

17. [2015] 2 Malayan LJ 441, [123]. An argument on subjective devaluation based on *Ministry of Defence v Ashman* (1993) 66 P & CR 195 was dismissed on the grounds that the case had not been raised in the lower courts and was in any event distinguishable as it related to residential property, and that in any event the seller had not provided any evidence to demonstrate subjective devaluation: [2015] 2 Malayan LJ 441, [156].

18. [2015] 2 Malayan LJ 441, [106–108].

19. *Lexane Pty Ltd v Highfern Pty Ltd* (1985) 1 Qd R 446, 455.

20. [2008] UKHL 55; [2008] 1 WLR 1752.

21. See further See [2016] Conv 60, 62–63.

22. See Wilmot-Smith (2016) 132 LQR 196, 198–199. See also *post*, text after n 33.

23. C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (Sweet & Maxwell, London, 2011) (hereafter, "*Goff & Jones*, 8th ed"), [1.11].

24. *Ibid*, [1.19].

produce a fairer outcome".[25] One would have thought that, in taking the momentous step of shifting the jurisdiction's fundamental conception of the subject of unjust enrichment, consideration ought have been given to the question whether a "fairer outcome" would be the result in most (if not all) cases. However, the Federal Court appeared to focus only on the just outcome on the facts of the case before it.

The Federal Court did not consider whether recovery could have been possible under one of the traditional unjust factors. Both the High Court and the Court of Appeal had allowed recovery of the cost of construction based on both the Contracts Act 1950, s 71[26] and the common law. However, insofar as the common law claim was concerned, it was not clear what unjust factor had been relied on.[27] Indeed it is difficult to find one. At all court levels it was found that the *entire* benefit was unjustly obtained at the expense of the purchaser. This presents several problems.

First, it is difficult to justify the recovery of the *entirety* of the benefit of the construction project on the basis of mistaken conferment of a benefit because it is not easy to pin-point a mistake that was operative for the duration of the entire construction. The purchaser had disentitled itself from obtaining specific performance of the contract of sale by its own repudiatory breach in failing to meet deadlines for part payments. The purchaser could perhaps have been mistaken as to its entitlement to such relief for a period when it thought that payments were not yet due; but, once put on notice, and at least once litigation began, the purchaser's state of mind begins to take on the shape of a misprediction as to the future completion of the contract. A misprediction, unlike a mistake, does not give rise to an unjust enrichment claim.

Secondly, the unjust factor might arguably be failure of basis if it is accepted that the basis in *Dream Property* could be a non-promissory future event—*ie* the eventual conveyance of legal title pursuant to the contract of sale.[28] Yet it is also arguable that the more likely joint understanding of the basis of the conferment of the benefit in such circumstances is that the "purchaser is making improvements for his own account, and that he takes the risk of not being able to make the required payments, thereby losing the land".[29]

Thirdly, it is also difficult to justify the decision on the basis of free acceptance[30] (insofar as it may have been part of the law in Malaysia),[31] as the seller had no choice but to accept the benefit annexed to its land.[32]

The Federal Court in fact held that there was unjustified enrichment of the seller because there was no legal ground for the seller to claim and enjoy the full commercial value of the mall.[33] This conclusion is somewhat curious because one would have thought that the starting point was that the seller, as the legal owner of the land (and of the mall to the extent that it had been annexed to the land), throughout had a legal justification for enjoying the commercial value of the mall on its land.

Additionally, the Federal Court was moved by the consideration that the purchaser had not only suffered a loss, but that the seller was also at the same time made richer by the purchaser's loss "by the same amount".[34] This is curious because the seller's gain, as measured by the market

25. [2015] 2 Malayan LJ 441, [129].

26. "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

27. [2013] 6 Malayan LJ 836, [42–44] .

28. A Burrows, *The Law of Restitution*, 3rd ed (OUP, Oxford, 2011), 398–399.

29. C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (Sweet & Maxwell, London, 2016), [14.24].

30. *Ibid.*

31. See further See (2016) 11 AJCL 141.

32. See also See [2016] Conv 60. It could be argued that seller had freely accepted the benefit in granting a power of attorney to facilitate work on the land, but this would not continue beyond the time when it gave notice to the purchaser to stop work.

33. [2015] 2 Malayan LJ 441, [129].

34. *Ibid*, [130].

value of the mall, would correspond to the purchaser's loss only if the purchaser's loss is measured by reference to the purchaser's contractual expectation, which had been forfeited by its own repudiatory breach.

