Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd [2001] SGHC 206

Case Number : Suit 1053/2000

Decision Date : 31 July 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Benjamin Sim (Kelvin Chia Partnership) for the plaintiffs; Harpreet Singh and Gerald Kuppusamy (Drew & Napier) for the defendants

Parties : Management Corporation Strata Title No 473 — De Beers Jewellery Pte Ltd

Contract – Intention to create legal relations – Whether payments made by subsidiary proprietor to management corporation to obtain latter's approval to subdivide units contractual in nature – Respective position of parties

Equity – Defences – Laches – estoppel and change of position – Whether defences available bar subsidiary proprietor's claim against management corporation for payments made under mistake of law

Land – Strata titles – Management corporation – poers/rights – Management corporation's right to levy contribution on subsidiary proprietor for upgrading and maintenance of common property as condition for granting approval of subdivision of units – Whether contributions levied and recoverable as money had and received – Whether payments made under mistake of law – Recoverability of payments made under mistake of law – ss 3, 12, 30(2), 42 & 48 Land Titles (Strata) Act (Cap 158, 1999 Ed)

Restitution – Mistake – Monies paid under mistake of law – Right of recovery – Payments by subsidiary proprietor to management corporation to obtain latter's approval to subdivide units – Whether payments recoverable as money had and received – Recoverability of payments made under mistake of law – Whether recovery time-barred

Restitution – Money had and received – Recovery under colore officii principle – Whether principle applicable

: The plaintiffs (`the MC`) are the management corporation of the well-known commercial and residential development in Chinatown, People`s Park Complex. In December 2000, the MC commenced what they thought was a straightforward action against the defendant company (`De Beers`) to recover arrears of maintenance contributions and other payments due from the latter in respect of the 18 residential units they own in the complex.

No doubt to their great surprise since no hint of such a claim had been made before, the MC found themselves faced with a counterclaim for reimbursement of $370,000 being the aggregate of two payments previously made to the MC by De Beers. The gravamen of the counterclaim was that the MC had been unjustly enriched by the payments. It was asserted that the MC had unlawfully demanded the same as a condition for approving certain conversion works that De Beers wished to undertake in respect of their units in the complex. There was also a claim for a declaration in respect of a proposed covenant relating to the maintenance of the roof above the units.

The MC`s claim was for $341,596.05 being the aggregate of amounts accruing due from De Beers, as subsidiary proprietors, for their 18 lots during the period between 1 June 1996 and 1 November 2000. The MC also claimed interest at 10%p[thinsp]a up to the date of judgment and legal costs on the indemnity basis. The MC applied for summary judgment and this application was heard on 19 February 2001. In the result, the MC obtained judgment for the principal amount of their claim but execution on the judgment was stayed until the trial of De Beers` counterclaim. The MC was awarded interest on

various amounts at 10%p[thinsp]a up to the date of judgment. Post-judgment interest was reserved to be determined by the judge hearing the trial of the counterclaim.

This judgment deals with the counterclaim and the question of interest.

The facts

People`s Park Complex was constructed in the late 1960s and completed in about 1970. It is a mixed development containing over 650 units in both a podium block and a tower block. Over 200 of the units are residential units situated in the tower block. On the 31st and 32nd storeys of the tower block, there were, originally, four penthouse units that had a total area of 27,000sq[thinsp]ft. These penthouses were originally occupied as one unit by the moving spirit of the development company, Mr Ho Kok Chong.

Unfortunately, financial difficulties experienced by the then owner resulted in the penthouses being left vacant for several years before they were put up for auction in September 1988 by the mortgagees. De Beers purchased the four units at the mortgagee sale. The penthouses were in a state of considerable disrepair and in that condition were close to impossible to let. De Beers formed the view that in order to get the best return from their investment, they should convert and subdivide the four penthouses into 18 maisonette units that could then be rented out profitably.

In late 1988, Mr Ow Chor Seng, a director of De Beers, spoke with the company`s architects and instructed them to commence work on the conversion process. It was De Beers`s intention not only to reconstruct the four penthouses into 18 maisonettes but also to subdivide the existing four strata title lots into 18 strata title lots, one for each maisonette. Mr Ow was informed by the architects that De Beers would require approval from the MC for the intended subdivision. Accordingly, Mr Ow subsequently spoke with one Mr Lim On Guan [commat] Lim Woon Kiat, who was the managing director of SCMS Property Management Pte Ltd, the managing agent of the MC. Mr Lim was informed of the plans in respect of the four units. This conversation was followed by a letter dated 18 January 1989 in which De Beers formally requested the MC`s approval for the conversion work and forwarded the relevant plans for endorsement by the MC prior to submission to the Building Control Division.

On 25 January 1989, there was a meeting of a sub-committee of the MC. One of the matters discussed was the proposed conversion of the four penthouses. The minutes of the meeting in relation to this item read as follows:

> *PENTHOUSE UNITS [num]31-991 TO [num]31-994*
>
> *The subsidiary proprietor through their Architects, DP Architects applied for endorsement to convert and sub-divide the 4 units to 18 smaller units with subsequent creation of common properties (**sic**).*
>
> *Meeting was briefed that a special resolution is required.*
>
> *After some deliberation, Meeting agreed in principle to the conversion subject to the cost sharing of an additional lift. MA [managing agent] to negotiate.*

Mr Lim was asked to convey this decision to De Beers.

According to Mr Lim, the reason for the cost sharing proposal was simple. There were three lifts which served the residential units. By 1989, these had reached the limits of their capacity. There had been many complaints about the waiting time, breakdowns and congestion. One of the duties of the MC was to ensure that the subsidiary proprietors were able to enjoy the common facilities and would not be inconvenienced. Once the four penthouses were converted into 18 maisonettes, there would be many more people living on the 31st storey and the three lifts would not be able to cope with the increased demand.

Mr Lim duly informed Mr Ow that the MC had no objection in principle to the conversion plan but that De Beers must share the cost of installing an additional lift. Thereafter, however, when Mr Lim met with a representative of Schindler Lifts (S) Pte Ltd (`Schindler`) to discuss the improvement of the lift services at the complex, Schindler recommended that instead of installing an additional lift, the MC modernise the existing three lifts. The estimated cost of such modernisation work was $390,000.

On 10 April 1989, at a meeting of the council of the MC, the alternatives were weighed and the council decided to proceed with modernisation of the existing lifts. Mr Ow was then invited into the meeting. Mr Lim told him that since installing a new lift was not technically feasible, the existing lifts would be modernised and that if the MC was to approve De Beers`s conversion plans, the company must contribute $220,000 to the modernisation work. According to the minutes of the meeting, Mr Ow requested the meeting to reconsider the contribution figure taking into consideration the total share value of the penthouses and then offered to pay 50% of the final cost. The chairman of the meeting then suggested a lump sum contribution of $200,000. According to the minutes, Mr Ow agreed to this figure.

Three days later, the MC wrote to De Beers stating that it had no objection to the proposed conversion `subject to the following terms and conditions`. One of these was `a one-time contribution of $200,000 to the Management Corporation towards part of the cost for modernisation of the three lifts serving the residential apartment ( ***sic*** ) such payment to be made to us within two weeks from the date of our notification of payment`. In due course, De Beers accepted all the terms and conditions imposed in this letter. Mr Ow`s explanation for so doing was that he honestly believed that De Beers had no choice but to agree to the financial contribution in order to obtain the MC`s consent to the proposed conversion. The $200,000 was eventually paid to the MC in January 1992.

In September 1992, an extraordinary general meeting of the MC was called to approve certain special works. These were (1) replacement of the existing passenger lifts serving the residential block (this was the modernisation work planned earlier), (2) refurbishment of the escalators at the podium block, (3) replacement of the existing goods lift and (4) installation of a travellator at the podium block. The resolution stated that the cost of the works was estimated at $1,139,860 and that this would be paid from the sinking fund account and/or from the management fund account and/or by other financial arrangement by way of loan which the management council might think fit. The minutes of the meeting show that the subsidiary proprietors who attended it were not told that De Beers had contributed $200,000 towards the cost of modernising the lift system. No reference was made either to the additional traffic that the lifts would have to bear as a result of the conversion works carried out by De Beers. The resolution was duly passed.

In the meantime, in early 1990, De Beers had submitted their formal renovation plans to the MC for endorsement prior to submission to the building authority. On 3 April 1990, the MC replied that they were prepared to approve the renovation plans only on receipt of De Beers`s undertaking to comply with the various terms and conditions set out in their letter. One of these was that the roof of each maisonette was to be maintained by the individual owner of the maisonette at the latter`s own cost.

This condition was accepted by De Beers on 20 April 1990.

The next development took place in February 1993 when De Beers submitted 14 sets of strata subdivision plans from their surveyor for the MC`s endorsement. These plans were to effect the subdivision of the original four strata title lots issued for the penthouses into 18 strata title lots, one for each maisonette apartment. As part of the conversion process, a common corridor had also been created giving access to the 18 new units. Upon strata subdivision of the original four lots, the space making up this corridor would no longer be included in any strata lot and would therefore become part of the common property. It was for this reason that De Beers asked for the MC`s endorsement of their strata subdivision plans.

