IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 226

Originating Claim No 499 of 2023 (Registrar's Appeal No 106 of 2024)

Between

(1) Ng Chee Tian
(2) Ng Chee Seng

… *Claimants*

And

(1) Ng Chee Pong
(2) Ng Phek Cheng
(3) East Asia Trading Company (Private) Limited

… *Defendants*

JUDGMENT

[Civil Procedure — Pleadings — Amendment]
[Civil Procedure — Pleadings — Striking out]
[Limitation of Actions — Particular causes of action — Contract]
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[Restitution — Unjust enrichment]

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v
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Mohamed Faizal JC
12 July 2024

04 September 2024 Judgment reserved.

Mohamed Faizal JC:

Introduction

1 The present appeal, in spite of its superficial simplicity, brings to fore various challenging doctrinal and practical questions relating to the law surrounding the doctrine of unjust enrichment: (a) what are the contours of the subsidiarity relationship that unjust enrichment appears to have *vis-à-vis* more conventional causes of action (for example, in contract or in tort) in the domestic context; (b) how, if at all, does the applicability of a limitation period that effectively stymies the pursuit of such conventional causes of action affect the dynamics of this relationship; and (c) to what extent should proprietary remedies feature as a relief for any claim under unjust enrichment?

2 These questions arise in this appeal by the claimants in HC/OC 499/2023 ("OC 499") against the decision of the learned Assistant Registrar Kenneth

Wang Ye (the "AR") to strike out the claims in relation to shares that had been transferred from the deceased to the 1st defendant (the "2014 transfer"). The AR, in gist, struck out the claims relating to the 2014 transfer as he concluded that there was no basis to recognise a proprietary remedy in a claim for unjust enrichment under Singapore law, and that all other causes of action were time-barred under ss 6(1)(a) and 6(2) of the Limitation Act 1959 (2020 Rev Ed) ("Limitation Act"), read with s 10(1) of the Civil Law Act 1909 (2020 Rev Ed) ("Civil Law Act").

3 For the reasons set out below, I dismiss the appeal. As will be apparent from the considerations set out in this judgment, I am of the view that unjust enrichment is an interstitial cause of action and, consequently, recourse to the doctrine of unjust enrichment cannot generally be had where more conventional causes of action are available. This conclusion is not varied by the existence (and applicability) of limitation periods for such conventional causes of action. I also conclude that proprietary remedies are not available in the present instance and have come to that conclusion against the backdrop of a broader reservation on whether proprietary remedies can ever arise out of claims in unjust enrichment in the domestic context.

Background

The parties

4 The 1st and 2nd claimants, Ng Chee Tian and Ng Chee Seng, and the 1st and 2nd defendants, Ng Chee Pong and Ng Phek Cheng, are four of the children of the late Ng Piak Mong (the "deceased"). The deceased passed on 11 May 2021 at 95 years old. All four parties to the proceedings are

beneficiaries of the deceased's will dated 26 July 2017. The 1st and 2nd defendants are the executors and trustees of the will.[1]

5 The 3rd defendant, East Asia Trading Company (Private) Limited ("EATCO"), is a company incorporated in Singapore that was founded by the deceased. The 1st defendant is also the managing director of the 3rd defendant.[2] Although counsel for the 3rd defendant was in attendance at the hearing before me, the 3rd defendant took no position on the issues that are before this court and confirmed that they were in attendance *qua* nominal defendants.[3] As such, for the purposes of the present appeal, I will refer to the 1st and 2nd defendants collectively as the "defendants" unless otherwise indicated.

The facts

6 I first set out the facts in relation to the 2014 transfer, which underlie the claims relevant to the present appeal.

The 2014 transfer

7 There were 1,020,000 issued shares in EATCO, which were initially held as follows: (a) the deceased held 720,000 shares; (b) the 2nd claimant held 60,000 shares; (c) the 1st defendant held 120,000 shares; (d) the 2nd defendant held 60,000 shares; and (e) Ng Lee Cheng (daughter to the deceased, and sister to the claimants and defendants) held 60,000 shares.[4]

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1 Claimants' joint affidavit dated 15 October 2023 ("C12 Joint Affidavit") at [4] to [5].

2 C12 Joint Affidavit at [6].

3 Minute sheet dated 16 July 2024 ("Minute Sheet") at p 2.

4 2nd claimant's affidavit dated 2 May 2024 ("C2 Affidavit") at [12].

8 Sometime in October or November 2014, the 2nd claimant signed a document for the transfer of 700,000 shares in EATCO from the deceased to the 1st defendant (the "share transfer document"). According to the 2nd claimant, he signed the share transfer document as he saw his late father's signature on the document. The 2nd claimant thus believed that his late father not only knew of the contents of the share transfer document, but also approved the share transfer.[5]

9 In around October or November 2014, the 2nd claimant apparently discovered that the deceased had allegedly signed the document without knowing what he was signing.[6] When the deceased learnt of the nature of the document, he allegedly "confront[ed]" the 1st defendant on the 2014 transfer. However, the 1st defendant refused to undo the 2014 transfer.[7] According to the 2nd claimant, the deceased felt that he had no choice and did not press further, in view of his frailty and his reliance on the 1st defendant as his care giver.[8] At the time, the 2nd claimant did not "kick up a fuss" after "[finding] out the truth" either as he did not want to cause any distress to his father, and only decided to pursue the matter after the deceased passed on 11 May 2021.[9] Sometime after December 2021, the 1st defendant received a total of $4.1m in dividends, of which $3.5m was for the 700,000 EATCO shares that are the subject of the 2014 transfer (the "EATCO shares").[10] The claimants also allege that an additional $100,000 was paid into the 1st defendant's personal account instead of the estate

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5 C2 Affidavit at [13].

6 C2 Affidavit at [15] to [17].

7 C2 Affidavit at [24].

8 C2 Affidavit at [24]; and Statement of Claim (Amendment No. 2) dated 31 May 2024 ("SOC2") at [24].

9 C2 Affidavit at [17] to [18].

10 C2 Affidavit at [41].

account, even though that $100,000 was for the 20,000 EATCO shares that still resided with the deceased's estate.[11]

10 On 2 August 2023, the claimants commenced OC 499 against the defendants.[12] In relation to the 2014 transfer, the claimants sought, at the time: (a) restitution of the $3.6m in dividends paid out to the 1st defendant; (b) claims for the 2014 transfer to be declared void *ab initio* on the grounds of *non est factum*, or an order rescinding the 2014 transfer on the grounds of mistake, unconscionable bargain or undue influence; and (c) an action for an account of the dividends paid out in relation to the shares, and a declaration that these dividends were held on constructive trust for the deceased's estate.[13]

The other claims in OC 499

11 Although the other claims in OC 499, unrelated to the 2014 transfer, are not the subject of the present appeal, I set them out briefly to provide context to the wider dispute between the parties.

(1) The Malaysian shares

12 According to the 2nd claimant, the deceased had a substantial Malaysian share portfolio, in view of his numerous investments in publicly-listed companies on the Malaysian Stock Exchange, Bursa Malaysia Bhd.[14] In order to facilitate his share trading activities, the deceased opened a joint bank account with the 2nd defendant at RHB Bank Bhd, Malaysia (the "RHB account") which

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11 C2 Affidavit at [37] and [41].

12 Originating claim dated 2 August 2023.

13 Statement of Claim dated 2 August 2023 ("Original SOC") at [57.1] to [57.5].

14 SOC2 at [11] and [45].

was linked to two Malaysian share trading accounts, one in the deceased's sole name and the other in the 2nd defendant's name (the "share trading account" and the "share trust account" respectively).[15] The claimant alleges that the deceased never intended to benefit the 2nd defendant by including her name on the RHB account or the share trust account, and the 2nd defendant's name was only included for administrative convenience, such as to avoid probate issues with the authorities when the deceased passes on.[16]

13 However, on or around 13 June 2022, the 2nd claimant was shown a statement of the share trading account which revealed that the deceased only held 10,000 shares in two de-listed companies. When the 2nd claimant requested for further documentation such as the statements of the RHB account, share trading account and share trust account, the 2nd defendant allegedly refused.[17] Thus, according to the claimants, the 2nd defendant breached her fiduciary duty by abusing her access to the RHB account and the share trust account to convert the deceased's money and shares to her own use instead of including them in the deceased's estate for distribution.[18]

(2) The Seletar property

14 The deceased's home was in Seletar, Singapore (the "Seletar property"). The Seletar property formed part of the deceased's estate, and the proceeds of its sale are to be distributed to the beneficiaries less expenses.[19] According to the claimants, the defendants failed to enable the sale of the Seletar property

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15 SOC2 at [12].

