Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd [2002] SGCA 13

Case Number	: CA 600105/2001
Decision Date	: 06 March 2002
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s)	: Michael Hwang SC, Andrew Chan, Desmond Ho, Mohd Reza (Allen & Gledhill) and Benjamin Sim (Kelvin Chia Partnership) for the Appellant; Harpreet Singh Nehal, Gerald Kuppusamy and Shirin Tang (Drew & Napier LLC) for the Respondent
Parties	: Management Corporation Strata Title No 473 — De Beers Jewellery Pte Ltd

Judgment

GROUNDS OF DECISION

This was an appeal from the decision of Justice Judith Prakash ("the judge"), in which she upheld the respondent's counterclaim for a reimbursement of certain sums which it had paid to the appellant. She also granted two declarations in terms requested by the respondent.

The facts

2 The appellant is the management corporation of People's Park Complex, a mixed use development in the Chinatown area. In 1988, the respondent bought four penthouse units (occupying the top two storeys), which it intended to convert into 18 maisonette units. It required the appellant's permission to do so. Discussions took place from 1989 to 1993. During that time, the respondent paid $200,000 towards the cost of upgrading the lifts and $170,000 towards the cost of maintaining part of the common property. The facts will be dealt with in greater detail below.

3 On 12 December 2000, the appellant sued the respondent for maintenance contributions and other payments for the 18 units. On 27 March 2001, the respondent counterclaimed for the $370,000. The respondent also sought declarations relating to the maintenance of the roof above the 18 units. On 19 February 2001, the appellant obtained summary judgment for its claim, but execution was stayed pending the trial of the respondent's counterclaim. The counterclaim was heard by Justice Prakash in July 2001.

The judge's decision

4 The judge delivered her judgment on 31 July 2001. She first set out the facts and procedural history. She then identified the issues and dealt with them as follows (these issues are not classified in the same way as we have classified the issues arising in this appeal):

> a No contract existed between the parties. As the respondent was in the position of an applicant, and the appellant in the position of a licensing body, there was no intention to create legal relations.
>
> b The appellant's demands of $200,000 and $170,000 were *ultra vires* s 42(2) and s 42(5) of the Land Titles (Strata) Act ("LTSA") (Cap 158) respectively. The demands could not be legitimised by anything outside the LTSA framework.

c The respondents had paid the sums under a mistake of law. It was time for the Singapore courts to abrogate the rule against the recovery of payments made under a mistake of law.

d The respondents could not claim the money under the *colore officii* principle, as the appellant is not a public, quasi-public or monopolistic body. (This is not an issue in the appeal and will not be dealt with here.)

e The counterclaim was not time-barred because it did not fall within the provisions of the Limitation Act (Cap 163).

f At all times, the appellant had a statutory duty to maintain the roof of the building, hence it could not require the respondent to do so. Therefore the court granted the declarations sought by the respondent.

g The appellant did not succeed on any defences pleaded:

i. The appellant could not rely on the defence of laches because: one, not much time had lapsed since the respondent could first have been aware of its cause of action; and two, no prejudice had been caused to the appellant by the time lapse.

ii. The appellant failed on the defence of promissory estoppel because the respondent had not made any relevant representations to it. The respondent had merely accepted that the appellant had the power to make the demands. (The appellant did not seek to rely on this defence on appeal, and its submissions before the judge will not be dealt with here.)

iii. The appellant could not establish the defence of change of position because: one, the demands for payment and that the respondent maintain the roof were *ultra vires*; two, the appellant would have had to upgrade the lifts anyway; and three, there was no evidence that the $170,000 had been used to maintain the common property.

h The parties were to pay interest as follows:

i. The respondent was to pay the appellant simple interest on the maintenance contributions and other payments, from the date of the summary judgment, at ten percent per annum (this was not an issue in the appeal and will not be dealt with here).

ii. The appellant was to pay the respondent simple interest:

1. on $200,000: at five percent per annum from February 1992 to June 1995, and at ten percent per annum thereafter; and

2. on $170,000: at five percent per annum from September 1993 to June 1995, and at ten percent thereafter.

The judge subsequently ordered that the respondent be awarded the full costs of the counterclaim.