On 19 February 1993, a council meeting was held. One of the attendees was Mr Wong Kwong Chen, another employee of SCMS Property Management Pte Ltd. Mr Wong briefed the council on De Beers`s plans for subdivision of the strata title lots and for the common property to be handed over to the MC. The council was of the opinion that the acceptance of the common property had to be discussed and resolved at an extraordinary general meeting and that the issue of the cost of maintaining the additional common property had also to be resolved. Mr Wong was asked to assess this additional cost and he subsequently estimated that services such as cleaning, security, repainting, repair, electricity and re-tiling of the common property would cost approximately $130,000 over a 20-year period.

On 23 March 1993, Mr Wong`s estimate was given to the council. The council then decided that De Beers should contribute a lump sum of $200,000 towards the cost of maintaining the new common property. On 5 May 1993, Mr Wong wrote to De Beers setting out the terms and conditions imposed by the council for endorsement of the strata subdivision plans, including that relating to the contribution of $200,000. On 28 June 1993, De Beers replied with a counter-offer of $100,000. Mr Ow was then invited to attend the council meeting of 23 July 1993 and at this meeting, the council suggested that he pay $175,000 instead. Mr Ow increased his counter-offer to $150,000. Finally, on 17 August the council agreed to reduce the contribution to $170,000. This was accepted by De Beers who paid the amount on 25 August 1993.

Another condition in the same letter was for the purpose of enforcing the earlier requirement to maintain the roof. De Beers was required to `cause to be registered a covenant in each of the eighteen (18) Subsidiary Strata Certificates of Title for the 18 sub-divided units to the effect that the subsidiary proprietors thereof shall maintain at their own cost the roof directly above the 18 units. This covenant shall be registered against the properties so that it shall bind all subsequent owners ...`. This condition was also accepted by De Beers. After payment of the sum of $170,000, the MC endorsed the strata subdivision plans.

The issues

In the re-re-amended counterclaim De Beers pleaded that their counterclaim arose out of two payments of $200,000 and $170,000 respectively which the MC had wrongfully extracted from them as a condition for agreeing to De Beers`s request in respect of the conversion of the penthouse units. De Beers averred that this consent was required under s 12(2) of the Land Titles (Strata) Act (Cap 158, 1999 Ed) (`the Act`) which provides that:

> *Where the subdivision of a lot or the amalgamation of 2 or more lots results in the creation of any additional or new common property, the subsidiary proprietor shall obtain the approval of the management corporation before lodging the strata title plan for redevelopment with the Registrar.*

De Beers then went on to plead the facts leading up to the payment of $200,000 in January 1992 as a contribution towards part of the cost for the modernisation of the three lifts and those leading up to the payment of $170,000 in August 1993 towards the cost of maintaining the new common property created by De Beers`s renovations. In relation to the first payment, De Beers pleaded that the MC had no basis in law to demand $200,000 or any other sum as a condition for exercising their discretion to approve the conversion plans. In relation to the second payment, De Beers pleaded that it was unlawful of the MC to levy the same on account of s 42(4) and (6) of the Act which required the MC to obtain approval from the Commissioner of Buildings before levying extra contributions from a subsidiary proprietor to pay the cost of maintaining new common property. In para 29 of the re-re-amended counterclaim, De Beers averred that the MC had been unjustly enriched in the amount of $370,000 and that their counterclaim was for that sum of money recoverable as money had and received.

Paragraphs 30 to 33 of the pleading dealt with the condition that De Beers maintain the roof above the 18 units at their own cost. The relevant facts were recited including the contents of the letter of 5 May 1993 and De Beers then pleaded that the condition was unlawful and void. This was because under the Act, it was the MC`s duty to control, manage and administer the common property which included the roofs. The MC had been seeking, unlawfully, to transfer to De Beers their own obligation to maintain the roof.

Finally, De Beers put in a further or alternative plea that they had paid the said sum of $370,000 to the MC and caved in to the MC`s further condition on maintenance of the roof under the mistake that the MC was lawfully entitled to demand the said payments and impose the condition relating to the maintenance of the roof.

De Beers went on to claim the following reliefs:

(1) the return of the sum of $370,000;

(2) alternatively, such further or other sum as the court finds to be due from the MC;

(3) interest on the sums awarded;

(4) a declaration that it is the MC and not De Beers who is legally obliged to maintain the roof above the 18 units known as [num]31-987 to [num]31-1004, People`s Park Complex; and

(5) a declaration that De Beers is not legally obliged to register any covenant in respect of any of the 18 subsidiary strata certificates of title for the 18 subdivided units to the effect that the subsidiary proprietors of the same shall maintain, at their own cost, the roof directly above the 18 units, and/or that if such covenant has already been registered, the same is void and of no effect.

In their defence to counterclaim, the MC denied that they had extracted or wrongfully extracted the sums of $200,000 and $170,000 from De Beers. They pleaded that the payments had been made pursuant to contracts between the MC and De Beers in connection with De Beers`s proposed redevelopment plans of the four penthouse units. They went on to aver that the respective obligations of the parties under the two contracts had been performed except that the MC`s obligation to repair and maintain the additional common property created by the subdivision was continuing and that there was outstanding the registration of the covenant to repair the roof.

The MC further pleaded that De Beers`s cause of action if any was time-barred. Further, De Beers was guilty of prolonged, inordinate, and inexcusable delay in bringing their claim and had acquiesced in the matters complained of and further that they caused or permitted the MC to believe that De Beers did not intend to make a claim so that the MC had been prejudiced and/or had acted to their prejudice. De Beers was therefore barred by laches from reclaiming the amounts and it would be unjust and inequitable to allow the claim or to grant De Beers any relief. The MC also relied on their change in position as a distinct defence. Another alternative plea was that the payments had been made voluntarily and were therefore not recoverable. It was denied that De Beers had operated under any mistake of law or otherwise in making the payments.

colore officii The issues that arise out of the facts and the pleadings are as follows:

(1) whether the payments by De Beers to the MC were made pursuant to contracts between the parties;

(2) whether the MC was entitled as a condition for their approval of the conversion and subdivision of the four large units into 18 smaller units to:

(a) levy on De Beers a contribution of $200,000 towards the modernisation of the lifts;

(b) collect from De Beers a sum of $170,000 towards payment of the cost of maintaining the corridor which would become common property upon completion of the subdivision;

(3) if either or both payments were unlawful, is De Beers entitled to recover the same as being payments made under a mistake of fact (this issue and the next would involve a consideration of whether the payments were voluntary);

(4) if either or both payments were unlawful, is De Beers entitled to recover the same under either the line of cases or the principle established by **Woolwich Equitable Building Society v IRC** [1993] AC 70[1992] 3 All ER 737;

(5) if the answer to either issue (3) or issue (4) is in the affirmative, is De Beers`s claim time-barred;

(6) alternatively, is De Beers prevented from recovery by reason of laches or change of position on the part of the MC;

(7) in relation to the roof, is De Beers entitled to the declaration sought; and

(8) what interest, if any, should be payable to the MC and/or De Beers.

(1) THE LEGAL POSITION OF THE MC

The status, responsibilities and powers of any management corporation are primarily derived from the Act. In addition, any particular management corporation will have the powers and responsibilities conferred on it pursuant to the by-laws in the First Schedule to the Act and any other by-laws which may have been adopted by a special resolution of the subsidiary proprietors. In the present case, there is no assertion that any of the by-laws governing the running of People`s Park Complex is relevant and therefore I need only to look at the statute to ascertain whether what the MC in this case did was permitted.

The duties of a management corporation are set out in s 48 of the Act. The first four of these duties,

set out in sub-s (1)(a) to (d) are, though the legislation does not indicate so specifically, the principal duties. These are:

(a) to control, manage and administer the common property for the benefit of all the subsidiary proprietors;

(b) to properly maintain and keep the common property in a state of good and serviceable repair;

(c) to renew or replace any fixtures or fittings comprised in the common property; and

(d) when so directed by special resolution, to install or provide additional facilities or make improvements to the common property.

Among the subsidiary duties of a management corporation as set out in the same section, is its responsibility to determine in general meeting the amounts which are necessary to be raised by way of contributions for the purpose of meeting its actual or expected liabilities incurred or to be incurred in relation to the functions specified above and also to repaint the common property, to renew or replace any electrical or mechanical installations existing for common use and to undertake major repairs of and improvements to the common property (see s 48(1)(m) and (n)).