16 SOC2 at [13].

17 SOC2 at [42] to [45].

18 SOC2 at [47].

19 SOC2 at [16] and [54].

even though years have elapsed since the deceased's death. Furthermore, the 1st defendant continues to occupy the Seletar property rent-free, and is liable to the estate for damages for the use and occupation of the Seletar property.[20]

(3) Other assets and valuables

15 According to the claimants, the deceased also operated as a sole trader in general produce and stock such as aloeswood, exotic ornaments and shark fin. The deceased also had in his possession two Rolex watches, a jade ring, gold coins and other valuables which were stored in a safe at the property. None of these assets were included by the defendants in the statement of account of the deceased's estate.[21]

16 In gist, the claimants also sought, amongst others:

(a) in relation to the Malaysian shares, an account and order for payment of whatever sum is found due and/or equitable compensation, to be paid to the deceased's estate;[22]

(b) in relation to the Seletar property, the claimants sought an order that the defendants sell the property within such time as specified by the court and to distribute the proceeds of sale, and pay to the deceased's estate any damages for the 1st defendant's continued use of and occupation of the property;[23] and

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20 SOC2 at [54].

21 SOC2 at [49] to [51].

22 SOC2 at [56.6].

23 SOC2 at [56.8].

(c) a full and proper account of the assets that form a part of the deceased's estate, and, where the defendants breached their duty to account, an order that such additional assets are to be added to the deceased's estate.[24]

Procedural history

17 I now set out briefly the relevant procedural history of the claims relating to only the 2014 transfer (the "2014 transfer claims"), particularly in relation to the manner that the claim in unjust enrichment arose in the course of these proceedings.

18 When OC 499 was initially filed, the claim in unjust enrichment was pleaded as a "claim against [the 1st defendant] in unjust enrichment for restitution of the value of the dividends paid by EATCO to [the 1st defendant] as a result of the 2014 [t]ransfer", and the relief sought was "restitution to the [d]eceased's estate from [the 1st defendant] in a sum of $3,600,000" (see above at [10]).[25] This appeared, on its face, to be nothing more than a tangential reference. There were no further particulars provided for the apparent claim in unjust enrichment (such as which unjust factors were relied on), nor any mention of the restitution of the EATCO shares in any other part of the original statement of claim.

19 On 22 April 2024, the 1st defendant applied to strike out the 2014 transfer claims on the basis, amongst others, that the claimants had no standing, as beneficiaries, to bring these claims (the "striking out application").[26]

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24 SOC2 at [56.7].

25 Original SOC at [5.5] and [57.5].

26 1st defendant's affidavit dated 19 April 2024 at [5].

However, as the claimants submitted at the time, based on the law as they understood it, the court may permit an action to be brought by a beneficiary on behalf of the estate under special circumstances, such as where the beneficiary sought relief to protect the assets of the estate (*Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 3 SLR(R) 27 ("*Wong Moy*") at [24] and [28]). The claimants relied on this court's finding in *Sia Chin Sun v Yong Wai Poh (Sia Tze Ming, non-party)* [2019] 3 SLR 1168 ("*Sia Chin Sun*") (at [27]) that a beneficiary would be allowed to pursue a proprietary claim which has as its object the protection and preservation of the assets of the estate, in contrast to a purely pecuniary claim.[27] I would, as an aside, highlight that this is no longer the claimants' position on what the law requires in light of intervening jurisprudential developments, a matter I will discuss in further detail at a later point of this judgment (see below at [43]). As such, in order to avail themselves of the exception in *Wong Moy*, the claimants explained that their claims were effectively *proprietary* in nature since "all the reliefs (if granted) would result in the recovery of the 700,000 EATCO shares and the dividend[s] of $3,600,000".[28] Peculiarly, counsel for the defendants accepted that the claimants were "essentially seeking a reversal of the 2014 transfer" (which was, on its face, an ostensibly *proprietary* remedy),[29] but submitted that the claims were *in personam*.[30]

20 The matter was first heard by the AR on 10 May 2024. Right at the conclusion of such hearing, counsel for the defendants appeared to realise for the first time that there was a plausible argument to be made that the

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27 Claimants' written submissions dated 8 May 2024 ("8 May CWS") at [26] to [27].

28 8 May CWS at [35].

29 Defendants' written submissions dated 7 May 2024 at [2].

30 Transcript dated 10 May 2024 ("10 May Transcript") at p 3 lines 15 to p 5 line 19.

2014 transfer claims may potentially be time-barred.[31] This was because, for the most part, the causes of action as crafted appeared to fall within those contemplated under s 6 of the Limitation Act.

21 The hearing was therefore adjourned by the AR for parties to file submissions on whether the 2014 transfer claims were indeed time-barred. In the interim, the defendants filed further submissions indicating that the 2014 transfer claims comprise solely of contractual causes of action (*ie*, undue influence, unconscionable bargain *et al*), and that these were no longer actionable in so far as such claims would fall foul of the 6-year limitation period set out in s 6 of the Limitation Act.[32] Significantly, in their submissions at the time, the claimants did not suggest that they were seeking to plead unjust enrichment.

22 The matter was then heard by the AR for the second time on 17 May 2024. At this second hearing, the claimants requested an adjournment so that they could "*mount a new claim* in unjust enrichment based on [the] material facts already pleaded" [emphasis added].[33] The AR granted the adjournment, though he understandably expressed concerns about the piecemeal nature of the proceedings and also ordered that no further adjournments be granted.[34]

23 Consequently, the claimants sought leave to amend their pleadings by inserting the following paragraphs particularising their claim in unjust

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31 10 May Transcript at p 8 line 32 to p 9 line 18.

32 Defendants' written submissions dated 13 May 2024 at [5].

33 Transcript dated 17 May 2024 at p 2 line 30 to p 3 line 1.

34 17 May Transcript at p 3 lines 27 to 29, and p 4 lines 12 to 13.

enrichment on the grounds of mistake, unconscionable bargain and/or undue influence, in order to seek "restitution to the [d]eceased's estate from [the 1st defendant] of 700,000 shares in EATCO":[35]

> *By reason of the facts and circumstances pleaded at paragraphs 24 to 34*, [the claimants] aver that [the 1st defendant] was enriched at the expense of the [d]eceased in circumstances where it is unjust for [the 1st defendant] to retain the enrichment of 700,000 shares in EATCO. [The claimants] rely on the following unjust factors:
>
> … for mistake and unconscionable bargain, the facts and circumstances pleaded at paragraphs 24 to 33; and
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> … for undue influence, the facts and circumstances pleaded at paragraph 34.
>
> …
>
> The [c]laimants therefore seek the following relief in their capacity as beneficiaries of the [d]eceased's estate… :
>
> … restitution to the [d]eceased's estate from [the 1st defendant] of 700,000 shares in EATCO; …
>
> [emphasis added]

24 In essence, as the claimants themselves have accepted in the hearing before me, the proposed amendment to the pleadings was motivated by a desire to re-constitute the 2014 transfer claims under unjust enrichment in order to avoid any potential time bar.[36] As foreshadowed by their remarks to the AR on 17 May 2024 (see above at [22]), there were no new facts or circumstances pleaded for the re-constituted unjust enrichment claim. As such, as a result of the events outlined above (at [18]–[23]), the revised claim in unjust enrichment, as it presently stands, sought a proprietary remedy.

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35 SOC2 at [34A] and [56.3A].

36 Claimants' written submissions dated 27 June 2024 ("27 June CWS") at [17].

25 In sum, as a result of the above amendments, the claimants are presently seeking:

(a) a claim in unjust enrichment for the restitution of the EATCO shares and the value of the dividends (in the sum of $3.6m) paid out thereunder on the grounds of mistake, unconscionable bargain or undue influence;

(b) the 2014 transfer to be declared void *ab initio* on the ground of *non est factum*, or an order rescinding the 2014 transfer on the grounds of mistake, unconscionable bargain or undue influence; and

(c) an action for an account of the dividends paid out in relation to the shares, and a declaration that these dividends were held on constructive trust for the deceased's estate.[37]

26 For ease of reference, I shall refer to the claim in unjust enrichment as such, and the other claims in relation to the 2014 transfer as the "other 2014 transfer claims".