The issues

5 The issues in this appeal were:

> a Whether the appellant's demand for $200,000 was *ultra vires* the LTSA; if it was, whether the parties could and did contract around the LTSA.
>
> b Whether the appellant's demand for $170,000 was *ultra vires* the LTSA; if it was, whether the parties could and did contract around the LTSA.
>
> c Whether the law allows recovery of payments made under a mistake of law; if so, whether the respondent in fact paid out under a mistake of law.
>
> d Whether the declarations relating to the maintenance of the roof above the units should have been granted.
>
> e Whether the appellant should succeed on the defences pleaded before the judge: time bar, laches and change of position.
>
> f Whether the appellant should succeed on the defences raised on appeal: settlement of an honest claim, compromise, honest receipt, estoppel by convention and abuse of process / extended res judicata.
>
> g Whether other defences should be recognised, for example: payment made under a closed transaction, payment made under a settled view of the law, promissory estoppel and passing on the burden of the payment.
>
> h Whether the judge erred in awarding interest to the respondent at such rates and for such period as she did.
>
> i Whether the judge erred in awarding the full costs of the counterclaim to the respondent.

The first issue: whether the demand for $200,000 was ultra vires

The relevant facts

6 In a letter dated 13 April 1989, the appellant said that it would not object to the conversion of the four penthouse units to 18 maisonette units on condition that, *inter alia*:

> A one-time contribution of $200,000 to the Management Corporation towards part of the cost for the modernisation of the 3 lifts serving the residential apartment (*sic*)…

The next day, Mr Ow Chor Seng ("Mr Ow"), a director of the respondent, signed on the letter to indicate acceptance of the conditions. The respondent paid $200,000 by a cheque dated 10 January 1992. According to the appellant's accounts for 1992, the money was put into the sinking fund and used to upgrade the lifts.

7 The appellant claimed that the reason for this demand was that the increased number of occupants in the top two storeys would place more pressure on the lifts. However, at the Extraordinary Meeting of the management corporation held on 29 September 1992, this reason was not mentioned. Instead, the Explanatory Notes to the Special Resolution passed at that meeting stated that the lifts had to be upgraded due to wear and tear, that residents had complained about the waiting times for lifts and that shopkeepers had complained about the goods lift. The appellant tried to explain away the fact that no mention had been made of the respondent's contribution in the Explanatory Notes, by repeating the testimony of Mr Lim On Guan ("Mr Lim"), an employee of the appellant's managing agent:

> Court: Wouldn't it have helped you get the resolution passed if residents knew defendants were defraying part of this cost?
>
> A: No. All kinds of questions could have come up like why not get them to pay all the costs or why convert the penthouses, why not maintain them for a more exclusive environment. We had to consider what would make it easier to get the resolution passed.

The role of a managing agent is to present all the facts to the subsidiary proprietors and allow them to decide whether to pass a resolution, not to conceal material facts and manipulate the outcome of a vote. Any misfeasance aside, it was difficult to believe that the managing agent would have been motivated by such a minor consideration to risk misinforming the subsidiary proprietors. The judge found that the impetus for upgrading the lifts was not the increased traffic that would allegedly have resulted from the conversion of the penthouse units. There is no reason to overturn this finding.

The relevant LTSA provisions

8 The starting point was s 48(1)(q) of the LTSA, which provides:

> 48. --(1) A management corporation shall, for the purposes of the subdivided building concerned —
>
> (q) from time to time, *levy, in accordance with section 42*, on each person liable therefor a contribution to raise the amounts referred to in paragraphs (m) and (n)… (*emphasis added*)

Section 48(1)(n)(ii) allows a management corporation to raise contributions "for the renewal or replacement of any electrical and mechanical installations existing for common use". As the upgrading of the lifts fell within s 48(1)(n)(ii), contributions thereto should have been raised in accordance with s 42. Section 42(2) provides:

> 42. --(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*. (*emphasis added*)

As the appellant had demanded a flat-rate contribution of $200,000, it had acted *ultra vires* the LTSA.

A contract circumventing the LTSA?

9 The appellant's submission here was founded on two points. Firstly, a management corporation has the capacity to enter into contracts. This argument, according to the appellant, would not be defeated even if the appellant was akin to a public body, because public bodies also have the capacity to contract. It was unfortunate that the judge likened the appellant to a licensing body, because it allowed the appellant to go off on a tangent by submitting on principles applicable only to public bodies. A management corporation is not a public body, but an unlimited liability company. In any case, the issue was not whether the appellant had the *capacity* to contract, but whether there were any contracts between the parties.

10 The appellant's second point was that all the elements of a contract were present, including an intention to create legal relations. The judge had found that there was no such intention. We accepted that the dealings took place in a commercial context, but even if all the ingredients of a contract were established, the appellant's contract argument was untenable for the following reasons. Firstly, it is trite law that a body created by a statute only has powers granted expressly or by implication in that statute. A management corporation's power to raise contributions is clearly and exhaustively provided for in s 42 of the LTSA. Anything done outside these powers is void *ab initio*. Secondly, upholding contracts which circumvent the detailed and carefully drafted provisions of the LTSA would drive a coach and horses through it.

