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Restitution of mistakenly transferred bitcoins

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RESTITUTION OF MISTAKENLY TRANSFERRED BITCOINS

Ong v LUNO and BitX

1. Introduction

The first Malaysian judgment of precedential value relating to the recovery of mistakenly transferred cryptocurrency, *Robert Ong Thien Cheng v LUNO Pte Ltd and BitX Malaysia Sdn Bhd*,[1] is uncharacteristically short but raises important issues in the law of unjust enrichment. Even within the Commonwealth, this is the first reported case involving an unjust enrichment claim to recover mistakenly transferred cryptoassets.[2]

In short, *Ong* was a modern replay of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*[3] involving a mistaken transfer of Bitcoins ("BTC"). The claimant cryptocurrency exchange, LUNO, made a second mistaken transfer of 11.3 BTC to an electronic wallet of the defendant, Robert Ong, after having already made a transfer on the same day. LUNO informed Ong of the mistaken transfer the next day. Ong acknowledged his liability to return the additional Bitcoins received and offered, about a month after the transfer, to pay LUNO RM300,000 for the additional Bitcoins. LUNO rejected this offer on the basis that the value of Bitcoins fluctuated from day to day.

LUNO commenced proceedings against Ong to seek proprietary restitution of the Bitcoins, relying on the Malaysian Contracts Act 1950, s.73[4] which states: "A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it".[5] The High Court of Malaysia upheld the decision of the Sessions Court in ordering the return of the 11.3 BTC.[6] Although the crux of the appeal concerned statutory interpretation, the decision does raise issues of general importance within the law of unjust enrichment. This commentary discusses two main issues: first, whether BTC is a thing, a question that cuts across statutory interpretation as well as the common law concept of "property"; and second, the availability of proprietary restitution.

1. [2021] 3 All Malaysia Rep 143.

2. The earlier Singapore case of *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03; [2019] 4 SLR 17; [2020] SGCA(I) 02; [2020] 2 SLR 20, although also addressing the topic of mistake, does so principally in the context of contract law. The unjust enrichment claim was mounted by the defendant as a defence, the argument being that the defendant was entitled to cancel the trades entered into as a result of a system glitch because the claimant would otherwise be unjustly enriched at the expense of the counterparties to the trading contracts and/or the defendant. The claim failed before both the Singapore International Commercial Court and the Court of Appeal.

3. [1981] Ch 105.

4. The law of unjust enrichment in Malaysia is found both in the Contracts Act 1950 (see, in particular, ss 69–73) and in case law (see, notably, *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441). See generally Alvin W-L See, "Introduction to the Law of Unjust Enrichment" (2013) 5 MLJ i.

5. Malaysia's Contracts Act 1950, s.73 is *in pari materia* with the Indian Contract Act 1872, s.72. The same piece of legislation has also been adopted in Bangladesh, Brunei, Myanmar, Pakistan, and Tanzania, thus governing almost a quarter of the world's population.

6. The High Court of Malaysia also upheld the lower court's decision to reject Ong's counterclaim for the tort of unlawful interference of trade. This commentary focuses only on the unjust enrichment claim under the Contracts Act 1950, s.73.

2. Is bitcoin a "thing"?

The defendant argued that the term "anything" in s.73 covers only tangible things, thus excluding cryptocurrencies, which exist only in the virtual world in the form of unique data strings. These data strings, also known as Unspent Transaction Output, are locked onto a user's public address and controlled through an electronic wallet. Certainly, considering that the provision was derived from the Indian Contract Act 1872, its drafters could never have imagined the advent of virtual assets such as cryptocurrencies. The problem with the defendant's argument, however, is that it assumes that the statutory meaning is fixed and frozen at the time of enactment. As the High Court rightly recognised, the statute "ought to be construed to reflect changes in modern technology and commerce".[7] Indeed, there have been extreme examples, in India, where the equivalent restitutionary provision was broadly construed to incorporate a change of position defence even though the statutory wording is silent on this point.[8] Similarly, English courts recognise that contemporary ideas and developments would influence statutory interpretation.[9]

Returning to *Ong*, it is suggested that interpreting the Contracts Act 1950, s.73 to encompass both tangible and intangible things would not require departing from its statutory purpose or the original parliamentary intention, for two related reasons.