27 At the hearing on 29 May 2024 before the AR, the defendants sought yet another adjournment to address the court on whether proprietary remedies were available for a claim in unjust enrichment.[38] The focus of the hearing thus turned to, and anchored largely on, this point.

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37 SOC2 at [5.1] to [5.5] and [56.1] to [56.5].

38 Transcript dated 29 May 2024 ("29 May Transcript") at p 3 lines 20 to 26.

The learned AR's decision

28 The AR rejected the defendants' request for a third adjournment of the matter, noting that three hearings have been convened for the striking out application, that the "trickle of authorities and amendments must stop at some point" and any legal argument can be raised at the hearing itself.[39]

29 With respect to the proposed claim in unjust enrichment, the AR ordered that it be struck out on the basis that Singapore law, as it stands, does not recognise proprietary remedies sought for a claim in unjust enrichment. The AR relied on this court's decision in *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 ("*Ho Dat Khoon*"), which held that a claim is "misconceived" in as much as it was premised on the availability of proprietary remedies in a claim for unjust enrichment (at [70]). The AR agreed with the decision in *Ho Dat Khoon* and its interpretation and application of the Court of Appeal's decision in *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 ("*Esben Finance*") (at [251] and [251(c)]), and noted that, in any event, he was bound by *Ho Dat Khoon*. The AR also observed that the finding in *Esben Finance* at [251(c)(iii)], that an unjust enrichment action would generally not be available where the claimant has any other available cause of action for the recovery of property under established areas of law, was made in the context of "lack of consent" as the unjust factor in that case. Nonetheless, the AR did not see why a different position ought to be taken for different unjust factors such that proprietary remedies may be available for claims in unjust enrichment premised on certain factors but not necessarily for others.[40]

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39 29 May Transcript at p 10 lines 19 to 24.

40 29 May Transcript at p 10 line 29 to p 12 line 11.

30 In so far as the other 2014 transfer claims are concerned, the AR found that these were time-barred under ss 6(1) and 6(2) of the Limitation Act, read with s 10(1) of the Civil Law Act, and thus ought to be struck out. The AR noted the claimants did not dispute that any cause of action against the 2014 transfer would have been time-barred by November 2020 (*ie,* six years from November 2014 when the share transfer was effected), prior to the deceased's passing in May 2021. The AR found that s 22 of the Limitation Act did not assist the claimant since the cause of action was already time-barred by the time the deceased had passed.[41]

Arguments on appeal

Claimants' case

31 The claimants' arguments on appeal are broadly as follows. Firstly, the claimants argues that the AR erred in striking out the claim in unjust enrichment. The claimants contend that *Esben Finance* did not go so far as to say that proprietary remedies are not available for claims in unjust enrichment and had, in fact, left the question open. Moreover, in view of the unsettled state of the law and that novel questions of law may arise, the issue of whether proprietary remedies ought to be recognised for claims in unjust enrichment is one that is best resolved only after having been fully ventilated at trial.[42] Alternatively, the claimants sought leave to amend their claim in unjust enrichment such that: (a) the unjust factor relied on is that of "lack of consent"; or (b) the claim is *in personam* instead of *in rem*.[43]

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41 29 May Transcript at p 12 lines 13 to 32.

42 27 June CWS at [22] to [24] and [29].

43 27 June CWS at [27] to [28].

32 Next, the claimants contend that the AR erred in finding that the other 2014 transfer claims are time-barred. According to the claimants, the 1st defendant is a "Class 1 constructive trustee", as opposed to a "Class 2 constructive trustee", of the EATCO shares when the 2014 transfer was effected, such that the claims fell within the ambit of s 22 of the Limitation Act. Additionally, the other 2014 transfer claims are an action by the claimants, who are the beneficiaries of the deceased's estate, to recover trust property or proceeds thereof in the possession of the 1st defendant or previously received by him and converted to his use, such that s 22(1)(*b*) of the Limitation Act operates and there is therefore no time bar.[44]

33 Finally, with respect to the 2014 transfer claim on the ground of *non est factum* in particular, the claimants contend that this is not an action "founded on a contract" such that it is time-barred under s 6(1) of the Limitation Act. If *non est factum* is successfully pleaded as a defence, the contract will be void *ab initio.* According to the claimants, such an action is not founded on a contract, but rather, on the *non-existence of a contract*.[45]

Defendants' case

34 The defendants, in their written submissions comprising a singular page, made the point that the AR's decision should be affirmed on appeal because: (a) this court in *Ho Dat Khoon* made clear that, under Singapore law, proprietary claims in unjust enrichment are not available to the claimants; and (b) the other 2014 transfer claims are time-barred since the deceased, when he was alive, did

44 27 June CWS at [32], [33] and [38].

45 27 June CWS at [39].

not commence any action within six years from the time he was aware that he had a cause of action.[46]

Issues to be determined

35 I deal with the two main issues in turn, namely:

(a) Firstly, whether the AR erred in striking out the claim in unjust enrichment. In coming to a conclusion on this, two sub-issues need to be determined:

(i) Whether, in the present case, unjust enrichment is an available cause of action.

(ii) Even if a claim in unjust enrichment represents an available cause of action to the claimants, whether such a claim afforded a proprietary remedy.

(b) Secondly, whether the AR erred in finding that the other 2014 transfer claims were time-barred. This, once more, necessitated resolution of two sub-issues:

(i) Whether the exception in s 22(1)(*b*) of the Limitation Act applied to the claims such that they are not time-barred.

(ii) Whether the claim that the 2014 transfer is void on the ground of *non est factum* is not an action "founded on a contract" within the meaning of s 6(1)(*a*) of the Limitation Act, such that it is not time-barred.

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46 Defendants' written submissions dated 27 June 2024 at [1], [3] and [4].

The law on striking out and the amendment of pleadings

36 The application to strike out the 2014 transfer claims is based on O 9 r 16(1) of the Rules of Court 2021 ("ROC 2021") which provides that:

> **Striking out pleadings and other documents (O. 9, r. 16)**
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> **16.**—(1) The Court may order any or part of any pleading to be struck out or amended, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence;
>
> (*b*) it is an abuse of process of the Court; or
>
> (*c*) it is in the interests of justice to do so,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly

37 In the present case, the defendants essentially relied on the ground that there is "no reasonable cause of action or defence" to strike out the 2014 transfer claims (see above at [19]). In *Leong Quee Ching Karen v Lim Soon Huat and others* [2023] 4 SLR 1133, the High Court made the following general observations on the law on striking out (at [25]–[26]):

> 25 First, it is trite that the bar for succeeding in a striking out application is a high one. Thus, it has been said in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814, where the Court of Appeal cited its previous decision in *Ko Teck Siang v Low Fong Mei* [1992] 1 SLR(R) 22, which in turn endorsed the English Court of Appeal case of *Wenlock v Moloney* [1965] 1 WLR 1238, (at [172]) that the power to strike out is "very sparingly exercised, and only [applied] in very exceptional cases" and would not be justified "merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". …
>
> 26 Second, pursuant to the above, the applicant in a striking out application bears the burden of proving that the claim is "obviously unsustainable, the pleadings [are] unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out" (see the High Court decisions of *Koh Kim Teck v Credit Suisse AG*,

> *Singapore Branch* [2015] SGHC 52 at [21] as well as *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd and others* [2021] 5 SLR 738 at [21]).

38 The Court of Appeal held that the test under O 9 r 16(1)(*a*) is whether the pleading to be struck out discloses a reasonable cause of action, *ie*, that "the action has some chance of success when only the allegations in the pleadings are concerned" (*Iskandar bin Rahmat and others v Attorney-General and another* [2022] 2 SLR 1018 at [17], citing *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]). As such, a cause of action will not be struck out just because the case is weak and unlikely to succeed. Further, in assessing whether to strike out such pleadings, the court would presume the pleaded facts to be true in favour of the claimant (*Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at [29]).

39 As I observed earlier, if this court is inclined to strike out the claim in unjust enrichment as it presently stands, the claimants' fallback position is their application to amend the claim in unjust enrichment such that it seeks *in personam* rather than proprietary relief (see above at [31]). In this regard, I note that there is coincidence between the tests for allowing an amendment of pleadings and for striking out (*Nimisha Pandey and another v Divya Bothra* [2024] SGHC 88 ("*Nimisha Pandey*") at [18], citing the Court of Appeal's decision in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 at [4]). With respect to such an application to amend pleadings, at this stage of the proceedings, it is sufficient (to allow the application) that the proposed amendment discloses a reasonable cause of action (*Mohamed Shiyam v Tuff Offshore Engineering Services Pte Ltd* [2021] 5 SLR 188 at [38]). As such, it is unlikely for a court, having allowed any amendment to the pleadings, to later strike it out for having disclosed no reasonable cause or action or defence on the basis of the pleadings alone (*Nimisha Pandey* at [18]). In the circumstances, this

judgment will consider the striking out application and the claimants' alternative application for amendment of their pleadings collectively.