The management corporation`s powers to collect money from the subsidiary proprietors for the purposes set out above are delineated in s 42 of the Act. For present purposes, the relevant provisions of this section are as follows:

> *(1) A management corporation may levy the contributions determined by it in accordance with section 48(1)(m) and (n) and the contributions referred to in section 48(1)(r) by serving on the subsidiary proprietors notice in writing of the contributions payable by them in respect of their respective lots.*
>
> *(2) Contributions levied by a management corporation shall be levied in respect of each lot and shall, subject to subsections (3), (5) and (6), be payable by the subsidiary proprietors in shares proportional to the share value of their respective lots.*
>
> *(5) Where a lot has been subdivided into 2 or more lots and the management corporation will incur additional expenditure in maintaining the new facilities or common property arising from the subdivision of the first-mentioned lot, the management corporation may levy such additional contributions as may be approved by the Commissioner on the subsidiary proprietor or his successors in title in order to recover the additional expenditure.*
>
> *(7) The Commissioner shall give a subsidiary proprietor an opportunity of being heard before giving his approval for any additional contributions to be levied under subsection (5) or (6).*

It is because the MC is the body charged with the management and administration of the common property that their approval must be obtained for any conversion or subdivision of any existing unit that would result in the creation of additional common property. That is the rationale behind s 12(2) of the Act which I have cited in [para]19 above. Since the new common property would become the

responsibility of the management corporation it is only right that it should have a say in whether the new common property should be created or not. This does not mean, however, that the management corporation has an absolute and unfettered right to deny a subsidiary proprietor`s request for approval of his plans to so convert and subdivide his unit that new common property would result. As in any case where a person or body has to exercise administrative or quasi administrative powers to approve or license action by another party, the power which the management corporation has under s 12(1) must be exercised rationally.

Mr Ow`s evidence was that he sought the approval of the MC for his conversion and subdivision plans because he had been advised by his architect that such approval was required. The MC themselves implicitly accepted that the approval was within their hands pursuant to s 12(1) as is shown by the minutes of the sub-committee meeting on 25 January 1989. This referred to the conversion and subdivision of the four units `with subsequent creation of common properties`. Although Mr Wong endeavoured to explain that the word `subdivide` as used in the minutes did not refer to strata subdivision but simply to physical subdivision of the four units, this evidence appeared to me to be a post-mortem attempt to escape from the natural inference to be drawn from the minutes. The juxtaposition of the phrases `subsequent creation of common properties` and `to convert and subdivide` in the minutes shows clearly that the committee members had the provisions of s 12(1) in mind when they were discussing De Beers`s application for approval.

The MC`s powers of approval or disapproval of De Beers`s plans came directly from the legislation. This put the MC in the position of an administrative licensing body. De Beers had no alternative but to obtain the approval of the MC if they wanted to implement their plans. Accordingly, when De Beers approached the MC they were doing so in the position of an applicant. De Beers was not approaching the MC in order to enter a commercial transaction. The MC in considering De Beers`s request/application was acting administratively and not in a commercial capacity. I cannot accept the submission of the MC that a contract resulted from the request made by De Beers and the MC`s agreement to issue their approval on the basis of De Beers`s acceptance of the conditions laid down by the MC. As I pointed out to the parties in the course of the argument, a vital ingredient for the existence of a contract was missing and that was the intention to create legal relations. No intention to create legal relations could exist on either side since De Beers was in the position of an applicant for a licence and the MC was in the position of the issuing authority. The situation was analogous to that which exists when someone applies to a governmental or statutory body for an approval, for example, a licence to operate a restaurant or a radio or even a permit to construct a building. The situation is different when there is a licence for sale and the only relevant consideration is the price as in the case of the certificates of entitlement issued for cars.

The above comments do not mean that the MC was obliged to grant approval to De Beers to implement their plans. What they mean is that if approval were given that approval would not result in a contractual relationship between the two. Section 12(2) of the Act does not specify how any management corporation should act when it receives an application for approval pursuant to this section. It is plain, however, that the application by De Beers had to be considered by the MC in a rational manner and the MC was entitled to reject it if they considered there were good reasons, relating to the management and administration of the common property, to do so. On the other hand, the MC could grant the approval either unconditionally or subject to certain conditions. Again these conditions would have to relate in some way to the management and administration of the common property. The question that arises, however, is whether the MC`s powers in granting approval included imposing financial conditions of the nature which were actually imposed.

(2) WAS THE MC ENTITLED TO LEVY THE TWO CHARGES?

There is nothing in either s 12(2) or any section of the Act that specifically authorises a management corporation dealing with an application for approval to levy a charge which relates to the improvement of common property. The management corporation may be able to impose certain administrative charges for dealing with the application. I certainly do not rule out such a power. The Act, however, has specific sections dealing with the management corporation`s power to raise money from subsidiary proprietors when the money is required to maintain or improve the common property or fixtures or equipment which are part of the common property or required for the enjoyment of the common property.

It is clear from s 48 of the Act that if any management corporation wishes to raise money by way of contributions for the purpose of meeting its liabilities for the renewal or replacement of any electrical and mechanical installations existing for common use, it must determine the amount of such contributions in general meeting of the subsidiary proprietors. Subsection (q) expressly empowers the management corporation to levy, in accordance with s 42, on each person liable therefor, a contribution to raise the amount which the general meeting has determined is necessary for such renewal or replacement. Secondly, under s 42(2), these contributions levied by a management corporation shall be levied in respect of each lot and, with certain exceptions which are not applicable here, be payable by the subsidiary proprietors in shares proportional to the share value of their respective lots. This provision re-emphasises the directive in s 30(2) which provides that the share value of a lot shall determine, among other things, the amount of contributions levied by a management corporation on the subsidiary proprietors of all the lots in a subdivided building.

It was emphasised by the Court of Appeal in **MCST No 980 v Yat Yuen Hong Co** [1993] 1 SLR 555 that an essential feature of the Act is the levying of contributions in proportion to share value:

> *In the High Court and before us, it was common ground that this resolution was not binding on the subsidiary proprietors as it was passed contrary to ss 28(2)(c) and 36(3) of the Act. These two provisions of the Act respectively provide that the share units of each subsidiary lot shall, inter alia, determine `the proportion` payable by each subsidiary proprietor of contributions levied by the management corporation and that the management corporation in general meeting may only raise the amounts determined in the manner prescribed by levying contributions on the subsidiary proprietors `in proportion to the share units` of their respective lots. It was a failure to understand this essential feature in the strata title scheme established by statute that invalidated this resolution, which purported to impose maintenance charges at a flat rate rather than in proportion to the share units. [per Lai Kew Chai J at p 558]*

It should be noted that the s 28(2)(c) referred to in the extract is now s 30(2)(c). The then s 36(3) no longer exists but the same scheme is provided for by s 42(1) and (2) read with s 48(m), (n), and (q).

The Court of Appeal also quoted with approval the following observation by Holland J in **Jacklin v Proprietors of Strata Plan No 2795** [1975] 1 NSWLR 15 (at p 24) in relation to the strata legislation of New South Wales which, as our appellate court observed, is schematically and conceptually similar to the Act:

> *The legislation takes the common property as a whole and treats each proprietor as having an undivided beneficial interest in every part of it, whether or not that part is susceptible of any use or enjoyment by that proprietor or of greater use or enjoyment by that proprietor than by any other. Similarly, with respect to the provision of funds for the repair and maintenance of all or any*

part of the common property, the legislation provides for only one fund with contributions to be levied proportionately on all proprietors irrespective of any individual proprietors` use and enjoyment thereof. Thus the ownership and the financial burden of common property is to be held and shared by all proprietors in common in shares according to their respective unit entitlements. Consistently with this unity of approach, the duty of control, management, administration, repair and maintenance of common property is imposed by the legislation upon the body corporate. This duty is necessarily owed to each and every proprietor. In my opinion, there flows from the scheme of the legislation as an incident of proprietorship of a lot a right in each proprietor to have the body corporate`s duty performed in relation to all of the common property at the cost and expense of all proprietors in proportion to unit entitlements. As the duty is not only to repair and maintain but also to control, manage and administer, the right of each proprietor includes a right to have the whole administration of repairs and maintenance of common property carried out by the body corporate by its servants and agents.

It is thus clear that when a management corporation like the MC in this case wishes to raise funds from the subsidiary proprietors in order to finance the replacement or modernisation of an elevator system which is part of the common property and used by various subsidiary proprietors to gain access to their units from the common property, it must do so by levying contributions on each subsidiary proprietor in the proportion that his share value bears to the total cost of such work. It cannot charge any subsidiary proprietor a flat amount that bears no relation to that proprietor`s share value whether that flat amount is more or less than the proprietor would have paid on a calculation based on his share value. This rule applies even if that subsidiary proprietor is likely to use the elevator system more than the other subsidiary proprietors.

In this case, the MC at all times realised it was levying a `contribution` on De Beers as a subsidiary proprietor towards the cost of the modernisation of the lifts. The word `contribution` was used not only in the correspondence by the MC itself but also by its witnesses in court and by its counsel. So the nature of the first payment was not in dispute. Since it was a contribution towards the cost of modernising the lifts, it should not have been charged to De Beers in the way that it was. Instead, the total cost should have been put (as it was eventually) to the general meeting and, once approved, properly calculated contributions could have been levied on each subsidiary proprietor if the funds then in the MC`s hands were insufficient to meet the cost.