It is quite unfortunate that such a fundamental philosophical shift was executed in three short paragraphs, the first of which substantially comprised quotations from *Goff & Jones*.[35] It is not clear what the Federal Court meant by "absence of basis", and its adoption of this idea potentially casts the liability net very wide. Other methods of circumscribing liability will need to be found. On the facts of *Dream Property*, the Court found it to be relevant that the purchaser had acted lawfully and in good faith[36] in the construction of the mall, and that the seller had not taken appropriate steps to stop the construction.[37] Oddly, this was in the context of determining whether the benefit had been received by the seller at the purchaser's expense.[38] Moreover, this was also done in the context of distinguishing Privy Council[39] and English[40] authorities which suggest that a mistaken improver of another's land cannot claim in unjust enrichment against the landowner unless the landowner had acted unconscionably. Even if these authorities represent good law,[41] it is not clear how the seller's unconscionable conduct (or otherwise) bears on the "at the claimant's expense" inquiry. Even if such considerations are excluded from that inquiry, it is not clear how the moral qualities of each party's conduct fit into the "absence of basis" model of unjust enrichment in Malaysian law.

Given this change of direction by the Federal Court, all earlier Malaysian common law cases applying the unjust factor approach have potentially been swept aside. We must await further clarification from the courts of: what constitutes a legal ground capable of justifying an enrichment; whether and to what extent the new approach will affect analysis of equitable claims in knowing or unconscionable receipt; whether the burden lies on the claimant to prove the absence of a legal ground, or on the defendant to show the existence of legal ground;[42] the relevance of the moral relativities of the parties; and which (if any) are the countries the laws of which the Malaysian courts might look to for guidance.

Legislation similar to the Malaysian Contracts Act 1950 exists in several other Asian Pacific jurisdictions.[43] It should not be assumed that the judicial approach will be the same in all these countries. Notably, in a recently-published book, Professor Adrian Briggs and Professor Andrew Burrows had to confront some of the issues highlighted above under the law of Myanmar, where the Contract Act 1872 contains materially similar provisions.[44] The authors suggest two improvements to the Myanmar statute: first, creating a new provision to allow for restitutionary claims for unjust enrichment not covered by the other provisions; secondly, establishing a common approach via a new provision stating that the recovery under these statutory provisions is based on principles of unjust enrichment.[45] The Malaysian court, at least, appears to have found its own way forward.

35. *Ibid*, [128–130].

36. *Ibid*, [124]. The finding in the lower courts that the purchaser had acted in bad faith in relying on the power of attorney to sell to conclude sale and lease agreements of shop units did not appear to affect the Federal Court's analysis.

37. A written notice was held insufficient; the seller was expected to seek injunctive relief.

38. [2015] 2 Malayan LJ 441, [125].

39. *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17.

40. *JS Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724; [2008] 2 EGLR 85.

41. HW Tang, "An Unjust Enrichment Claim for the Mistaken Improver of Land" [2011] Conv 8; KFK Low, "Unjust Enrichment and Proprietary Estoppel: Two Sides of the Same Coin?" [2007] LMCLQ 14; B McFarlane, "*Blue Haven Enterprises v Tully & Another*" (2006) J Eq 156; See [2006] Conv 60, 66–67.

42. The court's statement that a party "can escape restitutionary liability by showing that there was a legal ground for receiving" the benefit ([2015] 2 Malayan LJ 441, [129]) is suggestive but not conclusive that the burden is on the recipient.

43. Bangladesh, Brunei, India, Myanmar, Pakistan.

44. A Briggs and A Burrows, *The Law of Contract in Myanmar* (OUP, Oxford, 2017).

45. *Ibid*, [12.9].

C. EVOLUTION IN SINGAPORE

Of the Asia-Pacific countries surveyed in the *Restitution Law Review*, Singapore contains the most appellate case law reviewing the jurisprudential bases of the law of unjust enrichment, with many in the most recent years.[46] In particular, the Singapore Court of Appeal has accepted that the law of unjust enrichment can be conceptually differentiated from restitution for wrongs,[47] the former being limited in its focus on enrichment in the subtractive sense.[48] In respect of the law of unjust enrichment, the Court of Appeal has also considered the debate between the traditional "unjust factors" and the more recently proposed "absence of basis" approaches, and confirmed that the traditional approach is adopted in the common law of Singapore.[49] Its main concerns were that the "absence of basis" approach has not been tested in the common law,[50] as well as the academic arguments against such an approach. Trials in Malaysia will undoubtedly prove to be of instructive value.

In respect of the law of unjust enrichment, two prominent issues which will require the further attention of the Singapore Court of Appeal are: (1) the applicability of the related unjust factors of lack of consent and want of authority, and (2) the applicable limitation periods for common law restitutionary claims.

1. Unjust factors: want of authority and lack of consent

Want of authority was accepted as an unjust factor in the law of unjust enrichment by the Singapore High Court in *Tjong Very Sumito v Chan Sing En*[51] ("*Tjong v Chan*"). The factual matrix is complex, but for the purpose of exposition the key facts are these. C agreed to sell company shares to X-purchaser for US$18m. The purchase price was to be paid in several parts to a number of third parties (including D) authorised under the agreements to receive the sums. C received a third of the purchase price, and sued several third parties (including D) to recover money they had received from X-purchaser in respect of the transaction.