40 With these principles in mind, I turn to consider the issues at hand.

The claim in unjust enrichment

41 I first highlight the significance of the piecemeal amendments of the 2014 transfer claims in the course of these proceedings (as outlined above at [17]–[25]). The amended pleading for the claim in unjust enrichment read, in essence, that the 1st defendant was "enriched at the expense of the [d]eceased in circumstances where it was unjust for [the 1st defendant] to retain the enrichment" and the claimants relied on "the following unjust factors … mistake and unconscionable bargain … and … undue influence" and the remedy sought was the restitution to the deceased's estate of the EATCO shares and the dividends paid out thereunder.[47]

42 Firstly, the claimants contend that the 2014 transfer claims may also be re-constituted as a claim in unjust enrichment. As alluded to earlier (see above at [24]), this proposed amendment was made *solely* to get around any potential time bar as claims in unjust enrichment in the domestic context are not subject to the limitation periods set out in the Limitation Act (*Esben Finance* at [48]). I would add parenthetically that the approach in Singapore on this specific issue departs from that in the UK (and indeed, elsewhere) where claims under unjust enrichment are subject to limitation periods (*Re Diplock* [1948] Ch 465 at 514 and *Kleinwort Benson v Sandwell BC* [1994] 4 All ER 890 at 942).

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47 SOC2 at [34A] and [56.3A].

43 Secondly, the amended pleadings were drafted with a view to seeking proprietary relief as a result of unjust enrichment.[48] This was the result of the law as the claimants understood it at the time (see above at [19]). It would be useful for me to elaborate briefly on this. It is trite that, as a starting point, the proper party to bring any action on behalf of the estate is the executor (*Fong Wai Lyn Carolyn v Kao Chai-Chau Linda and others* [2017] 4 SLR 1018 at [7]). In this case, the claimants are not the executors, but the beneficiaries to the estate. The claimants had assumed that the law prevailing at the time only allowed beneficiaries to bring a claim on behalf of the estate if the claim was proprietary rather than personal in nature (*Sia Chin Sun* at [27]). It was in that specific context that the claimants sought a proprietary remedy for unjust enrichment and the focus of the hearing before the AR on 29 May 2024 was on whether proprietary remedies were available to claims in unjust enrichment.

44 As the procedural history of this matter makes plain, the eventual hearing before the AR on 29 May 2024 almost singularly focused on the question of whether proprietary remedies were available under the rubric of unjust enrichment. In doing so, the parties focused primarily on the effect and impact of this court's decision of *Ho Dat Khoon* on whether proprietary remedies are available for claims in unjust enrichment. After a survey of the law and some academic commentaries, Aedit Abdullah J decided the question in the negative, opining that proprietary remedies for such claims were a "non-starter" in the domestic context (*Ho Dat Khoon* at [74]). I pause here to note that the relevant discussion in *Ho Dat Khoon* (to the extent it was relevant for the present case) pertained solely to whether proprietary remedies could be afforded under the rubric of the law of unjust enrichment, and not the separate question of

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48 27 June CWS at [17].

whether such a cause of action of unjust enrichment ought to be available in the first place.

45 By the time the matter was heard before me, the jurisprudential landscape on the question of whether there was a need for a proprietary claim when pursuing a claim *qua* beneficiary had somewhat morphed. On 15 May 2024, the Appellate Division of the High Court issued the decision of *Mustaq Ahmad (alias Mushtaq Ahmad s/o Mustafa) and another v Ayaz Ahmed and others and other appeals* [2024] SGHC(A) 17 ("*Mustaq Ahmad*"). I note in passing that the decision of *Mustaq Ahmad* slightly pre-dated the hearing on 29 May 2024 before the AR, but it appears that none of the parties, nor the AR, appeared to be conscious of that decision at the time. In *Mustaq Ahmad*, the Appellate Division observed that in determining whether a beneficiary would be allowed to bring a claim to preserve the assets of an estate, the court would not be concerned about whether the claim was "proprietary" or "personal" in nature (at [105]). Instead, the Appellate Division clarified that the primary issue governing whether a beneficiary should be allowed to do so would be whether there were "special circumstances" allowing a beneficiary to bring such claim to preserve the assets of an estate. Such an assessment is necessarily fact-dependent, though significant weight would be given to the matter of whether the circumstances were such that it was either impossible or otherwise seriously inconvenient for the executor or administrator to themselves commence such proceedings (at [106]).

46 As a result of *Mustaq Ahmad*, the hurdle ostensibly put before the claimants in the form of their understanding of *Sia Chin Sun* (at [27]), *ie*, of the need for any unjust enrichment claim pursued by *beneficiaries* (as opposed to *executors*) to be proprietary in nature before it would be viable, no longer existed. Nonetheless, before me, counsel for the claimants confirmed that it

remained their position that they were seeking to maintain a proprietary claim in unjust enrichment. However, as I observed earlier, the claimants also advanced the alternative that if I were not minded to recognise the existence of proprietary remedies for unjust enrichment on the present facts, they would be seeking leave to amend their pleadings to essentially pursue an *in personam* unjust enrichment claim.[49]

47 Seen in the context of the Appellate Division's decision of *Mustaq Ahmad*, it would appear that the entirety of the proceedings before the AR (by focusing on the implications of *Ho Dat Khoon* and, in particular, on whether proprietary remedies were available in the law of unjust enrichment) put the cart before the horse, and may have muddied the conceptual analysis by focusing squarely on the matter of the existence of proprietary remedies and not the logically anterior question of whether unjust enrichment is even an available cause of action on the present facts.

48 Consequently, it would be apposite for me to discuss the merits of this appeal by way of a two-stage analysis (as I have set out above at [35(a)]): (a) whether unjust enrichment is, or should be, an available cause of action in cases like the present where claims founded on other causes of action would otherwise be theoretically available on the exact same facts but for a time bar; and (b) if unjust enrichment is an available cause of action, are proprietary remedies available for claims of unjust enrichment on the present facts?

49 Each of these issues are somewhat complex. I deal with each *seriatim.*

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[49] Minute Sheet at p 12.

Whether unjust enrichment is a plausible cause of action

The applicable law and approach taken in Esben Finance

50 The locus classicus in relation to understanding how, and when, unjust enrichment can be pleaded as a cause of action in the domestic context is *Esben Finance*. The facts of that case can be summarised within a reasonably brief compass. In *Esben Finance*, payments were made from four offshore companies (the "appellants" in that case) to the respondent. The appellants sued the respondent to recover the payments on the basis of unjust enrichment, dishonest assistance, knowing receipt and unlawful means conspiracy. However, most of the payments were made more than six years prior to the appellants' commencement of the action. Consequently, the first instance judge found that these claims were time-barred under the Limitation Act (at [18]). However, if not for the time bar, the unjust enrichment claims on the basis of "lack of consent" would have succeeded as there was no merit to the respondent's assertion that the payments were gifts or for legitimate purposes (at [19]–[23]). The appellants appealed the decision.

51 The Court of Appeal in *Esben Finance* dismissed the appeal. On the law, the Court of Appeal clarified that a claim in unjust enrichment was not founded upon any contract, tort, trust or other ground in equity as such claims are a distinct branch of the law of obligations (at [76]–[78]). As such, the appellants' claims in unjust enrichment were not time-barred as no limitation period applied for such a cause of action (at [86]). However, the availability of a proprietary claim for the payments (which the Court of Appeal termed as "hard-nosed property rights", citing *Foskett v McKeown and others* [2001] 1 AC 102 at 109) precluded the recognition of an unjust enrichment claim (at [253]). In relation to whether "lack of consent" ought to be recognised as an unjust factor justifying

restitution on the basis of unjust enrichment, the Court of Appeal found as follows (at [251]):

> (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.
>
> [emphasis in original]

52 In essence, for one to invoke the doctrine of unjust enrichment, it would not suffice to merely show the existence of a recognised unjust factor (*Esben Finance* at [251(c)(iii)]), and mere inequity on a broad level would not suffice either (*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 ("*Anna Wee*") at

[130]). Instead, the law of unjust enrichment should only generally be allowed to operate in situations where other more established causes of action are unavailable. In essence, the Court of Appeal's approach appeared to be a decidedly conservative one, *ie*, it conceived of unjust enrichment (*qua* cause of action) as an interstitial mechanism, or a secondary legal vehicle, that serves to fill in the gaps between the more conventional areas of law (see also Ross Grantham and Charles Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273 ("*Grantham & Rickett*")).

