IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 1

Civil Appeal No 3 of 2021

Between

(1) Esben Finance Limited
(2) Incredible Power Limited
(3) Rayley Co Limited
(4) Lismore Trading Company Ltd

… *Appellants*

And

Neil Wong Hou-Lianq

… *Respondent*

In the matter of SIC/Suit No 6 of 2018

Between

(1) Esben Finance Limited
(2) Incredible Power Limited
(3) Rayley Co Limited
(4) Lismore Trading Company Ltd

… *Plaintiffs*

And

Neil Wong Hou-Lianq

… *Defendant*

JUDGMENT

[Trusts] — [Constructive trusts]
[Restitution] — [Unjust enrichment]
[Limitation of Actions] — [When time begins to run]
[Contract] — [Illegality and public policy]

TABLE OF CONTENTS

INTRODUCTION **1**

THE PARTIES TO THE DISPUTE **1**

BACKGROUND TO THE DISPUTE **2**

DECISION BELOW **5**

THE UNSATISFACTORY STATE OF THE EVIDENCE 5

THE ISSUE OF TIME-BAR AND/OR LACHES 7

THE UNJUST ENRICHMENT CLAIM 11

The 11 payments *11*

The three payments *12*

The remaining 36 payments *14*

The illegality issue *16*

THE OTHER CLAIMS 17

THE PARTIES' CASES **18**

APPELLANTS' CASE 18

RESPONDENT'S CASE 20

ISSUES ARISING IN THIS APPEAL **20**

OUR DECISION **21**

THE TIME-BAR ISSUE 21

Whether the Time-Barred Claims were time-barred under the Limitation Act *22*

(1) Preliminary issue 22

(2) Application of s 6 of the Limitation Act to claims in unjust enrichment 24

(A) The position in Singapore law 25

(B) Statutory wording of the Limitation Act....26

(C) Legislative history of the Limitation Act....41

(3) Application of s 29 of the Limitation Act 44

Whether the appellants' claims were barred under the equitable doctrine of laches 56

THE UNJUST ENRICHMENT CLAIMS 65

The unjust enrichment claims for the 36 payments 67

(1) The Pleading Argument 67

(2) The Admissibility Argument 70

(3) The Lack of Evidence Argument 72

(4) Whether a prima facie case of unjust enrichment is established with regard to the 36 payments 75

(5) Whether illegality bars a defence to the unjust enrichment claim for the 36 payments 86

(A) Whether the Comity Unenforceability Principle ought to be extended to unjust enrichment claims 90

(B) Whether the Comity Unenforceability Principle bars defences to unjust enrichment claims 94

The unjust enrichment claims for the 11 payments and the three payments....101

(1) Taxonomical issues in the identification of the relevant unjust factor....105

(2) The position in Singapore law 110

(3) The legal backdrop to the controversy....114

(4) Limits to the recognition of novel unjust factors 132

THE MERITS OF THE OTHER CLAIMS....142

CONCLUSION....146

Esben Finance Ltd and others
v
Wong Hou-Lianq Neil

[2022] SGCA(I) 1

Court of Appeal — Civil Appeal No 3 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, David Edmond Neuberger IJ and Arjan Kumar Sikri IJ
5 July 2021

10 January 2022 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the International Judge ("the Judge") in *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 ("the Judgment"). As we shall see, although the present appeal concerns claims made in respect of payments made in the distant past, it nevertheless engages issues of law that remain open for resolution in the present. Thus, what appears at first blush to be a withered claim may yet bear fresh leaves in the context of the present case.

The parties to the dispute

2 The appellants are two companies incorporated in the British Virgin Islands ("BVI"), *viz*, Esben Finance Limited ("Esben") and Incredible Power

Limited ("Incredible Power"), and two companies incorporated in the Republic of Liberia, *viz*, Rayley Co Limited ("Rayley") and Lismore Trading Company Ltd ("Lismore") (collectively, the "appellants"). The appellants were related to the WTK Group of companies ("WTK Group") founded by a Malaysian businessman, the late Datuk Wong Tuong Kwang ("WTK"). The appellants were administered by Double Ace Trading Co (Pte) Ltd ("Double Ace") in Singapore. One of Double Ace's employees, Richard Tiang ("Tiang"), was responsible for the appellants' book-keeping.

3 The respondent, Neil Wong Hou-Lianq, was WTK's grandson, being the son of WTK's son, Wong Kie Nai ("WKN"). WTK had two other sons, Wong Kie Yik ("WKY") and Wong Kie Chie ("WKC").

Background to the dispute

4 From 1993, WTK handed over responsibility for the overall management and control of the WTK Group and the appellants to his sons, WKN, WKY and WKC, although the precise role played by each of them in the WTK Group is disputed. They were also directors and shareholders of Double Ace. According to the appellants, WKN was the leading spirit among the three brothers. It was he who handled the day-to-day management of a number of the Malaysian companies in the WTK Group, including Elite Honour Sdn Bhd, Ocarina Development Sdn Bhd, Sunrise Megaway Sdn Bhd, Harvard Rank Sdn Bhd, Faedah Mulia Sdn Bhd and WTK Management Services Sdn Bhd ("WTK Management") (which provided administrative services to the Malaysian companies in the WTK Group). WKN was also in charge of the day-to-day management, affairs and business of, and exercised complete control over, the appellants. Despite WKY being the eldest of the three brothers, WKN

became, in effect, the patriarch of the Wong family and did not tolerate any interference in the appellants' affairs.

5 On 11 March 2013, WKN passed away, survived by his widow, Kathryn Ma Wai Fong ("Mdm Ma") and two children, one of whom is the respondent. Upon WKN's death, effective control of the WTK Group and the appellants passed to WKY and WKC. According to the appellants, this was when WKY noticed that the balances of the appellants' bank accounts were lower than expected. He then instructed Janice Ting Soon Eng ("Ms Ting"), a senior employee of WTK Management, to make inquiries with Tiang. These inquiries were eventually made with Tiang about a year later, in March 2014. Tiang revealed that over a period of some 11 years between January 2001 and November 2012, WKN had instructed that some 50 payments ("the 50 payments") be made from the appellants' bank accounts to the respondent without the knowledge of WKY and WKC. The payments shall be referred to hereafter as "payment No 1", "payment No 2", and so on. The 50 payments amounted, in total, to US$20,278,565.41 and S$4,473,100.52. Significantly, the telegraphic transfer ("TT") forms for some of the 50 payments bore WKY's own signature.

6 Tiang further claimed that in April 2012, he had been instructed by WKN to destroy the documents of all the offshore companies related to the WTK Group, including the appellants, but Tiang only carried out the destruction of the aforesaid documents in September 2014.

7 After some considerable delay, on 21 April 2016, the appellants (excluding Esben, which had by then been struck off the register) demanded that the respondent repay the monies that had been remitted to him from their bank accounts (in respect of the 50 payments). However, the respondent

refused. After some further delay, the appellants then commenced legal action to recover the 50 payments from him by a writ of summons dated 20 November 2017.

8 It is noteworthy that Tiang had, in February 2019, pleaded guilty to and been convicted of some 15 criminal charges, with a further 54 charges taken into consideration for the purpose of sentencing, for dishonestly misappropriating some S$46.2m of the appellants' monies over an extended period of time. Not all of the appellants' documents were destroyed by Tiang. Some of them, relating to the appellants' business of trading logs and documenting their transactions with Malaysian logging companies within the WTK Group and other logging companies for the sale of logs, were seized and preserved by the Commercial Affairs Department ("CAD") in connection with the investigations into, prosecution and subsequent conviction of Tiang for dishonest appropriation ("the CAD Documents"). These were returned to Double Ace in June 2016.

9 Before the Judge, the respondent did not dispute that he had received all 50 payments. According to him, the 50 payments consisted of the following.

(a) 11 payments were "gifts" from WKN;

(b) Three payments were directors' fees and shareholder dividends to which he was entitled and/or gifts from WKN; and

(c) The remaining 36 payments were made in connection with an alleged "practice" by which companies in the WTK Group, including the appellants, entered into "split fee" arrangements which permitted their taxable revenues to be split into "onshore" and "offshore" components, the latter of which would not be declared to the Malaysian

tax authorities, thereby effectively evading Malaysian tax and which was illegal under Malaysian law.

10 Before the Judge, the respondent argued that there was no wrongdoing on his part or on WKN's part with regard to the 50 payments. Further, both WKY and WKC had actual knowledge, or ought to have had actual knowledge, of most if not all of the payments when they were made. The appellants' claims for the payments were therefore time-barred under s 6 of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act"), or, alternatively, barred by the doctrine of laches and/or acquiescence.

Decision below

The unsatisfactory state of the evidence

11 The Judge began with observations on the unsatisfactory state of the evidence at trial. He observed that the earliest of the 50 payments was made over 20 years ago, and that this made it "difficult, if not impossible" for the respondent to recollect the exact true purpose for the payments, which explained the shifts in his pleaded Defence (see the Judgment at [63]). The Judge also noted that the documentary record for the 50 payments was unsatisfactory because the appellants had no proper accounting system and did not prepare any trial balances, financial statements, monthly management accounts or year-end accounts (see the Judgment at [66]). The Judge found that the respondent was not to blame for these deficiencies in documentation (see the Judgment at [67]).

12 The Judge also found that Tiang's assertion that WKN had instructed him to destroy a large number of the appellants' documents was doubtful, given that Tiang had his own motives for doing so. Tiang was a "convicted fraudster on a massive scale" who was guilty of misappropriating the appellants' funds

(see the Judgment at [42]). In addition, Tiang only destroyed *some* of the appellants' documents some 18 months after WKN's death, which contradicted Tiang's version of events, namely, that he had been instructed by WKN to destroy *all* of the appellants' documents (see the Judgment at [70]–[71]).

13 The appellants did not originally disclose the CAD Documents and only did so subsequently pursuant to an order for specific disclosure. The Judge observed that this was a serious failure on the part of the appellants to comply with their disclosure obligations (see the Judgment at [71]). Although the appellants contested the admissibility of the CAD Documents on the grounds that they were hearsay, the Judge was satisfied that they were properly regarded as the appellants' own documents and records (see the Judgment at [84]) and fell within the exception to hearsay under s 32(1)(*b*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") as statements made by a person in the ordinary course of a trade, business, profession or other occupation (see the Judgment at [86]).

14 Apart from the destroyed documents and the CAD Documents, there was also the possibility that some of the appellants' documents were stored in steel cabinets in WKN's offices in WTK Management's premises in Sibu, Malaysia. However, Mdm Ma had arranged for these steel cabinets to be removed and there was no trace of the documents (if any) therein or any indication of what they were. The Judge, however, doubted the relevance of such documents (if any) to the dispute since the appellants were administered by Double Ace in Singapore (see the Judgment at [73]).

The issue of time-bar and/or laches

15 The Judge next turned to consider whether and to what extent the appellants' claims were time-barred, observing that while the defence of time-bar was raised only at a late stage in the course of the trial, it could be justified on a close reading of the Defence and thus had been sufficiently pleaded (see the Judgment at [107]). On the issue of when the applicable limitation period of six years, as provided for in s 6 of the Limitation Act, would start to run, the Judge proceeded on the assumption that ss 29(1)(*a*) and 29(1)(*b*) of the Limitation Act applied (see the Judgment at [108]). These provisions read as follows:

> **Postponement of limitation period in case of fraud or mistake**
>
> **29.**—(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (*a*) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> …
>
> 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.

16 The effect of the above provisions was that the six-year limitation period applicable to claims in unjust enrichment under ss 6(1) read with 6(7) of the Limitation Act ran only from such time as the appellants "discovered the fraud", namely, the making of each of the 50 payments, or "could with reasonable diligence have discovered" the said payments. For this purpose, the Judge was of the view that it was WKY whose knowledge or reasonable diligence was relevant. This was because:

(a) WKN's knowledge and reasonable diligence was not relevant as he was (assuming that the making of the payments was fraudulent) the party perpetrating said fraud. The same could be said for Tiang (see the Judgment at [110]); and

(b) The parties had proceeded on the basis that it was WKY's knowledge and reasonable diligence that was relevant (see the Judgment at [110]).

17 In the Judge's view, "reasonable diligence" did not mean the doing of everything possible, but the doing of that which, under ordinary circumstances and with regard to the relevant expense and difficulty, could be reasonably required (see the Judgment at [115]). Here, under BVI and Liberian law, WKY and WKC, as directors of Esben and Lismore, had the right to inspect and access the companies' records but did not have a clear duty to do so. In so far as Incredible Power and Rayley were concerned, the Judge found that WKY and WKC were not *de facto* or "shadow" directors of those companies as there was little to no evidence that they exercised real influence in the governance of the same (see the Judgment at [114]).

18 The Judge then considered whether WKY could, with reasonable diligence, have discovered the various payments when they were made. He was of the view that WKY could have done so. This was because:

(a) WKY's explanation as to why he did not enquire about the 50 payments was that he thought that WKN would be unhappy about it. He was, however, unable to explain the reason for such belief. The Judge observed that WKY was not an inexperienced or timid individual. He was a Chartered Certified Accountant and a former Senator of Malaysia

holding the title of "Permanca". He was also the Chairman of the Sarawak Timber Association. The Judge also found that, having heard WKY give evidence, he was "very well able to make appropriate enquiries if he wanted to do so" (see the Judgment at [123(a)]).

(b) WKY had also claimed that WKN had told him not to interfere in the appellants' business and did not allow him access to the appellants' records, and that WKN would have been angry with him if he had asked questions. This, however, contradicted WKY's previous position that he trusted WKN, and his own acknowledgment that the relationship between the three sons of WTK was "very good" and "close" (see the Judgment at [123(f)]).

(c) Although the Judge accepted that WKY had the practice of signing TT forms in blank from time to time, there was at least one instance in which he was aware of some payments being made by the appellants to the respondent personally, namely, the two payments, Nos 48 and 49. The Judge accepted the evidence of Helen Loh Leh Fong ("Ms Loh"), a senior employee of WTK Management, that a statement of account dated 31 August 2011 recording these payments bore a handwritten annotation stating that money was to be transferred "7/10/11 to Neil Wong Accounts", and that the said statement of account, bearing the abovementioned handwritten annotation, had been signed by WKY himself without his asking any questions (see the Judgment at [123(c)]). It was impossible to say, however, even on a balance of probabilities, whether the 25 TT forms signed by WKY and which were relevant to the 50 payments in issue in the present case did or did not bear the respondent's name when WKY signed them (see the Judgment at [123(d)]).

(d) WKY accepted that he was very interested in the appellants' business and that he could have asked Tiang about the reason for the payments, and that had he done so, Tiang would have been obliged to explain why payments had been made to the respondent personally (see the Judgment at [123(e)]).

(e) In March 2011, WKN went to Australia to receive medical treatment. On the evidence of Mdm Ma and Ms Ting, in early 2011, WKN had instructed his staff to report to and take instructions from WKY (see the Judgment at [123(j)]). It "beggared belief" that in WKN's absence, WKY did not take up the reins or avail himself of the opportunity to look at the appellants' records, given that he was very interested in their business (see the Judgment at [123(h)]).

(f) WKY had also signed various documents of the appellants (for example, sales invoices, payment vouchers, cheques and financial statements up to 2012). While these did not refer to the 50 payments, they showed that WKY was directly involved to some extent in the business operations of the appellants and that he could, with reasonable diligence, have accessed the appellants' records and discovered the payments to the respondent (see the Judgment at [123(i)]).

(g) WKY's inaction after WKN's death in March 2013 reflected a "remarkable indifference to the [appellants'] business operations" which he could not justify simply on the basis of his "constant mantra" that he left everything to WKN because he trusted or did not want to quarrel with WKN (see the Judgment at [123(k)]).

Thus, the Judge held that all of the appellants' claims in unjust enrichment save in respect of payment No 50 were time-barred (see the Judgment at [128]).

The unjust enrichment claim

19 The Judge next considered the merits of the unjust enrichment claim, *assuming* that *none* of the claims in respect of the 50 payments was time-barred. He observed that it was undisputed that WKN had caused the appellants to make the 50 payments to the respondent personally (see the Judgment at [137]) and that WKN had, under BVI and Liberian law, a duty to act in the best interests of the appellants, to exercise his powers for a proper purpose in accordance with the appellants' memorandum and articles of association, to act honestly, *bona fide* and in good faith for the appellants, to exercise due care, diligence and skill, and to disclose any breaches of the above to the appellants (see the Judgment at [135]). WKN did not have *carte blanche* to act as he liked (see the Judgment at [136]).

20 The Judge also observed that the legal burden of proving that the 50 payments were unjust rested on the appellants throughout and that this burden had been *prima facie* satisfied by the fact that payments *had* been made to the respondent's personal bank accounts in circumstances where it was undisputed that the appellants were in the business of trading in timber and the respondent did not personally supply timber or provide services in relation thereto (see the Judgment at [140]). The evidential burden therefore shifted to the respondent to satisfactorily explain the payments and show why they were not unjust (see the Judgment at [141]).

The 11 payments

21 The Judge took the view that the respondent had not discharged the evidential burden of proving that the 11 payments were gifts from WKN as there was simply no, or insufficient, evidence to support that assertion (see the Judgment at [148]). But for the time-bar, the appellants would have been

entitled to recover these payments from the respondent on the basis of unjust enrichment – specifically, on the basis of the "unjust factor" of the appellants' *lack of consent* to the payments, which the Judge "readily accepted" was an unjust factor (see the Judgment at [133(e)(i)], [133(e)(iv)] and [134]). This is a point of considerable importance which we will discuss in more detail below.

The three payments

22 In so far as the three payments were alleged to be "gifts" from WKN, the Judge found that there was, as with the 11 payments, no evidence that they were (see the Judgment at [153]). In so far as they were asserted to have been made in respect of directors' fees and shareholder dividends to which the respondent was entitled, the Judge found as follows:

> (a) Payment No 3, dated 3 July 2002, which was for the sum of US$50,000 from Esben, was described in handwritten form on the TT form as being directors' fees for 2001. The respondent's case was that this sum was paid to him in respect of his directorships in Malaysian companies in the WTK Group. This was *prima facie* evidence that the payment was indeed for directors' fees. However, the Judge accepted the evidence of the appellant's forensic accounting expert, Mr Andrew Heng of Ferrier Hodgson MH Sdn Bhd ("Mr Heng"), that the financial statements of the 11 Malaysian companies of which the respondent was director did not disclose any dividend paid to him in the amount of US$50,000 (see the Judgment at [158]).
>
> (b) Payment No 16, dated 8 August 2005, was for a sum of US$263,852 from Lismore. The TT form carried a typewritten annotation, "DR [Debit] JATI BAHAGIA SDN BHD". The respondent's case was that he was a shareholder of Jati Bahagia Sdn Bhd

in August 2005 and that the payment was made by Lismore on behalf of Jati Bahagia as shareholder dividends due to him. The Judge found that the respondent was unable to furnish sufficient evidence to support a *prima facie* case that the payment concerned shareholder dividends, since the annotation did not assist in that particular regard (see the Judgment at [162]–[163]).

(c) Payment No 38, dated 28 July 2008, was for a sum of US$179,456 from Esben. The TT form bore a typewritten annotation referring to "WTK TRADING", "KAULULONG" and "WTK SHARES". The respondent's case was that he was a director and shareholder of WTK Trading Sdn Bhd ("WTK Trading") and Syarikat Kaululong Sdn Bhd ("Syarikat") in July 2008 and that the payment was made by Esben on behalf of those companies as directors' fees and/or shareholder dividends (see the Judgment at [168]). However, the Judge found that there was no or insufficient evidence to support that particular case (see the Judgment at [169]). The Judge accepted Mr Heng's evidence that the financial statements of WTK Trading showed that it had paid dividends in 2006 and 2007 but not in 2008, and that it had paid directors' fees from 2006 to 2008 in full; and that the financial statements of Syarikat showed that it did not pay any dividends in 2006 to 2008 as well as that it had paid directors' fees in full from 2006 to 2008 (see the Judgment at [170]). This contradicted the respondent's case.

23 In the circumstances, the Judge was of the view that the respondent had not discharged his evidential burden of proving that the three payments had been made for legitimate purposes, as such evidence as there was pointed to the

contrary. But for the time-bar, the appellants would have been entitled to recover the three payments (see the Judgment at [171]).

The remaining 36 payments

24 The remaining 36 payments were made in connection with an alleged "practice" by which companies in the WTK Group, including the appellants, entered into "split fee" arrangements which permitted their taxable revenues to be split into "onshore" and "offshore" components. This was done for the purpose of *evading Malaysian tax*, which was conduct unlawful by the laws of Malaysia (see the Judgment at [217]).

25 The "practice" involved companies in the WTK Group and/or controlled by the respondent which were engaged in the timber logging business ("the Logging Companies"), and the appellants. The Logging Companies included Golden Cash Harvest Sdn Bhd ("GCH") and the companies mentioned at [4] above. Essentially, the Logging Companies routed their sales of timber logs through the appellants such that the appellants ended up holding the revenue received from the end buyers of the timber logs. The Judge found that this was done in the following manner (which the Judge accepted was a "fair summary" of the evidence) (see the Judgment at [209]):

> (a) Instead of transmitting the full sale price for the sale of the Logging Companies' timber logs back to the Logging Companies, the appellants "retained some revenue" and "paid part" of the logging fees and expenses "offshore". The remaining logging fees and expenses would be paid by the Logging Companies "onshore" (*ie*, in Malaysia). This splitting of the logging fees and expenses into "onshore" and "offshore" components, respectively, resulted in lower income and consequently lower taxes payable in Malaysia, as the "offshore" fees

were "deliberately kept off the books of the onshore companies" and were not reported for Malaysian tax purposes.

(b) It was WKN who proposed the "onshore-offshore" payment structure for the services that the respondent's companies provided to the Malaysian companies in the WTK Group, as well as the "directors' fees and/or dividends" for the respondent's directorships and shareholdings in WTK Group companies. Mdm Ma and the respondent both agreed with this arrangement.

(c) In furtherance of and/or pursuant to the said arrangement, the appellants made the 36 payments, which were payments for the "offshore" components made in respect of services which the respondent's companies provided to the Malaysian companies in the WTK Group and his "directors' fees and/or dividends", to the respondent's bank account in Singapore.

26 In making the above findings, the Judge accepted the evidence of three witnesses, namely Mr Hii Siik Kiong ("Mr Hii"), the general manager of GCH, Mr Ling Thien Kwong ("Mr Ling"), the senior accounts supervisor of GCH, and Mr Ling Heu Chong (a Log Pond Supervisor employed by Harvard Rank), all of whom he regarded as honest (see the Judgment at [179(e)]). In his view, Mr Hii and Mr Ling in particular gave "detailed and straightforward" evidence and were "plainly honest witnesses who were doing their best to explain the practice" (see the Judgment at [179(c)]; see also [186] and [192] of the Judgment). Their evidence in favour of the existence of the "practice" outweighed any adverse inference which might be drawn against the respondent for failing to give evidence (see the Judgment at [179(e)], [186] and [192]).

27 The Judge thus concluded that in any event and even apart from the time bar, the appellants would not be entitled to recover the 36 payments on the basis of unjust enrichment, subject to the issue of illegality.

The illegality issue

28 The Judge considered, in so far as the 36 payments were concerned, the appellants' argument that, even if the respondent could make out his case that the payments had been made to him pursuant to the "practice", this was an arrangement which was illegal under Malaysian law and which therefore vitiated the *defence* to the unjust enrichment claim (see the Judgment at [206]). The Judge accepted that Mdm Ma and the respondent "both fully understood all along" the implications of the "practice", *ie*, that the "deliberate and intended purpose" of the "practice" was to evade tax in Malaysia. In so far as Mdm Ma was concerned, the Judge noted that she had no explanation as to why the "offshore" component was deliberately kept off the books and her silence betrayed the fact that she well knew that the object of the "practice" was to evade the payment of taxes on the "offshore" component (see the Judgment at [213]).

29 In so far as the respondent was concerned, the Judge drew an adverse inference against him to the effect that he knew that the true purpose of the "practice" was to evade Malaysian tax, on the basis of his refusal to give evidence, since it was possible that this "was driven by a reluctance to being pressed with questions on this topic and to the risk of having to admit in open court that this was the case", though the Judge recognised that this was speculative (see the Judgment at [214]).

30 The Judge therefore accepted the appellants' submission that the "practice" was entered into, and the 36 payments were made and performed, with the deliberate intention by the respondent of evading taxes in Malaysia, which was conduct unlawful by the laws of Malaysia (see the Judgment at [217]). The Judge next turned to consider the appellants' case that, as the respondent's *defence* to the unjust enrichment claim was tainted by such illegality, he was precluded from relying on, and the court should not recognise or allow him to rely on, the said defence (see the Judgment at [218]); this particular argument was premised on the principles set out in two cases (see the English Court of Appeal decisions in *Foster v Driscoll* [1929] 1 KB 470 ("*Foster v Driscoll*") and *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Brothers*") (see the Judgment at [219])), as well as the maxim *ex dolo malo non oritur action* (*ie*, that no right of action can have its origins in fraud) ("the *ex dolo malo* maxim"). The Judge was of the view that neither principle applied (see the Judgment at [233] and [236]). In so far as the *ex dolo malo* maxim was concerned, the appellants' case in that regard was "no more than a rehash of their submissions based on the *Foster v Driscoll* principle" and therefore likewise did not succeed. Moreover, in his view, the maxim did not apply as the illegality was not a relevant "wrong" between the appellants and the respondent (see the Judgment at [238]).

The other claims

31 The Judge then dealt briefly with the appellants' alternative claim based on dishonest assistance, knowing receipt and unlawful means conspiracy. He accepted that WKN owed fiduciary duties to the appellants. However, the appellants did not satisfy the legal and evidential burden on them with regard to the other elements of the dishonest assistance claim, in particular, that the 50 payments had not been shown to have been in the appellants' interests or that

the respondent assisted WKN's breach of his fiduciary duties, still less that he had been dishonest in so doing (see the Judgment at [197]). As regards the 11 payments and the 3 payments which the Judge had already found appeared to have been made without legitimate basis, the Judge emphasised that it was important not to reverse the burden of proof (see the Judgment at [199]). Whilst a *prima facie* case had been made out with regard to the claim in unjust enrichment, this was not the case for the dishonest assistance claim. The same reasoning applied to the claim in knowing receipt (see the Judgment at [203]) and unlawful means conspiracy (see the Judgment at [205]).

32 For the above reasons, the Judge held that all of the appellants' claims failed (see the Judgment at [240]).

The parties' cases

Appellants' case

33 In this appeal, the appellants argue that their claims were not statutorily time-barred under the Limitation Act. They contend that the phrase "could with reasonable diligence have discovered [the fraud]" in s 29 of the Limitation Act involves two considerations: (a) whether the plaintiff was put on inquiry of a possible fraud; and (b) whether, having been put on inquiry, the plaintiff acted with reasonable diligence in taking steps to ascertain the existence of the fraud. The Judge, however, had applied these considerations in the wrong order. Further, the applicable test is whether the appellants had been put on inquiry *in respect of a possible fraud*. The court had erred in finding that WKY had been put on notice; and even if he had been put on inquiry, he could not with reasonable diligence have discovered the fraud. Finally, the respondent's plea of time-bar under the Limitation Act did not cover their claim in unjust enrichment. The appellants therefore submit that their claims are not statutorily

time-barred, and, further, that their claim in unjust enrichment is not barred by the equitable doctrine of laches.

34 The appellants further contend that the Judge had erred in finding that their claim in unjust enrichment for the 36 payments failed. First, the court's finding that the 36 payments were made pursuant to the "practice" as set out in Mdm Ma's second affidavit of evidence-in-chief ("AEIC") was based on an unpleaded case. Second, the respondent's defence of the "practice" only emerged belatedly. Third, the evidence that the respondent sought to rely on did not show that such a "practice" existed. In this regard, the CAD Documents should not have been admitted into evidence, and in any event did not support the respondent's account of the "practice". Finally, the appellants challenge various findings of fact made by the Judge in relation to the 36 payments, and contend that the respondent had not discharged his evidential burden of showing that the payments had been made for the reasons pleaded.

