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Unjust enrichment in Asia Pacific

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(Brunei, Hong Kong, Malaysia and Singapore)

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CASES

1. ***Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd*** [2018] SGCA 2; [2018] 1 SLR 239 (Sing CA: S Menon CJ, A Phang JA and J Prakash JA); rvsg in part [2016] SGHC 281 (Sing HC: A Abdullah JC); [2018] RLR §1

Advance payment—failure of consideration

D held the Singapore master dealership rights for Lorinser cars, which were manufactured by Daimler AG. While P and D were negotiating an exclusive sub-dealership agreement for the Lorinser cars, P ordered a batch of cars with/through D and made an advance payment in respect of that order. The payment was made after P had received a copy of the draft agreement to be entered between D and Lorinser. It was intended that the exclusive sub-dealership agreement between P and D would be on substantially the same terms. The exclusive sub-dealership agreement was not ultimately concluded. P claimed for the recovery of the advance payment in unjust enrichment, on the basis of failure of consideration. The High Court allowed the claim. D appealed the decision.

Decision: The appeal was allowed in part. The unjust enrichment claim was unsuccessful. (1) The advance payment was made not to show good faith and seriousness, but to avoid delay in the supply of cars which P ordered. On the evidence, Daimler AG would not commence manufacturing until the required deposit was paid, but neither Lorinser nor D was willing to put up the funds first. Based on the evidence, P knew of the purpose for which the advance payment was made. (2) The implied basis of the payment was that D would offer P the exclusive sub-dealership agreement on terms which would materially correspond to the draft agreement between D and Lorinser. (3) The basis did not fail because it was P who refused to move forward with the exclusive sub-dealership agreement as it did not agree to provide the required standby letter of credit.

Held: (1) The basis must be determined objectively based on the communications exchanged between the parties. Subjective thoughts of the parties which had not been communicated would be disregarded. (2) Implication of basis must be derived on objective features of the transfer and its context, as opposed to being based on merely a fortuitous overlap between the parties' unexpressed expectations.

* Associate Professor, Singapore Management University. I am immensely indebted to Associate Professor Rebecca Lee, Faculty of Law, University of Hong Kong, for her assistance with the Hong Kong materials.

Dicta: (1) There may be more than one basis to a transfer. (2) The possibility of accepting partial failure of consideration under Singapore law is not foreclosed.

2. *Grupo Pacifica Incorporada v Worldwide Marine Product Ltd* [2018] HKCFI 1930; [2018] HKEC 2787 (HK CFI: Recorder Houghton SC)

Recovery of money paid pursuant to fraud—change of position defence—change of position made by third parties—ministerial receipt

P contracted to purchase a ship from a Korean seller. Both P and the seller acted through their agents. Full purchase price was made to the seller's agent but the ship was not delivered to P. Pursuant to P's demand for return of the purchase price, it received from the seller's agent a bundle of documents which included a notice purportedly sent by P to the seller's agent instructing the latter to pay over the money to D1 and D2 at their respective accounts with D3 and D4. A sum of US$449,963.60 was paid into D1's account, and the transfer was not disputed by D1. P alleged that the signature on the notice was forged. P claimed in unjust enrichment against D1, alleging that the money was held for it by D1 on a constructive trust.

D1 argued that it was entitled to the defence of change of position and the defence of ministerial receipt. It said that it was an innocent recipient and that it had no knowledge of P or the alleged fraud. On D1's account, it was running a seafood wholesale trading business for a PRC Company (T), and it facilitated T's receipt of funds and settlement of payments with customers and suppliers in foreign currency. It said that T had agreed to a company (W)'s request to receive on its behalf a payment in US currency, to be paid to W in China in RMB and it was further agreed that the sum in US dollars would be remitted to D1's account in Hong Kong. It was in these circumstances that D1 received US$449,963.60 into its account from the seller's agent and this sum had been disbursed by way of three payments in China and one payment in Hong Kong the next day. The transaction was unusual as the four subsequent disbursements, on W's instructions, were made to three individuals' accounts. There was also a return of an overpayment to the seller's agent, on W's advice. The case was complicated by the uncertainty of which were the receiving and paying parties. The payments in China were transferred from accounts in the names of two employees of T. There was no payment into or out of T's account. As a matter of book-keeping, the payments received in Hong Kong and the payments made in China balanced. D1 claimed that the disbursements in China were causally linked to the receipt of money into its own account in Hong Kong and that the accounts in the name of T's employees were beneficially owned by T.