In the High Court, the claims failed against most of the defendants for various reasons unrelated to any unjust factor; but C's claim against D succeeded. The High Court held that, under the legal documentation, D was authorised to accept payments on behalf of C, but was not authorised to retain the benefit of the payments. The court then relied on the eighth edition of *Goff & Jones*[52] to reach the conclusion that the defendant's lack of authority from the claimant to retain the property beneficially constituted the unjust factor. Specifically, the court relied on these extracts from the book:[53]

> "[A] defendant, D, obtains an enrichment by immediate transfer from a claimant, C, in *circumstances* where C did not consent to the enrichment. It is also common for a defendant, D, to obtain an enrichment from a claimant, C, more remotely, as a result of the actions of a third party, X, which were neither authorised nor consented to by C …
>
> *Where X holds assets subject to duties and powers to deal with them for C's benefit, and acts within his authority, C will have no remedy. But where X acts outside his authority, his 'want of authority' will itself constitute a sufficient ground for recovery by C.*"

46. For a recent survey, see R Leow and T Liau, "Unjust Enrichment and Restitution in Singapore: Where Now and Where Next?" [2013] SJLS 331.
47. *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317, [31].
48. *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801, [152].
49. *Ibid*, [129]. See also *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845, [92]; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540, [134–135].
50. The Court of Appeal did not appear to have considered Canadian case law in this respect.
51. [2012] SGHC 125; [2012] 3 SLR 953. The official report is a heavily edited version of the full judgment.
52. *Goff & Jones*, 8th ed (*supra* n 23), [8.01–8.02].
53. *Tjong v Chan* [2012] 3 SLR 953, [120] (emphasis of the High Court).

However, it is hard to see how these passages applied to the facts. In these passages, the claim of C is against D, who has received property from X, a third party, who had control over C's assets, and who acted outside his authority in transferring the assets to D.[54] It is different from the situation presented in *Tjong v Chan*, where C was suing D, who had been authorised by C to *receive* money from X, but had no authority to *retain* the money. On these facts, there is a simpler explanation for the liability of D. Although the payment to D was described as being "akin to a situation where money due to a claimant has been transferred by a third party to the claimant's authorised agent", there was also a clear finding that the relevant contractual clause created a relationship of agency in respect of the receipt of the money.[55] It is a settled principle of agency law that a principal may bring an action for money had and received against an agent who has received money on behalf of his principal and who refuses to pay it over to the principal.[56]

On appeal, the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito*[57] ("*Handoyo v Tjong*") took a different view of the transaction, and reversed the finding on agency. The Court of Appeal held that the only consideration that C was entitled to under the agreement was what it had actually received and no more.[58] Accordingly, the claim against D had to fail; to allow the claim would undermine the risk allocated by the contracting parties.[59] This reason alone was sufficient to allow D's appeal to succeed. However, the Court of Appeal also proceeded to disagree with the holding in the High Court that "want of authority" was an unjust factor in the law of unjust enrichment. The Court of Appeal disagreed with the position adopted in *Goff & Jones*, on the basis that it was not supported by judicial authorities, and was further not supported by other academic authorities, including previous editions of the same book.[60] In any event, the Court of Appeal also found that there could be no unjust enrichment because of the lawful receipt by the defendant of a benefit from a third party when the benefit was the unencumbered property of the third party.[61] Because the court found no unjust enrichment, it did not deal with the issue whether the enrichment was at the claimant's expense.

The Court of Appeal rejected the view expressed in *Goff & Jones* that *Lipkin Gorman v Karpnale Ltd*[62] supported want of authority as an unjust factor.[63] The Court of Appeal did not explicitly identify the "true" juridical justification of the *Lipkin Gorman* decision, but it was undoubtedly of the view that the basis of the successful claim was the defendant's receipt of the claimant's property. At the same time, however, the Court of Appeal also declined to follow the view, recently expressed in the English case of *Armstrong DLW GmbH v Winnington Networks Ltd*,[64] that *Lipkin Gorman* was an example of a proprietary restitutionary claim. The Court of Appeal preferred instead to classify the *Lipkin Gorman* claim as a claim lying in the law of unjust enrichment.

The Court of Appeal did not *expressly* reject "lack of consent" as an alternative unjust factor—it only explicitly dealt with and rejected "want of authority". Nevertheless, its clear view that the defendant's liability had arisen from the receipt of the claimant's property is not necessarily aligned with a scheme of unjust factors based on the vitiated (or absent) intention of the claimant, and should not be taken as implicit acceptance of lack of consent as the explanation for *Lipkin Gorman*. In other words, it may be that the law of unjust enrichment as envisaged by the Court of Appeal is not solely premised on protecting the autonomy of the claimant in the narrow sense

54. See *Goff & Jones*, 8th ed, [8.94–8.96], where this point is elaborated.
55. *Tjong v Chan* [2012] 3 SLR 953, [93] and [96–119].
56. P Watts, *Bowstead and Reynolds on Agency*, 20th ed (Sweet & Maxwell, London, 2014), [6.100].
57. [2013] 4 SLR 308.
58. *Ibid*, [67–87] and [103].
59. *Ibid*, [104–109].
60. *Ibid*, [111–112].
61. *Ibid*, [110], accepting the arguments in A Tettenborn, "Lawful Receipt—A Justifying Factor" [1997] RLR 1.
62. [1991] 2 AC 548.
63. *Handoyo v Tjong* [2013] 4 SLR 308, [113].
64. [2012] EWHC 10 (Ch); [2013] Ch 156.

contemplated by Professor Birks.[65] The principle of protection of property also safeguards the autonomy of the claimant (to deal with his own property).