The second issue: whether the demand for $170,000 was ultra vires

The relevant facts

11 The conversion entailed a subdivision of the four strata title lots into 18. It would also have resulted in the creation of a common corridor. In a letter dated 5 May 1993, the appellant said it would approve the strata subdivision plans on condition that, *inter alia*:

> [the respondent] …pay an outright contribution of $200,000 to [the appellant] for the maintenance… of the additional common property…

The appellant later agreed to reduce the sum to $170,000. Mr Ow signed on the first letter to indicate acceptance of the conditions. The respondent paid $170,000 by a cheque dated 25 August 1993.

The relevant LTSA provisions

12 The starting point was s 48(1)(q) of the LTSA, which is reproduced in 8. Section 48(1)(m)(i) allows a management corporation to raise contributions "for the purpose of meeting its actual or expected liabilities incurred or to be incurred under paragraph (a), (b), (c) or (d)". Section 48(1)(b) further provides:

> 48. --(1) A management corporation shall, for the purposes of the subdivided building concerned —
>
> (b) properly maintain and keep it in a state of good and serviceable repair —
>
> (i) the common property…

Section 3 defines "common property" as:

> (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*, lobbies, *corridors*, stairs, stairways, fire escapes, entrances and exits of the building and windows installed in the external walls of the building… (*emphasis added*)

As the new corridor was "common property" within the meaning of s 48(1)(b)(i), contributions thereto should have been raised in accordance with s 42. Section 42(5), an exception to s 42(2), applied in this case:

> 42. --(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. (*emphasis added*)

13 As Professor Teo Keang Sood (*Strata Title in Singapore and Malaysia*) has pointed out, this provision recognises that a subsidiary proprietor should not be allowed to impose the additional cost of maintaining new common property on other subsidiary proprietors, by subdividing his property. However, the interests of the subsidiary proprietor who intends to subdivide his property must also be safeguarded, hence the Commissioner's role in ensuring that the contribution imposed by the management corporation is fair. As the appellant had failed to raise the contribution in accordance with s 42(5), it had acted *ultra vires* the LTSA.

LTSA s 12(2)?

14 The appellant submitted that s 12(2) afforded it another route to raise contributions, quite apart from s 42. Section 12(2) provides:

> 12. --(2) 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.

The appellant relied on s 12(2) in respect of both payments. However, as s 12(2) deals only with the creation of new common property, it was at most relevant only to the payment of $170,000.

15 The appellant's lengthy exploration of the legislative history of s 12(2) did not aid its case. It also claimed that a management corporation has powers incidental to those which are expressly provided for in the statute, and hence the manner in which it raised the contribution was within the powers incidental to s 12(2). These arguments failed for three reasons. Firstly, s12(2) makes no mention whatsoever of a management corporation's authority to raise contributions in connection with granting approval. The judge did not rule out the possibility that it could charge an administrative fee, but surely such a fee could not run into hundreds of thousands of dollars. Secondly, there was no need to speculate about the extent of powers to levy contributions incidental to s 12(2), as s 42 clearly delineates a management corporation's powers to raise contributions. Thirdly, recognising

vague incidental powers would defeat the scheme of s 42; this rationale is akin to the one explored in 10.

16 The appellant also sought to apply its contract argument to the $170,000. For the reasons discussed in 9 and 10, this failed.

The third issue: whether the sums are recoverable as payments made under a mistake of law

The present law

17 The law in Singapore in this area, since *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113, has been that money paid out under a mistake of law –as opposed to fact – is not recoverable. The key question here was whether Singapore law should follow the example of some other Commonwealth states and abrogate this rule. If the answer was in the affirmative, subsidiary questions included: whether the rule should be abrogated legislatively (as in Western Australia and New Zealand) or judicially (as in Australia, Canada, England and South Africa); and what defences, if any, should be developed.

Should the law be changed?

18 In *Kleinwort Benson v Lincoln City Council* [1998] All ER 513, the House of Lords unanimously decided that it was time to abrogate the rule; by a majority, it decided to do so judicially. Lord Goff referred to the Law Commission's Consultation Paper No. 120 on Restitution of Payments Made Under a Mistake of Law (1991), which cited the following as the main criticisms of the rule:

a The rule was contrary to justice, which demanded that money paid under a mistake of law should be repaid unless there were special circumstances justifying its retention by the payee.

b The distinction between mistakes of fact and mistakes of law could lead to arbitrary results.

c Courts were tempted to manipulate the fact-law distinction in order to achieve practical justice. This led to uncertainty in the application of the rule.