The pretext for asking De Beers to pay such a large proportion of the cost was that the conversion plans would result in increased traffic which the existing lift system could not accommodate. The evidence that was adduced in court, however, indicated very clearly that in any case the MC had been contemplating upgrading the lift system in some way due to the numerous complaints it had received from many subsidiary proprietors on the frequent breakdowns and slow response time of the lifts. It would also be noted that when the resolution to approve the modernisation works was put to the general meeting of the MC, the explanatory notes accompanying the special resolution gave a detailed history of the lift equipment. These mentioned that lift equipment had not been replaced since the completion of the complex 22 years previously and therefore despite regular maintenance, further repairs and parts replacement were necessary in the immediate future. There was not a word in this statement about increased traffic arising from the conversion of the penthouses. In my view, therefore, the modernisation of the lift system was not the result of the conversion of the penthouses into maisonettes but work that would have been done sooner or later by the MC. Even if the MC had decided to install an extra lift simply because of the conversion work, that would not have justified it in charging De Beers for the cost of the same in the way that it did. As the lift would have been a

mechanical installation existing for common use those costs would have had to be levied on all the subsidiary proprietors in the normal way.

I am satisfied therefore that the MC had no power under the Act to levy the $200,000 contribution on De Beers.

The case of the $170,000 contribution is even plainer. The situation was covered by s 42(5). Under that provision, the MC was permitted, if it incurred additional expenditure by reason of having to maintain the common corridor created by the conversion works, to levy additional contributions on De Beers in order to recover such additional expenditure. The proviso to the implementation of such a levy was that the additional contributions had to be approved by the Commissioner of Buildings who would have to give De Beers an opportunity of being heard before approving the same. The MC did not follow this procedure. Instead, it asked De Beers for a totally arbitrary figure of $200,000 to cover the maintenance cost and was only willing to reduce that to $170,000 after some bargaining by De Beers. There was no justification for the amount charged: Mr Wong`s estimate of those costs was $70,000 less than the MC`s initial asking price. Further, that estimate covered a period of 20 years. With such a high mark-up over such a prolonged period, it is not surprising that the MC did not ask the Commissioner of Buildings for its approval of the additional levy.

Counsel for the MC, Mr Benjamin Sim, contended that s 42(5) did not apply because its wording referred to a situation `where a lot has been subdivided into 2 or more lots`. He submitted that the procedure in that section would only apply after the subdivision had taken place and not when the subsidiary proprietor asked for approval prior to subdivision. Counsel referred in particular to the situation where the subsidiary proprietors by a special resolution direct the management corporation to accept the additional common property under s 25(1) of the Act. He also submitted that s 42(5) was permissive rather than mandatory in that it provided that the management corporation `may levy such additional contributions as may be approved by the Commissioner`. That meant that the management corporation could, but need not, resort to s 42(5).

I do not accept the above submissions. It is obvious that s 42(5) was designed to allow a management corporation to recover the extra cost of maintaining new common property from the subsidiary proprietor who had created the same. This is a fair provision. It is not right that if one proprietor decides to subdivide his lots and create new common property from them that all the other proprietors should share in the cost of maintaining the new property especially when the new common property basically accommodates the subdividing proprietor and his successors. The charges imposed must be fair, however, and probably, collected as they are incurred and not in advance. This is why the Commissioner of Buildings has to approve their imposition and hear the subsidiary proprietor`s views on them before doing so. It would be subverting the purpose of the legislation if I were to interpret it as not applying when approval is asked for before the subdivision takes place since in the light of s 12(2) the management corporation`s approval must be given before the subdivision can be implemented. As far as the argument on the permissive nature of the provision is concerned, I agree it is a permissive provision but not in the way that counsel submitted. The section is permissive in the sense that the management corporation may, but need not, levy additional contributions on the subsidiary proprietor. If the management corporation chooses to make such levies, it must then obtain the approval of the Commissioner of Buildings. The section does not permit the management corporation to choose not to obtain approval if it has chosen to levy additional contributions.

In my judgment, the MC had no power to require De Beers to pay it $170,000 towards the cost of maintaining the new common corridor as a condition for its approval of De Beers`s subdivision plans. In addition, the MC acted unlawfully in not complying with the requirements of s 42(5).

(3) ARE PAYMENTS MADE UNDER A MISTAKE OF LAW RECOVERABLE?

Prior to the decision of the House of Lords in **Kleinwort Benson v Lincoln City Council** [1998] 4 All ER 513[1998] 3 WLR 1095, the common law position was that payments made under a mistake of law were not recoverable, unlike payments made under a mistake of fact. This rule originated from the decision of Lord Ellenborough in **Bilbie v Lumley** [1802] 2 East 469(Unreported) which was made on the basis that `every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried`. **Bilbie v Lumley** (Unreported) was subsequently approved in **Kelly v Solari** [1835-42] All ER Rep 320(Unreported) and despite increasing academic criticism the rule stood firm until it came up for consideration in the ***Kleinwort Benson*** case. The common law rule was applied in Singapore in 1959 in **Serangoon Garden Estate v Chye Marian** [1959] MLJ 113 .

In ***Kleinwort Benson*** (supra) the House of Lords was invited on a leap-frog appeal from the High Court to consider whether the mistake of law rule should be maintained as part of English law. So rife had the criticism of the rule become by that time (its abolition had been recommended by the English Law Reform Commission (1994)) that whilst Kleinwort Benson itself presented a fully developed argument for the abrogation of the mistake of law rule, the opposing party did not submit that the rule should be retained but rather that it should be reformulated. It was held by a majority of three to two (the leading judgment being delivered by Lord Goff) that on an application of the principle of unjust enrichment the rule precluding recovery of money paid under mistake of law could no longer be maintained and recognition should be given to a general right to recover money paid under mistake, whether of fact or law, subject to the defences available in the law of restitution. It was further held that recovery was permissible even where the payment had been made under a certain understanding of the law which was subsequently departed from by judicial decision or where the payment had been received by the recipient under an honest belief of entitlement to retain the money.

The two dissenting judges were also convinced that the law should be changed so as to permit moneys paid under a mistake of law to be recovered but they considered that this change should be effected by legislation and not by judicial decision because the consequence of the change was, as Lord Browne-Wilkinson put it, that `On every occasion in which a higher court changed the law by judicial decision, all those who had made payments on the basis that the old law was correct (however long ago such payments were made) would have six years in which to bring a claim to recover money paid under a mistake of law` ([1998] 4 All ER 513 at 523; [1998] 3 WLR 1095 at 1105). It was only the legislature that would be able to properly regulate the limitation period applicable to recovery actions brought on this basis. The dissenting judges therefore thought it would be better to leave the law as it was and let the legislature introduce both the new cause of action and the necessary limitation provisions.

Mr Harpreet Singh, counsel for De Beers, submitted that since the ***Kleinwort Benson*** decision, in Singapore too the distinction between payments made under mistake of fact and those made under mistake of law had been abrogated. He asserted that, accordingly, De Beers was entitled to claim recovery on the basis that the payments totalling $370,000 made to the MC were made in the mistaken belief that the MC was entitled to impose the payment conditions as a prerequisite to the granting of its approval. Mr Sim did not contend that the mistake of law rule still applied in Singapore. Instead, his submissions concentrated on reasons why, factually, this cause of action was not available to De Beers.

Despite the fact that Mr Sim has not taken issue on the point, I have to decide whether I should follow ***Kleinwort Benson*** (supra) or continue to observe the prior common law rule on mistake of law as the same has been considered to apply to Singapore for many years. One example of this is the

Serangoon Garden case cited earlier. Further, in 1992, in the course of dealing with a case involving a payment made under an alleged mistake of fact, the Court of Appeal observed that the law requires a person who receives money, to which he is not entitled, to repay the person who paid it, unless the mistake is one of law. See **Borneo Motors (S) v William Jacks & Co (S)** [1992] 2 SLR 881 . In that case, however, the court did not have to deal with a payment made under a mistake of law and therefore its observation was a repetition of the then generally understood common law position. It was not a considered holding that this position should continue to apply in Singapore despite all the criticisms that had been made of the artificiality and arbitrary nature of the distinction between a factual mistake and a legal mistake.

It is also relevant that other common law jurisdictions, apart from England, have abolished the rule. In Canada, the rule was abrogated by the Supreme Court of Canada in **Air Canada v British Columbia** [1989] 1 SCR 1161(Unreported) , in Australia, by the High Court of Australia in **David Securities v Commonwealth Bank of Australia** [1992] 175 CLR 353(Unreported) and in South Africa in **Willis Faber Enthoven v Receiver of Revenue** (Unreported) . These judicial decisions were following far in the trail of the legislative paths blazed in New Zealand in 1958 and in Western Australia in 1962 when the rule was abolished by statute.