"Lack of consent" as an unjust factor was considered by the Court of Appeal almost contemporaneously in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[66] (*"Wee v Ng"*). The claimant had alleged that her deceased ex-husband had fraudulently concealed immense wealth from the claimant, causing her to refrain from seeking statutory division of matrimonial property during divorce proceedings. One of the claims was that the trustees of certain trusts set up in the husband's lifetime had been unjustly enriched in respect of the assets that the claimant would have been entitled to receive under the matrimonial laws of Singapore. The High Court[67] dismissed this claim, and its decision was upheld by the Court of Appeal.

An important aspect of *Wee v Ng* is the Court of Appeal's analysis of the requirement of the enrichment's being "at the claimant's expense". The court decided that it was not enough to show that certain assets would have been the claimant's but for the misrepresentations. The court rejected a simple causal connection test,[68] and concluded instead that the law required that the benefit received by the defendant be one to which the claimant is legally entitled or that forms part of the claimant's assets—whether the benefit is one of traceable property or merely value transferred. Thus, in cases of indirect enrichment, to satisfy the "at the expense of" requirement, the nexus must be proprietary, or at least linked to the claimant's assets.

The Court of Appeal in fact found that the claimant could not prove any enrichment at her expense. As such, there was technically no need to deal with unjust factors. The court nevertheless considered that the unjust factor of "lack of consent" might come to the claimant's aid, but left open the question whether this was a legally-recognised unjust factor—noting that there was no authority expressly acknowledging "lack of consent" as an unjust factor.[69] The Court of Appeal was acutely aware of the effect of recognising such an unjust factor on equitable claims currently dealt with as claims for knowing receipt.[70]

The Court of Appeal in *Wee v Ng* also discussed the law on knowing receipt of assets previously transferred in breach of trust, even though it found that the pleadings in the case did not reveal such a claim.[71] The High Court had dismissed the unjust enrichment claim on the ground that the claimant had not shown that the trustees had acted unconscionably.[72] The Court of Appeal found this to be a conflation of the law on knowing receipt and the law of unjust enrichment, and clarified that the two rested on separate conceptual bases, and that the requirement of fault was inconsistent with the law of unjust enrichment.[73] After reviewing Commonwealth case law and academic literature, the court concluded that the law on knowing receipt was in a state of flux.[74] It noted that there were three possible paths that the law could take: (1) the equitable doctrine of knowing receipt could be subsumed under the common law doctrine of unjust enrichment, and liability would be strict; (2) third party liability for receipt of property transferred in breach of trust or fiduciary duty could be confined to the equitable sphere only, and liability would always be based on the unconscionability of the recipient; and (3) there could be two co-existing principles of law, one based on unjust enrichment where liability is strict, and another based on equitable principles of wrongdoing where liability is fault-based.[75] The Court of Appeal observed that

65. P Birks, *Introduction to the Law of Restitution*, rvd ed (Clarendon Press, Oxford, 1989).
66. [2013] 3 SLR 801.
67. [2012] SGHC 197.
68. [2013] 3 SLR 801, [117–127].
69. *Ibid*, [139].
70. *Ibid*, [139].
71. *Ibid*, [154].
72. [2012] SGHC 197, [128].
73. [2013] 3 SLR 801, [98–110] and [138–139].
74. *Ibid*, [144].
75. *Ibid*, [140].

existing authorities were against the first path.[76] It also noted an observation by a commentator in 2011[77] that the judicial trend did not appear to support the third path.[78] Without taking a position, the Court of Appeal advocated caution in adopting unjust enrichment as the sole or alternative basis for cases currently dealt with under the rubric of knowing or unconscionable receipt.[79]

Four contemporaneous and subsequent developments are worth noting in this context. They will no doubt contribute to further exploration of these issues in Singapore.