The first reason is that the common law has long recognised at least two forms of personal property: thing in possession and thing in action.[10] There is nothing to suggest that the drafters intended the statutory meaning of "anything" to be narrower than under the common law. In fact, s.73 has been applied to allow restitution in cases of mistaken bank transfers, which do not involve any movement of physical money.[11] Although the courts have not always distinguished between mistaken transfer of money in a bank account and physical money in their legal analysis and conveniently assume the subject matter in both situations to be simply "money", there are important differences between the two. Unlike physical money, money in a bank account is more accurately characterised as a thing in action, specifically a contractual right of a customer to demand payment from his or her bank.[12] That being the case, the court may well consider both scenarios to fall within the meaning of "money" instead of "anything" under s.73. The same simplistic analysis is harder to apply in respect of Bitcoins, which are clearly not "money".[13] Moreover, as

7. [2021] 3 All Malaysia Rep 143, [16].
8. *Sales Tax Officer, Banaras v Kanhaiya Lal Mukundlal Saraf* (1959) AIR SC 135.
9. For example, in *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3; [2011] 1 WLR 433, [24–29], Lady Hale said that the definition of the term "violence" in the Housing Act 1996 has "moved on" with the times, and is therefore to be interpreted differently from the meaning as intended at the time of the drafting of the legislation. "Violence", on Lady Hale's progressive interpretation, would thus extend beyond physical violence. Lady Hale had, crucially, relied on the more expansive definition of the term used by national and international bodies and documents to support her conclusion.
10. *Colonial Bank v Whinney* (1885) 30 Ch D 261 (CA); *Ryall v Rolle* (1749) 1 Wilson KB 260. See also William Blackstone, *Commentaries on the Laws of England*, Book II (Oxford, 1768), 389.
11. See eg *Malayan Banking Bhd & Maybank Islamic Bhd v Noor Hazaini bin Yahya* [2018] 1 LNS 2159; *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364; *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787; *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262. See also Andrew Burrows, *The Law of Restitution*, 3rd edn (Oxford, 2011), 45, who said that money in a bank account "is as important in the law of unjust enrichment as money in the form of cash".
12. *Foley v Hill* (1848) HLC 28.
13. [2021] 3 All Malaysia Rep 143, [12].

Bitcoins exist in a decentralised blockchain, there is no equivalent of a bank against which a contractual right can be asserted. Although it may be possible to also classify Bitcoins as things in action by adopting a broad definition of this category, this is not without controversy.[14] In any event, it is not meaningful to ask in the abstract whether Bitcoins are property, as there is no universally accepted definition of property to begin with.[15] The more sensible approach is to address the legal characterisation of Bitcoins within specific contexts.[16] In the context of s.73, we suggest that the better question to ask is whether Bitcoin is an asset that should be accorded protection under the provision in view of its statutory purpose.

This brings us to our second argument. The restitutionary provisions in the Contracts Act 1950, including s.73, are premised on the principle of unjust enrichment.[17] Accordingly, the meaning and operation of s.73 should be informed by common law developments of the principle.[18] It is well established that the law of unjust enrichment focuses on the transfer of value from the claimant to the defendant.[19] As Professor Birks explained, "[e]nrichment received is the generalisation of money received".[20] Although proprietary restitution (discussed below) is available in some circumstances, it is important to recognise that claimants are "most commonly awarded" personal restitution, and hence the general focus on monetary value.[21] While the transfer of a specific thing necessarily entails the transfer of value, the converse is not true. Consider the case of an interbank transfer from Alice to Bob. The transfer works by simultaneous extinction (or reduction) of the debt owed to Alice by her bank and the creation of a new debt owed to Bob by his bank.[22] What Bob acquired is not exactly what Alice had, but no doubt there is a transfer of value from Alice to Bob. The decrease in value of Alice's contractual right against her bank is matched by a corresponding increase in value of Bob's contractual right against his bank. What matters, for the law of unjust enrichment, is the direct connection between the two events. In this sense, Bob has been directly enriched at Alice's expense.