On 9 April 2001, the Law Reform Committee of the Singapore Academy of Law endorsed, and approved for publication, a paper entitled `Reforms to the Law of Restitution on Mistakes of Law` prepared on behalf of the Committee by Cavinder Bull and Chou Sean Yu. This paper considered the mistake of law rule as it had developed and been applied in the Commonwealth and discussed the various criticisms of the rule, the jurisdictions in which the rule had been abolished either judicially or by legislation and the consequences of an abolition of the rule. It concluded that the common law rule that a payment under a mistake of law is irrecoverable is no longer tenable. The recommendations made by this paper are, inter alia:

> *(a) The rule precluding the recovery of payments made under a mistake of law [should] be abrogated by legislation;*
>
> *(b) There be no recovery where payment was made on the basis of settled law which was subsequently changed by judicial decision;*
>
> *(c) The legislation is to be of retrospective effect;*
>
> *(d) Section 29(1)(c) of the Limitation Act be amended to clarify that it applies irrespective of whether the mistake is one of law or of fact;*
>
> *(e) There be an overriding time limit of 12 years for limitation periods in respect of claims made under mistake.*

In my view, the legal tide has moved decisively against the mistake of law rule. We in Singapore should not, and, as is shown by the report cited in [para]52, do not wish to, cling to an old rule simply because of its antiquity. The mistake of law rule was itself a mistake. ***Kleinwort Benson*** (supra) has buried it in England and I consider that we should follow that very persuasive authority and bury the rule here as well. I realise that until there is legislative intervention following the English decision will lead to the difficulties commented on by Lord Browne-Wilkinson. Whilst I do not consider it generally beneficial for parties to be able to unravel long concluded transactions, in my view, it would, however, be worse to continue to deny recovery to all persons who have made payment under

a mistake of law. The category of persons who would have paid on the basis of a settled view of the law which is subsequently changed is only a sub-set of the persons who make payment by reason of a mistake as to the legal position and the general body of such payors should not, in my view, be prevented from recovering money from recipients who had no entitlement to the same simply because some of such payors would fall within the sub-set.

(4) WERE THESE PAYMENTS MADE BY REASON OF A MISTAKE OF LAW?

Mr Ow`s evidence in relation to the first payment was that he had felt at that time that the MC was simply using the occasion to extort the sum of $200,000 from De Beers as a condition for approving De Beers`s plans to subdivide the four penthouse units. He said that he could not then and still cannot see any justification for the MC`s imposition of this condition. However, it was clear to him that unless De Beers caved in and accepted the condition, the MC would not grant the requisite approval. Mr Lim told him that De Beers could either `take it or leave it`.

In relation to the second payment, Mr Ow testified that when he was informed by Mr Lim that the MC would only endorse its consent on the strata subdivision plans if De Beers paid a further $200,000 to the MC to offset the maintenance cost for the additional common property, he considered the explanation a lame excuse for extorting moneys from De Beers. He could not imagine how the MC could justify a demand of $200,000 from De Beers since the only additional common property which was created was a small stripe of corridor space in front of the 18 units. He further said that when he attended the council meeting on 20 July 1993 and his counter-proposal of $100,000 was not well received, it was apparent to him that the MC was using this opportunity to extract as much money as they could from De Beers. Mr Ow also stated that De Beers again felt forced to cave in to the MC`s demands and felt at the mercy of the MC.

Based on the above evidence, Mr Sim submitted that there was no mistake of law on the part of De Beers. He interpreted Mr Ow`s statements as indicating that all along De Beers was aware that the monetary requirements of the MC were unlawful. I do not agree with Mr Sim`s interpretation of the evidence. Mr Ow was expressing his dissatisfaction with what at the time he had considered to be exorbitant demands on the part of the MC. His further evidence in court was that he thought the MC was acting lawfully though immorally in requiring such payments. His contemporaneous behaviour also shows that his main objection was to quantum rather than to the imposition of a payment condition. He bargained the first time and obtained a slight reduction of $20,000 and the second time he bargained more strenuously and was able to obtain a slightly bigger reduction of $30,000.

Mr Ow had been advised by De Beers`s architect that the MC`s approval was a prerequisite for the company`s conversion plans. The architect had not advised him as to the conditions that the MC was entitled to impose for the issue of such approval and Mr Ow does not appear to have asked his advice or the advice of a lawyer on whether the financial conditions were lawful. He acted as a businessman in trying to reduce costs rather than as a lawyer in trying to challenge the basis of the costs. Was it wrong for him not to enquire as to the legal justification for the conditions? I do not think so. At the time, the MC themselves believed they had the legal power to impose the said conditions and both witnesses who testified on the MC`s behalf said that they too had believed that at all times these conditions were lawful. At no time did they, or to their knowledge any other person, suggest to Mr Ow that the MC lacked the power to impose the conditions. On the contrary, they made it plain to Mr Ow that satisfaction with the conditions was a prerequisite to the issue of the approvals. Whilst in his evidence, Mr Ow used strong words like `extort` to describe what the MC had done, such usage is not in itself an indication that at the time the conditions were imposed he seriously considered that they were unlawful. His conduct at that time would not indicate such a belief - the MC`s witnesses were at pains to recount how he never really protested but seemed to accept the MC`s decision

calmly, even cheerfully. No anger was shown. His only action was to attempt to bargain down the prices. The language of his affidavits was I believe a reflection of Mr Ow`s subsequent view of the events rather than a sign that he knew or suspected at the time something was wrong and chose, recklessly, to act in disregard of such knowledge or suspicions.

In these circumstances, I find it reasonable that De Beers as a subsidiary proprietor dealing with the MC as the body entitled to approve or reject their conversion plans and knowing that the MC had the power to levy contributions from subsidiary proprietors to provide for the upkeep of the common property, would believe that the MC was legally entitled to ask them for funds to upgrade the lift system and to maintain the additional common property as a prerequisite to approving work which would affect the usage of the lifts and result in increased expenditure on the part of the MC. I find, accordingly, that both payments were made by De Beers by reason of a mistaken belief that the MC was legally entitled to ask for the funds as a condition of the issue of the approval under s 12(2) and that if they did not pay the MC could, legally, withhold the approvals that De Beers required on the ground of non-compliance with the condition. This does not mean that the payments were made voluntarily. They were not. They were accepted by De Beers as being the cost of obtaining the approvals De Beers needed.

(5) DOES THE COLORE OFFICII PRINCIPLE APPLY?

Before I go on to consider whether De Beers`s claim for restitution on the basis of a mistake is time-barred, I should deal with the alternative basis of their claim, ie that they are entitled to reimbursement because the payments were made in respect of ` ***colore officii*** ` demands. As far as I know, there has been no reported case in Singapore of a claim having been brought on this basis prior to the present action.

The ***colore officii*** line of cases is discussed in the primary text on restitution, ***The Law of Restitution*** (15th Ed) by Goff and Jones, in a chapter entitled `Recovery of Benefits conferred under Duress`. A brief description of the effect of these cases is at p 320 of the text under the heading `(d) Money paid to obtain the fulfilment of a duty: demands ***colore officii*** `. This reads:

> *Where money has been paid to a public officer to obtain performance by him of a duty which he is bound to carry out for nothing or for less than the sum paid, such money or, where some money is due, the excess is recoverable in the language of the old pleaders as money had and received. For the duty is a `public duty imposed by law; and for the execution of that he had no right of any payment.` It is `not necessary to show that the defendant acted in bad faith ... Nevertheless the phrase [* ***colore officii****] bears an imputation of imposition by a person in authority upon another person ignorant of his rights.*

It would be noted that one of the prerequisites of this cause of action for restitution is that the payment in question has been made to a public officer. The text goes on to comment, however, that the right of recovery has been extended `to include all cases where the defendant is in a quasi-public or monopolistic position and demands a money payment to which he is not entitled, for the fulfilment of a duty owed by him` (at p 324).

Mr Sim contended that the ***colore officii*** doctrine did not apply to the facts of this case as the MC is neither a public authority nor in a quasi-public or monopolistic position. A management corporation, he argued, is not in the nature of a public body and it cannot be described as `monopolistic` in any sense of the word. In 1(1) ***Halsbury`s Laws of England*** (4th Ed) (2001 Reissue) at para 6, a public authority is described as being `a person or administrative body entrusted with functions to perform

for the benefit of the public and not for private profit` and `quasi` is defined by ***Black`s Law Dictionary*** (5th Ed) as `as if; almost as it were; analogous to`. As for `monopoly` that word, again according to ***Halsbury`s Laws of England*** (4th Ed) (1994 Reissue) (vol 47, para 102) relates to the securing of the sole exercise of any known trade throughout a particular country. It is also not apt to describe a management corporation. Interestingly enough, a note appended to that same paragraph quotes the case of **British South Africa Co v De Beers Consolidated Mines** [1910] 2 Ch 502 as authority for the proposition that an exclusive right granted by a landowner to a third party to exercise rights over his land is not a `monopoly`.