First, there have been significant developments in English law which have not yet been taken into account. The English High Court case of *Relfo Ltd (in liquidation) v Varsani*,[80] decided shortly before arguments were heard by the Court of Appeal in *Wee v Ng*, had apparently not been brought to the court's attention. In the English case, Sales J had allowed a claim against the defendant for knowing receipt of money resulting from the breach of fiduciary duty of a director of the claimant company. In the alternative, and on the same facts, Sales J also allowed the claimant to succeed on the principles of unjust enrichment. Liability on this alternative ground was held to be strict.[81] The judge found that there was sufficient causal connection on the facts even if the knowing receipt claim were to fail because tracing rules could not be satisfied. Significantly, Sales J explicitly adopted lack of consent/want of authority as the relevant unjust factor.[82]

The Court of Appeal of England and Wales[83] subsequently affirmed the judgment of Sales J on the basis of knowing receipt liability. Probably for practical reasons, the appeal on the unjust enrichment liability was only on the issue whether the defendant had received the benefit at the claimant's expense, and it arose only if the defendant's appeal against his liability for knowing receipt—on the basis that the tracing rules were not satisfied—had succeeded. Since the defendant's appeal failed on the knowing receipt-tracing issue, all that the Court of Appeal went on to say about the defendant's liability in unjust enrichment were technically obiter dicta. Arden LJ gave enthusiastic support for the suggestion that the "at the expense of" requirement in the law of unjust enrichment could be satisfied objectively by a test that looked to whether as "a matter substance, or economic reality" the defendant was a "direct recipient" of the benefit from the claimant.[84] This test is clearly more liberal than that adopted in *Wee v Ng*. Gloster LJ and Floyd LJ each adopted a more circumspect approach. While they accepted that the law of unjust enrichment did not limit claims only to those against direct recipients, and that there was sufficient causal connection on the facts as found by Sales J in the present case, they did not think that it was appropriate to attempt to articulate any general principle for the recovery of benefits against indirect recipients.[85] In the event, the Court of Appeal did not discuss the unjust factor in play.

More recently, the Supreme Court gave its most detailed analysis of the "at the expense of" element in an unjust enrichment claim, in *Investment Trust Companies (in liquidation) v HMRC*.[86] In a single judgment delivered by Lord Reed,[87] the Supreme Court held that, in a personal claim in unjust enrichment, the inquiry whether a defendant has been enriched "at the expense of" the

76. *Ibid*, [141–143].
77. TM Yeo, "The Right and Wrong of 'Knowing Receipt' in the Law of Restitution", Fourth Yong Pung How Professorship of Law Lecture, Singapore Management University, 19 May 2011, available at: http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1002&context=yph_lect (last accessed on 16 October 2017).
78. [2013] 3 SLR 801, [144–145].
79. *Ibid*, [146].
80. [2012] EWHC 2168 (Ch).
81. *Ibid*, [89].
82. *Ibid*, [88].
83. [2014] EWCA Civ 360; [2015] 1 BCLC 14.
84. *Ibid*, [97].
85. *Ibid*, [104] and [115].
86. [2017] UKSC 29; [2017] 2 WLR 1200.
87. With agreement from Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge.

claimant receives a positive answer only when there is direct receipt of a benefit, or a receipt which is equivalent to a direct receipt. The equivalence could result from agency, property or co-ordinated transactions, but not merely from notions of economic or commercial reality. While the English approach articulated in *Investment Trust Companies* appears to be a broader approach to the "at the expense of" inquiry than that adopted by the Singapore court in *Wee v Ng*, it is not necessarily inconsistent with it, if the statement in the Singapore court is read in the factual context where the only arguable link in the flow of benefits was property or something close to it.

Second, lack of consent and want of authority were explicitly rejected as unjust factors by the Hong Kong Court of First Instance in 2015 in *First Asia Finance Ltd v Tsoi Tin Kwan Fanny*,[88] in view of academic reservations on the subject.[89]

Third, in 2016, the Federal Court of Australia in *Great Investments Ltd v Warner*[90] expressed the view that fault-based liability in knowing receipt was *not* inconsistent with the existence of strict liability on another juristic ground.[91] This was in the context of a claim for recovery by a company of its rights, or their value, which had been transferred without its authority to a recipient. The Federal Court relied on Lord Nicholls' proposition to the same effect in *Criterion Properties Plc v Stratford UK Properties LLC*.[92] In that case, Lord Nicholls of Birkenhead was dealing with the rescission of a contract entered into without the authority of the company and the recovery of assets and benefits transferred under the contract. Lord Nicholls had referred to the availability of both proprietary claims and personal claims in unjust enrichment. In *Great Investments*, the Federal Court went further than Lord Nicholls and postulated that even the proprietary claim in this context could be based on unjust enrichment.[93] Nevertheless, the Federal Court did not explicitly pinpoint the unjust factor that might support either the personal or proprietary claim. This is an enormously important case, and justifies further thought about the relationship between the law of property and the law of unjust enrichment. For the personal claim at least, prime candidates for established unjust factors would have been mistake or failure of consideration. However, it is hard to find a mistake in the case of an errant director disposing of company assets behind its back. Failure of basis[94] is unworkable for the same reason because it requires the communication of the purpose of the transfer of benefit and the subsequent failure of the purpose. At the same time, though, *Great Investments* does not obviously go so far as to endorse lack of consent or want of authority as an unjust factor. Although it was certainly pervasive in the judgments that the disposition of the claimant's assets without authority was the basis of both the proprietary and personal claims, neither lack of consent nor want of authority was specifically identified as the unjust factor.