35 The appellants argue that even if the respondent could make out his case that the 36 payments had been made for the reasons pleaded, these reasons cannot afford him a defence as it should be barred on the basis of illegality. The defence is premised on an arrangement that involved illegal acts under Malaysian law, and pursuant to the principle in *Foster v Driscoll*, the Singapore courts should not recognise such an arrangement. The appellants also contend that allowing the respondent to rely on the said "practice" would be contrary to the principle in *Ralli Brothers*, as well as the principle that a person cannot rely on or profit from his or her own wrong.

36 Finally, the appellants contend that the Judge had erred in finding that their claims for dishonest assistance, knowing receipt and unlawful means conspiracy failed.

Respondent's case

37 In response, the respondent argues that the appellants' claims are time-barred. There is no requirement under s 29 of the Limitation Act that a claimant must first be put on inquiry of a possible fraud; but even if the appellants' proposed test applied, WKY had been put on inquiry and could have discovered the payments with reasonable diligence. Thus, the limitation period could not be extended. In respect of the appellants' claim in unjust enrichment, the respondent contends that it is statutorily time-barred under the Limitation Act; even if no statutory time bar applies, it should be barred by the doctrine of laches.

38 The respondent submits that the appellants' claim in unjust enrichment in respect of the 36 payments is misconceived. First, lack of consent is not a legally recognised factor (notwithstanding the fact that the Judge had accepted that it was). Second, the respondent's pleadings were adequate and his case was precisely what the Judge had found to be made out. Third, the existence of the "practice" was amply supported by the evidence, and the Judge had also rightly found that the CAD Documents were admissible. Finally, the respondent aligns himself with the Judge in submitting that his defence of relying on the "practice" should not be barred by illegality.

39 The respondent further submits that the Judge rightly found that the appellants' alternative claims in dishonest assistance, knowing receipt and unlawful means conspiracy should fail.

Issues arising in this appeal

40 From the parties' cases, the following issues arise and will be dealt with in turn:

(a) Whether the Judge had erred in finding that the appellants' claim in unjust enrichment, as well as the other claims in dishonest assistance, knowing receipt and unlawful means conspiracy in respect of the payments (apart from payment No 50) ("the Time-Barred Claims") were time-barred under the Limitation Act and/or under the doctrine of laches;

(b) If the appellants' claims mentioned at (a) above are not time-barred:

(i) Whether the Judge had erred in finding that the unjust enrichment claims in respect of the 36 payments failed;

(ii) Whether the Judge was right in finding that the unjust enrichment claims in respect of the 11 payments and the three payments would have, but for the time-bar, succeeded;

(iii) Whether the Judge had erred in finding that the merits of the other claims in dishonest assistance, knowing receipt and unlawful means conspiracy were not made out.

Our decision

The time-bar issue

41 We begin by considering whether the appellants' claims were time-barred. The Judge accepted the respondent's position that the appellants' claims in unjust enrichment, dishonest assistance, knowing receipt and unlawful means conspiracy were all subject to a limitation period of six years from the date of payment, pursuant to s 6 of the Limitation Act. The Writ of Summons in the action below was filed on 20 November 2017, but 49 of the 50 payments were made between January 2001 and October 2011, more than six years prior to the

commencement of the action. The appellants' claims in respect of the 49 payments were accordingly barred under the Limitation Act (see the Judgment at [93]).

42 The time-bar issue consists of three sub-issues:

(a) Whether s 6 of the Limitation Act applies to the Time-Barred Claims;

(b) If the appellant's claims were time-barred under s 6 of the Limitation Act, whether s 29 of the Act applied so as to extend the limitation period pursuant to which the claims could be brought; and

(c) If the appellant's claims were not statutorily time-barred, whether the claims were nevertheless barred by the equitable doctrine of laches.

Whether the Time-Barred Claims were time-barred under the Limitation Act

(1) Preliminary issue

43 The appellants sought leave to introduce a new point on appeal pursuant to O 57 r 9A(4)(*b*) of the Rules of Court (2014 Rev Ed) ("Rules of Court"). They argued that the Judge had erred in finding that their claims in unjust enrichment were time-barred, as the respondent's plea with respect to the time-bar did not cover their claims in unjust enrichment. In the respondent's defence, he had pleaded as follows:

> Further and/or in any event, the Plaintiffs' claims against the Defendant are barred by section 6(7) of the Limitation Act (Cap. 163) and/or the doctrine of laches. The Plaintiffs and all their directors at all material times knew or ought to have known of the Transactions.

44 The appellants argued that s 6(7) of the Limitation Act ("s 6(7)") states that the section is to 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". However, a claim for unjust enrichment falls under a distinct category of restitutionary claims. Section 6(7) therefore does not cover their claims in unjust enrichment. In any event, even if s 6(1)(*a*) of the Act ("s 6(1)(*a*)") applied to the appellants' claim in unjust enrichment, the respondent did not plead, and therefore cannot rely on, s 6(1)(*a*). In the circumstances, therefore, the appellants' claim in unjust enrichment was not time-barred.

45 We are not persuaded by the appellants' argument relating to the respondent's pleadings. The appellants had sought to make this argument at a late stage of trial, which argument was rejected by the Judge. We agree with the Judge that on a fair reading of the defence, the plea of time-bar applied potentially to all of the appellants' causes of action, including that in unjust enrichment. The Judge also noted that the parties had proceeded on that basis until the pleading point was raised (see the Judgment at [107]). This is implicitly acknowledged by the appellants who are now seeking leave to adduce a *new point* not argued below. It therefore could not be said that the appellants did not know the case that they had to meet or that they were taken by surprise as a result of the pleadings being lacking in specificity (see the decisions of this court in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*") at [168] and *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 at [16]).

46 We note that it is not disputed that the appellants' claims for dishonest assistance, knowing receipt and conspiracy fall within the ambit of s 6 of the

Limitation Act ("s 6"), and that, leaving aside the issue relating to s 29 of the Limitation Act which we will consider below, such claims for 49 of the 50 payments (except payment No 50) would have been time-barred as they were brought more than six years after the payments were made. However, the question of law that is of significance to the present appeal, and which we granted leave to the appellants to introduce on appeal, is whether s 6 applies to claims in *unjust enrichment*. The new argument is one of law and does not involve issues of fact that would have had to be canvassed at the trial below (see the decision of this court in *Zyfas Medical Co (Sued as a firm) v Millennium Pharmaceuticals, Inc* [2020] 2 SLR 1044 at [28]).

(2) Application of s 6 of the Limitation Act to claims in unjust enrichment

47 As noted above, the Judge accepted the respondent's case that the Limitation Act applied to claims in unjust enrichment, citing the High Court decision of *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [72]–[73] (see the Judgment at [93(a)]). With respect, we decline to adopt the Judge's view.

48 In our judgment, claims in unjust enrichment *and* for restitution for wrongs are both ***not*** covered under the Limitation Act. We reiterate, at this juncture, that restitution for unjust enrichment is to be distinguished from restitution for wrongs. The law of unjust enrichment comprises a separate cause of action (with restitution as the remedial response) and is made out when there is no civil wrong but the defendant is unjustly enriched at the expense of the plaintiff. In contrast, restitution for wrongs relates only to the remedial response to a civil wrong (including breaches of contract, torts and breaches of fiduciary duty) (see the decisions of this court in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655

("*Turf Club Auto Emporium*") at [181]–[182] as well as in *Alwie Handoyo* at [126]). We reach this conclusion on the basis of first, the statutory wording of the Limitation Act, and second, its legislative history. Let us elaborate.

(A) THE POSITION IN SINGAPORE LAW

49 The issue as to whether s 6 applies to restitutionary claims has not been conclusively decided by the courts in Singapore. In respect of unjust enrichment, the High Court in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2001] 2 SLR(R) 669 took the position that s 6 did *not* apply. In that case, a subsidiary proprietor intended to do some conversion works which required the permission of the management corporation ("MC"). The MC imposed conditions for granting such permission, including the payment of sums of money. The subsidiary proprietor later claimed against the MC for restitution of the said sums, on the basis that the conditions were *ultra vires* and that it had paid the sums under a mistake of law. The court held that the subsidiary proprietor's claim did not fall within the scope of the Limitation Act and that the MC's defence of time bar therefore failed. In arriving at her conclusion, Judith Prakash J (as she then was) held that the subsidiary proprietor's claim was founded in restitution, and that there was no contract between the parties that arose or could arise on the facts. As such, the claim could not be considered to be one "founded on a contract" within the meaning of s 6(1)(*a*) of the Limitation Act (at [77]). The decision of the High Court was upheld by this court in *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers (CA)*"), where the court held 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 [Limitation Act]" (at [32]).

50 However, as observed by this court in *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 ("*eSys*"), doubt appears to have been cast on the position in *De Beers (CA)* in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 ("*OMG Holdings*"), where it was suggested that a claim in restitution "*could well* be time-barred under [s 6] of the Limitation Act" [emphasis added]. The court in *eSys* further observed that the "underlying thread" in *De Beers (CA)* (where the court appeared to apply the doctrine of laches to a common law claim for restitution, see [116] below) and *OMG Holdings* "appears to be that it would be contrary to both logic as well as public policy for there to be no applicable time constraint whatsoever to a claim founded on restitution as opposed to contract or tort" (at [41]). The court nevertheless left open the question of whether a restitutionary action falls within the ambit of s 6 of the Limitation Act (at [42]).

51 In respect of restitution for wrongs, the position was considered by the High Court in *Chip Hup Hup Kee Construction Pte Ltd v Yeow Chern Lean* [2010] 3 SLR 213 ("*Chip Hup Hup Kee*"). In *Chip Hup Hup Kee*, the managing director of the plaintiff company issued three cheques to its general manager, who handed the cheques to the defendant. The defendant encashed two of these cheques. The plaintiff brought a claim against the defendant for moneys had and received in respect of the two cheques. Andrew Ang J held that the claim for money had and received lay in the tort of conversion and was therefore time-barred under s 6(1)(*a*).

(B) STATUTORY WORDING OF THE LIMITATION ACT

52 As mentioned above, we are of the view that claims in unjust enrichment and restitution for wrongs are both not time-barred under the Limitation Act. We begin with the ***statutory wording*** of the Limitation Act. The Act sets out

limitation periods based on specified causes of action, including that for "actions founded in contract or in tort", but does *not* include restitutionary claims. In this regard, ss 6(1) and 6(7) of the Limitation Act provide as follows:

> **6.**—(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;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> …
>
> (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.

53 In arriving at our conclusion that claims in unjust enrichment do *not* fall within the ambit of the Limitation Act, we are cognisant of the fact that the courts in the UK have held that a restitutionary claim, at least where it is coincident with a quasi-contractual claim, is a cause of action founded on simple contract within the meaning of s 5 of the Limitation Act 1980 (c 58) (UK) ("1980 UK Act") (the equivalent of s 6 of our Act). This court in *OMG Holdings* noted the position in the UK (at [44]) as follows:

> It would therefore appear that in England, quasi-contractual claims will be barred after six years, subject to other provisions of the English Limitation Act 1980. In substance, the quasi-contractual claims subsumed under s 2 (of the Limitation Act 1939) would typically include the bulk of what are in essence *restitutionary* claims: *eg*, recovery of money paid under a mistake of fact, duress or total failure of consideration, in compulsory discharge of another's debt, or in pursuance of a void contract; and recovery of goods supplied or services rendered under ineffective or unenforceable transactions, or

> contracts that fail for want of certainty, authority, illegality or mistake (see HM McLean, "Limitation of Actions in Restitution" [1989] CLJ 472 at 476). [emphasis in original]

54 The genesis of this reasoning is in the English Court of Appeal decision of *Re Diplock* [1948] Ch 465 at 514, where the court took the view that an action "founded on simple contract" under s 2(1)(*a*) of the English Limitation Act 1939 (c 21) (UK) ("1939 UK Act") is "taken to cover actions for money had and received", even though "the words used cannot be regarded as felicitous" (at 514). Subsequently, Hobhouse J (as he then was) agreed with the analysis in *Re Diplock* in the English High Court decision of *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 ("*Kleinwort Benson*") at 942–943 and held that s 5 of the 1980 UK Act should be construed as having the same effect. In arriving at this conclusion, Hobhouse J opined that a legislative omission resulting in there being no limitation period for any common law action based upon quasi-contract would be "clearly contrary to the general purpose of the [1939 UK Act]". Further, he referred to the relevant UK Parliamentary Debates and noted that the then Solicitor General had stated during the debates that the purpose of the bill was to "give effect to the recommendations in 1936 of the Law Revision Committee as set out in their Fifth Interim Report (Cmd 5334)". The Committee's report in turn recommended that "the period for all actions founded in tort or simple contract (including quasi-contract) should be six years". Hobhouse J was therefore of the view that the expression "simple contract" in the 1939 UK Act must therefore be understood as including quasi-contracts.

55 In recent cases, the position that restitutionary claims for the recovery of money are within the ambit of s 5 of the 1980 UK Act has been consistently upheld in the UK. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 4 All ER 482, the UK Supreme Court (at [25], *per* Lord Mance) held

that an independent restitutionary claim for the recovery of money "falls to be regarded as 'founded on simple contract' within s 5 of the Limitation Act". In stating this holding, Lord Mance cited Hobhouse J's reasoning in *Kleinwort Benson*, and noted that his reasoning had not been questioned by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 when it had to consider whether s 32(1)(*c*) of the 1980 UK Act operated to extend the limitation period. The UK courts' view on this issue, therefore, appears to be settled.

56 However, in our judgment, the interpretation adopted by the UK courts does not accord with the statutory wording of the Limitation Act. Whilst the UK interpretation is undoubtedly a pragmatic solution, we are, with respect, unable to agree with it on two levels.

57 First, the proposition that restitutionary claims are based on quasi-contract or the implied contract theory has clearly been rejected as the law of unjust enrichment developed over the past few decades. Historically, a restitutionary cause of action was brought by "fictional extensions of the action on the case upon assumpsit, which in form was an action for damages for breach of an undertaking". The three principal forms of assumpsit were *quantum meruit* for the value of services performed, *quantum valebant* for the fair value of goods and *indebitatus assumpsit*. *Indebtitatus assumpsit* "rested on the assertion that the defendant, being indebted to the plaintiff in a certain sum, and in consideration of that indebtedness, promised to make payment". The plaintiff had to indicate the basis for which the defendant was indebted to him, giving rise to a number of "common money-counts" including that for "money had and received" (see J H Baker, "The History of Quasi-Contract in English Law" in ch 3 of *Restitution: Past, Present & Future, Essays in Honour of Gareth Jones*

(W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo eds) (Hart Publishing Oxford, 1998) at pp 39–42).

58 Initially, a claimant had, in respect of a claim for money had and received, to expressly prove that the defendant owed him a sum of money, and that the defendant had promised to pay the money owed. Thereafter, the promise to pay came to be conceptualised as an implied *subsequent* promise to do so that was *incorporated* into a contract which contained an agreement to repay the money owed. Subsequently, however, this *fictional* subsequent promise was extended to circumstances in which there was ***no contract at all***, such that any notion of a promise to pay was completely fictitious (see James Edelman, "Money Had and Received: Modern Pleading of an Old Count" [2000] RLR 547 at 550; see also Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ("*The Principles of the Law of Restitution*") at p 46). As explained by Prof Edelman (as he then was) in the same article (at 551):

> Such fictions later became known as examples of *quasi-contract*, duplicating the Roman *quasi ex-contractu*. The action was "like" contract, although it was not really a contract. A mistaken payment claim for money had and received in *indebitatus assumpsit*, for example, was the classic example of a *quasi-contract*. There was clearly no contract between the plaintiff and defendant but the courts "imputed" a promise to repay the money to the defendant and allowed a claim for money had and received.

59 The same point was made by Prof Tang Hang Wu in Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) ("*Tang*") at para 01.007 in the context of claims for mistaken payments as follows:

> In the past, such actions were rationalised as a form of implied contract or a quasi-contract; the courts as a matter of legal fiction *imputed* an implied contract between the parties. In

> other words, although there was no actual contract between the parties, the courts pretended that there was a contractual obligation by the defendant to repay the plaintiff. It is important to note that under the implied contract theory, a promise to repay is imputed to the parties regardless of the actual intention of the parties. Barry J explained in *William Lacey (Hounslow) v Davies*: 'In these quasi-contractual cases the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views or intentions of the parties…' [emphasis in original]

60 Prof Tang considers that the implied contract theory has also led to wrong conclusions. For example, in *Sinclair v Brougham* [1914] AC 398 ("*Sinclair*"), the issue before the House of Lords was whether the depositors could recover the sums that they had deposited in bank accounts at a building society, pursuant to their claim for money had and received. The claim was brought on the basis that the society's banking business was *ultra vires.* However, the House of Lords held that a remedy for money had and received could be given only where "the law could consistently impute to the defendant *at least the fiction of a promise*" [emphasis added] (at 417). On the facts, the court held that it was unable to imply a contract to repay the sums since such a contract would have been *ultra vires*, and the depositors' claim on this basis was therefore dismissed. As Prof Tang observes, the unsatisfactory outcome of *Sinclair* was that the building society was entitled to keep the sums extended to it, even though the transactions were *ultra vires* (see Tang Hang Wu, "The Role of the Law of Unjust Enrichment in Singapore" (2021) Chin J Comp Law 1 ("*The Role of the Law of Unjust Enrichment in Singapore*") at 10).

61 In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* [1943] 1 AC 32 ("*Fibrosa*") at 62–64, the House of Lords (*per* Lord Wright) clarified the nature of a claim for money had and received. Lord Wright noted that the court in the seminal decision of *Moses v Macferlan* (1760) 97 ER 676 ("*Moses*") (*per* Lord Mansfield) had likened such claims to claims founded

upon a contract, and that Lord Mansfield's statement had become the basis of characterising these claims as being quasi-contractual. However, he emphasised (at 62 and 63) that the law in fact imposed a debt or an obligation on the defendant to pay the sum owed, rather than implying any promise to pay:

> …By 1760 actions for money had and received had increased in number and variety. Lord Mansfield C.J., in a familiar passage in *Moses v. Macferlan*, sought to rationalize the action for money had and received, and illustrated it by some typical instances. 'It lies,' he said, 'for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' Lord Mansfield prefaced this pronouncement by observations which are to be noted. "If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action [sc. indebitatus assumpsit] founded in the equity of the plaintiff's case, as it were, upon a contract ('quasi ex contractu' as the Roman law expresses it)." *Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort.* This statement of Lord Mansfield has been the basis of the modern law of quasi-contract…
>
> The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost…
>
> [emphasis added]

62 Nevertheless, it was only in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*") that the House of Lords formally recognised the principle of unjust enrichment in English law. Subsequently, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*

[1996] 1 AC 669 at 710 ("*Westdeutsche*"), the House of Lords (*per* Lord Browne-Wilkinson) firmly *rejected* the line of reasoning that the cause of action for moneys had and received was based on an implied contract:

> Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. 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*: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 63-64, *per* Lord Wright; *Pavey & Matthews Pty. Ltd. v. Paul* (1987) 162 C.L.R. 221, 227, 255; *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548, 578C; *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] A.C. 70. *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. [emphasis added]

63 The House of Lords in *Westdeutsche* held further that the depositors in *Sinclair* "should have had a personal claim to recover the moneys at law based on a total failure of consideration" in *unjust enrichment* (at 710).

64 More recently, in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561, the House of Lords considered that the "fiction of an implied contract [had] lingered long in the law" and "continued to govern the ambit of the remedy for money had and received", until it was eschewed in the House of Lords' decision in *Lipkin Gorman*. The court held that it is now accepted that a restitutionary claim is "not founded on a fictitious implied contract or 'quasi-contract'", which was a "false and misleading characterisation of the nature of claims for restitution as a remedy for unjust enrichment" (at 603–604).

65 It is therefore clear that a claim for money had and received would be characterised today as primarily one in *unjust enrichment*, and that any reliance

on there being a claim in "quasi-contract" is ***no longer good law***. Whilst the rationale for the rejection of the implied contract theory was made in the context of claims for money had and received, it would apply equally to all claims historically based in quasi-contract. As the learned authors of *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell and Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") noted at para 1-06 (also cited in *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728 ("*Eng Chiet Shoong*") at [33]):

> … Many of the cases discussed…were previously thought to form part of the law of 'quasi-contract' and were shakily conceptualised as a part of the law of contract, or else were treated as isolated incidents of equitable doctrine. The theory that all 'quasi-contractual' claims rested on an implied contract between the parties was strikingly articulated in *Sinclair v Brougham*, but decisively rejected in *Westdeutsche Landesbank Girozentrale v Islington LBC*, and the implied contract theory is now 'a ghost of the past' …

66 In Singapore, as noted by Prof Tang in *The Role of the Law of Unjust Enrichment in Singapore* (at pp 7–8), the first mention of the term "unjust enrichment" in the Singapore Law Reports was in *Abdul Shukor v Hood Mohamed* [1968–1970] SLR(R) 24 ("*Abdul Shukor*"), with reference to the implied contract theory. In that case, the High Court considered that even if an action for money had and received was based on the principle of unjust enrichment, limitations to restitutionary claims would be imposed by the test of the implied contract. The court endorsed Lord Summer's *dictum* in *Sinclair* (at 452) that "[t]he law cannot de jure impute promises to repay, whether for money had and received or otherwise, which if made de facto, it would inexorably avoid". Thus, the action could not succeed if the underlying contract would be avoided for illegality (at [27]–[30]). Subsequently, what was then the leading case on unjust enrichment, *Lipkin Gorman*, was accepted as good law by the Court of Appeal in *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R)

836 and since then, the law of unjust enrichment has been routinely applied by the Singapore courts. The salient point is this: as a matter of *authority*, even if limitations that apply to contractual claims (which would include a statutory limitation period) could be said to apply to claims for money had and received which were termed "unjust enrichment" on the basis of the implied contract theory, based on the holding of the High Court in *Abdul Shukor*, this was effectively *no longer the case* by the time *Lipkin Gorman* – which *rejected* the implied contract theory as a foundation for unjust enrichment claims *generally* – had been accepted in Singapore as good law by the Court of Appeal. This underscores the point that, even though claims in unjust enrichment were historically brought in quasi-contract, they should not be covered under the Limitation Act as the *underlying basis* for such claims has changed entirely.

67 Second, on a conceptual level, a claim in quasi-contract is *conceptually different* from a contractual claim. This is apparent from our analysis above, which makes clear that the implied contract theory came to be used in circumstances where any implied promise to pay was entirely *fictitious*. As also noted by this court in *Eng Chiet Shoong*, in the context of claims based on the doctrine of *quantum meruit*, claims in quasi-contract "involved the use of a fiction" where there was in fact *no contract* (express or implied) (at [32]). The court further noted that "the law of restitution or unjust enrichment is generally critical of the concept of the implied contract … as a rationale for that entire branch of the law, which criticism is understandable as it led to artificiality" (at [36]).

68 We refer to the views of several authors, who have highlighted the ***artificiality*** of construing a claim in unjust enrichment as one in quasi-contract, for the purposes of giving it a limitation period. As Prof Graham Virgo stated in *The Principles of the Law of Restitution*, the conclusion of Hobhouse J in

Kleinwort Benson that actions for money had and received should be treated as claims akin to contract is "artificial and harks back to the implied contract theory". In his view, however, this is the "best solution available" since no specific provision governs restitutionary claims in the 1980 UK Act, and "is certainly better than concluding that such restitutionary actions are subject to no limitation period at all" (at p 735). Prof Andrew Burrows (as he then was) similarly considered that this "escape route" taken by the courts "requires distorting the statutory words particularly when the independence of unjust enrichment – and the fictional nature of the implied contract theory – is fully appreciated" (see Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*The Law of Restitution*") at pp 606–607). Prof McGee in Andrew McGee, *Limitation Periods* (Sweet & Maxwell, 8th Ed, 2018) pertinently noted as follows (at pp 55–56):

> Hobhouse J. [in *Kleinwort Benson*] held that such actions fall within s.5 of the Limitation Act 1980 as actions founded on simple contract. In reaching this conclusion, his Lordship was influenced by the fact that there would otherwise have been no applicable period of limitation, an outcome which he regarded as unacceptable. It is submitted that this view should be treated with caution. In the first place, the principle clearly is that in the absence of a statutory limitation period the action never becomes barred. *There is no reason to strain the construction of the statute, as appears to have happened here, in order to avoid such a consequence.* … In the second place, this case should not be regarded as establishing that every action for money had and received is a contractual action for limitation purposes. Here the parties had purported to enter into a contract, so there was at least some contractual aspect to the case. But in other cases of money had and received (such as money paid under mistake of fact) it would be quite implausible to argue for s.5. Unless these actions are to be regarded as tort actions- surely an equally implausible outcome- it will have to be accepted that no period of limitation is applicable. Of course, once this principle is conceded, there is no longer any good reason why it should not apply equally to all cases of money had and received. … as a matter of ordinary construction an action for money had and received cannot be an action founded on simple contract. *Frequently the action is based on an argument that there is in*

> *fact no contract, which is the antithesis of what s.5 covers.* [emphasis added]

69 Thus, we are of the view that claims in unjust enrichment, even where they are coincident with claims historically brought in quasi-contract, should not fall within the Limitation Act.

70 In so far as restitution of wrongs is concerned, we reiterate our analysis above that it relates only to the remedial response to a civil wrong. In our judgment, whether a claim in question falls within the Limitation Act is thus dependent on the underlying wrong. As noted above, Ang J in *Chip Hup Hup Kee* found that the claim for money had and received in that case lay in the tort of conversion and was therefore time-barred.

71 At this juncture, we consider the reasoning in *Chip Hup Hup Kee* in greater detail. Ang J considered that the foundation of the restitutionary claim in question lay in tort, as the facts necessary to be alleged and proved in order to maintain the claim were those necessary to prove conversion. As such, the claim was one "founded on tort" for the purposes of the Limitation Act. The learned judge considered that this approach was a "natural interpretation following the plain statutory language" (at [22]). In reaching this conclusion, he rejected the reasoning in the English High Court decision of *Chesworth v Farrar* [1967] 1 QB 407 ("*Chesworth*"). In *Chesworth*, Edmund Davies J (as he then was) held that a claim for money had and received to recover the proceeds from the sale of converted goods was not a "cause of action in tort", which would have been statutorily barred six months after the tortfeasor's demise under the rule of *actio personalis*. Instead, the action was, in his view, "analogous to one brought in contract", to which the limitation period for a contractual claim would apply. Given our analysis in relation to quasi-contractual claims above, the reasoning in *Chesworth* is, with great respect, clearly untenable.

72 Ang J further observed that historically, in lieu of suing on a tort, a claimant could "waive the tort" and bring a claim for money had and received (at [10]). He reasoned that the Court of Appeal in *Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 had accepted the position taken by the House of Lords in *United Australia, Limited v Barclays Bank, Limited* [1941] AC 1, that a claimant by waiving his claim in tort and bringing a claim for money had and received was merely making "a choice between possible remedies for the commission of what was at the heart of it a tort" (see *Chip Hup Hup Kee* at [11]). As the claimant would have been time-barred from pursuing his claim under the tort of conversion, he would also be time-barred from his claim for money had and received founded on the tort, "since it was in substance only a choice in remedy" (at [25]).