I agree that the MC is not a public authority. Nor is the MC in a monopolistic position since there is no trade involved in the management of a subdivided property. The exclusive right of management which the management corporation has seems to me to be more closely analogous to the situation of an exclusive right over land granted by a landowner than to a trading situation.

The question is whether the MC is in a quasi-public position. Mr Singh`s argument was that since a management corporation owes its existence to the Act and has powers and functions conferred on it by statute, it does stand in a quasi-public position. He submitted that the MC in this case was clearly exercising statutory powers when it was faced with the decision whether or not to approve De Beers`s request for division. I find it difficult to accept that argument because it confuses the derivation of a management corporation`s powers with the purpose of such powers. Each management corporation`s powers are given to it purely to regulate the rights of a small body of private individuals inter se in relation to a piece of private property which they own in common, ie the common property of their subdivided building. Vis-.-vis the management corporation the subsidiary proprietors are not members of the public or even a section of the public, they are the constituent parts of the management corporation itself and the people that the corporation serves. The authority that that body exercises is exercised on behalf of all subsidiary proprietors for their common benefit in relation to their private property and is the power of managing and maintaining private property. In my view, even though the management corporation`s powers are conferred on them by statute, this does not put the management corporation into the position of a `quasi-public` authority.

Accordingly, I consider that the ***colore officii*** principle cannot be applied to the present case. De Beers also cited the case of **Woolwich Equitable Building Society v IRC** [1993] AC 70[1992] 3 All ER 737 which contained a detailed review of the ***colore officii*** line of cases and extended the principle of those cases so as to allow a building society to recover tax payments which had been levied on it pursuant to legislation which turned out to be ultra vires, although the payments were made voluntarily rather than by reason of compulsion imposed by the revenue authority. That case does not assist De Beers as the law lords there were dealing with the circumstances in which recovery of money exacted from a citizen under an unlawful demand by a public authority were permitted. It was held that the law of restitution should be reformulated so as to recognise a prima facie right of recovery based solely on payment of money pursuant to an ultra vires demand by a public authority and that it was not relevant in such inquiry whether the payment had been made under a mistake of fact or under compulsion. Their lordships did not need to, nor did they, discuss whether the principle could be extended to a party like the MC which has exclusive power to approve or prevent certain activities related to the use of private property but which is not even a quasi-public body.

Interestingly enough, Lord Goff also delineated the difference between the ***colore officii*** line of cases and cases like the present in his judgment in ***Kleinwort Benson*** ([1998] 4 All ER 513 at 538; [1998] 3 WLR 1095 at 1122):

> *The first observation is that, in our law of restitution, we now find two separate and distinct regimes in respect of the repayment of money made under a*

*mistake of law. These are (1) cases concerned with repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at common law on the principle in the **Woolwich** case, and otherwise are the subject of statutory regimes regulating recovery; and (2) other cases, which may broadly be described as concerned with repayment of money paid under private transactions, and which are governed by the common law.*

Now that the common law recognises the recoverability of payments made under a mistake of law there is no excuse, if indeed there ever could have been a good excuse, to stretch the definition of a `quasi-public authority` to cover organisations like the management corporation which exist for strictly private purposes.

(6) IS DE BEERS`S CLAIM TIME-BARRED?

Limitation of actions is entirely a statutory matter. The common law does not provide for explicit periods within which actions must be commenced. Under common law, a suit may be started decades after the cause of action arose. Equity has, however, provided through the doctrine of laches a defence for defendants who are sued after a substantial length of time has lapsed from the events giving rise to the suit. Even so, the situation was not considered satisfactory and the legislature therefore remedied it by passing legislation to provide for various periods of limitation for various causes of action. Thus, to find out whether a particular cause of action is time-barred and when such time bar accrued, one must look within the confines of the Limitation Act (Cap 163, 1996 Ed).

In this case, it is contended by the MC that De Beers should have commenced action within six years of making the respective payments to the MC. If this is correct, it would mean that De Beers`s claim for return of the sum of $200,000 would have been time-barred in January 1998 and its claim for the return of $170,000 would have been time-barred in August 1999. De Beers`s counterclaim in this action was first filed on 27 March 2001, some time after both those dates.

The period of six years is submitted to be applicable by virtue of s 6 of the Limitation Act. The relevant subsections are:

(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

and

(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or 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.

The submission made by Mr Sim was that the counterclaim for the sum of $370,000 based on the cause of action of moneys had and received was an action founded on a contract. He submitted that

the parties had entered into two contracts and De Beers must rely on the fact of the existence of these two contracts for their claim to recover the sum of $370,000. Even if the contracts were unlawful, the counterclaim would still be an action founded on a contract. Counsel cited the case of **Ching Mun Fong v Liu Cho Chit** [2000] 4 SLR 610 where Woo Bih Li JC held that the claim there for moneys had and received was founded on an oral contract even though the subject matter of the contract did not materialise.

In this case I have already found that there were no contracts existing between the MC and De Beers in relation to the two payments. The payments were levied by the MC as contributions to the costs of lift renewal and common property maintenance. In so doing, the MC was acting pursuant to its role as manager of the common property. It was not acting as a party to a commercial transaction. If the payments were not made pursuant to a contract, it would be difficult to categorise the claim for restitution as being `founded on a contract`. Mr Sim, however, pointed to [para]29 of the counterclaim where De Beers pleaded that the MC had been unjustly enriched in the amounts of $370,000 and accordingly, their counterclaim against the MC was for that sum being money recoverable from the MC as moneys had and received. In ***Ching Mun Fong*** `s case (supra), Woo Bih Li JC opined that the cause of action for moneys had and received was based on a contract and accordingly s 6(1)(a) would apply to that cause of action. Mr Sim relied on that view (especially as the Court of Appeal upheld the judge`s reasoning on the limitation point) for his submission that likewise De Beers`s cause of action here was within s 6(1)(a).

The relevant passages from the judgment of Woo Bih Li JC are at [para]71-74:

> *71 As the Court of Appeal has found that Mdm Lim never had an interest in the property, the causes of action based on total failure of consideration and on moneys had and received would arise when the moneys paid were deposited into Liu`s account sometime on or about 23 April 1981 and would be time-barred by about 22 April 1987.*
>
> *72 I am of the view that such causes of action are `founded on a contract` for the purpose of s 6(1)(a) of the Limitation Act (Cap 163) which states:*
>
> *...*
>
> *73 The moneys which are the subject of this action were paid pursuant to the oral contract to purchase Mdm Lim`s interest. The claim for moneys had and received are also founded on the oral contract in that it was not as though the moneys were received on a basis apart from the oral contract. In addition, the words `founded on a contract` are wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise.*
>
> *74 In any event, even if, for the sake of argument, these causes of action can be said to be founded upon some equitable principle of restitution, they would then come under s 6(7) of the Limitation Act ...*

When Woo Bih Li JC`s dicta is viewed in the context of the relevant passages and not in isolation, it can be seen that in the case before him he had to deal with a contract for the purchase of property which had not been performed because of a lack of the necessary proprietary interest. In that

situation, the claims for money had and received and for total failure of consideration logically sprang out of the pre-existing contract. Whilst a claim for total failure of consideration must always spring out of a contract, the same does not necessarily apply to a claim for money had and received which can also have a restitutionary basis. With due respect to JC Woo, as can be seen from the discussion hereunder, the claim in restitution arises at common law and not in equity.

Mr Singh`s submission was that s 6(1)(a) and (7) are not apt to cover the situation of a claim for restitution of moneys had and received by reason of a mistake where the mistake is not connected with any contract. He submitted that the claim for restitution is an independent claim arising at common law and is quite separate from a claim arising out of a contract. The action is based instead on the restitutionary principle of unjust enrichment.

In ***Kleinwort Benson*** itself the House of Lords had to consider whether the claim before them was an action `relating to a contract`. This issue arose not in the context of limitation but in that of jurisdiction because it was alleged that under the relevant statute, the English court had no jurisdiction to hear the action as it was an action relating to a contract. Despite the dissimilar context, the conclusion of the judges there that claims for restitution are usually, though not always, independent claims based on the principle of undue enrichment rather than claims based on contract, is pertinent. The reasoning is shown in the following extracts:

> *That question is whether the claim of Kleinwort to restitution of the sums paid by it to Glasgow under a contract accepted to be void ab initio falls within art 5(1).*
>
> *I have to confess that I find it very difficult to see how such a claim can fall within art 5(1). It can only do so if it can properly be said to be based upon a particular contractual obligation, the place of performance of which is within the jurisdiction of the court. Where however, as here, the claim is for the recovery of money paid under a supposed contract which in law never existed, it seems impossible to say that the claim for the recovery of the money is based upon a particular contractual obligation.*
>
> *In truth, the claim in the present case is simply a claim to restitution, which in English law is based upon the principle of unjust enrichment; and claims of this kind do not per se fall within art 5(1). It is not necessary for the purposes of the present case to hold that a claim to restitution can never fall within art 5(1). Very exceptionally, there may be particular circumstances in which it can properly be said, at least in cases arising under the convention, that the claim in question, although a claim to restitution, is nevertheless based on a contractual obligation and so falls within the article. This is a point to which I will return at a later stage. But no such circumstances arise in the vast majority of claims to restitution, which are founded simply upon the principle of unjust enrichment. Such is, in my opinion, the present case. No express provision is made in art 5 in respect of claims for unjust enrichment as such ... [per Lord Goff at p 649]*

Similarly, Lord Clyde observed (supra at p 665) that:

> *The claim which is being made by Kleinwort in the present case is simply and solely a claim for restitution. That is not a claim based on a contract but a claim based on the principle of undue enrichment. The remedy of restitution is in a category distinct from that of contractual remedies. That appears to be the position not only in England and Scotland but also in at least a number of*

the other states in Europe. That the parties purported to enter into a contract which turned out to be void ab initio is matter of background history, too remote from the claim now made to be related to a contract in the sense intended by art 5(1), even if what is now agreed to be a void contract can properly be called a contract at all. In the present case the plaintiffs do not seek to found on any contract; indeed their claim is one which is pursued in the absence of any contract. There is no contractual obligation forming the basis of their claim.