19 The court also held that two factors in particular did not defeat a claim: firstly, that the payment had been made as part of a transaction which was now closed; and secondly, that the payment had been made on a settled view of the law. These holdings are further discussed at 47 to 52.

20 The appellant's first objection to the abrogation of the rule was that it was well-entrenched. Such an argument had no merit because the common law is no stranger to judicial activism. The appellant's second objection was that the abrogation of the rule would undermine certainty, as closed transactions would be reopened and unscrambled. This contention will be addressed at 47 to 52. It will suffice to say here that it was not a fatal objection to the abrogation of the rule.

21 Most judicial and academic opinion is in favour of bringing the law on mistakes of law in line with that on mistakes of fact. There does not seem to be any insurmountable objection once thought has been given to the scope of the new rule and the exceptions to it.

If the law is to be changed, how should it be done?

22 The arguments in favour of judicial abrogation were as follows. Lord Lloyd in *Kleinwort Benson* gave two:

> Indeed I can imagine few areas of the law in which it would be more appropriate for the House [of Lords] to take the initiative. *The mistake of law rule is judge made law. There are no considerations of social policy involved.* (*emphasis added*)

Firstly, as the mistake of law rule was not created by Parliament, abrogating it judicially would not amount to defeating legislative intent. Secondly, as no social policy issues were involved, abrogating the rule judicially would not amount to usurping the legislative function. Thirdly, the courts were not in a position to know if, and when, Parliament would change the law.

23 The Law Reform Committee ("LRC") of the Singapore Academy of Law ("SAL"), like the Law Commission in England, recommended in its Paper on Reforms to the Law of Restitution on Mistakes of Law (2001) that the rule be abrogated by legislation. The key argument in favour of legislative intervention stemmed from a fear of opening the floodgates to the re-litigation of closed transactions. In particular, it was thought that Parliament would be better able to address two issues. The first was: whether the change in the law should have retrospective effect. The LRC of the SAL recommended that the Civil Law Act (Cap 43) be amended to allow this. However, a judicial abrogation of the law could achieve the same if this Court followed *Kleinwort Benson* in holding that a payment made under a mistake of law could be recovered even if it had been made under a completed transaction (see 47 and 48).

24 The second issue was: whether limitation periods should be introduced in respect of claims founded on a mistake of law, and if so, how long they should be. Section 29(1) of the Limitation Act provides:

> 29. --(1) Where, *in the case of any action for which a period of limitation is prescribed by this Act* — …
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. (*emphasis added*)

No legislative intervention was needed for two reasons. Firstly, s 29 does not specify "mistake" as either one of fact or one of law, hence it can apply equally to both. We noted that the LRC of the SAL recommended that s 29 be amended so as to clarify that it encompasses mistakes of law as well, but we did not think it absolutely necessary. Secondly, the italicised words show that s 29 was intended to apply only to situations covered by the Limitation Act. As there was no need to extend the scope of recovery under a mistake of law further than that under a mistake of fact, there was no need to amend s 29.

Application to the facts

25 In *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, a case decided after *Kleinwort Benson*, the court said:

> … it does seem to me clear that in order to found a claim for repayment of

> money paid under a mistake of law it is necessary for the payer to establish not only that *the mistake was made* but also that, *but for the mistake, he would not have paid the money*. (*emphasis added*)

The first requirement – that there was a mistake – was satisfied. Firstly, the judge found that the appellant itself had believed that it had the authority to make its approval conditional upon the respondent's paying the sums demanded. Mr Lim had been cross-examined in relation to the $200,000 payment:

> Q At the time this letter [dated 13 April 1989, see 6] was written did you believe that the MC had the power to impose this condition?
> A Yes.

He had also been cross-examined in relation to the $170,000 payment:

> Q At the time of this final offer, you still believed that the MC had the power to impose the conditions it did.
> A Yes.

26 Secondly, the judge found that Mr Ow had always been under the impression that the appellant's demands were lawful. Mr Ow had been cross-examined in relation to the $200,000 payment:

> Q You said you had no choice. Did you protest at the meeting?
> A No because *I believed they had the power to do so* and I had no choice. (*emphasis added*)

He had been further cross-examined in relation to the $170,000 payment:

> Q Aware of the EGM held on 29/9/92?
> A Yes.
>
> Q Agree you could have raised the issue of the payment of the sum of $200,000 [which was later reduced to $170,000] at the EGM?
> A Yes.
>
> Q You did not do so.
> A Agree.
>
> Q Why not?
> A Because at that time *we were of the opinion that the plaintiffs' action was lawful*… (*emphasis added*)

This had not been helped by the fact that the respondent did not consult a lawyer or an architect on the issue of whether it had a legal obligation to meet the appellant's conditions.