73 We agree with Ang J that where a claim for restitution for wrongs is founded on a tort, the limitation period as provided under s 6(1)(*a*) of the Limitation Act should apply. This accords with our analysis above that restitution for wrongs relates *only* to the remedial response to a civil wrong, and that the claim therefore is founded on the civil wrong *itself*. In the consultation paper by the Law Commission of England and Wales, the Law Commission considered that the "natural interpretation" of the UK legislation would be for the limitation period which applies to actions founded on tort to also apply to actions for restitution where the underlying wrong is a tort (see Law Commission of England and Wales, *Limitation of Actions* (1998) (Consultation Paper No 151)) ("*Consultation Paper No 151*") at para 5.17). Prof Virgo takes the same position, pointing out that "because the underlying cause of action for the claim is the tort or the breach of contract … the limitation period for those causes of action should apply even where the claimant seeks a restitutionary remedy". He notes that "[i]f the wrong is statute-barred then there is no longer

a cause of action on which the restitutionary claim can be based" (see *The Principles of the Law of Restitution* at pp 738–739). We are therefore of the view that the Limitation Act applies where the restitutionary claim brought is founded on a civil wrong for which a limitation period is provided under the Act, but not otherwise.

74 In contrast to this conclusion (as also noted, and rejected, in *Chip Hup Hup Kee*), is the position that a claim in restitution for wrongs could be independent from the underlying claim. For example, H M McLean in *Limitation of Actions in Restitution* [1989] CLJ 472 considered that where a restitutionary action "merely provides a supplemental tortious remedy, it should be subject to the same statutory bars as the normal damages action". On the other hand, for a claim in conversion, the decision in *Chesworth* is supportable. The author considered that the restitutionary action is "independent of the tort because it arises on the defendant's receipt of a benefit (the proceeds of sale) in circumstances (conversion) which make it unjust that he should retain that benefit" (at 487). However, given our conclusion above that restitution for wrongs provides only a remedy to a civil wrong, we do not consider this analysis to be a sustainable one.

75 For the above reasons, we are unable to agree that the statutory wording of the Limitation Act, which refers only to actions founded in *contract*, should be extended to restitutionary claims. As explained earlier, claims in *quasi-contract* were not founded on a *contract*, as any notion of there being a promise to pay was merely a *fiction* implied by the courts to provide the claimant with a remedy. In any event, claims which were once characterised as quasi-contractual are now primarily grounded in unjust enrichment and are *entirely distinct from* any obligation in contract as such.

76 For completeness, we make two further points. First, the respondent had initially argued (although this point appears to have been dropped during the hearing itself) that the appellants' claim in unjust enrichment was time-barred under s 6(7) of the Limitation Act, as the appellants had, in his view, sought equitable relief. However, to begin with, the claim in question has to be one "founded upon any contract or tort or upon any trust or other ground in equity". A claim in unjust enrichment does not fall into any of those categories. In addition, the analysis above in relation to the legislative history of the Limitation Act demonstrates that claims in unjust enrichment were simply not envisioned in the drafting of the Act.

77 Second, we are also of the view that claims in *unjust enrichment* do ***not*** fall within the ambit of claims founded on *tort* under s 6(1)(*a*) of the Limitation Act. This is for two reasons. First, it has been made clear in case law that claims in unjust enrichment are a distinct branch of obligations from the law of tort. As stated in *Turf Club Auto Emporium* at [181]:

> …it has been generally accepted that 'restitution for ***unjust enrichment***' is a ***distinct*** and ***new*** branch of the law of obligations (the other two great branches being the law of ***contract*** and the law of ***tort***, as part of the common law, and the law of ***equity*** constituting yet another distinct branch that developed separately from the common law). This is because the law of unjust enrichment comprises a separate ***cause of action*** (with ***restitution as*** the ***remedial response***), which is made out when there is *no civil wrong* but the defendant is *unjustly enriched* at the expense of the plaintiff. Unjust enrichment is thus a ***distinct branch of the law of obligations***. [emphasis in original]

78 Second, as noted by Prof Tang in *Tang* (at para 01.053), liability in unjust enrichment *cannot* be explained by reference to orthodox *tort* theory because "the defendant, being a passive recipient, has not breached a duty of care owed to the claimant unless one takes the view that there is a duty to return

a mistaken payment" (on the basis that the money was paid to the defendant by mistake). This however begs the question as to why there would be such a duty in the first place. We are therefore of the view that claims in unjust enrichment are *separate and distinct* from those in both contract and tort.

(C) LEGISLATIVE HISTORY OF THE LIMITATION ACT

79 We turn next to the ***legislative history*** of the Limitation Act. Apart from the statutory wording of the Act, its legislative history also supports our conclusion that claims in unjust enrichment do *not* come within its ambit. The legislative history of the Limitation Act has been helpfully set out by the Law Reform Committee of the Singapore Academy of Law ("SAL Reform Committee") in its *Report of the Law Reform Committee on the Review of the Limitation Act* (Cap 163) (February 2007)) ("*SAL Report*") (at paras 45–48) as well as in the relevant Legislative Assembly debates.

80 The earliest limitation statute applying directly to Singapore was the Limitation of Suits Act (Act XIV of 1859), later superseded by the Straits Settlements Ordinance VI of 1896, which was modelled on the Indian Limitation Act 1877 (Act 15 of 1877). Subsequently, a Committee was set up in the Federation of Malaya to consider the law relating to limitations. The Committee had recommended the adoption of the English law of limitations, resulting in the enactment of the Limitation Ordinance 1953 (Ordinance No 4 of 1953) (Federation of Malaya) ("Limitation Ordinance 1953"). The Singapore Bar Committee also undertook a review of the matter and recommended that legislation along the lines of the 1939 UK Act and the Limitation Ordinance 1953 be enacted in Singapore. As a result, the Limitation Ordinance 1959 (No 57 of 1959) was enacted, which superseded the Straits Settlements Ordinance VI of 1896. Mr K M Byrne, then Minister for Labour and Law,

observed that the Indian law on limitations was "extremely complicated", and that the purpose of the legislative amendment was to "effect a simplification" to the law of limitations in Singapore (see State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at cols 586–587). ***Since 1959***, there has been no major statutory overhaul of the law of limitation in the Singapore context.

81 However, the law of restitution and unjust enrichment is a developing branch of the law of obligations and most claims in this particular area of the law would not have been in the contemplation of the legislature at the point of drafting the Limitation Act as well as its predecessor legislation. Indeed, in the *SAL Report*, the SAL Reform Committee noted that the Limitation Act is "couched only in terms of obligations known to the drafters at the time of drafting", and this would therefore not include obligations such as unjust enrichment and other restitutionary claims, which were not known in 1959 when the act was drafted (at para 64). The Committee therefore recommended that the law of limitations in Singapore in relation to the law of restitution was "plainly in need of reform" (at para 67).

82 In *Consultation Paper No 151*, the Law Commission of England and Wales noted that the 1980 UK Act laid down limitation periods for specific and limited restitutionary claims but did not explicitly apply to the "bulk of restitutionary claims". The Commission concluded that (at paras 5.2–5.3):

> This means that the central choice facing the courts has been to construe the 1980 Act, *albeit artificially*, as applying to these claims; or to conclude that no limitation period applies to common law restitutionary claims and that any equitable restitutionary claims should be left to the doctrine of laches. [emphasis added]

83 Further, in the report of the Law Commission of England and Wales on the law of limitation, it was noted that unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991, in the case of *Lipkin Gorman* (see Law Commission of England and Wales, *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform* (July 2001) Law Com No 270 at para 2.48). Given that the Limitation Act was modelled after the 1939 UK Act, it must follow that claims in unjust enrichment *were not within the contemplation of the local legislature in 1959 (which, significantly,* ***represents the present law in Singapore today****)*. There would also be no basis for claims for restitution of wrongs (apart from claims founded on a civil wrong in one of the established grounds under the Limitation Act) to be construed as coming under the Limitation Act, as Parliament similarly did not envisage such claims as coming within the Limitation Act.

84 Indeed, it should be noted that statutory limitation periods are emphatically as well as quintessentially creatures of statute, and it is not the function of the courts to act as "mini-legislatures" by reading into the Limitation Act a statutory limitation period for a claim which the Legislature did not intend to impose. The Limitation Act does not, understandably, contain any "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not *expressly specified in* the Act itself. This suggests that the Legislature did not intend *all* claims to be subject to a limitation period but only those which it deemed *ought* to have been so limited (namely, the claims expressly specified in the Act). It follows that claims which could not have been within the contemplation of the Legislature at the time the Limitation Act and its predecessor legislation were enacted could *not* have been intended by the Legislature to be subject to statutory limitations under the respective statutes (in particular, the Limitation Act).

85 We acknowledge that the position that we have reached is an unhappy one. However, in view of the statutory wording of the Limitation Act and its legislative history, we decline to (artificially) hold that restitutionary claims, including those in unjust enrichment, come within the ambit of the Limitation Act. Until the lacuna in the law has been addressed by Legislature, restitutionary claims are therefore ***not*** time-barred. As we further elaborate at [123] below, this should be an urgent clarion call for legislative intervention.

86 Following from the above analysis, the appellant's claims in unjust enrichment are accordingly *not* statutorily time-barred under s 6 of the Limitation Act. ***However***, we agree with the Judge that the appellant's other claims are statutorily time-barred under s 6 of the Act. The claims in unlawful means conspiracy are time-barred under s 6(1)(*a*), being claims in tort; and the claims in dishonest assistance and knowing receipt are time-barred under s 6(7), being equitable claims (see *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 at [53], where this court considered that the six-year time bar would apply to an equitable claim for breach of fiduciary duties; see also the decision of the High Court in *Panweld Trading Pte Ltd v Yong Kheng Leong and others (Loh Yong Lim, third party)* [2012] 2 SLR 672 at [62]; and the *SAL Report* at para 17). We therefore proceed to consider whether s 29 of the Limitation Act applied to extend the limitation periods for the appellant's claims in unlawful means conspiracy, dishonest assistance and knowing receipt.

(3) Application of s 29 of the Limitation Act

87 The issue before the court is whether the appellants could rely on s 29 to postpone the limitation periods for the relevant claims. The provision provides as follows:

> **Postponement of limitation period in case of fraud or mistake**
>
> **29.**— (1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> > (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
> >
> > (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> …
>
> 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.

88 We will also consider the equivalent legislation in the UK. Section 32 of the 1980 UK Act provides as follows:

> **32 Postponement of limitation period in case of fraud, concealment or mistake.**
>
> Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> > (a) the action is based upon the fraud of the defendant; or
> >
> > (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> >
> > (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, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

89 As mentioned above, the Judge proceeded on the assumption that the threshold requirements under ss 29(1)(*a*) and/or (*b*) of the Limitation Act have

been met. The Judge held, in summary, that the appellants had not discharged the burden on them to show that WKY could not with reasonable diligence have discovered the payments prior to March 2011 (see the Judgment at [124(g)]). The Judge considered that a plaintiff would have to be put on inquiry or have reasonable cause to take steps which would have led to the discovery of the relevant facts. He also considered that a plaintiff would only be said to have been "put on inquiry" when he encountered facts which aroused suspicion, following which he had to act with sufficient diligence to discover the fraud. However, there is no requirement in s 29 of the Limitation Act that a plaintiff had to be put on inquiry *with regard to a possible fraud*. Nevertheless, even if there had been such a requirement, it would still have been satisfied by the appellants (see the Judgment at [125]–[127]).

90 We consider the parties' arguments in relation to whether the appellants could have with reasonable diligence discovered the payments, on the same *assumption* made by the Judge that the threshold requirements in ss 29(1)(*a*) and/or (*b*) have been met. The appellants contend that the phrase "could with reasonable diligence have discovered [the fraud]" in s 29(1) of the Limitation Act refers to a situation where there has been something to put the plaintiff on inquiry *in respect of a possible fraud*, citing the English High Court decision of *Loches Capital Ltd v Goldman Sachs International* [2020] EWHC 2327 ("*Loches Capital*") at [80]. The appellants also contend that the English High Court decision of *Davies v Sharples* [2006] EWHC 362 ("*Davies*") at [59] supports their case that the requirement for a plaintiff to be put on notice is implicit in the concept of "reasonable diligence". We agree with the Judge's views and *reject* the appellants' submission that a plaintiff had to be put on inquiry specifically in respect of a fraud. Let us elaborate.

91 We consider the approach of the English courts in respect of what "reasonable diligence" in the 1980 UK Act constitutes. In the English Court of Appeal decision of *Law Society v Sephton & Co and others* [2004] EWCA Civ 1627 ("*Sephton*"), Neuberger LJ (as he then was) held (at [116]) that s 32(1) of the 1980 UK Act contained an "assumption that the claimant *desires to discover* whether or not there has been a fraud" [emphasis added], stating at [116] and [117] as follows:

> 116 … I consider that the judge was right in his conclusion that it is inherent in s 32(1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in *Paragon*, that there must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word 'could', as emphasised by Millett LJ, of much of its significance. Further, the concept of 'reasonable diligence' carries with it, as the judge said, the notion of a desire to know, and, indeed, to investigate.
>
> 117 I accept that one must be very careful about implying words into a statutory provision, and it can be said that the judge's first step involves doing just that. However, it appears to me that the judge was not seeking to imply words, or a new concept, into the statutory provision. He was explaining what was involved in the process of deciding whether a claimant, could, with reasonable diligence, have discovered the fraud which it now seeks to plead.

92 On the facts in *Sephton*, one of the issues before the court was whether the Law Society's cause of action in fraud against a firm of accountants, Sephton & Co ("Sephton"), who had provided unqualified annual reports on a solicitor's practice, Payne & Co, first accrued more than six years before the action was brought. The English Court of Appeal upheld the High Court's decision that the Law Society's claim in *fraud* was time-barred and dismissed the appeal with regard to the aforesaid claim in *fraud* (though it allowed the appeal against the High Court's decision in respect of the Law Society's claim in *negligence* against Sephton), as it had failed to prove that it could not with

reasonable diligence have discovered the fraud more than six years before the action was brought in 2002. The Society had intervened in Payne & Co on 20 May 1996, and at that point, had access to all its papers and records. There was also other significant evidence available to the Society before or immediately upon the said intervention.

93 In *Gresport Finance Limited v Battaglia* [2018] EWCA Civ 540 ("*Gresport*"), the English Court of Appeal made reference to the holding in *Sephton* and stated (*per* Henderson LJ) at [49] as follows:

> …Another way of making the same point…might be that the 'assumption' referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of 'reasonable diligence' only makes sense *if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be).* [emphasis added]

The court further held that whether a claimant could with reasonable diligence have discovered the relevant fraud, concealment or mistake is a "question of fact in each case" (at [50]).

94 On the facts of *Gresport*, Gresport Finance Limited claimed against the appellant for various sums of money which it alleged he had wrongly caused to be paid away, as well as the value of a portfolio of investments and securities which it alleged the appellant had caused to be wrongly removed from its account. The appellant submitted, *inter alia*, that Mr Mackey, for whom Gresport Finance Limited held cash and securities, was a competent accountant. He therefore could be expected to be interested in and to have had no difficulty with finding out about his financial affairs, including the disposition of money and securities held for him through Gresport Finance Limited. The court held that whilst Mr Mackey "no doubt took a close interest in his financial affairs",

the judge below had accepted his evidence that he had no reason to think that there was anything amiss, or that he had cause to ask for further information (at [52]). The court found that Gresport Finance Limited could not with reasonable diligence have discovered the concealment more than six years before the commencement of the action, and it therefore could rely on s 32(1)(*b*) of the 1980 UK Act to extend the limitation period to bring its claim.

95 Subsequently, in *Granville Technology Group Ltd (in liquidation) and other companies v Infineon Technologies AG and another company* [2020] EWHC 415 (Comm) ("*Granville*"), the English High Court considered *Sephton* and *Gresport*, and held that there must be something which put the claimant on notice as to the need to investigate. In particular, the court considered that there could *not* be a "statutory assumption that the claimant was on notice of something meriting investigation", as such an assumption would make it very difficult for claimants to satisfy the test under s 32(1). Rather, the court considered that Henderson LJ in *Gresport* must have meant that "the drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry)" (at [45]). Whether there was in fact "something to put the claimant on notice" was to be determined on an objective basis (at [43]–[48]).

96 Subsequently, the English Court of Appeal in *DSG Retail Ltd and another company v Mastercard Inc and other companies* [2020] EWCA Civ 671 ("*DSG Retail*") agreed with the conclusion reached by the High Court in *Granville* (at [66]). The court took the view that s 32(1)(*b*) of the 1980 UK Act contained a test of (a) whether the claimants were put on notice of their claims;

and (b) whether they could, with reasonable diligence, have discovered the relevant concealed facts. The court reiterated that the issue of whether there was "something to put the claimants on notice" was an objective test (at [69]–[71]).

97 We agree with the principles set out in *Granville* and *DSG Retail*. In our judgment, the limitation period begins to run when there are circumstances that would give rise to a *desire to investigate*. The court will undertake an *objective* inquiry as to whether a reasonable person in the claimant's position had knowledge of sufficient information such that he ought to have undertaken further inquiry. This test strikes a logical balance: the law would not expect a claimant to look further if he or she had no knowledge of information that would trigger investigation (such as on the facts in *Gresport*); equally, it would be too high a threshold for the claimant to have to be put on inquiry of *the fraud* itself before time would begin to run (as the appellants in this case have sought to argue).

98 We consider several illustrations of how principles to the same effect have been applied in practice. In *Bank of America National Trust and Savings Association v Herman Iskandar and another* [1998] 1 SLR(R) 848 ("*Herman Iskandar*"), the plaintiffs brought an action against the defendant bank for refusing to pay out compound interest on a fixed deposit account ("FD"). The first plaintiff Herman was a joint account holder of the FD with his mother Lily and his father Lugito, and was a co-executor of Lily's estate with the second plaintiff. The bank contended, *inter alia*, that the claim was time-barred. The plaintiffs sought to rely on s 29 of the Limitation Act on the basis that the solicitor appointed by Herman and Lily for Lugito's estate had instructed the bank by letter to renew the FD for another year, but that this instruction had not been followed. This court observed, *obiter*, that even if the bank's conduct had amounted to fraud, the plaintiffs could not rely on s 29(1)(*b*) of the Limitation

Act ("s 29(1)(*b*)") as their legal advisers had not acted with reasonable diligence. If their legal advisors had done so, they would have found out much earlier that the moneys lying in the account were dormant and the course of events that followed would have been different. For example, the appointed solicitor did not follow up on the letter by confirming with the bank as to whether the FD had been renewed (at [76]–[78]).

99 In *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 ("*Chua Teck Chew Robert*"), the respondent Goh was a shareholder of Daikin Singapore ("Daikin") and the appellant Chua was a director of Daikin. Goh was to receive incentive payments from Daikin pursuant to an agreement, but Goh later discovered that there had been a shortfall. This court found that Goh's claim was time-barred and that s 29(1)(*b*) could not be used to extend the limitation period. Even if Chua had fraudulently concealed Goh's entitlement, Goh could have discovered the shortfall in payments had he exercised reasonable diligence. In particular, he had acknowledged receipt of the incentive payments on the payment vouchers. He had also been aware of Daikin's profits, on which the incentive payments were based, as these figures had been made known at the Annual General Meetings which either Goh or his personal representative had attended. Having had sight of those figures, Goh should have embarked on an inquiry (at [35]). As he did not do so, s 29(1)(*b*) could not assist him.

100 In *Peconic Industrial Development Ltd v Lau Kwok Fai & Ors* [2009] 5 HKC 135 ("*Peconic*"), a businessman, one Chio, dishonestly induced the Agricultural Bank of China ("the ABC") to invest in a Hong Kong land speculation by making false representations about the prospect of making a profit. The ABC funded the purchase through Peconic Industrial Development Ltd ("Peconic"), a joint venture company. The immediate vendor of the land

was Asiagreat Ltd ("Asiagreat"), of which Chio and his girlfriend were the beneficial owners. In November 1992, Huang was appointed as managing director of Peconic. The ABC later commenced proceedings against a solicitor, Danny Lau ("Lau"), claiming that Lau had dishonestly assisted Chio in the fraudulent breach of his fiduciary duties to Peconic. On the question of whether Lau had a defence of limitation, the Hong Kong Court of Final Appeal upheld the Hong Kong Court of Appeal's decision that Peconic could have, with reasonable diligence, discovered the fraud more than six years before the issue of the writ. Section 26(*a*) of the Hong Kong Limitation Ordinance (Cap 347) (HK) is *in pari materia* with s 32(1)(*a*) of the 1980 UK Act.

101 Lord Hoffman considered that Huang knew of facts that should have caused him to enquire further or instruct the law firm he had engaged to look into the ownership of Asiagreat. In the circumstances, "one would expect even the most unsophisticated banker to ask himself whether there was any explanation" for Chio's conduct. A "reasonable banker [would have] shown some curiosity" as to whether there was some connection between Chio and Asiagreat (at [48]). The burden of proof was on Peconic to show that it had exercised reasonable diligence, but Peconic did not give any evidence that it had given the law firm engaged the requisite instructions to investigate Asiagreat's ownership. Peconic was unable to satisfy the court that it could not with reasonable diligence have discovered the fraud.

102 The cases of *Herman Iskandar*, *Chua Teck Chew Robert* and *Peconic* support as well as illustrate the conclusion that we have reached above. In each case, the plaintiffs or their agents had information which should have aroused suspicion or put them on inquiry, such that a reasonable person in their position would have undertaken further investigation to discover the (alleged) fraud. As they had not exercised reasonable diligence, they could not rely on the relevant

statutory provisions to extend the limitation periods within which their claims had to be brought.

103 Finally, we turn to consider the two cases that the appellants sought to rely on. The appellants referred this court to *Loches Capital* at [80], where the English High Court held that it could not be said that an applicant could have with reasonable diligence discovered the fraud "unless reasonable diligence would have led the applicant to have … acquired knowledge of the critical allegations on which the fraud claim is based". The court further held at [87] that the question which arose was whether the plaintiff was "put on enquiry that [the defendant] might have committed *the fraud* so that it ought to have followed the matter up" [emphasis in original]; and that it would be "too general a proposition" to suggest that the plaintiff's "awareness either that it had suffered a loss or that 'something had gone wrong' was itself a trigger giving rise to a duty to exercise reasonable diligence to investigate".

104 We are of the view that the court's conclusion in *Loches Capital* could have been reached, instead, by undertaking an objective fact-specific inquiry of whether there had been something to put the claimant on notice of a need to investigate. On the facts in *Loches Capital* (which was an application for pre-action disclosure), the plaintiff Loches intended to bring a claim against the defendant Goldman Sachs International ("GSI") for unlawful means conspiracy. GSI submitted that Loches' claim had no prospect of success as it was time-barred, whilst Loches sought to rely on s 32 of the 1980 UK Act. The claim arose from the takeover of a company, Arcelor SA ("Arcelor") by Mittal Steel Company NV ("Mittal") and the subsequent merger of the two companies. Loches alleged that GSI had conspired with Mr Mittal (the Chief Executive Officer and majority beneficial owner of Mittal), amongst others, to carry out a scheme under which the Arcelor shareholders who did not accept Mittal's

takeover offer would have their shares exchanged for shares in the merged company at an artificially deflated Share Exchange Ratio ("SER"). Loches was not one of the shareholders which rejected the takeover offer; it intended to bring an action as an assignee of the rights of Deutsche Bank ("DB") under a sale and purchase agreement.

105 The court found that there was no fact or matter which would have put DB on notice to investigate *whether there had been a fraud*. For example, that the SER which applied to the Arcelor shareholders who rejected Mittal's takeover offer was less than the SER applied to the majority Arcelor shareholders who accepted the offer was "at least arguably not itself a 'trigger'" (at [95]). In our view, the court's decision could have been arrived at by a finding that Loches or DB simply did not have sufficient information which would have put it on inquiry to undertake further investigations. As we have emphasised earlier, the court would make its determination as to whether there was something to put a claimant on inquiry on an objective basis. This would necessarily be a fact-specific inquiry.

106 As for the appellants' submission in relation to *Davies*, the court in that case stated (at [59]):

> The concept of reasonable diligence seems to involve two considerations. The first is whether the Claimants were put on inquiry or had reasonable cause to take the steps which would have led to the discovery of the mistake and the second is whether having been put on inquiry they acted sufficiently diligently in taking the necessary steps to ascertain the existence of the mistake ….

107 We agree with the Judge that *Davies* does not go so far as to state that a plaintiff has to be put on inquiry of a *possible fraud*, but merely that they had to be put on inquiry or to have reasonable cause to investigate further. The test in

Davies is in fact aligned with our conclusion on the applicable principles as set out above.

108 Applying these principles to the facts in the present case, we are of the view that WKY had failed to exercise reasonable diligence and that s 29 of the Limitation Act would therefore *not* apply to extend the limitation periods in respect of the appellants' claims in dishonest assistance, knowing receipt and unlawful means conspiracy. The Judge rightly considered the state of WKY's knowledge as well as his reasons for not undertaking further investigations in relation to the TT forms that he had been asked to sign. As noted earlier, it is undisputed that WKY had signed 25 of the TT forms authorising the 50 payments (see the Judgment at [118]). WKY's evidence was not that there was no reason for him to investigate; rather, he claimed that he had trusted WKN and did not want to quarrel with him. According to him, WKN would be unhappy if he had questioned him, but WKY was unable to explain why that would be the case (see the Judgment at [123(a)]). WKY had also given evidence that WKN told him not to interfere with the appellants' business and did not allow him access to the appellants' records (see the Judgment at [123(f)]). These facts should have been sufficient to put WKY on inquiry and to make further investigations with regard to the 25 TT forms, as well as with regard to the appellants' business in general. A reasonable person in WKY's position would have done so: WKY was a director and shareholder of Esben, Lismore and Double Ace, and was at least indirectly a shareholder of Incredible Power and Rayley. In addition, he was a signatory to the appellants' HSBC bank accounts and could have obtained the bank statements at any stage (see the Judgment at [123(j)]). By WKY's own admission, Tiang would have been obliged to give him an explanation as to why payments were being made to the respondent if he had enquired about the 50 payments. The Judge, in our view, rightly

concluded that if WKY had asked Tiang what the TT forms were for, he would have been informed that the payments were being made to the respondent (see the Judgment at [122]). Therefore, if WKY had exercised reasonable diligence, he would have found out about the payments by March 2011 at the latest, when WKN fell ill and went for medical treatment overseas; and, in fact, should have done so before that juncture.

109 Following from our conclusion above, s 29 does *not* apply to extend the limitation period for the appellants' claims in dishonest assistance, knowing receipt and unlawful means conspiracy (save for payment No 50, which was not time-barred in the first place), and these claims are accordingly time-barred. It is therefore unnecessary for us to consider whether the threshold requirements under ss 29(1)(*a*) and 29(1)(*b*) had been met.

Whether the appellants' claims were barred under the equitable doctrine of laches

110 We now turn to the issue of whether the equitable doctrine of laches bars the appellants' claims for unjust enrichment, as well as their claims for dishonest assistance, knowing receipt and unlawful means conspiracy in respect of payment No 50. This issue was not canvassed by the Judge; it was not necessary for him to do so, in view of his finding that the Time-Barred Claims were time-barred under the Limitation Act. However, this issue becomes a live one given our finding that the appellants' claims in respect of unjust enrichment for all 50 payments and for dishonest assistance, knowing receipt and unlawful means conspiracy in respect of payment No 50 are *not* time-barred under the Limitation Act.

111 The respondent argues that the doctrine of laches applies where there is a substantial lapse of time, such that it would be practically unjust to give a

remedy. The respondent's argument on laches broadly follows his arguments on the time-bar issue, namely that WKY could, with reasonable diligence, have discovered the 50 payments and that, as a result of the long lapse of nearly 20 years from the first payment to the trial, the respondent was deprived of WKN's evidence, which would have been "most valuable and provided answers to key questions". The effluxion of time also gave rise to a "major lacuna in the evidence before the court" as a result of (a) Tiang's actions in destroying the appellants' records and (b) the erosion of the memories of the respondent's witnesses as to the circumstances under which the payments were made.