Lord Hutton said (supra at pp 666-667):

The claim of Kleinwort in its writ of summons is for restitution and there is no claim in contract. In English law it is clear that a claim for restitution is a separate and distinct cause of action from a claim in contract. In ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** *[1942] 2 All ER 122[1943] AC 32 Lord Wright stated:*

`It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.`

In ***Westdeutsche Landesbank Girozentrale v Islington London BC*** *[1996] 2 All ER 961[1996] AC 669 Lord Browne-Wilkinson stated:*

`The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: [his Lordship then cited several cases]. In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule ***Sinclair v Brougham*** *on this point.`*

Therefore in English law the action brought by Kleinwort against Glasgow is not a claim in contract.

I accept, with respect, the above statements of law. De Beers founded its claim in restitution. I have held that no contract arose or was capable of arising in the circumstances. The claim brought by De Beers cannot therefore be founded on a contract whether the word `founded` is used in a strict or a liberal sense. Accordingly, the claim does not fall within s 6(1)(a) of the Limitation Act.

The other proposition put forward by the MC was that the claim fell within s 6(7) of the Limitation Act because it was a claim for equitable relief founded upon a ground in equity. On this basis, a six-year limitation period would be applicable as well. This proposition cannot be accepted, however, because the restitutionary claim for recovery of moneys paid under a mistake is not founded in equity. This was clearly established by Lord Wright in **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour** [1943] AC 32[1942] 2 All ER 122. The relevant passage from his judgment is cited in the

quotation from Lord Hutton that I have set out in [para]76. Lord Browne-Wilkinson endorsed this view in **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] AC 669[1996] 2 All ER 961 cited in the same passage. Since the restitutionary claim has been classified as a common law claim, it does not fall within s 6(7).

Accordingly, I hold that De Beers`s claim for restitution of payments made under a mistake of law is not time-barred. Until the legislature intervenes, it would appear that there is no applicable limitation period for restitutionary claims which have no grounding in contract.

(7) WHO IS RESPONSIBLE TO MAINTAIN THE ROOF?

The legal issue here is whether the roof above the 18 units is common property. Section 3 of the Act states, inter alia:

> *"common property" -*
>
> *...*
>
> *(b) in relation to any subdivided building which is comprised in any plan approved by the relevant authority other than a plan bearing the title "condominium", means so much of the land for the time being not comprised in any lot shown in a strata title plan; and*
>
> *(c) unless otherwise described specifically as comprised in any lot in a strata title plan and shown as capable of being comprised in such lot, includes -*
>
> *(i) foundations, columns, beams, supports, walls, roofs, ... of the building; ...*

The evidence showed that the roof above the 18 units was not reflected originally in the strata title plan for the four penthouse units as being part of any or all of those lots. Further, after subdivision the roof above the 18 units was not reflected in the new strata title plan as being part of any or all of the new 18 lots. In fact, the roof was not built as roof for specific units: it was built as a roof for the tower block of the complex. Originally, the roof was flat and when Mr Ho occupied the penthouses, he maintained it at his own expense. When De Beers came along, they proposed changing the roof to a pitched roof as this type of structure is preferable from the point of view of preventing leakage. The fact that De Beers reconstructed the roof as a pitched roof did not turn it into private property. It remained the common property it had always been.

As the roof was common property, its maintenance was at all times the responsibility of the MC. Mr Wong admitted in court that under the Act, it was the MC`s duty to maintain the roof. He further testified that the reason the MC wanted De Beers to maintain it was to try and maintain the status quo, ie the position whereby the owner of the top-most units in the tower block maintained the roof. Whatever Mr Ho may have done on a voluntary basis, however, could not justify the MC imposing this responsibility on De Beers. The Act is quite clear. The persons who ran the MC were aware of its provisions. They had no business trying to pass the buck to De Beers as a condition for approval of its subdivision plans. I am somewhat surprised that the lawyers acting for De Beers at the time did not point this out but seem to have co-operated to try to give effect to the MC`s unlawful condition.

As Mr Singh submitted, what the MC sought to do in the present case was to abdicate their statutory duty. The court cannot assist them in this. It must declare this condition to be unlawful and of no effect. There is no question of limitation in relation to the roof since the condition imposed is an on-going one and the reliefs asked for by De Beers are declarations as to the present legal position.

(8) DEFENCES AVAILABLE TO THE MC

The MC raised the following defences to De Beers`s claim:

(a) laches;

(b) estoppel; and

(c) change of position.

(9) LACHES

The MC submitted that even if the Limitation Act did not apply, the defence of laches was available to them on the facts. Mr Sim maintained that De Beers was guilty of prolonged, inordinate and inexcusable delay in bringing their claim. He relied on the following events:

(a) at the extraordinary general meeting of the MC held on 29 September 1992 in order to approve the proposals for the modernisation of the lift system, De Beers chose not to raise any issue on the sum of $200,000 that they had already paid for this purpose;

(b) when sued on 21 September 1993 for outstanding maintenance and sinking fund contributions, De Beers did not raise the issue either;

(c) when in 1996, the MC registered a charge against the 18 maisonette units to obtain security for the unpaid maintenance and sinking fund contributions, De Beers did not raise this issue;

(d) when Mr Lim asked De Beers about paying the outstanding arrears during the financial crisis of 1997/1998, again De Beers was silent;

(e) when Mr Lim spoke to Mr Ow before the letter of demand dated 9 November 2000 which preceded the present suit, De Beers was silent; and

(f) on 21 November 2000, De Beers paid $10,000 towards the outstanding maintenance charges and said they would pay the claim later.

Mr Sim submitted that considering that there was a potential dispute over a substantial payment amounting to $370,000, it was inexcusable that De Beers chose not to enquire about the facts or the law or to protest or complain for so many years.

According to ***The Law of Restitution*** :

> *... laches [is] an equitable doctrine which defeats stale demands where a party has slept upon his rights. Equity adopts no fixed time-bar, but considers the circumstances of each case in determining whether there is delay amounting to laches. "Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other", in particular, the prejudice to the defendants caused by*

> *the conduct of the plaintiff. If the defendant has suffered substantial prejudice, he need not prove that that prejudice was caused by the delay. [at p 846]*

There are thus two ingredients to be considered: the length of the delay and secondly, whether such delay has caused prejudice or injustice.

In considering the first factor of the length of delay, it is important to know when the claimant became aware of his right to claim restitution. In **Beale v Kyte** [1907] 1 Ch 564, Neville J said:

> *But, further than that, in all cases of mistake in order that laches or acquiescence may be a defence there must be notice of the error, and time runs from the date of the notice and not from the time when the errors is committed; and it is inconceivable to my mind that on a question of laches time can run from the time the mistake was committed. It seems to me it must run from the time when the plaintiff`s attention is first called to the error. [at p 566]*

Similarly in **Rees v De Bernardy** [1896] 2 Ch 437, Romer J opined:

> *But it is said that the right to rescind has been lost by the delay of the two women and by their acting on the agreement made and permitting the defendant to receive the half of certain moneys recovered in respect of the property. Now, I take it to be a rule of the Court in cases of this kind, that where a person has once a right to rescind a contract he does not lose that right merely by acting upon it or by delay in impeaching it, so long as he remains in ignorance of his right and the position of parties remains substantially the same. [at p 445]*

In the present case, Mr Ow`s evidence was that he was entirely unaware that the MC`s demands were unlawful until he consulted his present solicitors after commencement of this action. He had had previous solicitors dealing with the previous claim and also with the strata subdivision and the registration of the covenant in respect of maintenance of the roof but had not been advised by these solicitors of the possibility that the demands were unlawful. It was submitted on De Beers`s behalf that time would not run against them because of their ignorance and that any delay in the prosecution of their claim arose solely from such ignorance.