Transfer of cryptocurrency operates in a similar way.[23] Suppose Alice mistakenly sends 1 BTC to Bob. What happens is that the original data string representing 1 BTC ("1 BTC_A") remains on record but is now worthless because the system will now indicate, through an accompanying icon, that it has been spent. At the same time, Bob's public address records a new data string representing 1 unspent BTC. The crucial point is that Bob has acquired

14. See discussion in the next section.
15. Jeremiah Lau, "That New Chestnut—The Proprietary Status of Bitcoins" [2020] LMCLQ 378, 383.
16. *Ibid*, 384.
17. *Bumiputra-Commerce Bank v Bhd v Siti Fatimah Mohd Zain* [2011] 2 CLJ 545.
18. Alvin W-L 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; c*f* Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia* (Petaling Jaya, 2015), 218–223.
19. Burrows, *The Law of Restitution*, 3rd edn (2011), 66; Graham Virgo, *Principles of the Law of Restitution*, 3rd edn (Oxford, 2015), 62–63.
20. Peter Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), 50.
21. Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London, 2016), [37.01].
22. See *R v Preddy* [1996] AC 815 (HL). It would be inaccurate to view the transfer as an assignment of the same contractual debt from Alice to Bob.
23. David Fox, "Cryptocurrencies in the Common Law of Property" in David Fox and Sarah Green (eds), *Cryptocurrencies in Public and Private Law* (Oxford, 2019), ch.6, 144–145 and 158; UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (November 2019), [45–47].

something new: 1 BTC_B. However, as explained, even though no specific thing has been physically transferred from Alice to Bob, in terms of value Bob has been directly enriched at Alice's expense.[24] This would be sufficient to establish a cause of action in unjust enrichment. As the Malaysian High Court rightly recognised, Bitcoins are a commodity with monetary value.[25] The court also rightly disregarded the defendant's reference to the tort of conversion as applying only to chattels. Indeed, the fact that property torts such as conversion and detinue operate by following the same thing from one person to another is a separate issue altogether. These claims are distinct from a claim in unjust enrichment.

3. Proprietary restitution

The word "restitution" does not appear anywhere in the Contracts Act 1950, probably because the term had yet to gain currency in legal usage during the mid-nineteenth century. Instead, s.73 uses the terminology of "repay or return". Naturally there is also no express reference to the distinction between personal and proprietary restitution, the latter being a fiendishly difficult topic in the law of unjust enrichment.[26] Yet, the High Court upheld the lower court's decision to impose a constructive trust over the 11.3 BTC in the defendant's hands. Although there was neither an issue of the defendant's insolvency nor the existence of a more valuable traceable substitute, the decision was significant in sidestepping a potential problem with quantification owing to the fluctuating value of Bitcoins. If the claimant were confined to claiming personal restitution, the valuation of the enrichment is to be undertaken at the time of its receipt by the defendant.[27] On the specific facts of the case, the rule would operate to the claimant's disadvantage. Based on historical data, the price of 1 BTC was US$6339.9 when the mistaken transfer happened (1 November 2017), $7024.8 when the defendant was informed of the mistaken transfer (2 November 2017), US$6650.8 when the lower court decision was delivered (9 October 2018) and $9594.4 on the date of the High Court's judgment (31 August 2019). The continued fluctuation of the value of this new asset type accentuates a key advantage of proprietary restitution outside the context of insolvency and tracing.[28]

Although the lower court appeared to have based its decision to impose a constructive trust on general principles of law and equity,[29] the Malaysian High Court sought to justify the outcome by reference to the word "return" used in s.73.[30] Indeed, the word "return" connotes specific restitution. In contrast, the word "repay" appears to be more neutral, as it

24. Different commentators have different views on the meaning of "at the expense of": a correspondence of loss and gain; a causal connection, etc. Under current English law, the requirement is a direct transfer: see *Investment Trust Companies (In Liquidation) v HMRC* [2017] UKSC 29; [2018] AC 275; noted Andrew Burrows, "Narrowing the scope of unjust enrichment" (2017) 133 LQR 537.

25. [2021] 3 All Malaysia Rep 143, [15].

26. The availability of proprietary restitution, the limits on proprietary remedies and the form of the remedy remain hotly contested issues. See generally *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (2016), ch.37. See also Andrew Burrows, "Proprietary restitution: unmasking unjust enrichment" (2001) 117 LQR 412.

27. *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, [14].

28. BTC suffered a brutal price crash in May 2021: see www.bloomberg.com/news/articles/2021-06-03/crypto-crash-aftershocks-hit-traders-with-50-premiums-vanishing.