27 Thirdly, the judge found that the respondent objected to the quantum demanded rather than its liability to pay.

28 The second requirement – that, but for the mistake, the respondent would not have paid – was also met. There was no reason to overturn the judge's finding that the respondent had not paid voluntarily. The appellant argued that the respondent faced a time constraint, and would have paid the money rather than run the risk of not obtaining the appellant's approval. If, as the appellant

contended, Mr Ow was a seasoned businessman and the parties had treated the transaction as a commercial one, it would have been hard to believe that, had the respondent known that the demands were *ultra vires*, it would have paid any more money than it had to.

The fourth issue: declarations requested by the respondent

The relevant facts

29 In a letter dated 5 May 1993, the appellant said it would approve the strata subdivision plans on condition that, *inter alia*:

> [The respondent]… cause to be registered as a covenant in each of the eighteen (18) Subsidiary Strata Certificates of Title for the 18 subdivided units to the effect that the subsidiary proprietors thereof shall maintain at their own cost the roof directly above the 18 units.

Mr Ow had signed on the letter to indicate acceptance of the conditions.

The relevant LTSA provisions

30 As was apparent from the strata plans, the roof had never been part of the original four penthouse units. The reasoning in relation to the new corridor applied here (see 12). As the roof above the units was "common property" (as defined in s 3) within the meaning of s 48(1)(b)(i), the appellant had a duty to maintain it. Moreover, as the judge pointed out, it was not only the roof of the units, but also the roof of the entire development. The appellant's imposition of the condition was *ultra vires* the LTSA, hence the judge was right in granting the following declarations:

a The appellants, not the respondents, were legally obliged to maintain the roof above the units.

b The respondents were not legally obliged to register any covenant to the effect that the subsidiary proprietors of the 18 units had to maintain the roof above their units.

31 The appellant also sought to apply its contract argument to the covenant. For the reasons discussed in 9 and 10, this failed. Although the discussion in 10 relates to s 42, it was equally true that parties should not be allowed to absolve a management corporation of its duties under s 48.

The fifth issue: defences pleaded before the judge

Time bar and laches

32 A perusal of the Limitation Act showed that a claim for unjust enrichment which was neither grounded in contract nor tort, and in which equitable relief was not sought, did not fall within the scope of the Act. Hence s 29 was irrelevant, and there was no need for an inquiry as to when the respondent first knew of the mistake, or could with reasonable diligence have known of the mistake.

33 Laches is an equitable doctrine which considers the facts of the case rather than a fixed time bar. In *Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221, the court said that two important factors were: the length of the delay; and the acts done during that time. In measuring the length of the

delay, the court in *Beale v Kyte* [1907] 1 Ch 564 said:

> … 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 error is committed*… (*emphasis added*)

The judge found that the respondent did not know of its mistake until during the trial: Mr Ow had paid the money while mistaken; solicitors who had acted for the respondent in earlier matters had failed to notice the mistake; and even the respondent's present solicitors had only raised the issue of mistake of law just before trial. She also said that the respondent could not reasonably have known much earlier that it had a cause of action, as money paid under a mistake of law was still not recoverable in Singapore.

34 The second factor related to the acts done from the time the mistake was made to the time when the party or parties realised the mistake. The judge found that the appellant would have upgraded the lifts anyway (see 7), and hence it had suffered no prejudice in relation to the $200,000. As for the $170,000, as no evidence was adduced as to whether, and how, it was spent, the appellant could not argue that it had been prejudiced by the alleged delay.

Change of position

35 This was one of the defences overtly accepted in *Kleinwort Benson*. Lord Goff said:

> I recognise that the law of restitution must embody specific defences which are concerned to protect the stability of closed transactions. The defence of *change of position* is one such defence; the defences of *compromise*, and *settlement of an honest claim* (the scope of which is a matter of debate), are others. It is possible that others may be developed… (*emphasis added*)

The defence of change of position was recognised – some say, created – in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Lord Goff held that "a bona fide change of position should of itself be a good defence". He elaborated:

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person *whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution*, or alternatively to make restitution in full. (*emphasis added*)

In *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 2 SLR 17, the court noted that this defence was also available in Singapore. It would seem that there are three elements to the defence:

a The payee has changed his position.

b The change is *bona fide*.

c It would be inequitable to require him to make restitution or to make restitution in full.