112 The appellants contend that the doctrine of laches did not apply to the unjust enrichment claim because it was an equitable defence in answer to a claim in equity, and did not apply to a claim at common law.

113 We begin with the observation that the equitable doctrine of laches is generally invoked to bar a claim for *equitable* relief where a substantial lapse of time has occurred, coupled with the existence of circumstances that make it inequitable to enforce the claim. The doctrine has, as its conceptual foundation, the *equitable* maxim *vigilantibus, non dormientibus, jura subveniunt* (equity aids the vigilant and not the indolent). This maxim itself stems from the *flexible* nature of the equitable jurisdiction of the court, which can be invoked in certain situations to bar claims where the *conscience* is pricked and where no other innocent interest is affected (see the High Court decision of *Re Estate of Tan Kow Quee (alias Tan Kow Quee)* [2007] 2 SLR(R) 417 ("*Tan Kow Quee*") at [32]–[33]). It can be seen, therefore, that the doctrine of laches has its origins in the notion of *unconscionability* that underpins the equitable jurisdiction of the court (see *Tan Kow Quee* at [33] as well as the decision of this court in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock*

Seng, deceased) and another [2013] 3 SLR 801 ("*Wee Chiaw Sek Anna*") at [101]).

114 In local jurisprudence, the doctrine of laches was originally strictly confined to equitable claims and did not apply to non-equitable claims. In the High Court decision of *Syed Ali Redha Alsagoff v Syed Salim Alhadad bin Syed Ahmad Alhadad* [1996] 2 SLR(R) 470, the plaintiff claimed to be entitled to property as the administrator *de bonis non*. The defendant sought to rely on the doctrine of laches to bar the plaintiff's claim, on the basis that the delays and inaction on the part of, *inter alia*, the plaintiff, amounted to laches. Warren L H Khoo J, however, rejected the defendant's argument and held that the doctrine of laches had no application to a non-equitable claim. His reasoning was as follows (at [47]):

> Laches is essentially an equitable defence in answer to a claim in equity. Here, the claim by the plaintiff as the administrator *de bonis non* is a claim to assert rights at law of the estate over the property. It seems to me that the defence of laches has no place in this context. It seems to me that this is a case where the maxim equity follows the law aptly applies.

115 On appeal, this court "entirely agree[d]" with Khoo J without providing any additional reasoning (see *Scan Electronics (S) Pte Ltd v Syed Ali Redha Alsagoff and others* [1997] 1 SLR(R) 970 at [19]).

116 Some doubt, however, was cast on this position by the decision of this court in *De Beers (CA)*. In that case, this court appeared to apply the doctrine of laches to a *common law* claim for restitution on the basis of mistake (even though no equitable relief was sought) (at [33]; see also *OMG Holdings* at [45]). Instead of finding that the doctrine of laches was *completely inapplicable* to the common law restitutionary claim, this court found, instead, that the appellant's reliance on the doctrine of laches failed on the facts (at [33]–[34]). This implied

recognition of the applicability of the *equitable* doctrine of laches to *common law* claims was therefore, strictly speaking, *obiter dicta*. It is also notable that in *De Beers (CA)*, this court did not cite *Alsagoff* or its own decision on appeal from *Alsagoff*.

117 Subsequently, the strict position in *Alsagoff* was reasserted in the High Court decision of *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec*"). In that case, the plaintiff sought to recover a debt in respect of 16 unpaid invoices from the defendant by proceedings commenced more than six years after 11 of the 16 invoices had fallen due. The defendant refused to admit the debt and pleaded the defence of laches, and, alternatively, that the amounts due in respect of 11 of the 16 unpaid invoices were time-barred. Andrew Ang J, following the approach set out in *Alsagoff*, held that the defendant's argument that the doctrine of laches applied even when the claimant was asserting a right at law was an untenable one (at [47]). He went on to observe (at [48]) that:

> The rationale behind this principle becomes clear when one considers the evolution of the doctrine of laches and the [Limitation] Act. Historically, early limitation statutes only applied to courts of common law (*Snell's Equity* at para 5-17). The courts of equity applied the maxim *vigilantibus, non dormientibus, jura subveniunt* (equity aids the vigilant and not the indolent) to control flagrant abuses of its procedure (at para 5-16). Delays sufficient to prevent a party from obtaining an equitable remedy were technically called 'laches' (at para 5-16). However, today, the Act (based largely on the UK Limitation Act which developed from early limitation statutes) prescribes limitation periods for certain equitable rights, such as claims for non-fraudulent breach of trust (six years) (see s 22(2) of the Act). Although it is plain that the Act does not affect the equitable jurisdiction of the court to refuse relief on the ground of laches (*per* s 32 of the Act), *where there is a statutory limitation period operating expressly or by analogy, the plaintiff is generally entitled to the full statutory period before his claim, whether legal or equitable, becomes unenforceable* (*Tay Tuan Kiat v Pritnam Singh Brar* [1985-1986] SLR(R) 763 at [6], citing *In re Pauling's Settlement Trusts* [1964] Ch 303). This was

> another application of the maxim equity follows the law. … Additionally, where *there are equitable claims to which no statutory limitation applies* (see, *eg*, *Re Estate of Tan Kow Quee* ([46] *supra*) *concerning the recovery of trust property by the beneficiary from the trustee, these would naturally be covered by the doctrine of laches*. [emphasis added]

118 Ang J concluded, at [50], that:

> Here, just as in *Scan Electronics … a legal remedy was sought to enforce a legal right, and the defence of laches had no application.* Further, *this was a case where the [Limitation] Act prescribed a particular statutory bar (s 6(1) read with s 26(2) of the Act)* and considering all the circumstances of the case, in particular the inconsistent positions taken by the defendant in respect of the existence of supporting evidence, there was no reason for equity to intervene. [emphasis in original]

119 We observe that two principal strands of reasoning for the non-applicability of the doctrine of laches to a contractual claim appear to emerge from the decision in *Cytec*. The first is the principle, laid down in *Alsagoff*, that laches, as an equitable doctrine, applied only to equitable claims. The second is that, where there is a *prescribed* statutory limitation in respect of an equitable claim (such as for the appellants' claims in respect of payment No 50), the doctrine of laches should *not* apply to bar the claim, as the "plaintiff is generally entitled to the full statutory period before his claim … becomes unenforceable", pursuant to the maxim that equity follows the law.

120 Some years later, the pendulum swung somewhat in favour of the recognition of the doctrine of laches to common law claims in the decision of this court in *eSys*. In that case, the appellant claimed an account of two invoices on an implied term under the common law of contract, and the respondent sought to rely on the doctrine of laches in resisting the claim (at [36]). This court, however, took the view that there was a "threshold difficulty in so far as the argument from laches [was] concerned". This was because the equitable

doctrine of laches was not available to a claim under the common law of contract, where a statutory limitation period applied (at [37]). Citing the abovementioned passages of *Cytec*, this court then observed (at [38]–[42]) as follows:

> 38 ***There is certainly much to commend in the reasoning of Andrew Ang J in* Cytec Industries *as set out in the preceding paragraph … and we gratefully adopt it (subject to the caveat mentioned below at [41]–[42])***. The doctrine of laches therefore *cannot* apply in the context of the present case.
>
> 39 In Andrew McGee, *Limitation Periods* (Sweet & Maxwell, 6th Ed, 2010) at para 3.021, it was also observed that:
>
> > The Limitation Acts are the only general provision which require that an action be brought within a given time. *There is no such thing as a common law limitation period and it would be quite inappropriate at the present time for the courts to attempt to develop such a common law doctrine*. In the case of equitable remedies, by contrast, it is clear that lapse of time amounting to much less than the statutory limitation periods can cause such prejudice to the defendant as to render the granting of the remedy inappropriate. [emphasis added; footnote omitted]
>
> 40 The observation by the learned author in the preceding paragraph, together with *Cytec Industries*, effectively disposes of the respondent's suggestion that there exists an implied term requiring the Appellant to request an account within a *shorter period of time* than that afforded to it under s 6 of the Limitation Act …
>
> 41 In arriving at our decision, we are fully cognizant of *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ('*De Beers*'), where this court was willing to apply the doctrine of laches to a *common law* claim in restitution even though no equitable relief was sought. The proposition put forth in *Cytec Industries* – *ie,* that the doctrine of laches *could not* apply to a claim at common law where no equitable remedies are sought – would appear, at first blush, to contradict this court's decision in *De Beers*. We note, however, that *De Beers* could ***possibly be distinguished on the basis that, unlike a claim founded on contract (as is the case in the present appeal), a claim in restitution (which was the situation in De Beers) does not, on its face, appear to fit neatly into any of the causes of action set out in s 6 of the Limitation***

> ***Act*** … However, some doubt appears to have been cast on such an approach by the court in its recent decision in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 ('*OMG Holdings*') where it was suggested (at [41], albeit only by way of *obiter dicta*) that a claim in restitution (at least in so far as it is coincident with a quasi-contractual claim) 'could well be time-barred under [s 6] of the Limitation Act' … Be that as it may, it suffices to note, for the purposes of the present appeal, ***that the underlying thread in both* De Beers *and* OMG Holdings *appears to be that it would be contrary to both logic as well as public policy for there to be no applicable time constraint whatsoever to a claim founded on restitution as opposed to contract or tort*** …
>
> 42 ***Nevertheless, the specific issues of (a) whether (and precisely when) the doctrine of laches is applicable to a common law claim***; and (b) whether a restitutionary action falls within the ambit of s 6 of the Limitation Act were not argued before us (as the respondent did not even expressly rely on the doctrine of laches, nor was its claim founded on restitution) and we would ***prefer not to express any conclusive view, leaving it to a future court to decide these issues when they next arise squarely for its determination***.
>
> [emphasis in italics in original; emphasis added in bold italics]

121 This court, in *eSys*, thus accepted the proposition that where a statutory limitation period applicable to a claim under the Limitation Act had *not yet expired* (as is the case with the appellants' claims in dishonest assistance, knowing receipt and unlawful means conspiracy in respect of payment No 50), it would not be appropriate for the court to curtail that limitation period by barring the claim under the doctrine of laches. However, this court left open the question of whether the equitable doctrine of laches could be applicable to a common law claim of a kind for which *no* limitation period applied. The court's reluctance to adopt the strict *Alsagoff* position and reject the applicability of the doctrine of laches to all *non-equitable* claims generally appeared to stem principally from the observation (quoted in the preceding paragraph) that it is "contrary to both logic and public policy for there to be no applicable time constraint whatsoever" to a claim. We can see some force in this argument. It is possible to conceive of situations where the lack of a limitation period with

regard to certain common law claims may lead to potential unfairness and prejudice. For example, owing to a considerable lapse of time, evidence by which a defendant to a claim might have rebutted said claim might have been lost or destroyed (see, for example, the English High Court decision of *Barrett v Universal Island Records and others* [2006] EWHC 1009 (Ch) at [205]).There would indeed be some unfairness in subjecting a potential defendant to the *permanent* risk of the Damoclean sword of potential litigation being opportunistically commenced when the evidence he could have adduced in his defence can no longer be obtained.

122 These weighty considerations notwithstanding, we are of the view that they cannot displace the *weightier* considerations in favour of not lightly extending equitable doctrines into the realm of the common law, bearing in mind the historical fact that flexible equitable doctrines were developed in response to what was seen as the harsh rigidity of the common law and thus that the equitable jurisdiction and the common law jurisdiction should not be conflated (see the observations of this court in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 ("*Chwee Kin Keong*") at [58] and [62]). The notion of unconscionability which, as we observed above, underpins equitable doctrines, does not readily lend itself to cases where the equitable jurisdiction of the court is not invoked at all, such as common law claims for common law reliefs (for example, claims in unjust enrichment) which are based on the *vindication* of an identifiable legal right, and not whether it is fair and/or just in the circumstances to grant such relief (see *Lipkin Gorman* at 578). Indeed, in *Wee Chiaw Sek Anna* at [109], we observed that "an unjust enrichment claim may be generally characterised as a claim based on strict liability at common law", subject to relevant defences. The introduction of equitable notions of unconscionability into common law actions by way of

incremental case law development risks producing intrinsically fact-sensitive outcomes which may "sow the seeds of confusion and harvest the returns of uncertainty" (see *Chwee Kin Keong* at [130]) with regard to what the applicable limitation period is in each case. This potential for uncertainty is further underscored by the fact that the local case law is divided over whether the doctrine of laches ought to apply in *pure* common law claims.

123 Whilst it is trite that the court must strive to do justice in each case, and that *some* injustice might, as we recognised above, be occasioned from the lack of a prescribed limitation period for certain kinds of common law claims, we consider that this does not outweigh the need for common law claims to be an effective avenue for the vindication of *legal* rights – the denial of which gives rise to another form of injustice to the party entitled to such vindication – and the need for parties contemplating action to enforce such legal rights to be *certain* of when such legal rights effectively expire, instead of subjecting all such claims to an amorphous time-bar decided, in almost if not all cases, on an *ex post facto* basis. Instead, we consider this an opportunity to sound a clarion call for *legislative* intervention in that Parliament ought to consider rectifying this lacuna in the Limitation Act to cover common law claims for which no statutory time-bar is presently prescribed. We consider Parliament the most appropriate forum to address prescriptive questions such as what the *specific length* of the limitation period for certain types of claims ought to be. A prescriptive approach in this regard would, in our view, promote the ends of *legal certainty* which is one of the fundamental tenets of the rule of law, being necessary for persons subject to the law to be able to regulate their conduct within its bounds (see the decision of this court in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [95], *per* Sundaresh Menon CJ).

124 For the reasons set out above, we are of the view that the equitable doctrine of laches does *not* apply to the Time-Barred Claims or to the appellants' other claims in respect of payment No 50 at all. The effect of our analysis thus far is that only the appellants' claims in unjust enrichment for all 50 payments, as well as their claims for dishonest assistance, knowing receipt and unlawful means conspiracy in respect of payment No 50, remain to be considered.

The unjust enrichment claims

125 We now turn to the unjust enrichment claims. It is well-settled (and indeed not disputed) that the elements of an unjust enrichment claim are: (a) that the defendant has benefitted or been enriched; (b) the enrichment was at the expense of the plaintiff; and (c) the enrichment was unjust (see *Anna Wee* at [98]). As we observed above at [21], [23] and [27], the Judge concluded that but for the time bar, the 36 payments were not unjust as they were made pursuant to a valid basis (namely the "practice") but that the unjust enrichment claim in respect of the 11 payments and the three payments would have succeeded because these payments were not made pursuant to any valid basis.

126 On appeal, the appellants dispute the Judge's conclusion that the 36 payments were not "unjust". They do not appeal the Judge's conclusion with regard to whether, *but for the time bar*, the unjust enrichment claim ought to succeed as regards the 11 payments and the three payments, and the respondent did not raise that point on appeal. The parties also do not dispute that the first element of unjust enrichment, namely, that the respondent had benefitted or been enriched by the receipt of the 50 payments, was satisfied.

127 In their written Case, the appellants raise the following issues as regards the unjust enrichment claim for the 36 payments:

(a) The Judge erred in finding that the "practice" existed. In this regard, the following arguments were made:

(i) That the "practice" which was raised by the respondent to the unjust enrichment claim for the 36 payments was unpleaded, and consequently the Judge had erred in finding that it existed ("the Pleading Argument");

(ii) That the "practice" was based on the CAD Documents which ought not to have been admitted into evidence as there was nothing on the face of the CAD Documents that suggested that they were made in the ordinary course of the *appellants'* business ("the Admissibility Argument");

(iii) That the allegations of the "practice" ought not have been believed. It was trumped-up (*ie*, contrived) as it was raised belatedly and there were various shifts in the respondent's defence. In any case, the CAD Documents and other evidence on record did not support the existence of the "practice" ("the Lack of Evidence Argument"); and

(b) That the respondent was barred from relying on the "practice" as a defence owing to its illegality ("the Illegality Argument").

128 The respondent, on the other hand, contends on appeal that the Judge did not err in finding that the "practice" existed and that he was entitled to rely on it as a defence to the appellants' unjust enrichment claim for the 36 payments. Additionally, the respondent raises a more fundamental point as regards the 50 payments *generally*: that the appellants' "lack of consent" to these payments was not and should not be legally recognised as an "unjust factor" and that that *entire* unjust enrichment claim ought to fail on that basis.

The unjust enrichment claims for the 36 payments

129 We first deal with the issue of whether the Judge had erred in finding that the 36 payments were made pursuant to the "practice", which requires us to consider the Pleading Argument, the Contrivance Argument, the Admissibility Argument and the Lack of Evidence Argument. We shall analyse each of these in turn.

(1) The Pleading Argument

130 The Pleading Argument was also made before the Judge. The Judge observed that para 4(d)(iv) of the respondent's amended defence permitted him to advance a positive case on the existence of the "practice" (see the Judgment at [33]). The appellants appear to argue that this pleaded "practice" was not the same as that set out in para 91 of Mdm Ma's AEIC and that therefore the Judge, in accepting as fact the "practice" as set out in the latter, had in effect gone beyond what was pleaded by the respondent. This argument is, in our view, without merit. First, para 91 of Mdm Ma's AEIC reads as follows:

> The change in payment structure was not proposed by Neil or me; it was suggested by someone on the WTK Group side. I do not exactly recall who it was but it is likely to have been WKN. I had no objections to the change in payment structure as a shareholder and director of GCH and agreed that the entire offshore amounts be paid to Neil. *It was the then practice of the Logging Companies to pay a portion of the logging expenses onshore through the Logging Companies themselves and the remainder offshore through the Offshore Companies. By routing the log sales of the Logging Companies through the Offshore Companies, the Offshore Companies ended up holding the revenue received from the end buyers. The Offshore Companies did not transmit the full sale price back to the Logging Companies; instead, they retained some revenue and paid part of the logging fees and expenses offshore; the remaining portion of such fees and expenses were paid onshore by the Logging Companies. From the perspective of a logging contractor such as GCH, the splitting of the logging fees and expenses into onshore*

> *and offshore components resulted in its income (and consequently taxes payable) being lowered.* [emphasis added]

131 The respondent pleaded, in Defence (Amendment No 4) ("the Defence"), that:

(a) There was a general practice of offsetting the companies' balances against one another and utilising the funds of a company within the WTK Group to pay for the debts of another company within the WTK Group. Thus, there were intercompany transactions between companies within the WTK Group (which included both the Logging Companies and the Offshore Companies);

(b) The 36 payments related to three categories of transactions between the Logging Companies and the Offshore Companies, namely:

(i) Transactions in respect of logging and transportation services involving GCH, Elite Honour Sdn Bhd ("Elite Honour") and the appellants which were facts set out by the Judge in the Judgment at [175];

(ii) Management consultancy services provided by Demeter Resources Management Sdn Bhd to Ocarina Development Sdn Bhd and Sunrise Megaway Sdn Bhd which were facts set out by the Judge in the Judgment at [182]; and

(iii) Transactions for the provision of timber logs involving WTK Reforestation Sdn Bhd and Faedah Mulia Sdn Bhd which were facts set out by the Judge in the Judgment at [188].

132 While it was, strictly speaking, not pleaded that the various transactions were made pursuant to a general "practice" in the detailed manner alleged by

Mdm Ma in para 91 of her AEIC, it is important to note that that was a conclusion which the Judge was entitled to come to on the facts and evidence before him. The respondent's defence was premised on the basis that the 36 payments were made for legitimate reasons, namely, the three pleaded categories of transactions set out above. Paragraph 91 of Mdm Ma's AEIC merely placed these transactions within a *wider* framework of the alleged "practice"; her evidence served the purpose of *additionally explaining* why and how the abovementioned three categories of transactions came to be. Put another way, the question of whether the *defence* that the 36 payments were made for legitimate reasons was pleaded in no way turned on whether the *details* of Mdm Ma's AEIC relating to the wider "practice" were pleaded.

133 Ultimately, however, the Judge had accepted, at [179(e)], [186] and [192] of the Judgment, that the pleaded defence was made out on the evidence before him, namely, that the payments were made for the reasons pleaded in the defence. The Judge had therefore made findings as to facts *pleaded* by the respondent. We do not think that the Judge had erred in doing so.

134 In any case, it was pleaded in paragraph 4(d) of the Defence that the 36 payments were in fact made pursuant to transactions within a "general practice" of intercompany transactions which arose from the treatment of the "various companies within the WTK Group as a single economic entity":

> … The WTK Group was controlled by the Wong brothers. The Wong brothers treated the various companies within the WTK Group *as a single economic entity*. There was a general practice of offsetting the companies' balances against one another and utilising the funds of a company within the WTK Group which at the material time had sufficient funds to pay for the debts of another company within the WTK Group. *As a result, inter-company debts developed between the companies within the WTK Group*. [emphasis added]

135 While Mdm Ma's AEIC went into greater detail in relation to what the context of these intercompany transactions was, we are of the view that it cannot be said that the Judge's finding that the 36 payments were made pursuant to a general "practice" was a finding of fact which was not pleaded. There is no rule which requires pleadings to be stated at the same level of detail as *evidence* contained in the AEIC. Indeed, O 18 r 7 of the Rules of Court states that pleadings need only contain a "statement in *summary form* of the material facts" [emphasis added]. In our judgment, the pleaded assertion that the 36 payments were made pursuant to a general practice existing within the WTK Group was *precisely* such a summary of the evidence contained in para 91 of Mdm Ma's AEIC.

136 For the reasons set out above, we do not accept the Pleading Argument.

(2) The Admissibility Argument

137 We now turn to the appellants' contention that the CAD Documents (on which the "practice" was allegedly based) ought not to have been admitted into evidence. The appellants' position is that the CAD Documents are inadmissible hearsay, and that s 32(1)(*b*)(iv) of the Evidence Act did not apply to the CAD Documents because there was nothing on their face that suggested that they were made in the ordinary course of the appellants' business. As observed above, the Judge rejected this argument, finding instead that the CAD Documents fell within the statutory exception to the rule against hearsay in s 32(1)(*b*)(iv) of the Evidence Act. The Judge noted that the CAD Documents were seized from the offices of Double Ace which handled the appellants' administration. The Judge was therefore satisfied that the CAD Documents were the appellants' own documents and records. Against this, the appellants say on appeal that there was no evidence as to who had prepared them and for

what purpose. However, the identity of the *specific* person who prepared them is not, on a plain reading of s 32(1)(*b*)(iv) of the Evidence Act, a requirement of that provision, which merely states that:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.**—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> ***or is made in course of trade, business, profession or other occupation*;**
>
> (*b*) when the statement was made by *a person* in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by *any person*, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by *a person* acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;
>
> [emphasis added in italics and bold italics]

138 In our view, s 32(1)(*b*)(iv) of the Evidence Act does *not* impose a requirement that the statement sought to be admitted must be made by a specific identifiable person. All that is required in this regard is that the statement must have been prepared by "a person". Furthermore, the rationale of the s 32(1)(*b*) exceptions to hearsay is that "a statement or entry made in the ordinary course or routine of business or duty may be presumed to have been done from disinterested motive and may therefore be taken to be generally true" (see the

High Court decision of *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 at [104], citing M C Sarkar et al, *Sarkar's Law of Evidence vol I* (LexisNexis, 17th Ed Reprint, 2011)). Thus, so long as the CAD Documents were likely to have been prepared by an employee of Double Ace or by the appellants themselves in the ordinary course of business (as the Judge accepted), it matters not in so far as their admissibility is concerned whether the preparer of those documents could be identified. We see no reason to think otherwise. The CAD Documents were found at the premises of Double Ace. As the appellants were administered by Double Ace in Singapore, it stands to reason that documents found at their premises would *prima facie* be the appellants' business records. In any case, the appellants did not advance any positive reasons for arguing that the CAD Documents were *not* business records of the appellants beyond advancing a negative case that there was no evidence for it. We do not think that this is sufficient in displacing the *prima facie* observation made above.

139 For these reasons, we are of the view that the CAD Documents were admissible evidence under s 32(1)(*b*)(iv) of the Evidence Act.

(3) The Lack of Evidence Argument

140 As we noted above, the appellants contends that the existence of the "practice" ought not be believed because it was contrived (as evinced, so they argue, by the shifts in the respondent's pleaded defence) or was not supported by the CAD Documents.

141 The respondent submits on appeal that he had belatedly raised the "practice" as a defence because the CAD Documents were belatedly provided to him only on 13 January 2020, and were disorganised, requiring time for

review, interpretation and analysis with the assistance of an accounting expert. The respondent also denied that his case had shifted; Mdm Ma's evidence was not inconsistent with what was pleaded in the defence and their case had remained consistent throughout as regards, for example, the definition of "Logging Companies" in Mdm Ma's AEIC as well as the transactions between the Logging Companies.

142 The respondent also submits that his case was supported by ample cogent evidence. First, the CAD Documents which he relied on were "all documents which were in [the appellants'] possession, custody and power and were disclosed by [the appellants] in their very first list of documents". The respondent also contends that the Judge did not err in admitting the said evidence and the appellants' assertion that there was nothing on the face of the CAD Documents suggesting that they were made in the ordinary course of business was a bare one; nor did the Judge err in accepting said documents as evidence even though there was no evidence as to who had prepared them because he had accepted and preferred Mr Ling's evidence over contrary evidence from Ms Loh, who was also Elite Honour's financial controller, that such evidence had not been prepared by her or her staff and that part of it was "unreliable". The respondent then went into much detail on the merits of the argument with regard to the existence of the "practice". In the interest of brevity, it suffices to state that the crux of the argument was that the "practice" and the details of the transactions accepted by the Judge were supported by Mr Ling's evidence.

143 In our view, there is no reason for us to interfere with the Judge's finding that the "practice" existed and that the 36 payments were made pursuant to the said "practice" based on the evidence before him. The Judge's conclusions appear to be principally based on his acceptance of the evidence of, in particular,

Mr Hii and Mr Ling. He found their evidence "compelling", "detailed and straightforward" and considered them "plainly honest witnesses who were doing their best to explain the 'practice'". This point was emphasised at least three times throughout the Judgment at [179(c)], [186] and [192], respectively. It is trite that (a) the trial judge is the trier of fact and that he has the benefit of hearing and seeing the witnesses give evidence; (b) the trial judge is in the position to test the witnesses' credibility and veracity in the witness box; and that (c) an appellate court should therefore be slow to disturb the findings on witness evidence reached by the trial judge (see the decision of this court in *Sharom bin Ahmad and another v Public Prosecutor* [2000] 2 SLR(R) 541 at [51]). This principle applies with full force here, especially given the various deficiencies in documentary evidence for which the respondent could not be held responsible. This court should therefore be slow to disturb the Judge's acceptance of Mr Hii's and Mr Ling's evidence.

144 The appellants' case also appears to be that there was no direct or documentary evidence of certain facts, namely, oral agreements to implement and to vary the various contractual agreements between the Logging Companies. The variations concerned the implementation of the "onshore-offshore" split fee arrangement (which was part of the "practice"). It was pleaded that the parties to these oral agreements were WKN, the respondent, Mr Hii and Mr Ling, or some combination of them. The appellants also assert that there was no evidence that any work was actually done pursuant to these agreements. In our view, the appellants' arguments sidestep the point that Mr Hii's and Mr Ling's evidence of the other parts of the "practice" *could be* and *was* accepted by the Judge as proof of the "practice" as a whole, in the absence of direct or documentary evidence as to certain components of the "practice" such as the oral agreements. The lack of work actually done pursuant

to these agreements is an argument directed at whether these agreements were sham agreements used for tax evasion purposes and not for any legitimate commercial purpose. It did not, however, detract from the issue as to whether the 36 payments were indeed and in fact made pursuant to the "practice". We therefore find that the appellants have not provided any compelling reason for this court to overturn the Judge's findings of fact that the "practice" existed and that the 36 payments were made pursuant to the said "practice".