Decision: P's claim was allowed. D1 failed in establishing the defences put forward. (1) The change of position defence failed, as the relevant change of position was made by others and not D1. D1 could not simply adopt transactions made in China: D1, T and T's employees are to be treated as separate legal entities. Common beneficial ownership did not entitle T/D1 to disregard the corporate personality of T. It was not established that D1's account was beneficially owned by T. In any event, the alleged change of position could be easily reversed on the facts of the case, because the notional set-off between D1 and T, as well as the transaction between T and W, could be readily reversed. Further, D1

had not acted in good faith, as it had not acted in a commercially acceptable manner. D1 chose to act as a money exchange service in respect of a substantial amount of money without carrying out any form of due diligence investigation as to why it was asked to provide such a service, the source of the funds, or the underlying basis of the transaction. (2) The ministerial receipt defence failed because D1 failed to plead as well as establish on the evidence that it was an agent for another or that it had an obligation to account. In any event, the defence would not be available as the illegitimate transaction could have been reversed and the supposed obligation to account avoided.

Held: (1) For the change of position to succeed, the relevant change of position must be made by the defendant, and not third parties. Adoption of transactions involving others (and not the defendant) by the defendant is generally not permissible. (2) Common beneficial ownership in the accounts does not entitle the beneficial owner to disregard the separate corporate personality of the company. (3) To show lack of good faith in respect of the operation of the defence of change of position, it is sufficient to show that the defendant has failed to act in a commercially acceptable way (*Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] 1 Lloyd's Rep 344; [2004] QB 985 followed). (4) The defence of ministerial receipt may be established on showing the defendant has acted as an agent for another and to whom he has an obligation to account.

Comment: Although the Hong Kong court acknowledged that P needed to show that D1's enrichment at its expense was *unjust*, there was no discussion as to what was the applicable unjust factor.

3. ***Lim Kim Huat v Datuk Johari Abdul Ghani and Azlan Bin Ahmad; Pauline Soo Wei Ling (third party)*** [2018] 1 LNS 1360 (Mal HC: F Jamaludin JC)

Misapplication of corporate assets—absence of basis

P and a company ("the Company") entered into a trust arrangement that the Company would hold its interests in various properties (purchased from DBKL) on trust for P. Following a sale and purchase agreement entered into between the shareholders of the Company and D1, D1 caused the shares of the Company to be transferred to him and D2 and they were both appointed as directors of the Company. Shortly after one of the two shareholders of the Company passed away, D1 and D2 gained full control over the Company and thereafter assigned and novated the Company's rights and interests in the properties to another company (I). D1 and D2 then proceeded to cause the Company to transfer all its shares to a corporate entity (J) owned by D1 and his wife. Through his shareholding in J, after the share transfer, D1 received the benefit of the proceeds of the assignment/novation, which comprised a novation fee and an amount equivalent to the 10% deposit which the Company had paid to DBKL for the purchase of properties. Further, D1 and D2 dishonestly caused the amount which D1 had paid for the Company's shares to be stated as a sum that was owed to a company director in the Company's audited accounts, which resulted in the same sum being paid out by the Company to D1. Subsequent to the transfer of all the shares in the Company to J, D1 and D2 caused the Company to be struck off the companies register. P brought various claims against D1 and D2, including a claim in

unjust enrichment and a claim for knowingly procuring/inducing a breach of duties on the part of the Company.

Decision: (1) D1 was liable for having been unjustly enriched at P's expense; but the claim against D2 failed. There was an absence of basis for D1 to receive the proceeds of the assignment and novation of the properties. (2) Both D1 and D2 were found liable for knowingly induced, procured and/or caused the Company to breach its trust and fiduciary duties to P. Following the Privy Council decision in *Royal Brunei Airlines Sdn v Tan* [1995] 3 MLJ 74; [1995] 2 AC 378, D1 and D2 were constructive trustees for P of the proceeds of the assignment and novation of the Company's interests in the properties.