Finally, and also in 2016, the Singapore High Court in *AAHG, LLC v Hong Hin Kay Albert*,[95] opened the door left ajar by the Singapore Court of Appeal in *Wee v Ng*:[96] it decided that, if mistake was an accepted unjust factor in the law of unjust enrichment, then *a fortiori* lack of consent must also be.[97] This was, however, an obiter dictum because the claim had already succeeded in damages in the same amount for conversion. As part of a loan arrangement, the defendant had transferred shares in the borrower company, which he controlled, to the claimant,

88. [2015] HKCFI 897, [83].
89. The court was also mindful that it had not received submissions from the parties on that issue: *ibid*, [83].
90. [2016] FCAFC 85.
91. *Ibid*, [54–55].
92. [2004] UKHL 28; [2004] 1 WLR 1846, [4].
93. [2016] FCAFC 85, [69].
94. Australian law has clearly moved beyond the traditional recovery based on failure of contractual performance, to recovery based on a failure to sustain a state of affairs contemplated as the basis for the transfer of the benefit: *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516, [16] (Gummow J) and [103–104] (Gleeson CJ, Gaudron and Hayne JJ).
95. [2016] SGHC 274.
96. [2013] 3 SLR 801.
97. [2016] SGHC 274, [74].

which was the parent of the lender company. The defendant purported to buy the shares from the claimant, and convened a board meeting to cancel the shares held by the claimant and to register the defendant as the holder instead, in order to sell the shares to a third party. The High Court did not discuss the further ramifications of its decision beyond the simple facts before it, especially in opening up a new vista of liability against recipients whether innocent or otherwise that could render equitable liability for knowing receipt practically obsolete. Nor did the court consider whether the acceptance of lack of consent as an unjust factor was really consistent with the rejection of want of authority as an unjust factor by the Court of Appeal in *Handoyo v Tjong*,[98] because both want of authority and lack of consent are proffered as alternative explanations for phenomena currently explained using principles which have a strong proprietary flavour. The explanation of the personal liability in *Lipkin Gorman*[99] as being based on the receipt of property, and the general requirement for a proprietary connection or something very close to it to establish that an indirect recipient had been enriched at the claimant's expense, demonstrate the judicial inclination of the Singapore Court of Appeal towards a property-based analysis.

2. Restitution for wrongs

In the field of restitution for wrongs, it is notable that Singapore was an early common law jurisdiction to accept that a fiduciary held bribes and their proceeds on a constructive trust in favour of the beneficiary of the fiduciary relationship,[100] pre-empting both the Privy Council in *Attorney-General for Hong Kong v Reid*[101] and the United Kingdom Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*.[102]

More recently, the Singapore Court of Appeal has considered the jurisprudential basis of the "user principle" in the assessment of damages for proprietary torts. In *ACES System Development Ptd v Yenty Lily*,[103] the key issue was whether the claimant, who had sued the defendant for wrongful detention of certain mobile platforms to be used for a construction project,[104] was able to claim substantial damages for the period of the unlawful detention.

The High Court allowed the claim on the basis of the user principle, awarding market rent and holding that it was irrelevant that the defendant had not actually made use of the property during the period. The High Court[105] reviewed the authorities in England and Australia, and concluded that the user principle was neither purely compensatory nor purely restitutionary. The court thought that, on any view, the opportunity to use the property which the wrongdoer had acquired by depriving the owner of such opportunity was a sufficient reason to award substantial damages even if the wrongdoer had failed to exploit the opportunity.[106]

This account of the hybrid nature of the user principle was subsequently rejected by the Court of Appeal. While affirming the High Court's award, the Court of Appeal took the view that there was sufficient evidence on the facts to support the award as a pure compensatory claim. That the claimant was prevented from being able to rent out the equipment was, in the view of the court, a compensable loss. Because of this finding, the Court of Appeal did not go on to consider

98. [2013] 4 SLR 308.
99. [1991] 2 AC 548.
100. *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638; affd in *Thahir Kartika Ratna PT Pertambangan dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.
101. *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (NZ PC).
102. [2014] UKSC 45; [2015] AC 250.
103. [2013] 4 SLR 1317; noted D Xu (2014) 14 OUCLJ 127.
104. Under the tort of detinue, which still exists in Singapore common law.
105. [2013] 1 SLR 577.
106. *Ibid*, [69].

whether the concept of loss of an opportunity to bargain with the defendant[107] had justificatory force within a compensation-focussed analysis.[108]

After reviewing the case law and literature, the Court of Appeal in *ACES* inclined to the view (without deciding the point) that the "user principle" was explicable on restitutionary principles, and that compensation and restitution were actually two different principles at play, rather than two alternative accounts of one principle.[109] On the restitutionary account, the relevant benefit to the defendant was the *opportunity* to use the claimant's property, so that it was irrelevant that the defendant had failed to exploit the opportunity.