(4) Whether a prima facie case of unjust enrichment is established with regard to the 36 payments

145 We note that the appellants' final argument concerning the 36 payments relates to the respondent's inability to rely on the "practice" as a defence to the unjust enrichment claim in respect of the 36 payments owing to the illegality of the said "practice". However, this argument is only engaged if the appellants are able to establish, on the evidence, a *prima facie* case of unjust enrichment for the said 36 payments. We observe, parenthetically, that the illegality of the "practice" does not prevent the respondent from pleading it as a fact, nor does it prevent the Judge from finding as *fact* that the "practice" existed and that the 36 payments were made pursuant to it; the effect of illegality is to prevent the *enforcement* of an arrangement which is contrary to public policy because of the *wider public interest* in overriding the parties' individual contractual rights, and not for the parties' sake (see the decision of this court in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [23]–[24]). Put another way, there is nothing preventing the court from recognising the *fact* that something was done pursuant to an illegal arrangement, as opposed to enforcing the illegal arrangement itself. Indeed, the position cannot be otherwise: there would be no need for the court to consider whether an illegal arrangement could nevertheless be enforced, in the exceptional situations set

out by this court in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid Trading*"), if the *existence* of the illegal arrangement could not even be recognised as a fact in the first place.

146 The issue of whether the appellants have made out a *prima facie* case of unjust enrichment for the 36 payments on the facts of the present case requires us to determine, in the first instance, whether, on the evidence, the respondent was *enriched at the appellants' expense* by receiving the 36 payments *and* whether such enrichment was unjust. We turn to consider the first of these questions.

147 We first observe that the "practice" as found by the Judge was essentially a way by which companies in and related to the WTK Group, including the appellants, structured intercompany payments (which the Judge found included the 36 payments) in order to avoid paying taxes under Malaysian law. In view of this, it was not apparent to us how the respondent could be said to have been enriched at the appellants' expense. As the Judge found (and as set out at [25(c)] above), the 36 payments were made for services rendered by the respondent's companies to other companies in the WTK Group. We were unable to see how the respondent was enriched at *the appellants' expense*: the appellants' net position did not appear to have deteriorated to the advantage of the respondent. The Judge accepted – and we found no reason to doubt this finding – that the respondent's case that, pursuant to the "practice", the 36 payments were made from companies in the WTK Group (which were *not* the appellants), in respect of services rendered by the respondent's companies to these entities (see the Judgment at [172], [179(c)], [186] and [192]), *viz*:

(a) payments made for log production, log transportation and road construction services provided by GCH to Elite Honour, *ie*, Payment Nos 4, 5, 14, 15,17, 19, 20, 21, 23, 24, 25, 26, 30, 35, 37, 39 (part), 40, 42, 45, 47 (part), 48, 50 (part);

(b) payments comprising management consultancy services provided by DRM to Ocarina and Sunrise Megaway, *ie*, Payment Nos 22, 27. 28, 31, 34, 36, 37, 39 (part), 41, 43, 44, 46, 47 (part), 49, 50 (part); and

(c) payments in respect of the supply of timber logs from WTK Reforestation to Faedah Mulia, *ie*, Payment Nos 29, 32, 33.

148 In our view, the fact that the appellants were neither the recipient nor the provider of the services in respect of which the 36 payments (as set out above) were made is a *prima facie* indication that the appellants were used as intermediaries for channelling funds from some entities in or related to the WTK Group to the respondent personally. The Judge had accepted that, pursuant to the "practice", the sale of the timber logs was routed through the appellants, who on-sold these logs to overseas buyers. Part of the money owed to the respondent's companies by the Logging Companies was paid by offshore payments from the Offshore Companies, including the appellants, by making payments directly to the respondent (on behalf of the Logging Companies). The Offshore Companies did not transfer the full sale price back to the Logging Companies, but instead retained some of this revenue to pay part of the logging fees and offshore expenses. The moneys for the 36 payments thus only came to be retained by the appellants as a result of this wider "practice" to evade taxes in Malaysia; the moneys were in fact owed to the respondent's companies by the Logging Companies, which had engaged their services. This has

implications as to whether said funds could be said to have been provided to the respondent at the appellants' expense. Whilst there is no local case law which deals with the *specific* situation that arises on the facts of the present case, English law recognises the principle that, in some situations, a claimant may claim in unjust enrichment for the benefit transferred through intermediaries to the defendant if the substance of these transactions is that the arrangement is a transfer of value *from the claimant* to the defendant. In such a situation, the intermediate transactions are ignored, because to consider each of the individual transactions separately would be unrealistic (see, for example, the UK Supreme Court decision of *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2018] AC 275 ("*Investment Trust Companies*") at [61]). Implicit in such reasoning is that *the intermediaries* have *no* right to mount an unjust enrichment claim for the same value as that would amount to double recovery. The conceptual justification for this may be that a payer which is a mere intermediary through which the funds of others passes to the defendant pursuant to a series of transactions which are so closely connected that they may be regarded as a *single transfer of value* cannot show that the payment is at its expense: simply put, it is *not the payer's money or resources* which constitutes the enrichment.

149 For instance, in the House of Lords decision of *Banque Financière de la Cité v Parc (Battersea) Ltd and others* [1999] 1 AC 221 ("*Banque Financière*"), the claimant lent a sum of money to a manager of a holding company which, in turn, lent the money to a subsidiary of a company so that it could discharge a debt secured by a first-ranking subsidiary. In reality, however, the claimant paid the money directly to the subsidiary's creditor; the interposition of the manager was done to avoid making public disclosure of the loan which would have been required were the claimant to loan the money to the first subsidiary directly. The

defendant was another subsidiary of the holding company which was enriched because the ranking of its own security improved by the discharge of the debt. Lord Steyn was of the view that the enrichment of the defendant *was* at the expense of the claimant (despite the fact that, strictly speaking, it was the *manager* who had directly enriched the defendant by discharging the debt) because while the loan to the manager was a "genuine one spurred on by the motive of avoiding Swiss regulatory requirements … it was nevertheless no more than a formal act designed to allow the transaction to proceed. It [did] not alter the reality that [the defendant] was enriched by the money advanced by [the claimant] via [the manager] to [the subsidiary]. To allow the interposition of [the manager] to alter the substance of the transaction would be pure formalism" (at 227). This implies that it was the *claimant* who had suffered loss, *not the manager*.

150 Similarly, in the English Court of Appeal decision of *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360 ("*Relfo (EWCA)*"), a director and shareholder of the claimant company caused it to "circuitously" (at [97]) transfer a considerable sum of money into the bank accounts of various intermediaries and ultimately into the bank account of the defendant. The liquidator of the claimant company sought to recover the money transferred on the basis of a proprietary claim based on tracing, and, alternatively, in unjust enrichment. Arden LJ (as she then was) observed that despite the transfer of the money through various intermediaries, "as a matter of substance, or economic reality", the defendant was a direct recipient of the money from the claimant (at [97]). This view was shared by the other two members of the court: Floyd LJ was of the view that the "intermediate arrangements were therefore an elaborate façade to conceal what was in truth intended and arranged to be a payment for the benefit of [the defendant]" as the structure put in place by the errant director

"made it inevitable" that payment would be effected to the defendant. There was "no other purpose in the interim arrangements other than to conceal the true nature of the transaction". These arrangements could not change "what would otherwise have been a direct payment into one which the law will not recognise as sufficiently proximate" for the purposes of a claim in unjust enrichment (at [121]–[122]). Gloster LJ was of the same view (at [103]).

151 In the UK Supreme Court decision of *Bank of Cyprus UK Limited v Menelaou* [2016] AC 176 ("*Menelaou*"), the claimant's parents decided to sell the family home which was encumbered by a bank loan and purchase a smaller family home in the name of the claimant with some of the proceeds. They engaged a firm of solicitors to act for them in the conveyancing transaction. The defendant bank agreed to release their charges over the old family home subject to a third-party legal charge over the new family home. Owing to the negligence of the solicitors, however, the fresh charge over the new family home was defective, but the bank was nevertheless registered as the purported chargee over the new family home on the basis of the defective fresh charge. The claimant brought an action to remove all references to the fresh charge in the Charges Register for the new family home. The bank counterclaimed against the claimant, contending that it was entitled to be subrogated to an unpaid vendor's lien over the new family home. Lord Clarke of Stone-cum-Ebony was of the view that the sale of the old family home and the purchase of the new family home were to be treated as one transaction, involving the bank, because the bank was central to the scheme from start to finish; it was because of the bank that the claimant became owner of the new family home, but only subject to the fresh charge (at [24]–[25]). The claimant was thus found to have been enriched at the bank's expense. Lord Neuberger of Abbotsbury agreed with

Lord Clarke (at [67]), and Lord Kerr of Tonaghmore and Lord Wilson of Culworth agreed with both of them (at [141]).

152 A different conclusion was reached in *Investment Trust Companies*, where value added tax ("VAT") was collected from suppliers of fund management services ("the managers") from the claimant companies. The VAT was paid to the defendant revenue authorities in circumstances where the VAT was not payable because the services in respect of which it was charged were exempt from VAT. The claimants sought to recover the VAT they had paid through the managers to the revenue authorities by an action in unjust enrichment. One of the issues was whether the revenue authorities had been enriched at the claimants' expense since no payments were made by the claimants to the revenue authorities (at [33]). The UK Supreme Court observed that the managers were not simply a "conduit, or in legal terms, an agent for payment" by the claimants to the revenue authorities, as the claimants owed no money to the revenue authorities, and additionally, the managers were liable to account for VAT to the revenue authorities once they had supplied the relevant services. It was argued that the claimants had no claim in unjust enrichment against the revenue commissioners directly. In determining this issue, the court observed that in certain cases the court may treat a set of related transactions operating in a coordinated way as forming a single scheme or transaction if considering each of the individual transactions separately would be unrealistic (at [61]). However, there was no transfer of value from the claimants to the revenue authorities in the present case and thus the enrichment of the revenue authorities was not at the expense of the claimants (at [71]). This was because, first, there was no agency relationship between the managers and either the claimants or the revenue authorities; second, as the payments made by the claimants of the VAT formed part of the managers' general assets to do with as

they pleased, it was impossible to regard the VAT payments as the receipt of property in which the claimants had an interest; third, the payments of VAT from the claimants to the managers and the payments of VAT from the managers to the revenue authorities could not be said to comprise a single scheme, as there was "no question of the transactions being a *sham or involving an artificial step*" [emphasis added]. The first transfer did not bring about the second transfer as a matter of causation (at [72]).

153 In our view, the common thread underlying the cases referred to above where unjust enrichment was established is the fact that in each of these cases the value directly transferred to the respondent was provided pursuant to a *wider scheme but for which* the transferor would not have had the value to transfer; in other words, a *causal link* could be established between, on the one hand, resources expended by the claimant and, on the other, the resources that were eventually transferred to the defendant. This was the situation in *Banque Financière* and *Relfo (EWCA)* where the entity that directly transferred the value to the recipient was regarded as a mere intermediary which merely passed on monies received (which originated from the claimant) without intending to dispose of them in any other way. The decision in *Menelaou* is slightly different in that it did not involve the transfer of value through intermediaries. However, in that case, the court regarded the bank's provision of value to the claimant by agreeing to discharge the bank's charge over the old family home as *contingent* on the creation of a fresh charge in the bank's favour over the new family home; accordingly, the bank was regarded as having enriched the claimant with regard to the *new* family home as the fresh charge failed. The result of *Investment Trust Companies* can also be understood in this light. First, while VAT was chargeable on the services provided by the managers, the liability to pay VAT to the revenue authorities was found to have rested *on the managers alone*, and

was not contingent on whether the managers passed on the economic cost of the VAT to the claimant companies by billing them for it. Put another way, the enrichment of the revenue authorities *was* ***not*** *contingent* on the provision of any value by the claimant companies. If the managers had failed to charge the claimant companies VAT, they would have remained liable for, and would have paid, the VAT to the revenue authorities *out of their own pockets*. The role of the managers was therefore not in relation to an artificial or sham transaction as they *bore the liability of paying VAT* on the services they provided even if the claimant companies had failed to pay. Thus, as the court observed in that particular case, the VAT payments could not be regarded as the receipt of property in which the claimant companies had an interest as there was *no causal link* between the payment of VAT by the claimant companies to the managers on the one hand, and the payment of VAT by the managers to the revenue authorities on the other.

154 The above conclusion above also accords with the principles espoused in local case law and is a logical development therefrom. In *Wee Chiaw Sek Anna*, this court considered that to establish that the defendant has received a benefit at the expense of a claimant, there is a requirement of a "nexus between the value that was once attributable to the claimant and the benefit received by the defendant, *ie*, the defendant has received a benefit from a subtraction of the claimant's assets" (at [113]). The "very notion of 'subtraction' assumes that there must have been something to be subtracted from" (at [119]). If moneys are transferred from an entity to an intermediary, with the purpose of having the said intermediary channel these moneys onto an eventual receiver, there is in actuality no *subtraction* that has occurred from the intermediary's assets despite any perceived "transfer of value" from the intermediary to the receiver. Any

enrichment received by the receiver therefore could not be said to have been made at the intermediary's expense.

155 With these principles in mind, we now turn to the facts of the present case. It is clear to us that the role played by the appellants in the "practice" was essentially akin to that played by the intermediaries in *Banque Financière* and *Relfo (EWCA)*. The 36 payments could not be viewed in isolation from the other transactions comprised in the "practice"; as the Judge found, they were part of a series of coordinated transactions to "evade taxes in Malaysia" (see the Judgment at [217]). Mr Davinder Singh SC, counsel for the appellants, conceded that but for the "practice", the monies for the 36 payments would not have come to the appellants in the first place; his argument, as we understand it, was that if the appellants did not pay the respondent what he was owed under the "practice" (*ie*, the 36 payments in this case), they would have been entitled to retain the monies they had received under the "practice". In other words, there was no clawback mechanism for this sum. We do not accept this argument. In our judgment, the appellants' own assets were never depleted or put at risk by the making of the 36 payments pursuant to the "practice" since *both* the making of the 36 payments *and* the wherewithal for making said payments stemmed from the "practice" itself. The monies for making the 36 payments could only be regarded as the assets of the appellants to dispose of as they pleased *if* the said monies came into their hands pursuant to the "practice" without any obligation on their part to pay it forward to the respondent. This simply did not comport with the "practice".

156 The case of *Investment Trust Companies* can be distinguished on precisely this point. In that case, the obligation of the managers to pay VAT to the revenue authorities was not contingent on their receipt of the VAT from the claimant companies and thus the VAT payments by the managers *to the revenue*

authorities could not be regarded as the assets of the claimant companies. This was not the case here.

157 At this juncture, we pause to note that academic debate is rife on what would constitute enrichment *at the expense of* another. In *Investment Trust Companies* itself, the court noted at [37]:

> Decisions concerning the question whether an enrichment was 'at the expense of' the claimant demonstrate uncertainty as to the approach which should be adopted. Such tests as have been suggested have been too vague to provide clarity. For example, in *Menelaou v Bank of Cyprus plc* [2016] AC 176, Lord Clarke of Stone-cum-Ebony JSC said, at para 27, with the agreement of Lord Neuberger of Abbotsbury PSC, Lord Kerr of Tonaghmore and Lord Wilson JJSC, that 'The question in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the bank and the benefit received by the defendant'. This leaves unanswered the critical question, namely, what connection, nexus or link is sufficient? The same can be said of Arden LJ's statement in *Relfo Ltd v Varsani* [2015] 1 BCLC 14, para 95, that there must be a 'sufficient link', Floyd LJ's reference in the same case to 'proximity' (para 110), and the Court of Appeal's finding in the present case [2015] STC 1280, para 67 that there was 'a sufficient economic connection'.

158 In this judgment, we consider only whether the respondent had been enriched at the appellants' expense so as to ground a claim in unjust enrichment. We make no determination on whether this criterion would have been satisfied if a claim had been made instead against the Logging Companies. Put another way, we do not, in this judgment, make a determination on the test to be applied to meet this criterion in three-party situations where the transfer of a benefit is not *prima facie* direct. What suffices for present purposes is that, considering the cases above, no loss could be said to have been occasioned to the appellants as a result of the 36 payments to the respondent.

159 For the reasons set out above, we find that in making the 36 payments pursuant to the "practice", the respondent was ***not*** enriched *at the expense of* the appellants. The appellants' unjust enrichment claims against the respondent in respect of the 36 payments thus fail *in limine* and it is unnecessary to consider the other elements of the claim any further, including whether the illegality of the "practice" barred the respondent from raising the "practice" as a defence to the unjust enrichment claim. However, as this point was argued extensively in submissions before us, we will nevertheless make a few observations on it. It is hoped that these observations will constitute an at least initial backdrop against which the issues concerned can be decided by the court definitively when they next arise directly before it and after considering the relevant arguments in full.

(5) Whether illegality bars a defence to the unjust enrichment claim for the 36 payments

160 The issue of illegality arises because the Judge had found that the "practice" was entered into and the 36 payments were made and performed with the deliberate intention by the respondent of evading taxes in Malaysia, which was conduct unlawful by the laws of Malaysia (see the Judgment at [217]). As noted above, the Judge concluded that such illegality did not bar the respondent from relying on the "practice" as a defence. He thus accepted the respondent's argument that the 36 payments were made for legitimate purposes pursuant to the "practice" (see the Judgment at [143]) and did not unjustly enrich the respondent.

161 The appellants' case is that where the parties enter into an agreement or arrangement with the object of breaking the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, the Singapore court ought not to recognise that agreement or arrangement on the basis that it

is contrary to conceptions of international comity, and the court should treat such agreement or arrangement as void. To support this particular argument, the appellants rely on the principles set out in *Foster v Driscoll* and *Ralli Brothers*, as well as the *ex dolo malo* maxim. The respondent, on the other hand, aligns himself with the Judge's reasoning on this particular issue.

162 We shall first consider the plaintiffs' reliance on the *ex dolo malo* maxim, which bars *causes of action* brought on the basis of an immoral and illegal act (see the House of Lords decision in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 at [26]; as well as the decisions of this court in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Ho Kang Peng*") at [63] and *Ochroid Trading* at [23]). It follows that this maxim has, at least as the present law now stands, no application with regard to *defences* and consequently is of no assistance to the appellants' case which is based on a plea of illegality that seeks to negate a *defence* that has been raised by the respondent.

163 We now turn to the more specific principles of illegality set out in *Foster v Driscoll* and *Ralli Brothers*. The principle laid down in *Foster v Driscoll* is that, where the real object and intention of an agreement is to perform in a foreign and friendly country some act which is illegal by the law of such country, the court should not enforce said agreement by awarding damages for its breach (see *Foster v Driscoll* at 521–522 (*per* Sankey LJ); reference may also be made to the further elaborations on this principle in the House of Lords decision of *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 ("*Regazzoni*") at 323 (*per* Lord Reid) and by this court in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [47]). In so far as the principle in *Ralli Brothers* is concerned, a contract is invalid in so far as the

performance of it is unlawful by the law of the country where the contract is to be performed (see *Ralli Brothers* at 300, *per* Scrutton LJ).

164 The *Foster v Driscoll* and *Ralli Brothers* principles (hereafter referred to the rule in *Foster v Driscoll* and the rule in *Ralli Brothers*, respectively) stem from the common root centring on considerations of international comity. For instance, in *Foster v Driscoll*, Lawrence LJ stated as follows (at 510):

> On principle however I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that the recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and *would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality*. [emphasis added]

165 Similarly, in *Ralli Brothers*, Scrutton LJ observed as follows (at 300):

> In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 553, where he says: 'A contract … is, in general, invalid in so far as … the performance of it is unlawful by the law of the country where the contract is to be performed' – and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. *The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.* [emphasis added]

166 The common thread of international comity running through both the aforementioned principles was recognised by Robert Goff J (as he then was) in

Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA [1979] 2 Lloyd's Rep 98 (cited by the Singapore International Commercial Court in *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 at [178]). It should be noted, however, that these principles or rules were articulated in the context of proscribing a *claim* in a *contractual* context and do not apply outside of contract (see also the Judgment at [223] and [235] as well as the English High Court decision in *Lilly Icos LLC and others v 8PM Chemists Ltd and others* [2009] EWHC 1905 (Ch) at [26] and the recent decision of this court in *Ang Jian Sheng Jonathan and another v Lyu Yan* [2021] 1 SLR 1091 at [26]). It has also been hitherto unclear as to whether or not these principles would apply to negate a *defence* that was raised in relation to a claim in the same (*ie*, contractual) context.

167 It should be noted that the issue that is raised in the context of the present appeal relates to an attempt to invoke the aforementioned principles or rules (in particular, the underlying policy of *international comity* embodied in *Foster v Driscoll* and *Ralli Brothers*) in order to negate a *defence* of illegality (raised by the respondent) that has been raised in response to a claim (by the appellants) in *unjust enrichment*. This raises – in turn – two important sub-issues, both of which have, to the best of our knowledge, never arisen for decision (at least in the Singapore context).

168 The first sub-issue is whether the policy of international comity ought to apply to bar claims not only in contract (see also [166] above) but *also* in *unjust enrichment*. In this regard, it ought to be borne in mind that *Foster v Driscoll* and *Ralli Brothers* were decided at a time *before* the law of unjust enrichment as we know it today had been established. Indeed, this is why even the chapters on illegality in *Goff & Jones* refer, in the main, to cases in relation to contractual

illegality. The issue that arises for our consideration in the present appeal is whether the fundamental principle in *Foster v Driscoll* and *Ralli Brothers* (that a claim ought to be unenforceable if it offends the principle of international comity (the "Comity Unenforceability Principle")) ought to be ***extended*** – whether by analogy and/or general principle – to apply to claims in *unjust enrichment* as well. Put simply, should a court disallow a claim in *unjust enrichment* if to permit it would otherwise result in the contravention of the laws of a foreign country?

169 The second sub-issue is even more controversial – not least because it raises an issue that (as we have already noted) has not been resolved even in the context of *contractual* illegality. It is as follows: assuming that we answer the first sub-issue in the affirmative, does the Comity Unenforceability Principle extend to ***defences*** to claims in *unjust enrichment*, such that a *defence* to an unjust enrichment claim may be barred if to allow it would offend the principle of international comity?

170 Let us now consider both these sub-issues in turn.

(A) WHETHER THE COMITY UNENFORCEABILITY PRINCIPLE OUGHT TO BE EXTENDED TO UNJUST ENRICHMENT CLAIMS

171 We first deal with the first sub-issue, *viz*, the question of whether the Comity Unenforceability Principle ought to be ***extended*** – by analogy and/or general principle – to apply to claims in *unjust enrichment* as well. Put simply, should a court disallow a claim in *unjust enrichment* if to permit it would otherwise result in the contravention of the laws of a foreign country (and thus offend against the principle of international comity)?

172 In principle, we see no reason why the Comity Unenforceability Principle should not apply to claims in unjust enrichment. We begin with the general proposition that the concept of *illegality* has been accepted as precluding claims in *unjust enrichment*. This is not surprising because, as is the case with, for example, contractual claims, there are *wider and broader concerns of public policy that* ***override*** *the claims between specific parties*. However, as the concept of public policy is, as noted in numerous cases, an "unruly horse", care must be exercised on the part of the courts to ensure that the specific legal relationship between parties is not *unnecessarily stifled*. That is why, for example, the heads of common law illegality in the context of contract law, while not closed, are very closely scrutinised and not easily extended. Indeed, the Comity Unenforceability Principle is one of these heads and is based on the principle of *comity* (as already noted above at [164]–[166]). Put simply, if permitting recovery under a contract would result in the contravention of the laws of a foreign country, then the principle of comity would *prevent* such recovery. Viewed in this light, there is, in our ***provisional*** *view*, no reason in principle why the Comity Unenforceability Principle should not apply *equally* to claims not only in contract *but also* (by analogy and general principle) in *unjust enrichment* as well. The underlying principle of comity would apply *equally* in the latter situation as it does in the former.

173 It is also important to note that whether or not other heads of common law illegality in contract apply to claims in unjust enrichment is *not* before us. Whether or not a particular head of common law illegality in contract applies in the context of claims in unjust enrichment needs – as was indeed the case in contract law – to be decided on case-by-case basis. What is clear in the context of the present appeal is that there is no reason in principle (and, indeed, logic) why the Comity Unenforceability Principle ought not to apply to claims in

unjust enrichment as well. Indeed, it would be illogical as well as unprincipled to preclude a claim in contract and yet permit a claim in unjust enrichment.

174 Another important example lies in the context of *statutory* illegality. Where a particular statute (or, more appropriately, the provision(s) thereof) prohibits the contract in question, it is clear that that contract cannot be enforced. It then follows that a claim in *unjust enrichment* should similarly not be permitted. Whilst this appeal does not relate to a situation of *statutory* illegality, it is apposite here to consider such a situation in order to explain how the principle of stultification laid down in this court's decision in *Ochroid Trading* is – as we shall see – related to the application of that same principle in relation to the present case. It should be emphasised once again at this juncture that a situation of *statutory* illegality is a distinct one and that where provision(s) of a particular statute *prohibit* recovery in *private law* generally, then it ought not, in principle, to matter whether the claim is in, for example, contract or in unjust enrichment – *no* recovery should be permitted in *both* situations. However, much would depend on the precise statutory language as well as context; put simply, whether or not the policy within a particular statute prohibits recovery between private parties is a matter, in the final analysis, of statutory interpretation.

175 It would be appropriate at this juncture to turn to *Ochroid Trading*. This was a case that involved *statutory* illegality, specifically, a contravention of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("Moneylenders Act"). It was held that no recovery was permitted pursuant to the *contract* in question. However, whilst there could not be (full) contractual recovery, there could possibly be (restitutionary) recovery pursuant to an independent cause of action in *unjust enrichment*. The court nevertheless held that, as the *policy* underlying the Moneylenders Act would be *stultified*, there could be no (restitutionary)

recovery in unjust enrichment either. If careful attention is paid to the particular factual matrix in *Ochroid Trading*, it will be seen that the arguments from illegality actually impacted the parties at *two* different (albeit related) points. The first point related to the enforceability of the *contract* between the parties; this was self-evidently an issue relating to *contractual* illegality. In this regard, the court was of the view that the contract was *illegal* pursuant to the doctrine of *statutory* illegality, and there could therefore be no recovery pursuant to that particular contract. However, under the law relating to *contractual* illegality in the local context, whilst a party might be prohibited from claiming under a contract because of contractual illegality, there were still possible legal routes to claim in *restitution* – one of which, in the context of the case itself, pertained to an independent cause of action in *unjust enrichment*. This court in *Ochroid Trading* held that the argument from *illegality* was *also* potentially (and *separately*) applicable to a claim in *unjust enrichment* and that, in that case, a claim in unjust enrichment would also be prohibited if to permit recovery would result in the *stultification* of the policy concerned. In *that* case, the policy concerned was the *same* as that which applied in the context of the contract, *viz*, that underlying *the Moneylenders Act*; put simply, recovery in unjust enrichment was *also* prohibited because to permit recovery would have been to *stultify* the *statutory* policy underlying the Moneylenders Act. This is in fact consistent with the approach proffered in the preceding paragraph.

176 Returning to the facts of the present appeal, what we are concerned with here is *not statutory* illegality as such. Whilst the principle of stultification laid down in *Ochroid Trading* might conceivably apply *beyond* the boundaries of *statutory* illegality (a point which was in fact recognised at least in passing at [158]), this ***necessarily presupposes*** *that there is* ***a policy*** *that could potentially be* ***stultified*** *in the first place*. *That* is why it is necessary to ascertain whether

or not there was a head of public policy (here, the policy of international comity recognised in *Foster v Driscoll* and *Ralli Brothers*) *that is applicable in the first place*. Having expressed the provisional view that a rule similar to that in *Foster v Driscoll* does indeed apply to claims in *unjust enrichment*, it follows that *the principle of stultification* would indeed be *engaged – inasmuch as permitting a claim in* ***unjust enrichment*** *would* ***stultify*** *the policy (of* ***international comity****)* ***underlying the Comity Unenforceability Principle***.