53 The Court of Appeal in *Esben Finance* also explored, in the context of whether to recognise a novel unjust factor, the question of whether the scope of unjust enrichment should be expanded to "provide an *additional* avenue of recovery in fact situations already adequately covered by other areas of law" [emphasis in original] (at [242]). It decidedly responded to this question in the negative, largely informed by concerns about unjust enrichment improperly encroaching on other established common law and equitable doctrines, thereby denuding their relevance and significance (*Esben Finance* at [247]). It would seem to me that while the Court of Appeal did not, strictly speaking, completely shut the door on the idea of unjust enrichment operating in circumstances where other causes of action were engaged (in that case, based on the unjust factor of "lack of consent"), it did seem to leave the opening so narrow as to make it extremely difficult to pass through. The Court of Appeal's approach is understandable in light of its concern that allowing the doctrine of unjust enrichment free rein for application would necessarily encroach on other established areas of law, rendering them otiose and hollowing them of any real legal significance (at [251(c)(iii)]).

54 In my mind, there is much wisdom in the approach taken by the Court of Appeal in dealing with the problem-fraught issue of the complex interplay

between unjust enrichment and more conventional causes of action. The thrust of *Esben Finance* is consonant with the logic advanced by numerous academic authors who have cautioned against an overly-expansive application of unjust enrichment in view of the doctrine's relative recency and infancy. Such a conservative approach, in which unjust enrichment as a cause of action serves largely as a residual category that would be available only when no other causes of action exists, mirrors the approach taken in civil law where unjust enrichment is similarly only available where other causes of action do not exist. Without wading too much into a somewhat contentious doctrinal debate, the subsidiarity of unjust enrichment to the more conventional common law doctrines (in, for example, contract, property or tort) is rooted in the idea that the latter schema provides the necessary recognition and voice to people's choices and accords appropriate deference and respect to property rights (*Grantham & Rickett* at 294 and 297), such that where they apply, there simply is no room to afford concurrent recognition to the doctrine of unjust enrichment. As *Grantham & Rickett* eloquently pointed out at 293–294:

> The traditional basic classification of private law into contract, property and torts is the juridical expression – even if it be in need of some internal refinement – of that categorisation of interests. Unjust enrichment, while certainly a player, does not hold a position at the front of the stage, where contract, property and torts are the stars. Rather, unjust enrichment has a smaller – although important – cameo part to play, but *only when the stars themselves fall silent.*
>
> [emphasis added]

55 For completeness, I note that there have been some who have criticised the prevailing view that unjust enrichment should only play a subsidiary role, retorting, among other things, that such an approach erroneously assumes unjust enrichment to be a relatively new concept (a proposition that finds judicial expression as well in *Esben Finance* at [83]). These commentators contend such

an approach assumes the genesis of the doctrine of unjust enrichment to be the celebrated decision of *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*"). While these commentators concede that *Lipkin Gorman* was the first known case to give the cause of action in question an identifier in the form of a name (*ie*, "unjust enrichment"), it may not have been the first case to apply the concepts underlying unjust enrichment, which such critics assert have long pre-dated *Lipkin Gorman*. Put another way, the critics suggest that cases like *Esben Finance* fail to appreciate that unjust enrichment as a cause of action may have been potentially in existence for a very long period of time; it was just that no one had thought of naming it and distilling its key features before the House of Lords did so in *Lipkin Gorman*. In that sense, they argue that if there were nothing new about unjust enrichment as a doctrinal principle, there should be no reason why it should be relegated to only playing a supporting role to the more conventional causes of action. Two commentators summarise the criticism in the following manner (Rachel Leow & Timothy Liau, "A Pyrrhic Victory for Unjust Enrichment in Singapore" (2023) 86(2) MLR 518 ("*Leow & Liau*") at 531):

> Unjust enrichment scholars like Peter Birks devoted enormous effort to demonstrating that 'unjust enrichment', as a source of legal obligations to make restitution, could better explain and justify the result in apparently disparate cases [that pre-dated its formal recognition in *Lipkin Gorman*]. The aim was to show that, despite being variously described, the cases were united by a common narrative and analytical structure. The success or otherwise of that project is a separate matter.

56 It is outside the scope of this judgment to engage in an in-depth doctrinal analysis of the merits of such critique. I only briefly observe that, even by taking the arguments in *Leow & Liau* at their highest, they do not address or adequately deal with the broader caution from our local courts that "it would be dangerous to read those [pre-*Lipkin Gorman*] cases as laying down a principle that only

came to be established and recognised much later" (*Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie*") at [123]). *Alwie* hints to the reality that there is always the risk that, even with the best of motivations, in engaging in such an exercise, one can subconsciously end up rationalising outcomes in accordance with one's operating assumptions and failing to escape the curse of motivated perceptions. In that sense, while *Leow & Liau* are not wrong in their observation that some decisions that pre-date *Lipkin Gorman* may very well be explained by way of an unjust enrichment-like analysis, such an *ex post facto* rationalisation of prior strands of jurisprudence is, in my view, not entirely meaningful. Furthermore, the detractors concede (as *Leow & Liau* themselves observe at the end of the reproduced paragraph above) that the success of the attempt to rationalise the decisions that pre-date *Lipkin Gorman* is not necessarily clear, *ie*, that one can only rationalise so much of past jurisprudence to support the argument. In my mind, given those realities, it does not seem apt to accord too much weight to such critiques that take issue with the courts' stance that the doctrine of unjust enrichment is a relatively new cause of action that ought to accordingly take a backseat to more established doctrines of law in cases where the two overlap.

57 In the premises, I am of the view that there is much merit to the approach taken by the Singapore Courts hitherto and that it would be sensible to view with some wariness any attempt to utilise the law of unjust enrichment in situations where other areas of law would, or could, have afforded an adequate recourse, lest the law of unjust enrichment ends up cannibalising the application of more conventional and established common law and equitable doctrines.

Unjust enrichment is not an available cause of action on the facts

(1) The relevant findings in *Esben Finance* are not confined to only cases premised on "lack of consent"

58 Having sketched out the broad landscape of the underlying normative justifications of the relationship between unjust enrichment and other causes of action, I now turn to the facts. As I observed earlier, under orthodox unjust enrichment principles, it would not suffice for a party to simply contend that the circumstances were, in a general sense, unconscionable or unjust (*Anna Wee* at [130]). Instead, a party seeking relief must first establish a recognised unjust factor on the facts of the case. The claimants contend that one of the unjust factors in this particular case is that of "mistake" (the others being unconscionable bargain and undue influence) and that such an unjust factor infects the 2014 transfer. I note that "mistake" constitutes one of the recognised categories of unjust factors in Singapore that ostensibly could allow for the seeking of relief under the doctrine of unjust enrichment (*Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 ("*Singapore Swimming Club*") at [93]). I will proceed on the basis that "mistake" suffices, in principle, to serve as a recognised unjust factor. In any event, though it is not strictly necessary for me to consider it in any great detail, I see considerable force in the category of "unconscionable bargain" being a recognised unjust factor in principle ("undue influence" similarly already appears to be a recognised unjust factor, see *Singapore Swimming Club* at [93]), should the issue ever arise in the domestic context (Tang Hang Wu, "The role of the law of unjust enrichment in Singapore" (2021) 9(1) Chin J Comp Law 1 at 13).