The Court of Appeal suggested that the claimant could choose whether to pursue a compensatory award or a restitutionary award.[110] Tantalisingly, however, the court also suggested that the restitutionary principle may also be seen as an exception to the compensation principle in tort law, engaged where the compensation principle yields only nominal damages.[111] These two ways of stating the law can lead to different results: following the latter view, a restitutionary award would not be available to a claimant who is entitled to non-nominal compensatory damages even if the restitutionary award would be substantially higher.[112] We await further clarification from the Court of Appeal on the relationship between the compensatory and restitutionary awards.

3. Change of position

The restitutionary analysis of the user principle raises the intriguing question whether the defences developed in the law of unjust enrichment are applicable. The Singapore High Court decided that the change of position defence was in principle available to a wrongdoer in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*[113] ("*Cavenagh*"). The defendant had been deceived by the claimant's fraudulent employee into occupying the claimant's apartment without the claimant's consent, while paying "rent" to the fraudster. The claimant sued the defendant. The High Court found the defendant liable in trespass for restitutionary damages measured by the market value as (found as a fact to be) represented by the supposed rental, but allowed the defendant to invoke the change of position defence.

The High Court noted the statement of Lord Goff of Chieveley in *Lipkin Gorman*[114] that "it is commonly accepted that the defence [of change of position] should not be open to a wrongdoer",[115] but also noted the contrary suggestion by Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*.[116] Noting disagreement among academics on this issue, the court disagreed with the view of Andrew Burrows,[117] that the purpose of the change of position defence is to protect a defendant's security of receipt and has no application to cases where the law's concern is to remedy a wrong.[118] Instead, the court chose to follow an observation of Elise Bant[119] that the central purpose of the defence is to ensure that restitution does not operate contrary to principles

107. The article by RJ Sharpe and SM Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OJLS 290 was mentioned in the judgment but not discussed.

108. On the facts, the quantum would probably have been the same on the hypothetical bargain analysis.

109. [2013] 4 SLR 1317, [38].

110. *Ibid*, [41].

111. *Ibid*, [38]. See further A Phang, "The Law of Remedies: The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746, [16].

112. *Cf* K Low, "The User Principle: *Rashomon* Effect or Much Ado about Nothing" (2016) 28 SAcLJ 984, who argues that the restitutionary award can never exceed the compensatory measure.

113. [2013] 2 SLR 543.

114. [1991] 2 AC 548, 580.

115. [2013] 2 SLR 543, [60].

116. [2002] UKHL 19; [2002] 2 AC 883, [79].

117. Burrows, *The Law of Restitution* (*supra* n 28), 699–700.

118. [2013] 2 SLR 543, [62].

119. Bant, *The Change of Position Defence* (Hart, Oxford, 2009), 171.

of unjust enrichment in circumstances where a defendant's position has irreversibly changed. The High Court agreed with Bant's statement that, "subject to any overriding policy considerations", there was no reason not to apply the defence to strict liability wrongs. It noted that Lord Goff's statement was probably directed at "wrongdoers who display a certain level of moral turpitude and therefore are underserving of the defence".[120] Interestingly, the court did not also refer to the part of Bant's discussion where she goes on to say that the general common law perspective was that the application of the change of position defence to property torts would be likely to undermine the protection of the claimant's proprietary interest, and that it would require a "significant change in judicial attitude" to extend the defence to restitution based on such property torts.[121] Perhaps the High Court has indeed made a significant shift in its judicial attitude, bringing it into closer alignment with Lord Nicholls' view that different policy considerations could apply to different aspects of the consequences of a property tort. This shift could have wider implications beyond the change of position defence, and it may affect the substantive law of property torts. Lord Nicholls had suggested that there could be an unjust enrichment claim in respect of benefits, where liability is strict subject to defences like change of position, and a claim based on the claimant's loss, where it could make a difference whether the defendant was innocent or dishonest.[122] Whether the same philosophical shift will occur at the Court of Appeal level remains to be seen.

The High Court in *Cavenagh* prescribed a two-step approach for the application of the change of position defence against claims based on restitution for wrongs. The first is to determine whether the category of wrong in question is of such a nature that permitting the defence of change of position would stultify the policy behind the remedy for the wrong. The court found that this was not case,[123] and that the defence was therefore applicable on the facts. Secondly, the defendant needed to have acted in good faith.[124] On the facts, the court found that the defendant had not committed the trespass with knowledge of and wrongful disregard for the rights of the claimant. The defendant's change of position defence therefore succeeded.