177 We note that the claim in unjust enrichment in *Ochroid Trading* arose from and was related to a contract that was illegal under the Moneylenders Act. Indeed, this court held that the defence of illegality and public policy in unjust enrichment was premised on the principle of stultification which required the court to determine whether to allow the claim would undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place. However, we see no reason in principle or logic why the principle of stultification should not apply to a claim in unjust enrichment even in the absence of an underlying contract. If, for example, the facts in *Ochroid Trading* were slightly different and an independent claim in unjust enrichment had been mounted, in which granting the claim would have violated the fundamental policy underlying the Moneylenders Act, the principle of stultification would, in our view, have applied in order to prohibit recovery.

(B) WHETHER THE COMITY UNENFORCEABILITY PRINCIPLE BARS DEFENCES TO UNJUST ENRICHMENT CLAIMS

178 The next sub-issue is whether the Comity Unenforceability Principle would apply to defences in unjust enrichment, *ie*, whether the fundamental domestic public policy of international comity bars ***defences*** in addition to claims in unjust enrichment. If so, it would follow that the principle of stultification would similarly be potentially engaged. As already noted above

(at [169]), this particular issue is even more controversial than the one just considered – not least because it has not (to the best of our knowledge) been decided definitively even as regards the *contractual* sphere (although in this last-mentioned respect, regard should be made to our observations below at [179] and, especially, [191]). Our views in this regard are therefore ***even more*** *provisional as well as tentative*, however, given the fact that the Judge had decided firmly that the rule in *Foster v Driscoll* did ***not*** apply to ***defences*** in *both* contract *and* unjust enrichment. With respect, however, we are of the view that there are arguments that do point in the *opposite or contrary* direction and therefore set them out here in order that *all* the relevant arguments can be canvassed at a future date when this particular issue arises directly before the court for decision. Indeed, we would think that these would be only some of the relevant arguments – there would, undoubtedly, be further refinement of the present arguments and/or the presentation of new arguments when the issue does in fact arise directly before the court in a future case.

179 Turning now to the issue at hand, we first make a preliminary (and general) observation that if, applying the framework set out in *Ochroid Trading* at [176], there can be no recovery pursuant to a contract which is prohibited either pursuant to a statute (expressly or impliedly) and/or an established head of common law public policy (subject to the caveat in *Ting Siew May*, applying to certain contracts which are not unlawful *per se* but entered into with the object of committing an illegal act), the defences to claims for recovery pursuant to such contracts would not even arise since the claim itself would be barred. The issue of whether illegality or repugnance to public policy bars *defences*, therefore, *only* arises in the context of contractual or non-contractual claims which are *not* already barred on the same basis, for example, as here, claims in unjust enrichment.

180 We further observe that this issue is somewhat controversial owing to the decision of the English High Court in *Barros Mattos Junior and others v MacDaniels Ltd and others* [2005] 1 WLR 247 ("*Barros*"). In that case, the plaintiff bank was defrauded of monies which were received by the defendant from the fraudster and changed, for the most part, into Nigerian currency. The plaintiff sued the defendant in unjust enrichment. The defendant sought to rely on the defence of change of position on the basis that it had transferred the monies on the fraudster's instructions to the payee without knowledge of the fraud. Laddie J held that the defendant was not entitled to rely on the change of position defence because this was based on an illegal act: the currency conversion was in breach of Nigerian foreign exchange laws. He based his decision on the assertion that, where the positions of either party were tainted by illegality (at [43]):

> … there is no room for the exercise of any discretion by the court in favour of one party or the other. If the recipient's actions of changing position are treated here as illegal, the court cannot take them into account. The recipient cannot put up a tainted claim to retention against the victim's untainted claim for restitution.

181 Thus, according to Laddie J, a defence which is tainted by *any* illegality, however relevant to the claim and the defence, would fail for that reason. This approach has been doubted as a "hard-and-fast" and "inflexible" principle as regards foreign illegality (see Gregory Mitchell QC and Christopher Bond, "The effect of foreign illegality on English law contracts" (2010) Journal of International Banking and Financial Law (October 2010) 531 at 533). The Judge also noted several criticisms of *Barros* at [230] of the Judgment, namely, that completely disabling a defence on the grounds of illegality (however significant) without more (a) was unprincipled and (b) gave rise to potentially harsh and arbitrary results. He also approved the comments of Prof Andrew Tettenborn, who argued that there was a "substantial difference between taking

away a cause of action so as to give a defendant a possibly unjust escape from liability, and artificially disabling a defence so as to allow a claim to succeed on what is effectively a false basis" (see Andrew Tettenborn, "Bank Fraud, Change of Position and Illegality: The Case of the Innocent Money Launderer" [2005] LMCLQ 6, cited in the Judgment at [230]).

182 With respect, there is support from the perspective of general principle for an ***opposite or contrary*** *view*, which holds, instead, that illegality or repugnance to public policy bars *defences* as well as *claims*, subject to the principle of stultification. There are three possible – and closely related – reasons for this view.

183 First, the underlying principle of comity applies with equal force to both situations. When a plaintiff mounts a claim, and the defendant mounts a defence to the said claim, both parties are advancing *legal positions* which each respectively urges the court to prefer and adopt. Whether the party advancing the legal position is a plaintiff or defendant in the action does not in itself change the fact that the *recognition* of a position illegal under foreign law would be repugnant to domestic public policy. In both cases, our courts should not, in principle, recognise such a legal position.

184 Second, the consideration before our courts is whether the *outcome* of a particular case would be in breach of the policy of international comity. As we stated in *Ochroid Trading*, in barring a *claim* to recover pursuant to a contract that is prohibited on the basis of illegality (subject to the caveat in *Ting Siew May*), the court is not focused on achieving justice between the parties. Thus, Prof Tettenborn's observation (which we had alluded to at [181] above) that disabling a defence on the basis of illegality may potentially allow claims to succeed on a false basis does not, with respect, offer a compelling justification

for not subjecting defences, as well as claims, to the principle of stultification. To elaborate, whilst the defendant may be undeserving, the strict rule that illegality would prohibit recovery under the contract did not operate for his sake. Rather, it was "premised on the unworthiness of the plaintiff and the broader public policy in protecting the integrity of the courts" (see *Ochroid Trading* at [25], as well as generally at [23]–[26]). In the same way, the courts, in deciding not to give effect to a *defence* that offends the policy of international comity, do not do so for the sake of the claimant. Rather, the court is concerned about upholding the fundamental domestic public policy of international comity. In doing so, substance must surely prevail over form. There is no reason why the same reasoning should not apply where the *claimant* could instead be the undeserving party, as against Prof Tettenborn's argument.

185 For this reason, the court should not stop at examining whether the bringing of a *claim* may engage the principle of stultification, but should proceed to examine the *merits* of the said claim, which necessarily involves the consideration of the relevant defence(s), if any. Thus, in *Ochroid Trading* at [159], we considered it necessary to *examine* whether the *allowance* of a restitutionary claim (in unjust enrichment) would engage the principle of stultification, which impliedly requires the court to *also* consider the *converse* proposition, namely, whether the *disallowance* of the restitutionary claim in unjust enrichment would engage the principle of stultification as well. The principle of stultification therefore applies to the *outcome* of the unjust enrichment claim and *not* the claim or the defence(s) thereto in *isolation*.

186 In this connection, it is worth noting that the appellant here in unjust enrichment is using illegality as a shield against the respondents' defence, and not as a sword. Borrowing from the principles applicable to promissory estoppel, the court considers that the justice of the outcome could trump the

strict legal rights of the parties. As Denning LJ (as he then was) stated in the decision of the English Court of Appeal in *Combe v Combe* [1951] 2 KB 215 ("*Combe*") at 219:

> That principle [of promissory estoppel] does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.

187 We can make a comparison between the two principles. First, it is clear that illegality and repugnance to public policy, like promissory estoppel, do not furnish a direct cause of action and thus may only act as a shield, but not as a sword (see *Combe* at 224).

188 Thus, in the present case, the respondent would not be allowed to rely on the "practice" as a defence, if the success of that defence, namely, the *outcome* of the claim, would require the courts to stultify or violate the policy of international comity. Viewed in this light, in the same way in which the demands of justice and/or equity of the case *overrides* the *legal merits* of the parties' cases in the estoppel scenario, the demands of the policy of *international comity* may override the legal merits of the parties' cases with regard to the unjust enrichment claim here.

189 Third, the *effect* of allowing a defence to succeed despite its illegality would result in the dismissal of the unjust enrichment claim, which amounts to acquiescing in the outcome of the illegal act or act repugnant to public policy. Rejecting the defence, on the other hand, would result in the unjust enrichment claim succeeding, thereby resulting in a return to the *status quo ante*. This is no different in *effect* from rejecting a claim on the basis of its illegality or allowing it to proceed despite such illegality.

190 For the reasons set out above, we would express a ***provisional*** *view* that there are indeed merits to the view that the stultification principle ought to apply to *claims* as well as *defences* in unjust enrichment, such that the court must consider whether the *outcome* of the unjust enrichment claim would undermine the fundamental domestic public policy of international comity. We hasten to emphasise, however, that since it is unnecessary for us to consider the illegality issue with regard to the 36 payments, this provisional view is one that should be assessed together with all relevant countervailing arguments in an appropriate case in the future.

191 We would also observe further that the considerations which apply to the question as to whether illegality or repugnance to public policy bars *defences* in the law of *contract* may well be different from those which applies to *defences* to claims in *restitution*, for example, unjust enrichment claims. It may well be the case that in so far as *contractual* claims are concerned, the distinction between claims and defences might not (often at least) arise because a contract, being an *agreement* between the parties, would almost invariably be confined to issues of enforcement in relation to *claims*, with any argument from illegality being mounted (again, almost invariably) in the form of a defence. Put simply, the argument from illegality in a contractual context would almost invariably (and perhaps even naturally) focus on the *claim* rather than on the defence and (as just mentioned) would almost invariably be, in fact, *the defence itself*. *However*, in the context of claims in *unjust enrichment*, the argument from illegality has to be viewed in a more *holistic and integrated* manner, with the focus being on whether the underlying policy recognised by the courts has been *stultified* – with the result that the argument from illegality often tends to *straddle and overlap* in so far as both claims and defences are concerned.

However, as this issue does not arise in the present case, we do not say anything more on it.

The unjust enrichment claims for the 11 payments and the three payments

192 We now turn to consider the unjust enrichment claims for *the 11 payments and the three payments* which, as we noted above, the Judge found were made without any legitimate basis. We also take the view that, in respect of these payments, the respondent was enriched at the appellants' expense. It is not disputed that these payments were all made by the appellants to the respondent. We are also of the view that there is nothing in the evidence that suggests that the source of the monies thus transferred was anything other than the appellants. While the respondent provided ostensible bases for these 14 payments, the Judge rejected them on the basis that such explanations lacked evidential support (see [21] and [23] above). We do not see any reason to doubt the Judge's findings on these points and, indeed, the respondent has not contended in his written Case (as required by O 57 r 9A(5) of the Rules of Court) that the Judge's decision on the unjust enrichment claim for these 14 payments (which was that it would have succeeded but for the time-bar) ought to be affirmed on other grounds.

193 This leaves the issue of whether the 14 payments were unjust, which is the third element in a claim for unjust enrichment. In confronting this issue we must now turn to what continues to be a vexed issue in the law of restitution (or, more appropriately, unjust enrichment). Indeed, the law of restitution and unjust enrichment itself, whilst now an established branch of the law of obligations, is itself of relatively recent origin – particularly when viewed against the prior centuries during which the common law and equity have developed. As a body of law, it is only several decades old. As this court observed in *Eng Chiet*

Shoong (at [2]), this is "a relatively fledgling area of the law". It also cited (at [2]) the observations it made in its earlier decision in *Wee Chiaw Sek Anna* (at [99]) to the effect that "[t]he law of unjust enrichment is still developing and there remain … many unresolved issues (and even controversies)". One of those unresolved issues that was considered briefly in that particular decision (albeit by way of *obiter dicta*) is precisely the issue that has arisen directly for decision in the present appeal – whether lack of consent should be recognised as an unjust factor in the context of the law of unjust enrichment. The appellants rely on lack of consent as the unjust factor on which their unjust enrichment claim for the 14 payments (namely, the 11 payments and the three payments) is based.

194 Given the complexity of the relevant analysis, it might be helpful to state the main considerations as well as our views on this particular issue right at the outset of this part of the judgment. By way of background, the issue has not been definitively resolved by this court (see, for example, *Wee Chiaw Sek Anna* at [139]). Although this court explicitly rejected "want of authority" as an unjust factor in *Alwie Handoyo* at [114], this court did not go so far as to reject the *distinct, albeit overlapping*, concept of "lack of consent" as an unjust factor. There are, in fact, a few High Court decisions which *not only endorse* lack of consent as an unjust factor *but also* would have permitted an action in unjust enrichment (based on lack of consent) as an *alternative* cause of action (see the decisions of the High Court in *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 ("*AAHG*"), *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased v Ong Teck Seng and another* [2017] 4 SLR 819 ("*Ong Teck Soon*") and *Compania De Navigacion Palomar*, *SA and others v Koutsos, Isabel Brenda* [2020] SGHC 59 ("*Koutsos*")). Indeed, in the first two decisions, a claim was brought both for the tort of conversion *and* in unjust enrichment. Against the position taken in these cases, however, is the recent High Court decision of

Ok Tedi Fly River Development Foundation Ltd and others v Ok Tedi Mining Ltd and others [2021] SGHC 205 ("*Ok Tedi*") in which Vinodh Coomaraswamy J rejected the notion that lack of consent was an unjust factor which forms part of Singapore law (although it was unnecessary for him to decide the question): at [179]. We would also observe that the analysis as well as observations with regard to lack of consent as an unjust factor in three of the four High Court decisions referred to above (with perhaps the exception of *Koutsos*) were, strictly speaking, *obiter dicta*. As we will elaborate upon below, we do *not fully* endorse *either* of these competing and conflicting positions.

195 Put simply, we are not prepared at this stage to endorse the *blanket* and *unattenuated* recognition of lack of consent as an unjust factor in the law of unjust enrichment but recognise, at the same time, that there *may* be cases involving lack of consent where restitution on the ground of unjust enrichment may, *in principle*, be justified. We would however lay down *definitive* guidance that lack of consent would *not* be available as an unjust factor in cases where an *alternative* (and established) cause of action is *already available* to the plaintiff concerned (a paradigm example of this is a case in which property has been transferred from the claimant to the defendant without the claimant's consent, but the claimant retains title to the property and may enforce that title against the defendant by means of a proprietary claim). An unjust enrichment claim also cannot be founded on lack of consent as an unjust factor in situations where the defendant is entitled in *law* to retain the property or value transferred. Whether or not this court would be prepared to recognise lack of consent as an unjust factor in exceptional cases where *no* alternative cause of action is available to the plaintiff *and* where the defendant is not entitled to retain the property or value transferred does not arise on the facts of the present appeal and a definitive decision will be rendered when the issue next arises directly for decision.

196 The legal position we have adopted in the preceding paragraph (the reasons for which we will elaborate on below) is consistent with the approach this court has hitherto adopted with regard to the introduction of new unjust factors in the law of unjust enrichment. Put simply, the law should be developed incrementally particularly, as is the situation here, where the law is still in somewhat of a state of flux.

197 It is also important to note, at this juncture, that there are at least two conceptions of the concept of "lack of consent". One concerns the underlying rationale and/or result of an *existing* unjust factor, for example, *mistake*. In this last-mentioned regard, if a plaintiff successfully establishes that there has been an operative mistake, the transaction concerned can be set aside because there has, *ex hypothesi*, been a lack of consent. It will be readily noticed that lack of consent in *this* particular context does *not* constitute *an unjust factor in and of itself*; indeed, the relevant unjust factor is that of *mistake*. The *second* conception of the concept of "lack of consent", however, is what we are concerned with in *the present appeal* – whether lack of consent, *in and of itself*, can *constitute an unjust factor*. When viewed in this light, it will become immediately clear that to permit lack of consent to be an unjust factor *in its own right* would be to adopt an approach that is *far too broad*. Indeed, it might even be argued that *established* unjust factors, such as mistake, might well be rendered *otiose or redundant* since a claim could always be brought based on lack of consent as the relevant unjust factor. This particular point is closely related to – and is wholly consistent with – that made in the preceding paragraph.

198 We now turn to elaborate on why we have come to the above conclusion that lack of consent will not generally be recognised as an unjust factor in the

law of restitution and that this would, *a fortiori*, be the case where an alternative cause of action is available to the plaintiff concerned.

(1) Taxonomical issues in the identification of the relevant unjust factor

199 We first begin with the *identification* of the relevant unjust factor. It appears to us that four distinct labels for the cases where restitution to reverse unjust enrichment has been sought on the basis that there has been *no intention* on the part of the claimant that the property should be transferred to anyone else have emerged: "ignorance", "powerlessness", "lack of consent" and "want of authority".

200 In one camp, Prof Peter Birks, Prof Virgo and Prof Burrows take the view that "*ignorance*" should be recognised as an unjust factor. This originated with the argument made by Prof Birks, in *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at p 141, that "total ignorance is *a fortiori* from the most fundamental mistake"; and that as such, "a system which believes in restitution for mistake cannot but believe in restitution for ignorance, quite independently of any wrong incidentally committed". As we have observed above, this court had made the same observation in *Wee Chiaw Sek Anna* (although there the court declined to express any conclusive opinion as to whether lack of consent ought to be recognised as an unjust factor). The same point was made, at greater length, by Prof Virgo in *The Principles of the Law of Restitution* (at p 152), as follows:

> Although ignorance has never been explicitly recognised by the courts as a ground of restitution in its own right, a number of commentators have resorted to this ground to explain why restitution has been ordered in a number of cases. This lack of judicial recognition is initially surprizing [*sic*] since it has been recognised for many years that, if a claimant has paid money to a defendant under the influence of a mistaken belief that he or she is liable to pay the defendant, the claimant will be able to

> obtain restitution of the money. This is because the claimant's intention that the defendant should receive the money can be regarded as vitiated by the operation of the mistake. If a mistake is regarded as sufficient to vitiate the claimant's intent that the defendant should receive the money, it should be even easier to justify restitution where the defendant received the claimant's money in circumstances where the claimant was ignorant of the transfer. This is because, where the claimant mistakenly pays money to the defendant, there is at least an intention to vitiate, whereas, where the claimant is ignorant that his or her money has been transferred to the defendant, there is not even an intention that needs to be vitiated. This will occur, for example, where, unknown to the claimant, the defendant has stolen the claimant's money. In such circumstances the claimant cannot argue that he or she made any mistake in respect of the transfer to the defendant, since the claimant was unaware of the theft. But, at least as a matter of principle, the claimant should be able to recover the value of the money from the defendant because there was no intention that the defendant should receive it. In the light of this it is surprising that ignorance has not been explicitly endorsed by the judges as a ground for restitution.

201 Prof Burrows similarly argues that "if mistake triggers restitution so, *a fortiori*, must ignorance", which he defines as a "lack of knowledge". In his view, ignorance "belongs to the same series as the well-recognised unjust factors triggering personal restitution". The claimant's consent in all these cases was defective, either because it was absent (which he terms as the unjust factor of "ignorance"), impaired (such as by mistake) or qualified (where there is failure of consideration). In his view, these factors all "reduce to the proposition that the claimant did not mean the defendant to have the enrichment". However, Prof Burrows himself recognises that no court has yet expressly recognised ignorance as a ground for restitution. He also adopts Prof Birks's view that "powerlessness" should be recognised as an additional unjust factor alongside ignorance, to account for cases where a plaintiff is aware of his property being transferred but does not consent to such transfer (see *The Law of Restitution* at pp 403, 405 and 406).

202 In ***contrast*** (and as a member of the opposite camp), Prof William Swadling rejects the view that the existence of a claim for unjust enrichment on the basis of ignorance should "flow as a matter of deductive logic from the availability of strict liability common law claims in unjust enrichment for mistaken transfers". He gives the paradigmatic example of the victim of a theft, and argues that the victim's title to the property in question remains vested in him. As a result, no enrichment had occurred at the victim's expense, and thus there can be no claim in unjust enrichment (see William Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 Oxford Journal of Legal Studies 627 at 628). As against this, Prof Burrows argues that Prof Swadling takes too narrow a view of enrichment, and that one should be concerned with the transfer of value rather than necessarily that of a right or a title (see *The Law of Restitution* at p 408).

203 By way of comparison, the authors of *Goff & Jones* advance the proposition that a ***combination*** of two overlapping grounds of recovery, namely, *lack of consent and want of authority*, would explain unjust enrichment claims across an entire spectrum of factual matrices. They argue that in circumstances where a defendant obtains an enrichment at the expense of a claimant without the intermediation of a third party, the claimant's lack of consent would ordinarily be sufficient to describe the operative ground for recovery. However, if a third party owns or controls assets subject to duties and powers to deal with them for the claimant's benefit, and the third party acts within his authority, then the claimant would have no remedy; but if the third party acts outside his authority, then such "want of authority" would provide the claimant with a ground for recovery (at para 8-02). As to this argument, we note, parenthetically, that "want of authority" itself falls within the broad ambit of lack of consent.

204 We first observe that we are ***not*** inclined to accept "*ignorance*" as an unjust factor and a general label for the aforesaid group of cases. As the authors of *Goff & Jones* point out (at paras 8-09–8-11):

> … C's [*ie* the claimant's] 'ignorance' cannot explain all the cases where the unjustness of D's [*ie* the defendant's] enrichment at C's expense stems from the fact that it has occurred without C's consent – for example, where C is aware of some taking from him, but is powerless to prevent it. Some authors have sought to address this apparent lacuna by identifying one or more further grounds, alongside 'ignorance' – such as the claimant's 'powerlessness'. However, this is an unnecessary proliferation of grounds – a single wider ground, reflecting C's lack of consent, covers the relevant territory.
>
> … [I]dentifying the ground for restitution as C's 'ignorance' has the potential to cause difficulties where corporate assets are misapplied by a company director. If the courts hold that the company's 'mind' should be identified with that of the director, then it is hard to say that the company is 'ignorant' of the misapplication. No similar difficulty arises if the focus is on whether the director had authority to act as he did.
>
> Finally, in an important category of case, basing the availability of a restitutionary remedy on C's 'ignorance' of the transaction through which D was benefited will fail to capture what appears to be the real reason for his claim. This is so where X [*ie*, a third party] owns or controls assets for the benefit of a principal, and disposes of those assets outside his authority. Here what justifies a restitutionary remedy against the third-party recipient is not the principal's 'ignorance' of the transaction; it is that X acted outside the authority conferred on him.

205 Similar sentiments were echoed by Prof Michael Bryan ("Prof Bryan"), "No intention to benefit" in ch 18 of *Research Handbook on Unjust Enrichment and Restitution* (Elise Bant, Kit Barker and Simone Degeling eds) (Edward Elgar Publishing, 2020) ("*Bryan*") at pp 364–365:

> Misunderstandings have occurred because the label [of ignorance] has wrongly been assumed to offer a doctrinally authoritative basis for ordering restitution. The best-known example of confusing the label with doctrinal substance is *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where the High Court of Australia gave, as one of its reasons for rejecting the explanation of equitable recipient liability in terms of the

> reversal of unjust enrichment, that '[n]o case, even in England, has treated ignorance as a "reason for restitution"'. The statement is correct, but irrelevant to answering the question the High Court raised in this part of its judgment, namely whether the right to restitution of property, or its value, received by the defendant as a result of a breach of fiduciary duty is based in unjust enrichment. 'Ignorance' is simply the label identifying the type of unjust enrichment claim being brought, being a claim founded on an owner's lack of awareness that his property has been taken. It is not a substitute for close analysis of the various authorities permitting or disallowing such claims.
>
> A more significant objection to the label is that, even as a concise descriptor of one unjust factor, 'ignorance' is both under-inclusive and over-inclusive. It is under-inclusive because, although providing an explanation of certain types of wrongful taking, such as a theft of which the victim is unaware, it does not explain the normatively indistinguishable theft occurring when the owner is painfully aware of being deprived of her property but can do nothing about it. …
>
> 'Ignorance' is an over-inclusive label, on the other hand, because not every non-consensual taking of property entitles the victim to a claim in unjust enrichment. Where the taking involves no passing of title, the title-holder will bring a claim enforcing her unimpaired title … But the boundary between claims in unjust enrichment and claims to enforce pre-existing rights in property is both messy and contested – a reality the label 'ignorance' obscures.

206 It is clear from the above that the use of "ignorance" as a label for "lack of intention to benefit" cases justifying restitution ought to be rejected. In our judgment, this proposed factor does not account for cases where the plaintiff has knowledge of the transfer but does not consent to it; in respect of recognising an additional ground of "powerlessness", we agree with the authors of *Goff & Jones* (at [204] above) that a "proliferation of grounds" is undesirable. In this regard, we are also of the view that an unjust factor of "ignorance" is far too wide, given that in many cases, a proprietary claim would exist on the same facts. This is related to Prof Swadling's view on the matter (see [202] above), and to which we return in our analysis of "lack of consent" as an unjust factor below.

207 We now turn our attention to the competing label of "want of authority". In our view, this label is also unsatisfactory in that in some cases, it artificially (and confusingly) implies an *agency* relationship between the owner of the property transferred, and the transferor of the property. This, as Prof Bryan observes (see *Bryan* at p 368), "ignores the essence of most thefts, which involve taking another's property when the victim is unaware of the taking or helpless to prevent it". In three-party cases where a third party does, in fact, act outside of his authority as an agent, we take the view that these cases are adequately covered by the ground of "lack of consent".

208 Bearing the above concerns in mind, we are therefore of the view that the ground of "lack of consent", as *qualified* in the manner we shall elaborate on below, would be sufficiently broad to encompass all cases where property is transferred to the defendant in circumstances where the owner of the property does not intend it to be transferred, while remaining *conceptually* sound at the same time. "Consent", after all, may take many forms and encompasses situations ranging from express agreement to the transfer to total ignorance of the owner of the property to a lack of *authority* on the part of an agent to make the transfer. In our judgment, the use of lack of consent, *properly qualified*, as a label would *avoid* potential issues of artificiality, as well as over- or under-inclusiveness that render the labels of "ignorance" and "want of authority" unsuitable. Having said this, we now set out the backdrop to the controversy over whether lack of consent ought to be recognised as an unjust factor justifying an action in restitution to reverse unjust enrichment.