Held: (1) Malaysian law applies the "absence of basis" approach, instead of the unjust factors approach under English law, following the Federal Court's decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453. (2) It is settled law that, if a fiduciary, in breach of his/her fiduciary duty, obtains a benefit for himself/herself at the expense of the beneficiary, it is a case of unjust enrichment. In this regard, the law does not distinguish between a fiduciary who is dishonest and one who is not.

4. ***Novaviro Technology Sdn Bhd v QL Plantation Sdn Bhd; Watermech Engineering Sdn Bhd (third party)*** [2018] 7 CLJ 119 (Mal HC: Wong KK JC)

Limitation period—Limitation Act 1953, s.6(6)

P entered into a joint venture arrangement with a third-party company and shared confidential information regarding a system to which P held an exclusive licence (the "System"). However, the joint venture was terminated. P subsequently submitted a proposal to D to design, build and commission a power plant which D wished to build based on the System. D also received a proposal from a third party which it accepted as it was a lower bid than P's proposal. P claimed that the third party was in breach of confidence, having misused confidential information which P shared with it previously whilst the joint venture arrangement was on foot. P sued D for having been unjustly enriched by reason of their misuse of the confidential information belonging to P when the power plant was launched into operation. D applied to strike out the claim, alleging, amongst other issues, that the unjust enrichment claim was time barred.

The Limitation Act 1953, s.6(6) provides:

"*Limitation of actions of contract and tort and certain other actions*

6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

…

6(6) Subject to the provisions of section 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract and for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity."

Decision: The claim in unjust enrichment was time barred under the Limitation Act 1953, s.6(6). The cause of action accrued on 30 April 2010, when the defendant retained the benefit of the confidential information, that is, when they first used the confidential

information in the construction of the power plant. The action was thus time barred on 1 May 2016.

Held: (1) A cause of action in unjust enrichment is a claim for "equitable relief" under the Limitation Act 1953, s.6(6). A six-year limitation period applies to unjust enrichment claims. (2) A cause of action in unjust enrichment accrued when a defendant retained the enrichment. Despite the differences in wording between the Limitation Act 1953, s.6(6) and the Limitation Act 1980 (UK), English cases (*Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681; *Michael Agapios Diamandis v Sir David Seton Wills* [2015] EWHC 312) on when a cause of action for unjust enrichment accrues are followed. This is because the Malaysian Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 has followed English cases in recognising a cause of action in unjust enrichment.

5. *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)* [2018] SGCA 5; [2018] 1 SLR 363 (Sing CA: S Menon CJ, A Phang JA, J Prakash JA, Tay YK JA and S Chong JA); affg [2017] SGHC 56; [2018] 3 SLR 617 (Sing HC: A Lim JC)

*Illegality—reliance principle—stultification—*locus poenitentiae *principle*

The dispute arose from a series of agreements between P and D that were on the face of the documents concerned with P investing in D's business, through the provision of "loans". These "loans", according to the agreements, were to be repaid at a later specified date with a "profit". The agreements were supported by tax invoices issued by D stating the kind, quantity and price of goods to which they related. P and D conceded that the agreements were not "entirely proper" and that the tax invoices were fabricated documents which did not relate to genuine transactions performed by D. P claimed against D on a number of bases, including contract and, alternatively, in unjust enrichment. The High Court found that the agreements were unenforceable for being in contravention of the Moneylenders Act (Cap 188, 1985 Rev Edn), as the agreements were in substance loan agreements and P were unlicensed moneylenders. The High Court also dismissed P's claim in unjust enrichment. P appealed.

Decision: The appeal was dismissed. (1) The Court of Appeal, agreeing with the High Court, found that the agreements were unenforceable for being in contravention of the Moneylenders Act. (2) The elements of the unjust enrichment were established. The applicable unjust factor was failure of consideration. (3) However, the unjust enrichment was barred by the principle of stultification. This is because allowing the recovery of the principal sums transferred under the illegal contracts would undermine the fundamental social and public policy against unlicensed moneylending which undergirds the Moneylenders Act.