29. The judgment of the lower court was unreported.

30. [2021] 3 All Malaysia Rep 143, [17].

is possible to repay in monetary terms, ie from a different source. However, is a court order to return the 11.3 BTC to the claimant conceptually the same as an award of a constructive trust over the 11.3 BTC in the claimant's favour? That the right to restitution is created by statute means that the court could make an order for the reconveyance of the thing without relying on general law concepts, such as the constructive trust. In fact, there is no explicit reference to a trust anywhere within the Contracts Act 1950. There is, nevertheless, an interpretative presumption that principles of equity will continue to apply,[31] and indeed there is nothing either within the legislation or during its legislative debate to indicate that such principles were to be excluded.[32] It may well be that, given its emphasis on the language of "return", the High Court did not regard the lower court's reference to a constructive trust to be different from a simple order to return.[33] However, it is important to recognise that the reference to a constructive trust, if seriously intended as a different kind of relief, could have important implications. In the case of an order to convey, which does not involve any trust, the thing does not become the claimant's until the order has been made. In contrast, if the court is merely declaring that a constructive trust has arisen in response to certain facts, the thing is beneficially the claimant's when those facts happen. The practical implication, which was untested in the present case, is best illustrated in a situation where the defendant becomes insolvent between the complained event and the judgment date. Only a constructive trust could give the claimant priority over the defendant's unsecured creditors.

Even assuming that a constructive trust can be accommodated within s.73, there is a further question whether it ought to be imposed in response to mistake alone. In this regard, it would be difficult to ignore existing Commonwealth authorities which take the view that mistake alone does not give rise to proprietary restitution. Notably, in *Westdeutsche*,[34] Lord Browne-Wilkinson sought to explain the outcome in *Chase Manhattan*[35] on the basis that the mistaken payee knew about the payor's mistake. That the payee's conscience was affected justified the intervention of equity, specifically by the imposition of an institutional constructive trust.[36] As his Lordship explained, "[a]lthough the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust".[37] Singapore law takes a similar position, save that unconscionable retention of a mistaken

31. FAR Bennion, *Bennion on Statutory Interpretation*, 5th edn (London, 2008), 1064–1069.

32. The Law Commissioners in fact expressed hope that the application of the provisions will be "guided by regard to justice, equity, and good conscience", although it is unclear if the reference to equity includes its substantive rules. See Third Indian Law Commission, *Second Report on the Substantive Law for India* (28 July 1866) in *Parliamentary Papers, House of Commons and Command*, vol.49 (HMSO, London, 1868).

33. See eg William Swadling, "The Fiction of the Constructive Trust" (2011) 64 CLP 399, who argues that the language of constructive trust obscures from sight two types of court order: first, an order that the defendant pay a sum of money to the claimant; and, secondly an order that the defendant (re)convey a particular right to the claimant. Neither order, according to him, involves any genuine trust.

34. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), 714.

35. *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

36. Although Lord Browne-Wilkinson discussed the concept of a remedial constructive trust, he did not give his explicit endorsement. To date, English law remains decidedly against the recognition of a remedial constructive trust: see *Bailey v Angove's Pty Ltd* [2016] UKSC 47; [2016] 1 WLR 3179, [27].

37. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), 715.

transfer of benefit would give rise to a judicial discretion to impose a *remedial* constructive trust.[38] In so far as the relationship between a cause of action in unjust enrichment and the remedial constructive trust is concerned, the Singapore Court of Appeal clarified in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve, BNP Paribas Jersey Trust Corp*:[39]

"The fact giving rise to the court's discretion to impose an RCT was therefore not the fact of unjust enrichment, but the knowing retention of the moneys in a way that affects the recipient's conscience. This arises separately from a strict liability claim in unjust enrichment, although the facts giving rise to an RCT may arise subsequent to or concurrently with this aforementioned claim."

It may be that focusing on the wording of s.73, as the High Court in *Ong* did, would allow sidestepping of the constraints imposed by the general law. However, as the provision states that the court may order the defendant to "repay" (personal restitution) or to "return" (proprietary restitution), this might suggest that the court can choose between the two types of relief. If this is right, then the courts surely must exercise this discretion on a principled basis. Not only does the bare and simplistic wording of s.73 provide no further guidance, it poses a challenge to the importation of general law limits, such as unconscionability, into the provision.[40] Perhaps this is the reason why the lower court based its conclusion on a cause of action that is separate and distinct from a s.73 claim. After all, the defendant in *Ong* was clearly aware of the claimant's mistake. Of course, this solution is not without its own problems. Although the common law may sometimes be used to supplement a legislative scheme, precisely how far this could be done is a matter of great difficulty.[41] On one view, the lower court might be seen to have engaged in judicial legislation given the significant overlap in the subject matter. Ideally the matter should be resolved by way of a legislative amendment to s.73. However, this is hardly a matter of priority for legislators considering that the restitutionary provisions in the Contracts Act 1950 have remained exactly the same for the past 150 years even though the courts have had to grapple with modern problems of increasing complexity. Should Malaysian courts breathe fresh imagination into the stale wording of s.73 or should they develop the common law more vigorously? Relatively recently, in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*,[42] the Federal Court of Malaysia pronounced the recognition of an independent common law claim in unjust enrichment, the broad impact of which is to signal approval of active judicial development of the law of unjust enrichment.