36 Could the appellant rely on this defence with regards to the $200,000? Firstly, it had changed its position by expending the money to upgrade the lifts. Secondly, because the appellant too had been mistaken as to the validity of its demand and its ability to apply the money to upgrading the lifts, its

change of position was *bona fide*. Thirdly, however, it would not have been inequitable to require the appellant to make restitution in full. According to Lord Goff:

> … the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because *the expenditure might in any event have been incurred by him in the ordinary course of things*. (*emphasis added*)

This was because, firstly, the judge had found that the appellant would have upgraded the lifts in any case (see 7). Furthermore, as the need for upgrading was not shown to be due, even in part, to the respondent's proposed subdivision, the appellant was not allowed to retain any part of the $200,000. Secondly, the appellant's demand was *ultra vires*.

37 Could the appellant rely on this defence with regards to the $170,000? As there was no evidence as to how the $170,000 was spent, the first requirement – that the appellant had changed its position – was not even met.

The sixth issue: defences raised on appeal

38 On appeal, the appellants raised the following defences for the first time. The principles governing such situations are found in *Attorney General for the Straits Settlements v Pang Ah Yew* [1934] 1 MLJ 189, which cited Lord Hershell in *The Tasmania* (1890) 15 App Cas 223:

> … a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that *it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial*: and next that *no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box*. (*emphasis added*)

39 As we state below that "honest receipt" and "estoppel by convention" are not acceptable defences, the above principles were applied only to the other grounds raised. The facts necessary for deciding whether the defences are made out were:

a Honest claim: the payee's state of mind at the time of demand; and the payer's state of mind at the time of payment.

b Compromise: the payer's state of mind at the time of payment.

c Abuse of process: the respondent's state of mind at the time of the earlier suit in 1992.

As for the first principle, these facts did not go beyond those which were necessary for deciding whether the payment had been made under a mistake of law. As for the second principle, it was the respondent whose conduct was impugned, whether by the suggestion that it knew or believed that the claim was invalid or was indifferent as to whether it was invalid. The respondent did not have to do more to prove its state of mind at the relevant time, than it had to for the purposes of showing that it had made a mistake of law. Hence the appellant was allowed to raise these new grounds.

Settlement of an honest claim and compromise

40 These defences were recognised in *Kleinwort Benson*, though Lord Goff said there was uncertainty as to the scope of the former (see 35). The elements of the defence of settlement of an honest claim are:

a The payee honestly believes that he can legitimately demand payment; and

b The payer knows or believes that the payee's claim has no legal basis.

Element "a" was met (see 25). However, element "b" was not: the respondent believed that the appellant had the authority to impose the conditions (see 26).

41 To satisfy the defence of compromise, it must be shown that the payer was indifferent as to whether the payee's claim had a legal basis. The discussion above has concluded that, far from being indifferent, the respondent believed that the appellant's demands were legal (see 26). The payee's state of mind was irrelevant.

Honest receipt

42 The appellant cited Brennan J in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 as support that this was a defence to a claim founded on mistake of law. This defence has not been embraced by other courts. It was in fact criticised by Lord Goff in *Kleinwort Benson*:

> … Brennan J's proposed defence is so wide that, if it was accepted, these other defences would in practice cease to have any relevance in the case of money paid under a mistake of law. Moreover in many cases of this kind the mistake is shared by both parties… In such cases, recovery by the plaintiff would automatically be barred by Brennan J's proposed defence.

We do not recognise this as a defence either.

Estoppel by convention

43 According to *Halsbury's Laws of England* (Volume 16 1070), the scope of this estoppel is still unclear. It was not appropriate at this juncture to accept it as a defence.

44 In any case, the appellant failed on this point. Firstly, the above-mentioned passage in *Halsbury's* defines "estoppel by convention" as:

> Where parties *to a contract* put a particular interpretation on it by a course of dealing on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation. (*emphasis added*)

As the parties' relationship was not contractual, the appellant could not rely on this doctrine. Secondly, the court would only uphold the common assumption if it would be unconscionable not to do so. As the judge found that the appellant had suffered no prejudice (see 34), it was not unconscionable not to give effect to any common assumption which existed. Thirdly, this estoppel

cannot be raised to deny one the protection afforded by a statute, the terms of which cannot be circumvented by contract. The discussion of the first and second issues (see 6 to 16) concluded that the relevant LTSA provisions could not be contracted out from.

Abuse of process / extended res judicata

45 The appellant said that the respondent had an opportunity to raise the issues in its counterclaim when it was sued by the appellant in 1992. The simple answer to this was that the respondent did not know of, and could not reasonably have known of, its claim at that time.