59 That, however, is not the end of the analysis. As *Esben Finance* highlighted (at [241] and [251(c)(iii)]), even if a recognised unjust factor can be identified, the court must still engage in a secondary analysis of whether other

causes of action exist such that unjust enrichment should then be afforded little to no scope for application. On this point, the claimants made significant hay about the fact that, strictly speaking, *Esben Finance* was only dealing with the unjust factor of "lack of consent". In that sense, the claimants contend that there is no basis to assume that the observations in *Esben Finance* about the interplay between causes of action and the interstitial nature of unjust enrichment should necessarily apply to a *different* unjust factor (in this case, to the unjust factor of mistake).[50]

60 With respect, I am unable to agree. As the AR noted, there is no reason, as a matter of logic, why the observations in *Esben Finance vis-à-vis* lack of consent would not apply in a case, like the present, involving mistake as the unjust factor. Any concern about the possibility of unjust enrichment encroaching into the space of more established doctrines, such as contract or tort, must surely apply with equal force to the unjust factor of "mistake" as it does to "lack of consent". Indeed, I would go further to suggest that the *identity* of the unjust factor would, in such a discussion, appear to be of peripheral significance, since the concern about unduly encroaching on more established doctrines would apply independent of the precise unjust factor that is applicable. I had, in the course of the hearing before me, asked counsel for the claimants, Mr Gerard Quek, for why the logic in *Esben Finance* should not apply *mutatis mutandis* for "mistake"; *ie*, how "mistake" is different analytically from "lack of consent" such that a different approach should follow. He was unable to come up with any reasoning specific to either unjust factor, whether to suggest that *Esben Finance*'s conclusions, in principle, should be restricted narrowly to the doctrine of lack of consent, or to suggest that mistake represents a *sui generis*

[50] Minute Sheet at pp 4 to 5.

category warranting differentiated treatment. Instead, his primary contention was that *Esben Finance*, on its face, did not discuss the matter of "mistake".[51] This, however, as I have explained, does not bring the argument very far at all.

61 For the foregoing reasons, the fact that the ostensible unjust factor in the present case is mistake does not, in my view, remotely detract from the persuasive force of the concerns highlighted by the Court of Appeal in *Esben Finance* that unjust enrichment simply has no scope for operation where there are other possible causes of action at play.

(2) A claim in unjust enrichment would not be available where there are alternative existing causes of action on the same facts, even if the other causes of action are time-barred

62 When the claimants first filed this suit in August 2023, it was commenced on various grounds including *non est factum*, undue influence and other grounds which need not be set out for present purposes. Even as the claimants belatedly insert pleadings in relation to unjust enrichment, the factual substratum of the allegations underlying such cause of action is *exactly coincident* with the other causes of action canvassed in the original statement of claim. No further particulars were added or pleaded (see above at [22]–[23]). Put another way, by the claimants' own reckoning, the exact same facts gave rise to a multitude of conventional causes of action *in addition* to unjust enrichment. As the claimants quite rightly accepted, the desire to seek recourse to the law of unjust enrichment was to overcome the fact that otherwise perfectly legitimate causes of action were rendered toothless as a result of the belated awareness of an applicable time bar (see above at [20]).

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[51] Minute Sheet at pp 4 to 5.

63 Given these underlying realities, and to use the words of *Grantham & Rickett* (as reproduced at [54] above), why should unjust enrichment be allowed to play a role, cameo or otherwise, when the stars are shining ever so bright? The answer to that question, in my view, cannot be that those very same stars have now become much more dim in the night sky, such that the sky must then be illuminated with unjust enrichment by way of replacement. In my mind, the logic for why a claim in unjust enrichment would typically not be available in circumstances where an alternative cause of action exists (*Esben Finance* at [251]) would apply with similar force even where the other causes of action are time-barred such that a claimant could, in substance, be deprived of any effective remedy. Indeed, the outcome in *Esben Finance* is itself reflective of this, in so far as the Court recognised that its unwillingness to allow for the use of unjust enrichment as an available cause of action in that case would, for all practical purposes, effectively deprive the appellants of any relief (at [253]).

64 I would pause here to note that I came to this conclusion with some trepidation in so far as I acknowledge that such an outcome is not completely satisfactory, and not without its own problems. To understand why, I need only highlight following hypothetical scenario that follows as a result of the logic above: imagine a case where one party ("A") has a cause of action in unjust enrichment *and* another in tort or equity or contract, while another party ("B") only has a cause of action in unjust enrichment. Assuming both A and B brought their claims after a decade (*ie*, long after the applicable limitation period for any tortious, equitable or contractual claims has passed), A would be unable to bring his claim, while B may still proceed with his claim in unjust enrichment. Notwithstanding the reasoning advanced at [54]–[57] above, this does appear to be intuitively unfair, since A, who had more causes of action to begin with, including those that completely overlap with B's, is now unable to pursue his

claim in spite of this fact. Nonetheless, in my view, the converse finding, that a claim in unjust enrichment would come alive when other causes of action are time-barred, would lead to an equally, if not more, perverse outcome. If it is accepted that the doctrine of unjust enrichment may be tasked to remedy a time-barred claim, this would lead to an unprincipled outcome where no such claim is ever truly time-barred. A substantially delayed claim that is otherwise time-barred may be artificially propped up indefinitely by way of the crutches of unjust enrichment and by way of engaging in an artificial "cause of action" selection exercise. Applying this alternative finding to the same hypothetical scenario above, *both* A and B's claims will never be truly time-barred even if they were brought after substantial delay. This outcome perversely promotes delayed justice and indeed, denudes the entire concept of limitation periods.

65 In some ways, the oddity of the outcomes set out in the preceding paragraph is nothing more than a function of the seemingly unintended absence of a statutory time bar for unjust enrichment claims. As acknowledged by the Court of Appeal in *Esben Finance*, the position that claims in unjust enrichment fell outside the ambit of the Limitation Act was "an unhappy one" (at [85]) as there was indeed "some injustice" that occasioned from the lack of a prescribed limitation period for certain claims (at [123]). Nonetheless, in the interests of certainty and the need for common law claims to be an effective vindication of legal rights, *Esben Finance* opined that Parliament represented the most appropriate forum to address the prescriptive questions such as the specific length of the limitation period for certain types of claims, including that of unjust enrichment (at [123]). Until such a clarion call for legislative intervention is answered, the less perverse outcome is, as I had found earlier (see above at [63]), that a claim in unjust enrichment should typically *not* be available in

circumstances where alternative causes of action exist, even where such other causes of action are time-barred.

66 For completeness, I should highlight that I am mindful of the Court of Appeal's language in *Esben Finance* (at [241]) that "a claim in unjust enrichment would *not* be available where there is an ***existing*** alternative cause of action on the same facts" [emphasis in original in italics; emphasis added in bold italics]. This raises the spectre of whether a cause of action that is the subject of an applicable limitation period could be said to be "existing". In my view, even when the other causes of action in relation to the 2014 transfer claims are time-barred, this *did not* render such causes of action non-existent. Albeit in the context of debt, the Court of Appeal found that the statutory scheme of the Limitation Act did not render a time-barred debt non-existent. This was because limitation only bars the remedy, and not the right (*Chuan & Company Pte Ltd v Ong Soon Huat* [2003] 2 SLR(R) 205 at [35]–[36], applied in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [125]). In my mind, the same principle applies to the present context. The fact that the other 2014 transfer claims may be time-barred under the Limitation Act does not render these claims non-existent. In that sense, from a theoretical perspective, there *does exist* "an existing alternative cause of action on the same facts" (*Esben Finance* at [241]), and the claim in unjust enrichment would thus not be available on the present facts.

67 There is one further observation that ought to be made about *Esben Finance*. Strictly speaking, *Esben Finance* offers a small sliver of an escape valve from the proposition that unjust enrichment should generally not be sought recourse to when there are other more established causes of action on the facts. It does so by highlighting that, in theory, there may be circumstances in which unjust enrichment could conceivably apply in the interests of justice and

fairness even where other causes of action may be disclosed (*Esben Finance* at [247]):

> 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.***
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> [emphasis in original in italics; emphasis added in bold italics]

68 However, even by taking the claimants' case at its absolute highest, there is nothing to suggest that there are any exceptional circumstances on the present facts that warrant fashioning such an exception. Indeed, the claimants have not been able to articulate any reason why this case should serve as an exception.[52] I note in particular that even on the claimant's case, at least the 2nd claimant was aware that it had plausible causes of actions in relation to the 2014 transfer from the outset but simply chose not to do anything about it (see above at [9]). Without putting too fine a point on it, allowing unjust enrichment to be utilised as a cause of action in a case like the present to get around the otherwise applicable limitation periods would be, in essence, to justify a conscious decision, or an election, to delay commencing proceedings.

69 For the above reasons, I am of the view that unjust enrichment ought not be allowed as a cause of action on the present facts. I should highlight, for good order, that in arriving at that conclusion, I have not given significant weight to

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[52] Minute Sheet at p 5.

the fact that the other 2014 transfer claims would otherwise be time-barred, save for the oddity or perversity of the outcome otherwise that I have alluded to (see above at [64]–[65]). I took that approach because, in my view, the tail cannot wag the dog: the absence of a limitation period for the claim in unjust enrichment cannot form the basis of denying a cause of action or a proprietary right that should be applicable but for a time bar. Nonetheless, I would add that such a conclusion cuts both ways in so far as the mere existence of a limitation period should similarly not form the basis for animating a cause of action where it is otherwise an inapplicable cause of action.