4. Limitation periods

Singapore law takes a different approach from English law on the question of limitation periods applicable to common law claims in unjust enrichment. In English law, such common law actions are treated as "contractual" for the purpose of the Limitation Act 1980, and are subject to the same limitation periods as contractual debts. In 2002, the Singapore Court of Appeal in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd*[125] took the view that the common law claim for the recovery in unjust enrichment of a mistaken payment was not contractual for the purpose of the Limitation Act[126] since the implied contract theory had been rejected. Because it had an independent foundation in the law of obligations, the common law claim in unjust enrichment fell outside the ambit of the statute, because it was not contractual, tortious or equitable. Instead, the common law claim, even where no equitable remedy is sought, will be subject to the equitable doctrine of laches (notwithstanding any fusion fallacy). It is difficult, however, to discern a consistent principle in the wider Singapore case law. Curiously, claims based on total failure of consideration in the context of a failed contract or a contract

120. [2013] 2 SLR 543, [61].
121. Bant, *The Change of Position Defence* (2009), 172.
122. [2002] UKHL 19; [2002] 2 AC 883, [79].
123. [2013] 2 SLR 543, [64–65].
124. *Ibid*, [65].
125. [2002] 1 SLR(R) 418.
126. Cap 163, 1996 Rev Ed.

which failed to materialise are within the ambit of the Limitation Act,[127] while claims premised on "waiver of tort" are not.[128] Further, a claim to enforce a foreign judgment—historically an action for money had and received to enforce an implied debt, in this case a judgment debt[129]—has been treated as contractual for the purpose of the Limitation Act.[130]

More recently, the Court of Appeal in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd*[131] noted the divergence between English and Singapore law on this issue, and suggested (without deciding) that a common law unjust enrichment claim may well be "contractual" for the purpose of limitation law after all.[132] However, the most recent Court of Appeal observation on the matter (in a case not involving unjust enrichment) merely noted that the "underlying thread in both *De Beers* 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".[133] It is no exaggeration to say that the Singapore position on the limitation periods for common law unjust enrichment claims is conceptually very unsatisfactory.[134] The only comfort is that the problem has been noted by the highest court. We can only hope that a case on point will appear before it for resolution in future.

D. CONCLUSION

This survey shows that there is lively ongoing debate in the common law Asia Pacific—at least in Malaysia and Singapore—on the future of the law of unjust enrichment. Some issues are jurisdiction-specific, like the relationship between statute and common law in Malaysia. As regards the common law, Malaysia has demonstrated one possible future, in taking the leap from a list of specific unjust factors to a general ground of absence of basis. The greatest challenge facing the Malaysian courts will be in the definition and demarcation of this new ground. In contrast, Singapore law has proceeded at an incremental pace, and the debates are likely to continue to concentrate on the contours of the various components of the claim in unjust enrichment: "enrichment", "at the claimant's expense", available "unjust factors", the principle of restitution for wrongs, and defences. Controversies will continue to arise in respect of all these aspects. The particular issues discussed above are likely to be significant for some time to come.

In a recent extra-judicial publication, Judge of Appeal Justice Andrew Phang of the Singapore Court of Appeal identified the law of unjust enrichment as an area where the Singapore courts had much to learn from case law from other jurisdictions,[135] as well as from academic scholarship.[136] This observation applies to other jurisdictions in the Asia-Pacific region, and to jurisdictions outside of it as well. In this context, the influence of *Goff & Jones* (in all its editions) on the jurisprudence of Hong Kong SAR, Malaysia and Singapore is more than palpable. The common

127. *Ching Mun Fong v Liu Cho Chit* [2000] 3 SLR(R) 304, [73]; *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 856, [27]; *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559.

128. *Neo Kok Eng v Yeow Chern Lean* [2008] SGHC 151, [129]. *Cf Chesworth v Farrer* [1967] 1 QB 407.

129. *Walker v Witter* (1778) 1 Dougl 4; 99 ER 1.

130. *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129, [49–53].

131. [2012] 4 SLR 231.

132. *Ibid*, [41].

133. *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200, [41]. This case decided that the equitable doctrine of laches could not apply to a claim on a debt at common law where no equitable remedy was sought. This is conceptually at odds with the laches reasoning in *De Beers* [2002] 1 SLR(R) 418, but distinguishable on the basis that there was no statutory gap in this case.

134. This problem has been the subject of long-running local commentary: (2002) 3 SAL Ann Rev 345, [19.42–19.47]; (2004) 5 SAL Ann Rev 436, [19.20–19.26]; (2008) 9 SAL Ann Rev 434, [20.47]; (2009) 10 SAL Ann Rev 433, [21.60–21.62]; (2012) 13 SAL Ann Rev 407, [22.27–22.30]; (2013) 22 SAL Ann Rev 466, [22.59–22.61].

135. A Phang, "The Law of Remedies: The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746, [7].

136. *Ibid*, [8].

point in the major debates discussed in this article is that *Goff & Jones* has featured more or less prominently in all of them. More often than not, the propositions in the revered tome have been followed by the courts. Sometimes they are not. But even in these grey areas, the book has provided great value in provoking debate about the shape and direction of the subject.