As regards prejudice, the submission was that neither in their pleadings nor their witnesses` affidavits of evidence-in-chief, had the MC explained how the alleged delay in the prosecution of De Beers`s claims had prejudiced them. I agree. It appears to me that the MC would have incurred the same expenditure on the lift system whether or not De Beers had agreed to pay the $200,000. This was because the lift system was old, complaints had been received and it was the advice of the experts Schindler that led to the MC`s proposals for modernisation. Further, when the matter was put before the general meeting for approval, De Beers did not inform the subsidiary proprietors of the $200,000 donation. They were not influenced by that donation therefore when they approved the expenditure. The situation might well have been different if they had known about the donation and had agreed to the upgrading on the basis that the levies on them would have been reduced by reason of the donation. As regards the maintenance of the new common corridor, I was not shown any evidence of the expenditure incurred by the MC and that this was more than they had anticipated. Further, the

MC had an avenue to recover such expenditure under s 42(5). The fact that they did not use that avenue but preferred to levy their own (illegal) charge is what has led to the possibility of having to regurgitate the same. It is not even certain that they may not be able to recover from De Beers the maintenance costs they have already incurred. It may very well be that a levy that includes a component to represent costs already incurred would be approved subsequently by the Commissioner of Buildings. In any case there is nothing to stop the MC from now following the procedure set out in s 42(5) in order to make the proprietors of the 18 units pay the on-going costs of maintaining the corridor.

I note that De Beers kept silent for a considerable period of time. As far as the complaints relating to 1992 are concerned, there is ample evidence to show that at that time Mr Ow believed the demands to be lawful. He acted on that belief in 1993 when he made payment of the second sum. His inaction thereafter was consistent with the continuing mistake under which he operated. This was a mistake that was shared by the MC and there was nothing that alerted him to the true situation. It is also true that had he sought advice earlier, say in 1996 or 1997, he might very well have been advised that since the mistake that he had made was one of law, recovery was impossible in any case. Even De Beers`s present solicitors did not realise until very late in the day that restitution on the ground of mistake was a cause of action that had become open to De Beers.

I find accordingly, that De Beers is not barred on the ground of laches.

(10) ESTOPPEL

The MC argued that estoppel was available as a defence because the three conditions necessary to raise an estoppel were satisfied. These conditions are representation, reliance, and change of position. I disagree. The essential element of representation is absent here.

Let me examine the assertions in relation to representation. First, as regards the payment of $200,000, the following are said to constitute representations by De Beers that that payment was not unlawful:

(a) De Beers`s agreement that their conversion plans would result in increased usage of the lifts and their consequent agreement to contribute towards the cost of modernisation;

(b) the fact that on 14 April 1989 De Beers signed an agreement undertaking to pay $200,000 to modernise lifts;

(c) the actual payment by De Beers;

(d) the verbal reminder by Mr Ow on 23 July 1993 when he was trying to get a reduction in the maintenance contribution that De Beers had already paid $200,000 and the written repetition of that contention in a letter dated 30 July 1993; and

(e) the failure by De Beers to raise the issue of the payment of $200,000 as a defence to the MC`s action in September 1992 for the sum of $130,138.15 being arrears in contributions levied.

I cannot see how any of the above could qualify as a representation that the payment made was a lawful one. The above incidents show De Beers`s acceptance at that time of the lawfulness of the imposition. They do not show that the MC was in any doubt about the situation or that they had to be persuaded by De Beers that what was being done was correct. The citation of these incidents also overlooks one prime fact that was that the requests for such payments emanated from the MC. There

was abundant evidence that it was the MC that decided on the impost not De Beers.

As regards the sum of $170,000, again counsel cited various incidents that showed De Beers`s acceptance of the situation and their agreement to make the contribution. Once again, these occasions were said to constitute representations that the payment was not unlawful. I do not accept this submission for the reasons given in [para]96. They apply equally to the imposition of the $170,000.

(11) CHANGE OF POSITION

Change of position is a distinct defence to a claim for restitution. It was recognised in **Lipkin Gorman v Karpnale** [1991] 2 AC 548[1992] 4 All ER 512 that this defence was wider than estoppel because it did not depend on any breach of duty or misrepresentation by the payee.

Mr Sim submitted that even if De Beers had a cause of action for money had or received, it was outweighed by the injustice caused if the MC was asked to repay the $370,000. He argued that De Beers had obtained the fruit of their bargain and it would be unconscionable for them to obtain these benefits and then be allowed to recover the moneys paid for the benefits. The MC was saddled with liabilities in modernising the lifts and maintaining the additional common property. Grave injustice would result if the MC had to repay the moneys.

The Court of Appeal has commented on the availability of the defence of change of position. It observed in **Seagate Technology v Goh Han Kim** [1995] 1 SLR 17 at 29:

> *We agree with the learned judicial commissioner that this defence is available in our jurisdiction. The availability depends on whether the defendant`s position has so changed that it would be inequitable in all the circumstances to require him to make restitution or restitution in full to the plaintiffs. What is relevant here is whether any inequity might result from an order to make restitution. Importantly, the inequity itself must arise from the defendant`s change of position, and in this all the circumstances relating to the change of position should be taken into consideration. A circumstance crucial to the availability of the defence of change of position is the bona fides of the defendant. It was not merely a change of position but a `bona fide change of position` which Lord Goff considered as a good defence. His Lordship said, at p 580:*
>
> *`It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.`*
>
> *The above extract makes it clear that knowledge of the facts entitling the plaintiff to restitution would bring the defendant`s bona fides into question and disentitle him from relying on this defence.*

In my view, the MC is not entitled to rely on this defence. They have not been able to substantiate any change in position. In the first place, the upgrading of the residential lifts in the complex was not, as I have stated in [para]91 above, due to De Beers`s subdivision plans. The fact is that the lift system was outmoded and needed replacement. Secondly, it was the wrongful demand from the MC that led De Beers to pay them the $200,000. As the authorities cited show, the MC cannot rely on their own wrongdoing to justify a change in position. Thirdly, the further condition regarding the

payment of $170,000 was also unlawful and there was no evidence presented substantiating the use of the same for the maintenance of the common corridor. There was no evidence either that this sum was used for any other purpose or that such expenditure would not have been incurred had the sum not been paid. Fourthly, as regards the roof, there can be no defence of change of position since the responsibility for the roof remained the MC`s at all times and it was not legally entitled to impose this responsibility on anyone else.

(12) INTEREST

The MC has claimed post-judgment interest on the outstanding management fund and sinking fund contributions and on the special levy at 10%p[thinsp]a. This claim is based on resolutions passed at meetings of the MC and these resolutions were passed pursuant to powers conferred on the MC by s 42(10)(b) of the Act. Post-judgment they are entitled to simple interest at 10%p[thinsp]a on all management fund and sinking fund contributions levied on or after 29 March 1995 and not paid within 30 days of such levy. They are also entitled to similar simple interest on the amounts payable as part of the special levy authorised by the extraordinary general meeting of 8 July 1997. I would like the MC to give me a breakdown of the judgment sum that De Beers has been ordered to pay so that I can ascertain how much of that is interest and how much represents the unpaid contributions and levies. I will then approve an order relating to the calculation and payment of post-judgment interest on the basis of what I have stated above.

The other issue is what interest should be awarded to De Beers in respect of the amounts wrongfully obtained from them. These amounts were paid in January 1992 and August 1993 respectively. The MC has had the benefit of these sums for a considerable period and De Beers has been out of pocket for the same period. It must be compensated for the loss of use of the funds. I order the MC to pay De Beers simple interest on the amounts of $200,000 and $170,000 at the rate of 5%p[thinsp]a from the respective dates falling one month after the date of each payment up till the month of June 1995. From June 1995 up to date of payment, interest shall be calculated at the rate of 10%p[thinsp]a, ie at the same rate as that which the MC is entitled to collect.

Conclusion

I make the following orders:

(1) the defendants shall pay the plaintiffs post-judgment interest at the rate of 10%p[thinsp]a on the outstanding contributions and levies, the exact form of the order to be approved by me after the plaintiffs have presented me with their calculations;

(2) the plaintiffs shall repay the defendants the sum of $370,000 with interest at the rates and for the periods stated in [para]103 above;

(3) there shall be a declaration that it is the plaintiffs and not the defendants who are legally obliged to maintain the roof above the 18 units at [num]31-987 to [num]31-1004, People`s Park Complex; and

(4) there shall be a declaration that the defendants are not legally obliged to register any covenant in respect of any of the 18 subsidiary strata certificates of title for the 18 units known as [num]31-987 to [num]31-1004, People`s Park Complex to the effect that the subsidiary proprietors thereof shall maintain, at their own cost, the roofs directly above the 18 units.

As for costs, I would like to hear the parties on what adjustments, if any, should be made to reflect the fact that the defendants have succeeded on mistake which was a late amendment to their counterclaim and failed on the doctrine of ***colore officii*** which was the original basis of their claim.

Outcome:

Order accordingly.