Does unjust enrichment afford a proprietary remedy

70 The findings above suffice to dispose of the appeal. Nonetheless, for completeness, I will also discuss the issue of whether proprietary remedies are afforded under the law of unjust enrichment, given: (a) the significance that the parties placed on this matter (see above at [27] and [29]); and (b) that the claimants' primary case remain that they should be allowed to seek proprietary remedies even if, as a result of the Appellate Division's views in *Mustaq Ahmad*, it would be, strictly speaking, unnecessary for them to do so in order to pursue a claim in unjust enrichment (see above at [46]).

The law of unjust enrichment does not, and should not, recognise proprietary remedies

71 To recapitulate, the AR took the view that *Ho Dat Khoon* was binding on him. This court had, in *Ho Dat Khoon*, concluded that the argument that proprietary remedies were available for a claim in unjust enrichment was a "non-starter" (at [74]).

72 As the claimants rightly point out, *Ho Dat Khoon* is not binding on me as it is a decision of a court of co-ordinate jurisdiction. Nonetheless, I see no reason to depart from the reasoning that had been adopted in that case. Indeed, much like Abdullah J in that case, I am of the view that unjust enrichment can only be pursued as an *in personam* claim and not an *in rem* claim. As *Ho Dat Khoon* had noted, the cleavage between a personal claim and a proprietary one under the rubric of unjust enrichment is one that has been endorsed time and time again by the courts in Singapore, even if this issue has admittedly never been addressed in stark and explicit terms (*Ho Dat Khoon* at [70]–[71], citing *Alwie* at [119] and *Esben Finance* at [251]). I pause here briefly to note that the grounds of decision of the Appellate Division of the High Court dismissing the appeal against Abdullah J's decision in *Ho Dat Khoon* was issued a few days before this judgment (*Chan Wai Leen (in her personal capacity and as the administratrix of the estate of Wong Ching Fong, deceased) and another v Ho Dat Khoon* [2024] SGHC(A) 24). However, as the decision of the Appellate Division did not discuss, or otherwise touch on, Abdullah J's findings on the matter of the (non) existence of proprietary remedies in unjust enrichment, it is not germane to the discussion at hand and will therefore not feature in the rest of this judgment.

73 In my view, there are extremely cogent reasons for the position adopted in *Ho Dat Khoon*. For one, extending proprietary status to unjust enrichment claims could potentially allow for claims to be made *vis-à-vis bona fide* third parties who afforded good consideration for the items in question in subsequent transfers and who otherwise have nothing to do with the underlying claim. It should be clear that this has especial (though I should add, not exclusive) implications in cases involving bankruptcy and insolvency (*Ho Dat Khoon* at [73]). Indeed, as one noted commentator observes (William Swadling, "A New

Role for Resulting Trusts" (1996) 16(1) Legal Studies 110 ("*Swadling*") at 127), the elevation of a cause of action that is generally understood to only allow for *in personam* remedies to one entailing *in rem* remedies would have a profound impact on a whole suite of matters, including whether a change in position defence is available, whether a duty to account for profitable investments exists, and, in the UK context at least, whether limitation periods apply (the same may not be applicable in the same way in the Singapore context given the findings in *Esben Finance*, see above at [42]).

74 Additionally, the consequence of the recognition of proprietary remedies for unjust enrichment claims would be that it is *almost always* (if not always) in the interest of a party to assert a claim for proprietary remedies rather than *in personam* ones. That dynamic would expand the principle of unjust enrichment in a manner that turns established norms on its head (*Swadling* at 128). This is problematic as it has the potential to undercut the point made in *Esben Finance* that unjust enrichment is an interstitial cause of action, and not one that should be the go-to cause of action for all matters. In my view, in the absence of a workable system that can meaningfully circumscribe the scope of proprietary remedies for unjust enrichment to certain enumerated categories, there is much wisdom in maintaining unjust enrichment claims as being only *in personam* in nature. In this connection, as commentators point out, if the extension of proprietary remedies to unjust enrichment is not restrained, it has the potential to "destroy much of the substance of the present law since it [leaves] no room for the fine-tuning which currently takes place" (*Swadling* at 131). Put another way, unless we can, in a principled fashion, delineate the specific circumstances in which proprietary relief may be considered for claims in unjust enrichment, the conferment of proprietary status on such a cause of action in any given case threatens to extend the use of proprietary remedies for

unjust enrichment so undeniably wide that it would be difficult to corral exceptions that can meaningfully circumscribe its application.

75 It is often said that the animating source for the entire debate of the prospect of proprietary remedies for unjust enrichment is Prof Peter Birks' seminal thesis in his article, "Restitution and Resulting Trusts" in *Equity and Contemporary Legal Developments* (S Goldstein ed) (Hebrew University, 1992) at pp 335–373. Nonetheless, Prof Birks explicitly concedes in his article that his hypothesis that one can justify the use of such proprietary remedies constitutes "an experimental position" (at p 373). As Lord Browne-Wilkinson observed in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, Prof Birks' thesis had been written "to test the temperature of the water", to which, in the UK context, "the temperature of the water must be regarded as decidedly cold" (at 689). Unfortunately for the claimants, while the climate in Singapore is typically less temperate than the UK, the temperature of the water, in so far as it relates to Prof Birks' thesis, ought to be, in my view, equally chilly for the reasons I have set out above.

76 In sum, the implications of concluding that proprietary remedies may be recognised for unjust enrichment appear to be profound. The judicial decisions and commentaries on proprietary remedies in the realm of unjust enrichment, including many of the commentaries and decisions set out earlier in this judgment, are legion and it is not the aim of this judgment to add to the cacophony of well-reasoned and articulate voices in that debate. The manifold discussions of the complex intersection between proprietary remedies and unjust enrichment have endured for decades precisely due to the elusiveness of a golden thread tying all of these (at times, diametrically opposed) philosophical strands in a coherent or even plausible manner. As Vinodh Coomaraswamy J noted, "proprietary restitution is an extremely difficult and unsettled area of the

law, both for the courts and for academics and both in terms of what it means and what it requires" (*Zaiton bte Adom v Nafsiah bte Wagiman and another* [2023] 3 SLR 533 at [210]). In my mind, there is no simple way to untie this Gordian knot by way of an overarching conceptual or jurisprudential framework. Nonetheless, the absence of a unifying theory or strong doctrinal basis is itself perhaps reflective of the need to exercise serious caution before recognising proprietary remedies for unjust enrichment claims. As one other author rightly notes, if we start recognising novel or new responses in law without being clear-minded of the motivations for doing so (albeit in the distinct but related context of the non-viability of attempting to fashion an unjust enrichment claim in equity), "clarity is lost and an agreed framework of analysis [becomes] hard to find" (Andrew Burrows, "Swaps and the Friction between the Common Law and Equity" (1995) 3 RLR 15 at 29). To my knowledge, no court in Singapore has been able to fathom any cogent reason for recognising proprietary remedies for a cause of action in unjust enrichment. For the reasons above, this court is the latest to join that long list.

77 Be that as it may, it would not be necessary, strictly speaking, for me to take a determinative view on this. Instead, I only observe that even if I were entirely wrong in my reasoning above, and it is in law *conceptually* possible for proprietary remedies to follow from a claim of unjust enrichment, the claimants' case for seeking proprietary remedies would still not get very far. This is because, even if such a remedy can theoretically exist, it must surely only be applicable in the most exceptional of circumstances. There is nothing on these facts that are remotely exceptional. Indeed, the claimants appear to accept that their claim in unjust enrichment is ostensibly independent from the matter of whether proprietary remedies exist, and the singular reason for even attempting to invoke the spectre of proprietary relief in this case was to try and avoid the

dilemma that *Sia Chin Sun* presented, a concern that no longer has any force for the reasons discussed earlier (see above at [46]). Seen through such lenses, even if one takes the position that proprietary remedies can theoretically arise in a claim for unjust enrichment in exceptional circumstances, whatever those circumstances might be, the present case would not be an appropriate one for considering the use of such remedies.

78 In the circumstances, I agree with Abdullah J in his remarks in *Ho Dat Khoon* (at [74]) that any attempt to introduce proprietary remedies under the rubric of unjust enrichment, at least on the present facts, is a "non-starter".