Held: (1) The "range of factors" approach in *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2017] AC 467 was not followed, as it would introduce unprincipled discretion and uncertainty and is unnecessary to achieve remedial justice. (2) In respect of contractual illegality, a two-stage approach would apply. Under the first stage, the issue is whether the contract is prohibited. Where the contract is prohibited by statute (expressly or impliedly) or is found to be illegal at common law, benefits transferred under the contract

cannot be recovered in contract law. At the second stage, the issue is whether a non-contractual claim to recover the benefits transferred under the contract is an independent claim, that is, it does not substantively rely on the underlying contractual illegality. (3) The formal/technical application of the reliance principle in *Tinsley v Milligan* [1994] 1 AC 340 was rejected. (4) Whether an unjust enrichment claim is defeated by the illegality defence is to be determined based on the stultification principle. The question is whether allowing the claim in unjust enrichment would undermine the fundamental policy of rendering the underlying contract void and unenforceable. (5) The *Ochroid* approach confines the exercise of discretion to stage one and only in relation to the category of contracts that are illegal at common law.

Obiter: (1) In relation to an independent proprietary claim in tort law or in the law of the trusts, if the technical reliance approach in *Tinsley v Milligan* is not to be followed, the court may bar the independent proprietary claim by applying the principle of stultification. (2) In relation to the "not *in pari delicto*" principle, it would apply to situations such as class protection statutes; fraud, duress or oppression; and where the transaction was entered into as a result of mistake. The stultification principle would be inapplicable in situations where the "not *in pari delicto*" principle applies, as awarding restitution to a less blameworthy plaintiff would not undermine the fundamental policy of the law. In some cases, awarding restitution may in fact further the fundamental policy of the law. (3) In applying the "not *in pari delicto*" principle, the court does not engage in a broad examination of the relative blameworthiness of each party. (4) In relation to the *locus poenitentiae* exception, a narrow account of the exception that is rooted in moral merit is favoured—as such, withdrawal must be penitent or voluntary. Such an application would be consistent with the policy of encouraging people to withdraw from their illegal activities. Moreover, it is only in such situations that an award of restitution would not conflict with the stultification principle.

Comment: (1) In cases where the underlying illegality does not relate to contract, it appears that the outcome would depend solely on the application of the principle of stultification. (2) It remains to be seen whether Singapore law will develop a uniform approach to illegality in private law. Although the court does not give a firm indication that it would depart from the technical reliance rule in the proprietary context, there appears to be no good reason why the rule should be abolished in the contractual context but retained in the other contexts.

6. *Tin Wan Tung v Wong See Yin* [2018] HKCFI 1143; [2018] HKEC 1333 (HK CFI: W Chan J)

Transfer of real property pursuant to fraudulent misrepresentations—failure of consideration—proprietary restitution

D1 had represented to Ps that he would set up an asset management company which would be listed on the Singapore Stock Exchange and that this asset management company would in turn help Ps to obtain financing for their construction projects in the PRC and Hong Kong. D1 told Ps that they could invest in the asset management company by injecting

their real properties into the company, while retaining a right to live in these properties free of rent. Pursuant to these misrepresentations, Ps transferred two real properties to companies (D3) owned and controlled by D1, without having received any consideration. D1 was also the director of D3. D1 used the two properties as security to obtain mortgage loans from a bank. Under pressure from D1, Ps also signed a tenancy agreement in respect of each property on the understanding that these agreements were required for complying with accounting requirements in order that D1 and D3 could more easily obtain finance for the construction projects. However, D3 later claimed to be the owner of the properties and demanded rent from Ps. Ps brought a number of claims against D1 and D3, including a claim in unjust enrichment, alleging that D1 and D3 had been unjustly enriched by the receipt of the two properties.

Decision: Ps' unjust enrichment claim was allowed. The properties were thus held on a resulting trust for Ps. (1) D1's representations to Ps were fraudulently made. (2) As such, the consideration for Ps' transfer of properties to D3 had failed totally.

Held: (1) "Consideration" in the context of an unjust enrichment claim refers to the anticipated performance for which the benefit was transferred from the plaintiff to the defendant (*Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79 followed). (2) Where total failure of consideration is relied upon as the unjust factor for the claim, the transaction which provides the basis for the defendant's enrichment must be correctly identified and characterised in order that the relevant anticipated performance and its failure may be determined. (3) In the law of unjust enrichment, the usual consideration which fails is the promised counter-performance.