The seventh issue: whether other defences should be recognised

46 It may be fortunate that the Singapore courts can draw on the jurisprudence of other courts in this area, but no body of judge-made law comes ready-made. As was said by Lord Goff in *Kleinwort Benson*:

> The proper course is surely to identify particular sets of circumstances which, as a matter of principle or policy, may lead to the conclusion that recovery should not be allowed; and in so doing to draw on the experience of the past, looking for guidance in particular from the analogous case of money paid under a mistake of fact, but also drawing upon the accumulated wisdom to be found in the writings of scholars on the law of restitution.

The following issues were not raised in this case, but it was necessary to examine them to delineate – however imprecisely – the scope of the new rule. In particular, this would give Parliament an indication of the courts' stand on this area of law, should it later wish to pass relevant legislation.

Payment made under a closed transaction

47 The main argument against allowing recovery after the transaction in which the money was paid has been closed, is that everyone who has paid money under a mistake of law can sue for its return, subject to any applicable time bar and laches. As mentioned, this would not bring about an effect any different from legislative intervention with retrospective effect (see 23). Any worries about opening the floodgates can however be addressed through the rules on payments made under a settled view of the law. Lord Goff also thought that certain defences would "protect the stability of closed transactions".

48 The reasons for allowing recovery in respect of closed transactions are as follows. Firstly, not allowing recovery would defeat the policy behind the relevant law (about which one or both parties were mistaken). In *Kleinwort Benson*, Lord Goff said:

> … it is incompatible with the ultra vires rule that an ultra vires transaction should become binding on a local authority simply on the ground that it has been completed.

Secondly, allowing recovery when transactions are still open, but not when they are closed, will lead to capricious results. It may simply be a question of luck whether the mistake of law is, or could have been, discovered before or after the transaction is concluded.

Payment made under a settled view of the law

49 The majority in *Kleinwort Benson* ruled that this was not a defence to a restitutionary claim, but the minority thought that it should have been. The majority's view can be summarised as follows. Judges merely "declare" what the law is; they do not change the law but merely correct what was an incorrect view of the law. This correct view of the law is retrospectively imposed, such that the payer's belief at the time of payment – which may have been correct according to the earlier view of the law – is on hindsight deemed incorrect. Hence he had paid out under a mistake of law, and should be allowed to recover the money.

50 The minority opposed this for two reasons. Firstly, the declaratory theory of law is artificial, and it should be recognised that judges make and change the law. If the payer's belief at the time of payment was in line with settled law, he was not mistaken. Even if the law is changed with retrospective effect, his state of mind could not be so changed. Secondly, allowing such a defence would further undermine the finality of closed transactions. While it is accepted above that the fact that a transaction is closed *per se* should not be a defence, it would be undesirable to allow a transaction to be reopened merely because it had been made under a settled view of law which has been changed. Lord Browne-Wilkinson cautioned in *Kleinwort Benson*:

> 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.

It should be noted that, as *Kleinwort Benson* involved contracts, the limitation period for claims arising therefrom was six years. If, however, an area of law not covered by the Limitation Act was changed, persons who had made payments in reliance of the old law would have an unlimited period (subject to laches) in which to recover their money.

51 The LRC of the SAL preferred the minority position. It also pointed out that other jurisdictions which have abrogated the rule have not accepted this defence. The key issue is how a "change in the settled view of the law" should be defined, and whether it can be defined with sufficient precision as to avoid much litigation. The LRC of the SAL recommended that:

a "Settled law" means:

i. there is binding judicial authority on the specific point; and

ii. if there is no such authority, a lawyer who was reasonably experienced in the relevant field would have advised the payer to make the payment.

b A change in the settled law can only be brought about by judicial decision.

We think that this should be accepted as a defence, and that the definition of the LRC of the SAL should be adopted.

Promissory estoppel

52 Goff and Jones (*The Law of Restitution*) suggest that, in the context of restitutionary claims, the

defence of promissory estoppel cannot exist comfortably with that of change of position. In *Avon County Council v Howlett* [1983] 1 WLR 605, the court held that estoppel cannot operate *pro tanto*, such that:

> … if the defendant has innocently changed his position by disposing of part of the money, a defence of estoppel would provide him with a defence to the whole of his claim.

In contrast, the defence of change of position will only allow the payee to keep that part of the money which he has disposed of. Given that change of position has been specifically recognised as a defence in *Kleinwort Benson*, it is unlikely that promissory estoppel will be accepted as a defence to a restitutionary claim.

Passing-on the burden of the payment

53 Such a situation arises where X demands that Y pay a tax, which Y pays. Y then passes on the tax to Z, for example, by incorporating it in the price of goods which he sells to Z. According to Evans LJ said in *Kleinwort Benson v Birmingham City Council* [1996] 4 All ER 737, this defence is not available in the context of private law claims.