Whichever view the Malaysian courts decide to adopt, there remain two general points relating to proprietary restitution that merit mention. First, because proprietary restitution is no longer concerned with merely restoring value as in the case of personal restitution, it is important to ask what precisely is the subject matter of proprietary restitution where

38. See *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve, BNP Paribas Jersey Trust Corp* [2013] SGCA 36; [2013] 3 SLR 801, [171–172], [184]; *Ching Mun Fong v Liu Cho Chit (No 2)* [2001] SGCA 36; [2001] 1 SLR(R) 856, [36].

39. [2013] SGCA 36; [2013] 3 SLR 801, [184].

40. Of course, if unconscionability operates as a limit on proprietary relief, it may be asked whether the remedy is imposed in response to unjust enrichment or a different cause of action.

41. Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London, 2020), [25.4], [25.9] and [25.16]. It may be argued that the separate claim in general law outflanks the statutory relief.

42. [2015] 2 MLJ 441.

cryptoassets are concerned. This pushes to the fore the legal characterisation of cryptoassets. Considering that equity has always taken a broader view of what can be the subject matter of a trust, it is unsurprising that there has been judicial support for the view that they can be held on a trust, even without clearly defining them.[43] In *AA v Persons Unknown*,[44] Bryan J agreed with the UK Jurisdiction Taskforce's *Legal Statement on Cryptoassets and Smart Contract*[45] that cryptoassets are a type of intangible property although they are not things in action as currently defined. However, if one takes the view that proprietary restitution is essentially restitution of a right,[46] one possibility is to say that "holders of bitcoins have the legal right to have their bitcoins, or more accurately their unspent transaction output or UTXO, locked to their chosen public bitcoin address on the blockchain".[47]

Second, proprietary restitution of cryptoassets may appear to challenge the "giving back" analysis of proprietary restitution. As explained earlier, the 11.3 BTC locked onto the defendant's public address are represented by an entirely new data string that is different from the data string representing what the claimant had. However, as this is similarly the case for an interbank transfer, the issue is not new. Given the direct connection between the two data strings, an order for the defendant to return the 11.3 BTC, whether in the form of a constructive trust or not, could still be characterised as restitution of unjust enrichment, not disgorgement. The reference to disgorgement is best confined to a case where the gains in the defendant's hand did not come from the claimant—the best example being the case of bribes.

4. Conclusion

In conclusion, *Ong*, a beguilingly simple judgment from the Malaysian High Court, raises interesting and complex legal issues that go far beyond Malaysian law. It adds to a string of recent decisions from the common law world that have affirmed the proprietary status of cryptoassets in different contexts. Yet it is the first decision to properly deal with an unjust enrichment claim concerning recovery of cryptoassets, bringing to the foreground the important inquiry as to how the issues of enrichment, at the expense of and proprietary restitution are to be dealt with in the context of cryptoassets. *Ong* therefore marks another remarkable intersection between technology and private law.

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43. *AA v Persons Unknown* [2019] EWHC 3556 (Comm); [2020] Lloyd's Rep FC 127; [2020] 4 WLR 35, [62]. See also *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03; [2019] 4 SLR 17; *Ruscoe v Cryptopia Ltd* [2020] NZHC 728.

44. [2019] EWHC 3556 (Comm); [2020] Lloyd's Rep FC 127; [2020] 4 WLR 35, [55]. See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch 156, [48].

45. UK Jurisdiction Taskforce, *Legal statement on cryptoassets and smart contracts* (November 2019), [82–84].

46. See eg Robert Chambers, "Two Kinds of Enrichment", in Robert Chambers, Charles Mitchell and James Penner, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, 2009), ch.9.

47. Kelvin FK Low & Ernie GS Teo, "Bitcoins and Other Cryptocurrencies As Property?" (2017) 9 LIT 235, 253. See also Kelvin FK Low, "Quoines in Cryptopia: When (if Ever) Are Cryptoasset Exchanges Trustees?" [2020] Conv 70, 80.

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