Obiter: There are three advantages of proprietary restitutionary claims. First, they may lie against an innocent recipient of the property, even if no other personal claims could be brought against him/her. Second, in the event of the recipient's insolvency, subject to statutory requirements in certain cases, the true owner may claim the property *in specie*. Third, the true owner may trace his assets into interest bearing investments and claim the interest in addition.

7. *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44; [2018] 2 SLR 655 (Sing CA: S Menon CJ, A Phang JA, J Prakash JA, Tay YK JA and S Chong JA); noted Fee [2019] LMCLQ 500; Lau [2019] LMCLQ 508; Yip and See (2019) 135 LQR 36

Wrotham Park *damages—restitutionary or compensatory in nature*

P and D were involved in a joint venture project to develop land that was subject to a state lease granted to D. Under the project, D would grant subleases to the joint venture companies, which would in turn let the premises out for income. A shareholder dispute subsequently arose between the parties while the site was being developed, but this was eventually settled. The parties' settlement agreement was recorded in a consent order and it provided for a bidding process, pursuant to which the higher bidder would buy over the lower bidder's shares. The parties behind the lower bid would also resign as directors. The point of this process was to facilitate a clean break between the parties. However,

before the bidding exercise took place, the defendants, on obtaining a renewal of the state lease, refused to grant corresponding subleases to the joint venture companies as they previously did. This development led to a substantial diminution of the companies' share value, thereby frustrating the bidding exercise.

P brought a number of claims against D, including a claim for breach of contract. In an earlier Court of Appeal decision (*Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12), it was found that D had committed repudiatory breach of contract. The second appeal thus focused on, amongst other issues, the question of what remedy should be awarded for the contractual breaches. The parties focused on the nature and applicability of an award of *Wrotham Park* damages (named after *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798), as well as a disgorgement award, as they were in agreement that it would be difficult to quantify the financial loss caused by the contractual breaches.

Decision: An award of *Wrotham Park* damages was denied. P was not able to show that there was a remedial lacuna in the case to justify an award of *Wrotham Park* damages; further, the hypothetical bargain, the measure of the *Wrotham Park* damages, would defeat the very purpose of the parties' settlement. On the evidence, the Court was satisfied that P had suffered some form of financial loss as a result of the frustration of the bidding process. P had lost business profits less the purchase price of the lower bidder's shares if they had emerged as the higher bidder; if they were the lower bidder, they had lost a reasonable price for their shares. Orthodox compensatory damages were thus awarded, assessed by reference to the value of the plaintiffs' shares prior to the breach with the addition of a 15% premium to reflect their expectation loss.

Held: (1) A compensatory account of *Wrotham Park* damages was affirmed. An award of *Wrotham Park* damages measures the plaintiff's compensation by reference to the defendant's gain but the rationale of the award is not based on the goals of punishment and deterrence. The goal of punishment is generally inconsistent with the law of contract. A *Wrotham Park* award is ordered to compensate for the loss of the performance interest. (2) A restitutionary account of *Wrotham Park* damages was rejected. (3) An award of *Wrotham Park* damages must be distinguished from an award of disgorgement of profits for breach of contract (see *A-G v Blake* [2001] 1 AC 268). (3) To be entitled to an award of *Wrotham Park* damages for breach of contract, three requirements must be satisfied. First, *Wrotham Park* damages would be ordered only if there is a "remedial lacuna"—that is, where the plaintiff has suffered no financial loss for which orthodox compensation may be awarded and specific relief is unavailable on the facts of the case. Second, as a general rule, a breach of negative covenant must be established. Third, the hypothetical bargain, on which the award is measured, must not be one that is irrational or unrealistic for parties to make. (4) Declined to follow the approach laid down by the UK Supreme Court in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2018] 1 Lloyd's Rep 495; [2018] 2 WLR 1353. The English limiting criterion of requiring that the breach of contract result in a loss of an economically valuable asset created or protected by that contractual right was considered to be too uncertain.