The eighth issue: interest awarded to the respondent

54 The authorities cited by the respondent related to situations in which the judge could award interest pursuant to what is now s 12 of the Civil Law Act (Cap 43). This provides:

> 12. —(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given *interest at such rate as it thinks fit* on the whole or any part of the debt or damages *for the whole or any part of the period between the date when the cause of action arose and the date of the judgment*. (*emphasis added*)

This is *in pari materia* with s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 in England. The words "any debt or damages" were construed by the House of Lords in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925:

> … the words "any debt or damages", in the context in which they occur, are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned.

Hence the judge had the power to award interest on these sums.

55 The first issue was whether the judge could have awarded interest for the period that she did. The appellant pointed out that s 12(1) only allows for interest to be awarded from the date the cause of action arose. It added that, since the respondent could not have known of its right to recover the money until the date of the judgment below, interest should only have run from that date. Although *BP Exploration* dealt with frustration of contract, the reasoning applied equally here because the common rationale was to prevent injustice to a successful plaintiff:

> … there cannot be any general rule that, whenever the amount of any debt or damages payable by one party... to the other cannot be ascertained until judgment is given, the court should never… award interest from a date earlier than the date of such judgment. To apply such a rule would, in my opinion, be plainly inconsistent with the express terms of s 3(1) [of the English Act], and in many cases… work *serious injustice on a successful plaintiff*. (*emphasis added*)

Hence the judge could exercise her discretion to award interest from the dates that she did.

56 The second issue was whether the judge was able to award interest at the rate she did. We saw no reason to interfere with her decision to award interest at five percent on the sums up to June 1995. However, we did not think that she should have linked her decision to award interest at ten percent thereafter to the rate which the appellant was entitled to collect for the maintenance arrears. They were unrelated causes of action. Interest from July 1995 should be at the more usual rate of six per cent.

The ninth issue: costs

Party-and-party costs in general

57 The principles governing the award of costs are elucidated in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, and adopted in Singapore in *Tullio v Maoro* [1994] 2 SLR 489. The relevant passage in *Re Elgindata Ltd (No 2)* provides:

> The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that… some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs… the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs.

As the respondent was the successful party below, according to principle (2), *prima facie*, it should be awarded costs. As for principle (3), the starting point was that the respondent failed on one ground, *colore officii*. However, it should not be deprived of its costs. Firstly, the trial ended within the allotted time. Secondly, as the respondent relied on the same facts for proving mistake of law and for proving *colore officii*, and as the appellant relied on the same defences to both claims, it was unlikely that the respondent's pleading *colore officii* caused a significant increase in the cost of the proceedings. The respondent had also paid costs to the appellant for the late amendment of its pleadings. Since it was not alleged that the respondent had raised issues improperly or unreasonably, according to principle (4), it was not ordered to pay the appellant's costs.

58 The court said in *Tullio v Maoro*:

> Although the question of costs is always in the discretion of the court and an

> appellate court will not readily interfere with the proper exercise of that discretion, an appellate court should not hesitate to interfere where the discretion has been manifestly exercised wrongly or exercised on wrong principles.

As the judge did not exercise her discretion wrongly nor on wrong principles, there was no reason to overturn her order on costs.

Costs of more than one solicitor

59 Both parties asked the court to certify costs for more than one solicitor under Order 59 r 19 of the Rules of Court:

> 19. –(1) Costs for getting up the case by and for attendance in Court of more than one solicitor for a party shall not be allowed unless the Court at the hearing or within 7 days thereof so certifies.
>
> (2) Such costs may be allowed notwithstanding that the solicitors are members of the same firm of solicitors.

We think that the requests were justified. The issues in this appeal were numerous and entailed consideration of reform of the law of Singapore. The lengthy submissions and large number of authorities cited also showed that considerable effort must have been expended.

Conclusion

60 We recognise the following as specific defences to a claim for money paid out under a mistake of law: settlement of an honest claim; compromise; change of position; payment made under a settled view of the law; and perhaps in non-private law claims, passing on the burden of payment. Lord Goff was alive to the possibility that other defences may be developed. We do not think that the following should be defences to such a claim: payment made under a closed transaction; honest receipt; promissory estoppel; and estoppel by convention. For these reasons, we dismissed the appeal.

61 We awarded the costs of this appeal to the respondent. We certified that costs for two solicitors be allowed. We also ordered that the security for costs and any accrued interest be released to the respondent to account of costs.

Sgd:

YONG PUNG HOW
Chief Justice

Sgd:

CHAO HICK TIN
Judge of Appeal

Sgd:

TAN LEE MENG
Judge