(2) The position in Singapore law

209 We first begin by setting out the position as it stands as a matter of Singapore law. The starting point is this court's observation in *Wee Chiaw Sek*

Anna that a total *lack* of consent follows *a fortiori* from the established unjust factors of mistake (vitiation of consent) or failure of consideration (qualification of consent) (at [139]). Shortly after the decision in *Wee Chiaw Sek Anna*, this court handed down its decision in *Alwie Handoyo*. This was an appeal from the decision of the High Court at first instance in which the High Court had held that the plaintiffs were entitled to recover from the defendant on the basis of unjust enrichment, the relevant unjust factor being the fact that the defendant had "no authority to retain the payments made to it" by the plaintiffs; in other words, "the want of authority to retain money constitutes an unjust factor" (at [101]). This is, as observed above, a species of "lack of consent". This court, however, *rejected* "want of authority" as an unjust factor, stating (at [111]) that:

> We also respectfully disagree with the Judge's acceptance of 'want of authority' as an unjust factor. As far as we can tell, 'want of authority' as an unjust factor is presently a theory advocated solely by the authors of *Goff & Jones (8th Ed)* … Crucially, it attracts no support from judicial decisions or other leading commentators. In fact, although the authors of *Goff & Jones (8th Ed)* purport (at paras 8-34–8-44) to derive "want of authority" as an accepted unjust factor from their interpretation of several English cases, including the seminal decision of *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 …, they acknowledged subsequently (at para 8-44) that the decisions in these cases were not stated to be based on the recognition of an unjust factor of 'want of authority', but on the basis that the respective plaintiffs *had title* to the asset. [emphasis in original]

210 The court was also unwilling to accept "want of authority" as an unjust factor because it had not gained wide academic acceptance (see *Alwie Handoyo* at [112]) nor was it in fact supported by case law (at [113]–[114]). Essentially, there was a lack of authority supporting the recognition of "want of authority" as an unjust factor. It is important to note here that while the court in *Alwie Handoyo* had rejected "want of authority" as an unjust factor, it did not express a view on whether the *broader* concept of lack of consent ought to be recognised

as an unjust factor (see TM Yeo, "Unjust Enrichment: Revolution and Evolution in the Asia-Pacific" [2017] RLR 152 at 158).

211 Subsequently, in *AAHG* at [74], Chua Lee Ming J opined (albeit without providing any additional reasoning) that the argument set out in *Wee Chiaw Sek Anna* in relation to recognising "lack of consent" generally as an unjust factor (as set out above) "had much force", and took the view that lack of consent ought to be recognised as an unjust factor. However, as the plaintiff's primary claim in conversion had been made out on the facts of *AAHG*, it was not necessary for the court to deal with the plaintiff's alternative claim in unjust enrichment. The views expressed by Chua J were therefore *obiter dicta*, and in any case are not binding on this court. In *Ong Teck Soon*, the plaintiff, who was a co-executor of the will of the testator, claimed that the first defendant had issued two unauthorised cheques, resulting in the withdrawals of moneys from the said testator's bank account. The plaintiff then sought restitution on the basis of either the tort of conversion or unjust enrichment. Steven Chong JA opined at [24] that a "plausible argument" could be made that the unjust factor of ignorance or lack of consent was available on the facts. However, he noted that the status of ignorance or lack of consent as an unjust factor was left open in *Anna Wee*, and he ultimately did not find it necessary to decide the issue as the claim in conversion could be established.

212 In *Koutsos*, six plaintiff companies sued the defendant for the recovery of US$2.75m which they said belonged to them. The facts of *Koutsos* were as follows. One of the plaintiffs' directors, one Ernest, had in breach of his duties transferred the plaintiffs' monies into his personal bank accounts without authorisation from the boards of the plaintiffs (at [12]). It was from his personal bank accounts that the US$2.75m had been transferred to and retained by the defendant (at [23]). The plaintiffs alleged that the defendant had "all along

known that the US$2.75m originated from assets belonging to [them] and that [the errant director] *had no authority to transfer this sum to her*" [emphasis added]. The defendant therefore could not argue that the US$2.75m transfer was a gift to her, and was therefore liable to pay back that sum to the plaintiffs (at [28]). Tan Siong Thye J found, on the facts, that the defendant was liable for knowing receipt and for breach of fiduciary duties for the US$2.75m (at [115]). Tan J went on to consider the merits of the plaintiff companies' alternative claim in unjust enrichment. Tan J, though noting the controversy surrounding whether lack of consent ought to be recognised as an unjust factor, nevertheless accepted that it was (at [123]–[124]):

> 123 This element, that the enrichment was unjust, is one that must be pleaded with sufficient particularity, pointing to a specific unjust factor. As stated in *Anna Wee* at [134], there is no freestanding claim on the abstract basis that it is 'unjust' for the defendant to retain the benefit – there must be a certain recognised unjust factor or event which gives rise to the claim. The Plaintiff Companies rely on the factor of lack of consent to establish their claim. Isabel argues that this is not a recognised unjust factor.
>
> 124 The very existence of this unjust factor of lack of consent is indeed a questionable one, as a matter of Singapore law. I recognise that arguments have been made that lack of consent should be rejected as an unjust factor, drawing on the CA's rejection of the factor for want of authority in *Alwie Handoyo* …

213 Tan J proceeded to observe that in *Wee Chiaw Sek Anna*, this court did not express a conclusive view on the recognition of lack of consent as an unjust factor, and then cited the *dicta* in *AAHG* in favour of such recognition (at [126]). The learned judge then accepted, on the basis of these authorities, that "lack of consent should be recognised as an unjust factor" (at [129]). He then held that on the facts of *Koutsos*, there was a "clear lack of consent from the Plaintiff Companies in relation to the five transfers aggregating US$2.75m to [the defendant]" because if "the Plaintiff Companies had not even been aware of the transactions, they would surely have been unable to provide their consent".

Thus, Tan J found that the US$2.75m transfer amounted to an unjust enrichment for the defendant (at [129]–[130]).

214 Subsequently, in *Ok Tedi*, Vinodh Coomaraswamy J struck out the plaintiffs' claim in unjust enrichment on two alternative bases: first, they had failed to show that the defendant had been enriched at their expense and second, there was, on the facts, no unjust factor on which a claim in unjust enrichment could be sustained (at [140]). In the course of his analysis, Coomaraswamy J did *not* accept that lack of consent ought to be recognised as an unjust factor as a matter of Singapore law. However, he did not provide any reasons for his conclusion other than that it was unnecessary for him to decide the question because the plaintiffs' case was unsustainable even if lack of consent as an unjust factor formed part of Singapore law (at [179]).

(3) The legal backdrop to the controversy

215 The *normative* questions that arise for consideration are as follows: whether lack of consent ought to be recognised as an unjust factor, and, if so, whether it should be subject to qualifications and, if so, what these qualifications ought to be. These normative questions can be traced to the cradle, so to speak, of the unjust enrichment doctrine, namely, the decision in *Lipkin Gorman*. There, one Cass was a partner in the plaintiff firm of solicitors and had authority to operate the firm's client bank account. Cass, however, was a compulsive gambler and, unbeknownst to the other partners, withdrew cash from the client account by making out cheques for cash. He exchanged the cash cheques for chips at the defendant casino and for payment for refreshments. Using the chips, Cass placed bets at the casino and, in this way, gambled away the firm's monies. The firm sued the casino in restitution for recovery of the monies stolen by Cass, but did not plead a proprietary claim for the same.

216 Lord Goff of Chieveley delivered the leading judgment. He found that the plaintiff firm retained the title to the money stolen by Cass and thus had a basis to be entitled to the money. He also noted that the casino had conceded that the plaintiff firm's title to the stolen money had not been defeated by mixing of the money with other money belonging to Cass while in his hands and therefore could be traced in common law into the hands of the casino (at 572–574). Under s 18 of the UK Gaming Act 1845 (c 109) (UK), all gaming and wagering contracts were void and consequently the defendant was deemed to have given no valuable consideration for the monies wagered by Cass at the casino, even if they had received the money in good faith (at 574–575). He also found that the respondent could not rely upon the defence of change of position (at 582). He therefore found that the plaintiff firm was entitled to restitution of the monies stolen by Cass from the defendant. In a short concurring opinion, Lord Bridge of Harwich agreed with Lord Goff in that "it is right for English law to recognise that a claim to *restitution, based on the unjust enrichment of the defendant*, may be met by the defence that the defendant has changed his position in good faith" (at 558). The learned judge did not controvert the proposition that an action in unjust enrichment could be brought to recover stolen moneys *even though* title to the moneys remained with the claimant and the moneys could potentially be recovered by means of a proprietary claim (albeit not pleaded). For Lord Templeman, the money stolen by Cass from the plaintiff solicitors had unjustly enriched the casino. His analysis, like Lord Goff's and Lord Bridge's, accepted, without more, that a separate and distinct claim to recover stolen money in unjust enrichment existed alongside a potential proprietary claim for the same. Lord Griffiths agreed with Lord Goff and Lord Templeman and Lord Ackner agreed with Lord Goff.

217 For present purposes, the principal issue with *Lipkin Gorman* is that, as a prototypical decision in the law of unjust enrichment as presently understood, it predated, and subsequently did not incorporate, subsequent developments in the law of unjust enrichment, particularly the emergence of the "unjust factors" approach as set out by Lord Hoffmann in the House of Lords decision of *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at [21] (and cited in *Wee Chiaw Sek Anna* at [130]):

> … unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. In the Woolwich case [1993] AC 70, 172 Lord Goff said that English law might have developed so as to recognise such a general principle – the condictio indebiti of civilian law – but had not done so. In England, *the claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognises as sufficient to make retention by the recipient unjust.* [emphasis added]

218 Thus, it was not entirely clear what the "unjust factor" relied on by the House of Lords for permitting recovery of the monies stolen by Cass in *Lipkin Gorman* was, which in turn engendered academic controversy (see *Wee Chiaw Sek Anna* at [114]). This is a point of practical significance, because if *Lipkin Gorman* were to be treated as a case in which recovery was permitted on the grounds of *unjust enrichment*, the "unjust factor" identified in *Lipkin Gorman* could itself be relied on to possibly expand the list of recognised unjust factors. As a result, as Prof Tang observed in *Tang* at para 05.008:

> The ambiguity in this judgment [*Lipkin Gorman*] has led Graham Virgo to reason that this case was primarily concerned with the vindication of the claimant's property rights. Other restitution scholars like Burrows justify *Lipkin Gorman* on the basis of the principle of reversing the defendant's unjust enrichment. In order to explain the embarrassing fact that the House of Lords did not identify the relevant unjust factor, various unjust factors have been proposed such as ignorance, want of authority and lack of consent. Professor Burrows

> rationalises *Lipkin Gorman* as a situation where the unjust factor is ignorance.

219 Thus, as observed by Prof Tang, academic opinion as to the significance of *Lipkin Gorman* is generally divided into two camps. The first camp advances the theory that *Lipkin Gorman* is to be read as a case decided on the basis of the vindication of property rights and *not* unjust enrichment, and ought not to be treated as authority for the proposition that a *restitutionary* claim in unjust enrichment for property transferred in circumstances where the claimant retains title thereto can coexist with an available *proprietary* claim for the same. As Prof Virgo observes (see *The Principles of the Law of Restitution* at p 560):

> The claim [in *Lipkin Gorman*] should properly be analysed as being based on the vindication of the firm's property rights in the money and was effectively analysed in this way by both Lords Templeman and Goff. Lord Templeman's analysis was rather unsophisticated. He asserted that the claim depended on the defendant's retention of the money, whereas Lord Goff emphasized that the claim was a personal claim which turned on whether the club had received money in which the firm had a continuing proprietary interest at the time of receipt. But Lord Goff acknowledged that the claimant needed to establish a basis on which it was entitled to the money and it could do so by showing that the money was its legal property.

220 Thus, for Prof Virgo, there would have been no need for the House of Lords to specify an unjust factor because the *claim* had nothing to do with unjust enrichment (see *The Principles of the Law of Restitution* at p 561). The authors of *Mason & Carter's Restitution Law in Australia* (K Mason, J W Carter and C J Tolhurst eds) (LexisNexis, 3rd Ed, 2016) also support Prof Virgo's view of *Lipkin Gorman* as "a restitution case concerned with the vindication of property rights" and not unjust enrichment, observing at [309] that it "is protective of property, a sufficient justification in itself, notwithstanding the occasional difficulties of defining 'property' at law and in equity".

221 At the heart of the argument that *Lipkin Gorman* ought not to be read as a case in which an unjust enrichment claim for lack of consent could coexist alongside an available proprietary claim is the thesis that a claimant who retains legal title to property in the hands of the defendant ought properly to seek relief by means of a *proprietary* claim for the property. There are two reasons for this. First, a defendant who holds property or value to which the claimant retains title cannot be said to have been enriched at the expense of the claimant (the "retention of title rationale"). Second, the court ought not develop the law of unjust enrichment in a way that may denude the proprietary claim of much of its legal significance (the "non-duplication rationale").

222 The first reason, *ie*, the retention of title rationale, is advocated by Prof Swadling. He argues that an action in unjust enrichment could not have been available because the defendant could not be said to have been enriched at the claimant's expense, as the claimant could vindicate such legal title against the recipient (see [202] above). We alluded to this argument in *Wee Chiaw Sek Anna* at [167] in the following terms:

> Prof William Swadling ('Prof Swadling') argues that ignorance cannot be an unjust factor as the 'at the expense of the claimant' requirement can never be satisfied. Prof Swadling observes, in 'A claim in restitution?' [1996] LMCLQ 63 (at 64), that 'there being no consent whatsoever to the transfer, there is no question of property passing from such a person, with the result that the "ignorant" payor can still bring claims based on his continuing retention of property rights'. While we do not necessarily agree with Prof Swadling's view that unjust enrichment is built on a transfer of property rights … we find that another way of formulating Prof Swadling's argument is simply this: ignorance as an unjust factor does not work because its application to the multi-party situation *fails to get over the basic hurdle that the enrichment is not at the expense of the claimant because there has been no transfer of the claimant's assets*. In response, Prof Burrows makes the short argument … that Prof Swadling's objections rest on an artificial interpretation of 'enrichment': that a transfer of a property right is necessary to satisfy the 'at the expense of' requirement.

> Burrows argues that enrichment is an enrichment of value, not one of property or title. On either view, the point is that there has been no transfer of a property right or any value that the claimant … can point to as belonging to her *at the point of transfer*. [emphasis in original]

223 The second reason, *ie*, the non-duplication rationale, is supported by Prof Grantham and Prof Rickett. They agree with Prof Swadling that a claim in restitution should not normally be available when title has not passed, albeit for a different reason. In their view, a claim of unjust enrichment may not be made out, "not because the plaintiff retains title *per se*, but because the rights available to the owner of property and the precedence which the law accords to claims to protect existing property rights will together prevent the defendant from being enriched" (see R B Grantham and C E F Rickett, "Restitution, Property and Mistaken Payments" [1997] RLR 83 ("*Restitution, Property and Mistaken Payments*") at 87–88). In the authors' view, the aim of unjust enrichment is to restore value to a plaintiff from whom that value was subtracted, and that value is "neither exclusively represented by title to an asset nor is its transfer necessarily co-extensive with the passing of title". Instead (see R B Grantham and C E F Rickett, "Restitution, Property and Ignorance – A Reply to Mr Swadling" [1996] LMCLQ 463 ("*Restitution, Property and Ignorance*") at 465):

> …where the plaintiff retains title to an asset, that title provides a ground to recover the asset, and thereby the value that asset represents to the plaintiff. That ground is quite distinct from any ground based in the law of unjust enrichment. Such is the law's commitment to the protection of property rights that it regards those rights as the first port of call for any plaintiff in whom the rights still subsist. The successful vindication of a property-based claim will obviously incorporate, as part of that claim, the value of the asset in question.

224 Prof Grantham and Prof Rickett accordingly take the view that the plaintiff's "persisting property rights in an asset sought to be recovered are the

concern of the law of property", and "[n]o restitutionary claim is recognised or necessary where such rights exist" (see *Restitution, Property and Mistaken Payments* at 83–84). Following from this, they further disagree with Prof Swadling's position that "ignorance" should be rejected *generally* as a ground of restitution. Instead, they argue that in some cases where title does *not* pass, a restitutionary claim should be available (*Restitution, Property and Ignorance* at 464).

225 In contrast, Prof Birks takes the view that a plaintiff can either insist on his title, or renounce his title and claim the value of the asset as a claim in unjust enrichment. He rejects the view that property and unjust enrichment are "categories in exclusive opposition to each other", arguing that such a view is "akin to an assertion that no animal can be both aquatic and a mammal" (see Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2009) at pp 66–67). In response to this, Prof Grantham and Prof Rickett argue that there is nothing to be gained from the duplication of causes of action (see R B Grantham and C E F Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] NZLR 668 at 684):

> Birks…suggests that in our earlier writing on this matter we come close to committing the categorical error of thinking of property as a different category with a higher priority than unjust enrichment. In our defence, we can say that we do not see the issue as one of hierarchy at all. … Returning to the example of your theft of my bicycle, first, you are *not* unjustly enriched because you come under an obligation that is logically a prior obligation stemming from my retained property rights; and, secondly, that prior obligation does in effect exactly the same task as I would be requiring of an obligation to make restitution in unjust enrichment. There is simply nothing to be gained – other than unnecessary duplication of causes of action – in restoring to any anything [*sic*] beyond property. [emphasis in original]

226 In this connection, the importance of not expanding the scope of unjust enrichment in such a manner as to encroach on avenues of recovery through the vindication of title and property rights was recognised by the House of Lords in *Foskett v Mc Keown* [2001] 1 AC 102 ("*Foskett*"), where Lord Browne-Wilkinson observed (at 109) that:

> *The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England.* It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers and interest as a result of which the court in its discretion provides a remedy. *It is a case of hard-nosed property rights.* [emphasis added]

227 In the same case, Lord Millett observed as follows (at 127):

> The transmission of a claimant's property rights from asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point.) The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend on ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

228 In a related vein, Prof Tang makes the following observations (see *Tang* at para 05.022), which in substance are largely echoed by Prof Virgo (see *The Principles of the Law of Restitution* at p 155) and Prof Bryan (see *Bryan* at p 366):

> A major problem with the unjust enrichment analysis is that it is by no means clear if title to the property remained with the plaintiff that the defendant has been enriched. Swadling has been making this fundamental point powerfully for some time. He gives the example of the thief who steals the plaintiff's wallet; in this case, title to the wallet (and its contents) does not pass to the thief. For the purposes of making an unjust enrichment

> claim, is the thief considered enriched at the plaintiff's expense? According to Swadling, the proper recourse is for the plaintiff to sue the thief in conversion and not in unjust enrichment. The thief is technically not enriched because title in the wallet remains with the plaintiff. *The principal argument against recognising ignorance or lack of consent as an unjust factor is that a claim based on the plaintiff's property rights will always almost exist on the same set of facts. It is difficult to discern why the court should develop the law of unjust enrichment to provide for a further cause of action when the plaintiff already has a remedy based on his or her proprietary rights.* [emphasis added]

229 As we have noted above, the position advocated by Prof Swadling is not without controversy (see, for example, the position taken by Prof Burrows). Prof Bryan also notes that Prof Swadling's argument on the retention of title rationale does not deal with cases of unjust enrichment for services (which we will deal with in greater detail below). Nevertheless, Prof Bryan argues, and we agree, that Prof Swadling's argument underscores the relevance and importance of *title* to an unjust enrichment analysis, in particular that a claim that is grounded in established property rights should not be easily overridden (see *Bryan* at pp 366–367):

> Swadling's argument assumes that, *leaving aside cases of unjust enrichment for services*, the law of unjust enrichment is concerned with transfers of rights; its function is to restore rights which have been unjustly transferred. *There is therefore no place in a scheme for unjust enrichment to apply where value has been transferred but the claimant's right to property is undisturbed.* The argument has been *countered, on grounds of both principle and authority, by writers who favour 'value-based' unjust enrichment, either as the exclusive test of enrichment, or operating in parallel with restitution of rights.* Many older authorities are ambiguous as to whether a successful claim was based on unjust enrichment – scarcely surprising in view of the late recognition of the unjust enrichment principle by common law systems – and there are obvious risks involved in engaging in ahistorical *ex post facto* rationalisations of these cases. But there are lines of modern authority, such as those concerning void transfers of the principal's property by agents acting without actual or ostensible authority, which demonstrate that failure to pass title to the recipient is not a fatal objection to an unjust enrichment claim. Swadling's argument cannot be

> rejected out of hand, however, because it draws attention to the significance of title analysis to unjust enrichment claims. Where a claim to restitution of property or to its value is asserted, *the passing of title is relevant to determining the nature of the claim; a claimant must not be allowed to ride roughshod over established property rights by the simple assertion that the defendant received 'value'*. A challenge for restitution theory is to identify the circumstances in which a claimant can pursue concurrent title-based and value-based claims. [emphasis added]

230 We also note that at least one English decision has characterised *Lipkin Gorman* as a case which was *not* decided on the basis of unjust enrichment at all. In *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156 ("*Armstrong*"), Stephen Morris QC (sitting as a Deputy High Court judge) relied on two decisions, one by the English Court of Appeal in *Trustee of the property of F C Jones & Sons (a firm) v Jones* [1996] 4 All ER 721 and another by the House of Lords in *Foskett*, in characterising *Lipkin Gorman* as a "proprietary restitutionary claim". This was because (at [75]):

> … [A] crucial element in Lord Goff's analysis was that the solicitors had legal title, not only to the original chose in action, but also to the cash held by Cass and given to the defendant's club … For this reason, those who support the distinction between the two types of claim … consider that the *Lipkin Gorman* case is, in substance, a case of a 'proprietary restitutionary claim': see *Chitty* at para 29-174, footnote 977. Mr Harris submitted, and Mr Joffe did not seriously dispute, that the subsequent analysis of Lord Millett in the *Trustee of FC Jones* case [1997] Ch 159 and *Foskett v McKeown* [2001] 1 AC 102 represents the current state of the law. These cases vindicated the academic view that the *Lipkin Gorman* case is in substance a case of a "proprietary restitutionary claim" and not a claim for restitution for unjust enrichment. In this regard, Mr Harris pointed in particular to the analysis of Professor Virgo in *The Principles of the Law of Restitution,* 2nd Ed (2006), pp 645-646. On the basis that this analysis currently represents the law as a matter of decided authority, I accept this submission.

231 However, in our view, such a characterisation appears to be artificial and difficult to sustain in view of the language used in the various judgments in *Lipkin Gorman*. As this court observed in *Alwie Handoyo* at [119]–[121]:

> 119 We appreciate the force and cogency of Morris QC's reasoning at [62]–[75] of *Armstrong*. However, with the greatest respect to him and Prof Virgo, we are not yet prepared to characterise *Lipkin Gorman* as a clear instance of a proprietary restitutionary claim. First, there is no gainsaying that the plaintiff's claim in *Lipkin Gorman* was explicitly recognised by several of the Law Lords as being founded on 'unjust enrichment': at 558 *per* Lord Bridge of Harwich; at 568 *per* Lord Ackner; and at 578 *per* Lord Goff. In fact, Lord Goff was evidently alive to the distinction between proprietary restitutionary claims and personal claims for unjust enrichment given his observation (at 572) that the plaintiff's claim "for money had and received is nevertheless a personal claim; it is not a proprietary claim, advanced on the basis that money remaining in the hands of the respondents is their property".
>
> 120 Second, we do not think that *F C Jones* and *Foskett* necessarily lead one to the conclusion that *Lipkin Gorman* ought to be read as a case of a proprietary restitutionary claim. *F C Jones* did not address the express references to unjust enrichment in the various judgments in *Lipkin Gorman*, while *Lipkin Gorman* was not even mentioned in any of the judgments in *Foskett*. This was despite the fact that both Lord Browne-Wilkinson and Lord Millett adverted in *Foskett* (at 108 and 127 respectively) that the vindication of property rights is clearly distinct from the law of unjust enrichment. One would have expected *Lipkin Gorman* to have garnered more attention in *Foskett* if it was clearly a proprietary restitutionary claim which has been 'incorrectly' characterised as a claim in unjust enrichment.
>
> 121 Third, the concept of a proprietary restitutionary claim distinct from unjust enrichment does present some juridical difficulties. Ostensibly, the two causes of action have different requirements and may attract different defences. …

232 Therefore, it appears to us that the essence of the various arguments *against* recognising lack of consent as an unjust factor on the authority of *Lipkin Gorman* (if *Lipkin Gorman* is read as a case decided on the basis of unjust enrichment with lack of consent as the operative unjust factor, as opposed to a

"proprietary restitutionary claim") is that in many cases, a *proprietary claim* and a putative *unjust enrichment claim* on the basis of lack of consent would exist on the same facts and that in such circumstances, a claimant who seeks to recover property or value from the defendant ought not to recover under unjust enrichment where he can recover said property or value through vindicating his title therein by bringing a *proprietary* claim.

233 In the other camp, as noted by Prof Tang in the passage cited above, are views that see *Lipkin Gorman* as endorsing lack of consent, want of authority or ignorance as unjust factors, given the use, by Lord Goff, of the language of unjust enrichment in the judgment and the fact that such lack of consent is revealed on the facts. Owing to the broadness of the concept of lack of consent, this view effectively advocates for an *expansive* view of unjust enrichment. For the authors of *Goff & Jones*, *Lipkin Gorman* was an example of a case where strict liability in unjust enrichment was recognised regardless of whether the claimant firm had a proprietary claim to the property in question (at paras 8-97–8-98).

234 We do not endorse such a broad interpretation of *Lipkin Gorman* and the consequent expansive view of unjust enrichment. As we will explain in greater detail below, we take the view that where a plaintiff retains legal title such that a successful proprietary claim can be established, there is no basis or reason to create an *additional* ground in unjust enrichment beyond the currently recognised unjust factors. Indeed, when viewed from an historical perspective, given the fact that the law of unjust enrichment was literally in its legal infancy at the time that *Lipkin Gorman* was decided, it comes as no surprise that this further issue (as to whether or not a remedy in unjust enrichment could be granted if an alternative (and established) course of action was already available to the plaintiff (in that case, a proprietary claim)) was not recognised at the time

and therefore not canvassed by the court itself. What *is* important is that we arrive at our decision as to what the appropriate legal position should be based on *principle*.

235 At this juncture, we note that the proposition that an action in unjust enrichment ought not to lie in cases where the claimant may recover property through vindicating his property rights therein *does not* resolve the *normative* question of whether lack of consent ought in *principle* and subject to *appropriate qualifications* to be recognised as an unjust factor. This is because cases where the claimant retains property rights to the asset transferred are but a part of the *broader* set of cases falling within the ambit of lack of consent. Indeed, as Prof Virgo observes in *The Principles of the Law of Restitution* at p 153, it might, in *exceptional* circumstances, be possible for a claimant to bring a claim in unjust enrichment on the basis of the unjust factor of ignorance where the said claimant is *unable* to bring a claim founded on the vindication of proprietary rights. For example, if the claimant has provided a service to the defendant which constitutes an enrichment and it can be shown that the claimant was ignorant that the service was provided, the claimant would not have a parallel claim on the basis of its *proprietary rights* to the enrichment. Prof Virgo illustrates this by referring to two hypothetical situations: first, where the defendant enters the claimant's theatre without paying and, second, where the claimant discusses confidential research with a colleague which the defendant overhears and exploits commercially (see *The Principles of the Law of Restitution* at p 154). Similarly, in R B Grantham and Charles Rickett, *Restitution: Commentary and Materials* (Brookers, 2001) ("*Grantham & Rickett*") at p 350 (reproducing part of the authors' prior article, "Restitution, property and ignorance: A reply to Mr Swadling" [1996] LMCLQ 463), it is observed thus:

> The focus of the law of restitution is upon 'value' and 'benefit'. The aim of unjust enrichment is to restore value to a plaintiff from whom that value was subtracted. Such value, however, at least in the dominant theory, is neither exclusively represented by title to an asset nor is its transfer necessarily co-extensive with the passing of title. The value with which the law of restitution is concerned may be found in such intangible things as services {*Craven-Ellis v Canons Ltd* [1936] 2 KB 403} and the saving of an expenditure, {*Ministry of Defence v Ashman* [1993] EGLR 102} as well as in the profits of an unauthorised use of an asset {*Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246}. In neither case does the defendant receive title to an asset from the plaintiff, though it is clear that the defendant receives value from the plaintiff. It is, furthermore, far from clear why (as Swadling seems to imply) the requirement of "at the plaintiff's expense" can only be satisfied by the passing of title. While this requirement may necessitate proof that the plaintiff's subtraction equates to the defendant's gain, the focus is on value not title. This point is illustrated most clearly in claims where tracing is necessary. Tracing focuses on value. Wherever the plaintiff successfully completes the tracing exercise, the defendant's gain will be at the plaintiff's expense, notwithstanding that the title acquired by the defendant may not have been that of the plaintiff.