Obiter: (1) The chief difficulty with recognising *A-G v Blake* damages as part of Singapore law is the uncertain legal criteria relating to their availability. The concept

of "legitimate interest" is too general and perhaps even vague. (2) It may be possible to rationalise *A-G v Blake* damages as an exceptional remedy and confined to cases where the law has a legitimate basis—upholding public interest/governmental interest that goes beyond the private interests—for punishing the defendant and/or deterring the non-performance of the contractual obligation. Alternatively, *A-G v Blake* may be reinterpreted as a case of awarding an account of profits for breaching an obligation akin to a fiduciary duty.

ARTICLES

8. Leow, R, "Enforcing Unjust Enrichment Rights: The Recovery of Mistaken Payments in Practice" [2018] Sing JLS 22.

It is well established under Singapore law that a mistaken payor may recover his/her mistaken payment by bringing a claim in unjust enrichment. However, the enforcement of the mistaken payor's rights in practice is not as straightforward, owing to privacy laws in the banking sector. The article considers the recoverability of mistaken payments made by bank transfer in practice in Singapore and argues for a simpler and cheaper way for mistaken payors to enforce their unjust enrichment rights. In essence, to improve access to justice, the article argues for expanding the Small Claims Tribunal's jurisdiction to encompass such claims.

9. Loh, JKH, "Disgorgement Damages for Breach of Contracts: Something New?" [2017] 1 Legal Network Series (A) lxxi.

This article analyses the disgorgement awards against the wider remedial framework under contract law. Although such awards appear at first sight to be inconsistent with the goals of contractual remedies, the article argues that the notion of contractual performance shows that the disgorgement award is consistent with corrective justice. It argues that disgorgement damages for breach of contract are also consistent with the goal of vindicating a plaintiff's right to contractual performance. It follows that such awards encourage performance of contracts at a broader societal level and are therefore consistent with the principles of corrective justice.

10. Rotherham, C, "Morally Blameless Wrongdoers and the Change of Position Defence" (2018) 30 Sing Acad LJ 149.

This article argues that morally blameless defendants who have committed strict liability torts should be allowed to raise the defence of change of position against plaintiffs who are claiming for *Wrotham Park* damages (named after *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798). In order for this argument to prevail, the article acknowledges that such damages must be characterised as gain-based in nature, as

opposed to being compensatory (which is the currently favoured account by Singapore and English courts). The article further qualifies its proposal by limiting the availability of the defence to defendants who have changed their circumstances, whether carelessly or not, in such a way that they derived no net enrichment by reason of their wrong. According to the article, defendants who have altered their circumstances by dissipating wealth for their own benefit should not be allowed to invoke the defence if they had acted carelessly. This marks a distinction in the application of the change of position defence in the context of restitution for wrongs from its application in the context of subtractive unjust enrichment.

OTHER

11. Loke, A (Professor, City University of Hong Kong School of Law), "Disagreement over the Illegality Defence in Private Law Claims: Contrasting Approaches and Shifting Values"

HKU-SMU Asian Private Law Workshop 2018, 17–18 May 2018, Singapore Management University School of Law

The rationalisation of the analytical framework for the illegality defence in private law is always bound to be controversial. The majority decision of the UK Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2017] AC 467 sought to replace the longstanding rule-based approach to illegality with a more flexible "range-of-factors" approach. Such a radical root-and-branch rethinking of how one should approach the illegality defence in private law claims up-ends the traditional approach and implicates the bounds of the judicial function. In January 2018, the Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui* (*ante*, § 5) unequivocally repudiated *Patel v Mirza*. The Singapore approach seeks to prune the unsatisfactory reliance principle by reconceptualising it. While it signals a radical return to the roots of the repentance principle, it also embraces the approach advocated by Birks, that an analysis of illegality in unjust enrichment claims should be underpinned by the stultification principle. This paper compares the UK and Singapore approaches and considers the claims of certainty as well as the controversy over "judicial discretion" in dealing with public policy concerns. It discusses the limits to the certainty that the stultification principle or an analytical framework can provide, and proposes that, at its core, a fair and discerning application of the illegality defence necessarily involves the resolution of public policy concerns which can pull in different directions.