236 Further, we observe that this proposition for not recognising lack of consent as an unjust factor, while applicable to instances where lack of consent *overlaps* with situations in which title is retained by the claimant, does not account for why lack of consent ought not to be a basis for recovery in unjust enrichment in *other situations* where the claimant seeks to recover value to which it does not have title. These would include the two situations posited by Prof Virgo which we have referred to above, as well as unjust enrichment by the provision of services and the saving of expenditure, as referred to in *Grantham & Rickett* cited in the preceding paragraph. These are, in our view, compelling arguments *against* a strict rule which prevents claims in unjust enrichment from *ever* being brought on the basis of lack of consent. As a matter of principle, we see no reason why a claimant whose property has, without his consent, been transferred to a defendant in circumstances where the defendant has *no legal right* to retain the said property, should not be allowed to bring an

action in unjust enrichment for the same on the authority of *Lipkin Gorman* (subject to certain caveats which we will set out in more detail below). It seems to us that this would result in a windfall being conferred on the defendant at the expense of the aggrieved claimant, which is a result which is difficult to countenance as a matter of justice and fairness as well as common sense (see *Grantham & Rickett* at p 350). Indeed, we would observe that the relevant case law in Commonwealth jurisdictions indicates that there is judicial acceptance of the view that recovery in unjust enrichment is available in those cases where there has been no consent to the transfer of property. In the House of Lords decision of *Criterion Properties plc v Stratford UK Properties LLC and others* [2004] 1 WLR 1846 ("*Criterion Properties*"), Lord Nicholls was prepared to recognise the availability of an unjust enrichment claim in *all* cases of unauthorised transfers of property (which is a sub-species of lack of consent in that there is an *additional element* of a want of *authority* to make the transfer). As Lord Nicholls stated (at [4]):

> … If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore *not* set aside, questions of "knowing receipt" by B do not arise. *So far as B is concerned there can be no question of A's assets having been misapplied.* B acquired the assets from A, the legal and beneficial owner of the assets, *under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position.* B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct on his part. B's accountability, in this regard, will be 'strict'. [emphasis added]

237 In the English High Court decision of *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168 (Ch), the liquidator of Relfo Ltd ("Relfo") brought an action in knowing receipt and alternatively, unjust enrichment for recovery of monies which had been diverted by Relfo's former director and controller, one Mr Gorecia, to the account of the defendant Mr Varsani through an entity, Intertrade LLC. Sales J (as he then was) found the transfers to be in breach of Mr Gorecia's fiduciary duty and without proper authority from Relfo (at [70]). He was thus of the view that the Liquidator was entitled to succeed in its claim for knowing receipt, and therefore did not have to rely on the claim based on unjust enrichment (at [71]). Nevertheless, he was of the view that (at [88]):

> In my view Bhimji Varsani was clearly enriched by the Intertrade payment at the expense of Relfo. *That is so even if the Intertrade payment cannot be identified with the Relfo/Mirren payment according to the rules of tracing.* Relfo had its funds diverted by Mr Gorecia in breach of his fiduciary duty as a director of Relfo and acting outside the scope of his authority from Relfo. *In my judgment, that establishes a proper ground for an in personam claim by Relfo under the law of unjust enrichment against Bhimji Varsani for repayment of a sum equivalent to the extent of his enrichment*, namely the amount of the Intertrade payment. *If Relfo had paid those monies to Bhimji Varsani by mistake it would have had a right to restitution of them. The position can in my view be no different where the matters which have affected Relfo's consent to the transfer of value from itself to Bhimji Varsani involve instead a breach of fiduciary duty and of authority by its director and controller, Mr Gorecia, acting to perpetrate a fraud on the company.* [emphasis added]

238 A similar position was taken in Australia. In *Great Investments v Warner* (2016) 335 ALR 542 ("*Great Investments*"), a director of the claimant company abused a power of attorney to procure the transfer of bonds with a value of A$6m owned by the company directly to two of the director's creditors in satisfaction of his personal debts. The Federal Court of Australia (consisting of Jagot, Edelman and Moshinsky JJ) held that (at [60]):

> This appeal is concerned with an even simpler scenario where a benefit is transferred to a recipient from the company, without the authority of the company and *without a contract*. As we explain below, in this scenario the company may be entitled, subject to defences, to a proprietary claim if the recipient still has the specific benefit. Even if the recipient does not retain the benefit, the *company will have a personal claim against the recipient, again subject to defences*. These principles apply with at least the same force where the person making the transfer is a director who owes fiduciary obligations to the company. [emphasis added]

239 Finally, we refer to the decision of the New Zealand High Court in *Torbay Holdings Ltd v Napier* [2015] NZHC 2477 ("*Torbay*"). In that case, a company director misappropriated company funds for the purposes of himself, his wife, and a family trust, without authorisation and in breach of his fiduciary duty (at [115] and [158]). The company claimed, *inter alia*, for money had and received (an action substantially similar to an action for unjust enrichment) against the director, his wife and the family trust. There was insufficient evidence for the court to find that the director's wife knew of the director's breach of fiduciary duty. Woolford J held that (at [166]–[168]):

> **[166]** As noted above, a claim for money had and received does not depend on proof of any wrongdoing or fault on the part of the recipient. However, the underpinning of the claim for money had and received in unjust enrichment consequently requires some element of unjustness in the defendant retaining the money he had received. This has been highlighted in other cases:
>
> An action for money had and received is based on the receipt of money by a defendant who **no longer has the right to retain it or has improperly disposed of it**. Other than that, the claim does not depend on proof of any wrongdoing or fault on the part of the recipient.
>
> **[167]** This dictum recognises that the action for money had and received is not a claim based in the personal conscience of the recipient. Instead, the unjustness assessment is focused on determining whether the retention of the money would unjustly enrich the defendant, who has no real right to the money. To this extent, the claim is complete when the money is received, if retaining the money would be unjust, as the defendant has

> no right to retain it. Heath J, in a recent case, saw some element of unconscionability or unjustness as being a key requirement to make out money had and received claims. This recognises the underlying focus of money had and received claims, in unjust enrichment.
>
> **[168]** The law recognises certain categories of cases in which it is considered to be unjust for the claimant to retain the benefit of the money. *In the case of a benefit obtained through wrongdoing, the wrongdoer's enrichment at the expense of the claimant is clearly seen as unjust. The unjust factor can be conceptualised as the transferring party's ignorance of a transaction, or the transferring party's actions being outside of their authority, but on either view the taking of an asset without permission, and passing it on to a third party creates the necessary unjustness for an unjust enrichment claim.* Although liability in money had and received directly against the initial taker is unusual, a person who misappropriates money can also be liable in money had and received directly.
>
> [emphasis in bold in original; emphasis added in italics]

240 In each of the abovementioned cases, the court appears to have recognised, in a *broad* sense, that an action in unjust enrichment was available in respect of unauthorised transfers of value or where there was a lack of consent to the transfer concerned. The fundamental thread running through these cases is that the *transfer* of property or value to the defendant without the owner's consent is in *some* way *unjust* and ought to be remedied. While this may be sound as a statement of *principle*, this begs the question of whether an action in *unjust enrichment* ought to be available as a legal avenue for remedying such an injustice, instead of other established causes of action which may be available on the same facts. Nevertheless, for the reasons set out above, we are of the view that in a lack of consent case, where an action in unjust enrichment is the ***only*** cause of action which is available on the facts, there is, in ***principle*** no reason why it ought not to be available, on the authority of *Lipkin Gorman*. However, we are ***not*** prepared to go as far as to recognise a ***blanket principle*** that unjust enrichment will ***always*** be available in ***all*** instances of unauthorised transfers of value or lack of consent. In our judgment, unjust factors ought to be recognised

incrementally, having regard to the particular facts and circumstances of each case, and such recognition ought to be ***subject to*** the caveats which we have alluded to above and which we will set out below. This position appears to us to be a sound one as opposed to laying down a *definitive as well as blanket* test of *general application* of when a claim in unjust enrichment on the basis of lack of consent ought to be available. The variety of fact situations where lack of consent in respect of a transfer of property or value can arise is myriad, and renders such an exercise an endeavour fraught with the risk of inadvertent over- or under-inclusiveness. For these reasons, we are of the view that a "never say never" judicial posture is an appropriate one to take in such situations (see also a similar approach towards the award of punitive damages in contract adopted by this court in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 at [136]).

241 With this, we now turn to the caveats to the recognition, *in principle*, of an available claim in unjust enrichment on the basis of lack of consent. In particular, the most significant caveat which we highlight at this juncture is that such a claim in unjust enrichment would *not* be available where there is an existing alternative cause of action on the same facts. This position represents a *departure* from that taken in the Commonwealth cases cited above.

(4) Limits to the recognition of novel unjust factors

242 We now set out some considerations which are applicable to questions as to whether a court ought to recognise a novel unjust factor and thereby expand the scope of unjust enrichment. This is of particular relevance in the present case because there are many fact situations which can be characterised as "lack of consent" situations *but which* give rise to established causes of action in *other* areas of the law such as agency, company law and equity. For example, an agent

may, without the knowledge of his principal, transfer the principal's property to himself, or to a third party. Whether recovery of the transferred property from the agent or the third party is permitted is a question that may be dealt with, depending on the facts and circumstances of the case concerned, under the law of agency, the law of property or the principles of equity. It is unclear whether, in such situations, the court should expand the scope of unjust enrichment to provide an *additional* avenue of recovery in fact situations already adequately covered by other areas of law.

243 Our courts have generally eschewed an approach which would expand the scope of a cause of action so broadly as to cause uncertainty in the law or which would result in an encroachment on other areas of law. The courts have traditionally cautioned against opening the door to "palm tree justice" by introducing uncertainty into a cause of action, so as to provide cover for adjudication in an unprincipled and arbitrary manner (see, for example, the decisions of this court in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 at [122] and *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [156]). Thus, in *Wee Chiaw Sek Anna*, this court observed (at [102]) that the suggestion that unconscionability could be equated to a general notion of unfairness, so as to ground an action in unjust enrichment, was "far too radical an approach" because (citing the decision of this court in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198) while in every instance of unconscionability there would be an element of unfairness, the reverse, namely that in every instance where there was unfairness there would *also* be unconscionability, was not necessarily true. The court went on to observe that unconscionability itself was too uncertain to constitute a cause of action in its own right or even operate as a unifying principle which could impose liability clearly and predictably (see *Wee Chiaw*

Sek Anna at [107]). It follows that the fact that mistake and failure of consideration, which are *examples* of lack of consent, are established unjust factors, does ***not necessarily*** justify the ***broader*** *concept* of "lack of consent" as an unjust factor *without more*.

244 Further, as a matter of legal policy, the courts will be slow to recognise a novel doctrine of law if such recognition would be redundant (*ie*, the ground covered by the novel doctrine of law had already been traversed or covered by a more established legal principle). Echoes of this policy resound in the following passage in the recent decision of this court in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Winsta*") at [96]:

> … in particular, the courts do best when they endeavour to embrace, as far as possible, all the relevant rules and principles of common law and equity, allocating the appropriate 'legal space' to each and utilising them as and when appropriate to achieve a just and fair result in the case at hand. *One doctrine ought not to be subsumed in the other unless to do so is principled*; in particular, mere theoretical elegance alone is an insufficient ground for doing so (see, for example, in the context of the doctrines of unconscionability, economic duress and undue influence, this court's decision in *BOM v BOK and another appeal* [2019] 1 SLR 349 at [175]–[180], especially at [176]. Much will depend, in the final analysis, on the precise area of law concerned as well as its content and potential interaction (or otherwise) with other area(s) of law. [emphasis added]

245 An example of this can be seen in this court's treatment of the concept of unconscionability in relation to the declaration of trust. In the decision of this court in *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM*"), a husband sought to set aside a declaration of trust he had made over his assets in favour of his children, claiming that his judgment had been impaired while signing it, and also that he had done so while operating under his wife's misrepresentation that the declaration of trust would only take effect upon his

death. At first instance, the High Court judge had set aside the declaration of trust on the basis of misrepresentation, mistake, undue influence and unconscionability. On appeal, this court considered that the mere concept of "unconscionability" which referred to the spirit of justice and fairness embodied in the maxim that one should not be permitted to take unfair advantage of another who is in a position of weakness (at [119]) was too general and vague to furnish sufficient legal criteria in order to enable the court to apply it, so as to arrive at a just and fair result in cases which were not obviously egregious in nature. There was a lack of legal clarity which resulted in the mere concept of unconscionability failing to provide the requisite legal guidance whilst engendering uncertainty as well as unpredictability in the process, thereby lacking the universality that a doctrine of law must necessarily have (at [121]).

246 In *BOM*, this court further observed that the situations to which the putative doctrine of unconscionability might potentially apply to might be dealt with better by alternative legal doctrines that were more established from a legal point of view (at [122]). This court, however, was not prepared to reject the doctrine of unconscionability entirely. It next considered whether it was possible to distil the general rationale of unconscionability into a legally workable doctrine (at [126]), observing that *narrowly circumscribed*, the doctrine had been generally accepted across the Commonwealth and would not lead to any obvious legal anomalies (at [149]). The court observed that, although the *narrow* doctrine of unconscionability overlapped considerably with the doctrine of undue influence such as to be *nearly* identical, it was not willing to reject the narrow doctrine of unconscionability entirely, given that it could not *definitively* say that *no* distinction could possibly exist (at [152]).

247 Thus, in the same way, as a matter of *legal policy* in Singapore law, the contours of the *common law* action in unjust enrichment ought not to be

expanded in such a way as to encroach on other established common law and equitable doctrines without very good reason for doing so. This is entirely consistent with, and appears to be the *overarching principle* behind, the arguments *against* recognising lack of consent as an unjust factor as such an approach *may* in certain situations denude other established legal doctrines and causes of action (for example, in the law of property) of legal significance, which we have already canvassed (see [232] above). For this reason also, "want of authority", which is a subset of lack of consent, ought not to be recognised as an unjust factor without more not only for the reasons given by this court in *Alwie Handoyo* (see [210] above), but, we would add, *also* because property or value transferred without authority may yet be subject to a *proprietary claim* by the owner who retains title to it. As mentioned above, we therefore would, with respect, *decline* to follow *Lipkin Gorman* to the extent that it stands for the proposition that a claim in unjust enrichment to recover property or value transferred without the claimant's consent may be brought on the basis of the claimant's *title* to said property or value in circumstances where the *vindication* of such title is an available remedy (*cf* also, though, the historical perspective in relation to *Lipkin Gorman* at [234] above). At the same time, the notion of expanding the action in unjust enrichment to encompass lack of consent as an unjust factor in some *legally-workable* and *appropriately circumscribed* form ought not to be rejected out of hand *if* such expansion is justified *in the interests of justice and fairness*. In other words, the *mere fact* that recognising lack of consent in an *unattenuated form* would potentially encroach on established causes of action in *certain fact situations* ought not to *preclude* further consideration of whether lack of consent in an *appropriately circumscribed* form may be recognised as an unjust factor in *other* relevant fact situations. Indeed, such an approach is entirely consistent with the "gap filling and auxiliary role of restitutionary remedies … to avoid unjust results in specific

cases – as a series of innovations to fill gaps in the rest of the law" (see the High Court of Australia decision of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335 at [75], *per* Gummow J). For the above reasons, the extension of recognised unjust factors to include that of lack of consent should only be considered in ***limited*** situations so as to be *legally workable*.

248 The second limit to recognising a novel unjust factor is that such a factor must, by definition, describe a state of affairs – in the context of unjust enrichment, a *transfer* of property or value – which is *unjust*. This means, at the minimum, that there must *generally* be no *legal basis* which *justifies* not reversing the transfer of property or value in question. There are many authorities which support this proposition; indeed, it found expression in a celebrated paragraph in the judgment of Lord Mansfield in *Moses* – a case which has been described as a "corner-stone of common law restitution" (see the UK Supreme Court decision of *Zurich Insurance Plc UK Branch v International Energy Group* [2016] AC 509 at [70]) at 680–681:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund: *it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty*, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: *because in all these cases, the defendant may retain it with a safe conscience*, though by positive law he was barred from recovering. But it lies for money paid for mistake, or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.
>
> In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

> [emphasis added]

249 Next, we refer to the *obiter dicta* of Lord Nicholls in *Criterion Properties*, which we have cited at [236] above. There, the learned judge observed that, where an agent makes a transfer of his principal's property without the principal's consent, *but within his authority* as agent, the transfer would have been made pursuant to a *valid agreement* and there could be "no question of [the principal's] assets having been misapplied". Similarly, this court, in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 ("*Quoine*") at [135], observed (in the context of transfers of value made pursuant to a valid contract or agreement):

> Further, given our conclusion that the Trading Contracts are not vitiated, B2C2's enrichment would have been pursuant to valid contracts and it is *difficult to see how this could be said to be unjust*. As stated in *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 9-94 …:
>
> > Where a benefit is mistakenly conferred by one party on another *under a contract*, a claim in unjust enrichment will commonly fail *even if the mistake would otherwise support such a claim*. … the contract will bar the claim, to the extent *that it entitles the defendant to receive the relevant benefit*. For the claim to succeed, the claimant will need to show that the contract is invalid, being either non-existent, void or voidable. …
>
> [emphasis in original]

250 Prof Tang, in his recent article, *The Role of the Law of Unjust Enrichment in Singapore* at p 16, observed that "the unjust enrichment principle may usually only operate if there is no valid contract between the claimant and the defendant" save in exceptional cases and thus "the law of unjust enrichment may be considered subsidiary to the law of contract". This is because "a right to restitution of a benefit transferred pursuant to a valid contractual obligation may upset the agreed distribution of risks". *Alwie Handoyo* is an illustrative case. In

that case, the respondent contracted to sell shares in two Indonesian companies for US$18m, of which US$6m would be paid to an offshore third-party entity controlled by the appellant. The respondent subsequently asserted that he was entitled to the entire purchase price and sued the appellant in unjust enrichment for the US$6m received by the third-party entity. This court held that the respondent's claim failed because he could not establish a recognised unjust factor and that in any case, the respondent ought to have sued the buyer of the shares in contract since the payment to the third-party was pursuant to the terms of the sale of the shares. Permitting a claim in unjust enrichment would "undermine the contract and the contractual allocation of risk between the plaintiff and the third party". Implicit in this reasoning is that – similar to Lord Nicholls' *obiter dicta* in *Criterion Properties* and the passage in *Quoine*, both of which are cited above – the existence of an existing *legal* basis for the transfer to the third-party (the contract for the sale of the shares) *precludes* a claim in *unjust enrichment* to reverse the transfer. This must be correct in principle; it is obvious that if a transfer is *legally valid* there can be *no question* of it having been unjust so as to justify a reversal of said transfer by way of a claim in unjust enrichment. This principle applies with equal force to situations where the defendant has a *legal right* to *retain* the property sought to be recovered (for example, where the defendant may take advantage to a *legal defence* to any claim for the property). This must be so since, as we have said above, if any *alternative* claim for the property or value in question under other established areas of law is available on the facts, the action in unjust enrichment on the basis of lack of consent ought not to be available. It logically follows that if the defendant is, pursuant to those areas of law, *legally entitled* to the property or value (which we would, parenthetically, observe is *different* from the claimant being *unable* to establish the alternative claim), there is nothing unjust in the defendant's retention of said property or value.

251 To summarise our views on whether lack of consent ought to be recognised as an unjust factor justifying restitution on the basis of unjust enrichment:

(a) There is in principle *no reason* why lack of consent ought not to be recognised as an unjust factor because to hold otherwise would result in defendants who have received stolen property or value benefitting from a windfall.

(b) However, the recognition of lack of consent as an unjust factor cannot be blanket and uncircumscribed because to do so would result in unacceptable encroachments on other areas of law, denuding them of their legal significance. In addition, *legally valid* transfers of the claimant's property or value without his consent, or the *retention by the defendant* of the claimant's property or value to which the defendant is *legally entitled* cannot be said to have been unjust.

(c) Thus, an unjust enrichment action on the basis of the unjust factor of lack of consent would *generally not* be available where:

(i) The transfer of the property or value in question from the claimant is a *legally valid* one;

(ii) The defendant is *legally entitled* (under a legal principle, rule or defence to *any* claim) to retain the property or value which is the subject-matter of the claim; and

(iii) Where the claimant has any other available cause of action for recovery of the property or value in question under established areas of law (for example, the vindication of property rights). This follows from the need to prevent unjust enrichment

> from encroaching on or making otiose established areas of the law or denuding them of much of their legal significance.

252 The principles set out above are sufficient to dispose of the present case and we need not go further than this for the purposes of this judgment. We stress that the law of unjust enrichment ought to be developed *incrementally* on a case-by-case basis and we thus leave the issues of whether there may be lack of consent situations in which a claim in unjust enrichment ought to be allowed, and whether there are *other* limits to recognising novel unjust factors, for a future appropriate case, as it is unnecessary for us to decide these points.

253 Turning to the facts of the present case, we agree with the Judge's finding that the 14 payments were made to the respondent's bank account without any valid basis. We also accept the appellants' argument that such payments could not have been actually authorised as payments made without any legitimate basis cannot be said to have been in the appellants' interests. There is also nothing in the evidence indicating that the appellants had made any representations to the effect that such payments were authorised; thus the question of ostensible authority does not arise. In these circumstances, we are of the view that the appellants retained property to the monies transferred by the 14 payments (see *Wee Chiaw Sek Anna* at [167], citing Prof Swadling's article, "A claim in restitution?" [1996] LMCLQ 63 at 64). There is also nothing on the evidence which suggests that the monies comprised in the 14 payments could not be traced by the appellants directly into the respondent's bank account. Accordingly, we find that the appellants had a *proprietary* claim against the respondent for the sums transferred by the 14 payments. This is a case of "hard-nosed property rights" (*per* Lord Browne-Wilkinson in *Foskett* at 109, also reproduced at [226] above) which should not be interfered with by recognising an unjust enrichment claim on the same facts. We therefore *dismiss* the

appellants' appeal against the Judge's decision to dismiss their claim in unjust enrichment for the 14 payments. As a claim based on the vindication of the appellants' proprietary rights was not pleaded as an alternative cause of action, we do not need to deal with any such claim in this judgment. We would simply observe that such a claim is now likely to be barred by the rule in *Henderson v Henderson* (1843) 3 Hare 100, which bars the same parties from "open[ing] the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case" (at 115).

The merits of the other claims

254 In respect of the appellants' claims in dishonest assistance, knowing receipt and unlawful means conspiracy, we have held that their claims are statutorily time-barred, apart from payment No 50 (which was one of the 36 payments). In view of our findings above, we turn to consider the merits of these claims in respect of payment No 50 *only*.

255 It is well-settled that the elements of a claim in dishonest assistance are (a) that there has been a disposal of the claimant's assets in breach of trust or fiduciary duty; (b) in which the defendant has assisted or which he has procured; (c) the defendant has acted dishonestly; and (d) there was resulting loss to the claimant (see the decision of this court in *Caltong (Australia) Pty Ltd and another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 2 SLR(R) 94 at [33]). In order to establish such dishonesty, the respondent must be shown to have had "knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them"

(see the decision of this court in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*") at [23]).

256 The elements of a claim in knowing receipt are (a) a disposal of the plaintiff's assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty. This court held that "actual knowledge of a breach of trust or a breach of fiduciary duty is not invariably necessary to find liability, particularly when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt" (see *George Raymond Zage* at [23] and [32]).

257 In so far as unlawful means conspiracy is concerned, a claimant has to show that (see the decision of this court in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the claimant by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the claimant suffered loss as a result of the conspiracy.

258 The Judge held that the appellants' claims for dishonest assistance, knowing receipt and unlawful means conspiracy failed because the appellants had not even made out a *prima facie* case against the respondent (see the Judgment at [199] (dishonest assistance), [203] (knowing receipt) and [205] (unlawful means conspiracy)). While the Judge accepted that WKN owed fiduciary duties to the appellants, he was not satisfied that the 50 payments were not in the appellants' interests or that the respondent assisted WKN's breach of his fiduciary duties, still less that he did so dishonestly (see the Judgment at [197]).

259 On appeal, the appellants argue that in so far as the 36 payments are concerned (of which payment No 50 is a part):

(a) The payments were made pursuant to the "practice" for the purpose of evading taxes in Malaysia, which was illegal by the laws of Malaysia;

(b) In causing the appellants to make the payments, WKN had exposed them to criminal liability and thus breached his duties as a director of the appellants; and

(c) As the respondent was a knowing participant in the "practice", he had likewise acted dishonestly and engaged in an unlawful means conspiracy.

260 In response to the appellants' arguments, the respondent argued that the 36 payments were legitimately made for services or timber provided by companies owned by Mdm Ma or the respondent and were therefore payments made in the appellants' interests.

261 In our view, the appellants are unable to show that they had suffered loss as a result of the payments made to the respondent. This is because, as we observed at [155] above, the appellants had not suffered any loss in making the 36 payments to the respondent pursuant to the "practice", since they would not have had the wherewithal to make said payments were it not for the "practice" in the first place. There was nothing in the evidence which pointed towards the fact that, in making the 36 payments pursuant to the "practice", the appellants would have been liable for penalties *beyond* what they had received and paid out in connection with the "practice". While the appellants submitted that the making of the 36 payments "exposed them to criminal liability", presumably as a result of breaching the Malaysian revenue laws, they did not adduce any evidence showing what loss would have been incurred as a result. This is significant, given that the appellants are *not* Malaysian companies and there is nothing in the evidence showing that they hold any assets in Malaysia which could potentially be the subject of seizure, or what the *legal* basis for any such potential seizure is. We are thus not persuaded that the appellants' claim for dishonest assistance or for unlawful means conspiracy can be made out.

262 We are also not persuaded that the appellants' claim for knowing receipt is made out because an essential element of such a claim is that the 36 payments can be traceable as representing the appellants' assets. For the same reasons as those set out in the preceding paragraph, we do not think that, in the context of the "practice", the moneys paid by the appellants to the respondent can properly be regarded as the appellants' assets since they would not have received said monies were it not for the "practice" itself. As we have concluded at [155] above that the appellants' own assets were never depleted or put at risk by the "practice", it follows that the 36 payments did not represent a transfer of the

appellants' assets and thus the appellants' claim for knowing receipt for part of the said 36 payments, for payment No 50, cannot succeed.

Conclusion

263 For the above reasons, we find that:

(a) The appellants' claims in unjust enrichment were not statutorily time-barred under the Limitation Act and were also not barred by the doctrine of laches. However, the unjust enrichment claims in respect of the 36 payments are not made out as the respondent had not been enriched at the appellants' *expense*. The unjust enrichment claims in respect of the 11 payments and three payments were not made out as we do not accept lack of consent as an "unjust factor" on which the appellants could make out their claim in unjust enrichment on the specific facts of this case.

(b) The appellants' claims in dishonest assistance, knowing receipt and unlawful means conspiracy were time-barred, apart from Payment No 50. The claims in dishonest assistance, knowing receipt and unlawful means conspiracy in respect of Payment No 50 also failed.

264 We therefore dismiss the appeal. Having regard to the parties' costs schedules, we award costs to the respondent at S$70,000 inclusive of disbursements. There will be the usual consequential orders.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

David Edmond Neuberger
International Judge

Arjan Kumar Sikri
International Judge

Davinder Singh s/o Amar Singh SC, Pardeep Singh Khosa, Rajvinder Singh Chahal and Sumedha Madhusudhanan (Davinder Singh Chambers LLC) for the appellants;
Francis Xavier SC, Jainil Bhandari, Disa Sim, Chia Xin Ran Alina, Kristin Ng Wei Ting, Tay Bok Chong Alvin and Veltrice Tan Yin Rong (Rajah and Tann Singapore LLP) for the respondent.