79 It would follow from the reasoning hitherto that I affirm the AR's decision to strike out the claim in unjust enrichment. There is no cause of action in unjust enrichment available to the claimants, and, in any event, no proprietary remedies are available in this case under the law of unjust enrichment in Singapore.

The issue at hand is a purely legal one that may be dealt with by this court instead of the trial court

80 I add one final point to this discussion. The claimants contend that, to the extent that there is some uncertainty in the areas of law as I have discussed hitherto, I should not strike out the claim in unjust enrichment or allow the amendments to the pleadings in so far as these are matters that are best resolved, and fully ventilated, at trial.[53] In support of this proposition, the claimants cite the observations of George Wei J in *AYW v AYX* [2016] 1 SLR 1183 ("*AYW*"), at [35], in which it was noted that:

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[53] Minute Sheet at pp 2 to 4.

> … [N]ovel questions of law *should not be resolved* at the striking out stage and should generally be litigated in full at trial. This is so even if the novel questions are pure questions of law which a court at the interlocutory stages of the trial may be in as good a position to resolve as a trial court who has heard all the evidence.
>
> [emphasis in original]

On the back of such observations, the claimants contend that this court should be chary of opining on these issues of law, and should defer to the trial court to deal with the matter instead.

81 I disagree. With respect, such a reference to the observations above in *AYW* is not fully reflective of Wei J's observations and findings in *AYW*. Indeed, after making the observations I reproduced in the preceding paragraph, Wei J nonetheless proceeded to strike out the pleadings in that particular case. As Wei J observed, "the assertion of novel legal issues does not *automatically* preclude the striking out of an action", particularly if "the facts pleaded simply do not justify the legal remedy prayed for *on any reasonable resolution* of the novel questions of law said to have been raised by the pleadings" [emphasis in original] (*AYW* at [40]). As Wei J quite eloquently puts it, "the legal interest in pushing the frontiers of the law [in such a case] is not reason enough to allow the action to proceed to trial" (*AYW* at [40]).

82 Similarly, while the Court of Appeal has pointed out in *The "Bunga Melati 5"* [2012] 4 SLR 546 (at [76]) that "knotty points of law requiring serious argument" should generally not be decided by a court exercising summary jurisdiction, this was in the context of a situation where it was entirely possible that, depending on how certain factual uncertainties were resolved by the end of trial, those legal points could be resolved in the favour of the party seeking to have the matter proceed to trial. That is, with respect, simply not the case

here. While the issues of law raised here are admittedly conceptually knotty, the merits of the legal arguments in this case do not turn on what a trial court may make of the facts. It is in this context that I find that there was precious little that a trial would likely add to the discussion in this case. Discrete issues of law can be, and often are, as well-interrogated in a hearing such as the one before me, as they might be in a full-blown trial, since such debates are not anchored on any factual finding *per se*.

83 Indeed, when I asked the claimants how, if at all, a trial judge would be better placed to deal with the matter than at present, given that I was willing to consider the legal arguments on the basis of the claimants' case being taken at its absolute highest and to assume all facts in their favour, the claimants demurred and sought refuge in the proposition that the trial judge should be the one to deal with the issue.[54] There is no suggestion that the trial judge would, as a result of having the trial unfold, be privy to any further factual information that would assist to inform his views in the present case. Indeed, it would seem the claimants accept that no such further information would exist; as counsel for the claimants conceded before the AR, the issues discussed here relate to "a point of law … [and] that *it does not turn on [the] facts*" [emphasis added].[55]

84 Furthermore, even though the legal issues before me are admittedly not the simplest, I struggle to see how a trial court could reasonably come to the conclusion that the compelling logic of *Esben Finance* should be ignored on the present facts, or how or why proprietary remedies could follow (both in the context of unjust enrichment generally, but more significantly, in the present case). While there are some academic debates that point to a different

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[54] Minute Sheet at pp 3 to 4.

[55] 29 May Transcript at p 8 lines 1 to 6.

conclusion, these largely pre-date *Esben Finance* and *Ho Dat Khoon*. The relevant local authorities (to the extent they consider the matter) all appear to speak with one clear, distinct and unambiguous voice suggestive of there being no reasonable cause of action in unjust enrichment where alternative causes of action exist, and doubly so when seeking proprietary remedies in unjust enrichment (*Esben Finance* at [251] and *Ho Dat Khoon* at [74]). In the circumstances, I have little reason to assume that a trial court in this case would have been provided a sufficiently different complexion to the understanding of the law of unjust enrichment such that it would be prudent to hold the resolution of these issues in abeyance in order to defer to the trial court on these issues.

85 In my mind, when the legal hurdles appear insurmountable or contrary to the logic of past decisions, it does not make sense to allow the claims to proceed on the tenuous premise that it is always theoretically possible (though highly implausible) that "another High Court Judge can come to a different conclusion" to the issues at hand.[56] To take a simple example, it cannot be that all pleadings involving proprietary remedies under unjust enrichment must go to trial on the superficial logic that the law in that area is not fully settled. A certain amount of judgment would invariably be needed for assessing whether the legal arguments possess a reasonable prospect for succeeding if the matter proceeds to trial. Otherwise, as I informed counsel for the claimants during the course of the proceedings, taking the argument that "a different Judge may decide differently" to its logical conclusion, no legal issues can be resolved at interlocutory stage since many areas of law are never truly settled.

86 For the reasons set out above, I find that there is no available cause of action in unjust enrichment on the facts, and no basis for proprietary remedies

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[56] Minute Sheet at pp 3 to 4.

for such claims. Consequently, the claimants' alternative application to amend their proprietary claim in unjust enrichment to one premised on "lack of consent" or an *in personam* one also falls away.

The other 2014 transfer claims

87 Having dealt with the matter of how and whether unjust enrichment can be pleaded in this case and whether proprietary remedies can be had under unjust enrichment, I now turn to the claimants' alternative argument that, in any event, the other 2014 transfer claims are not time-barred. To recapitulate, the claimants' argument is two-fold:

(a) The other 2014 transfer claims are an action by a beneficiary to recover trust property in the possession of the trustee within the meaning under s 22(1)(*b*) of the Limitation Act such that there is no time bar; [57] and

(b) The claim under *non est factum* is not time-barred because "the action is not founded on contract as such, but rather the non-existence of a contract".[58]

Whether the other claims fall under s 22(1)(b) of the Limitation Act

88 According to the claimants, the other 2014 transfer claims involved a "Class 1 constructive trust" which fell within the ambit of s 22 of the Limitation Act, and the exception in s 22(1)(*b*) applied such that the claims were not time-barred. Section 22 of the Limitation Act reads as follows:

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57 27 June CWS at [32], [33] and [38].

58 27 June CWS at [39].

> **Limitation of actions in respect of trust property**
>
> **22**.—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.
>
> (3) The right of action referred to in subsection (2) shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

89 With respect to the scope of s 22 of the Limitation Act, the Court of Appeal in *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Panweld*") held that only "Class 1 constructive trusts", and not "Class 2 constructive trusts", fell within the ambit of this provision (at [51]). The Court of Appeal distinguished the two types of constructive trusts as follows (*Panweld* at [46]):

> … If a person holds property in the position of a trustee … and deals with that property in breach of that trust, he will be a Class 1 constructive trustee; whereas a wrongdoer who fraudulently acquires property over which he had never previously been impressed with any trust obligations, may, by

> virtue of his fraudulent conduct, be held liable in equity to account as if he were a constructive trustee. But the latter is not a case of someone who had ever in reality been a trustee of that property; and it is only by virtue of equity's reach that such a person is regarded as a Class 2 constructive trustee.

90 In other words, a Class 1 constructive trust arises when a party voluntarily assumes the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust, whereas a Class 2 constructive trust arises as a direct consequence of an unlawful transaction which is impeached by the plaintiff (*Phoa Eugene (personal representative of the estate of Evelyn Phoa (alias Lauw Evelyn Siew Chiang), deceased and personal representative of the estate of William Phoa, deceased) v Oey Liang Ho (alias Henry Kasenda) (sole executor of the estate of Wirio Kasenda (alias Oey Giok Tjeng), deceased) and others* [2024] 4 SLR 1493 ("*Eugene Phoa*") at [84], applying *Panweld* at [46]).

91 A Class 1 constructive trust falls within the ambit of s 22(2) of the Limitation Act such that a time bar of six years applies to the action for breach of trust or for the recovery of trust property, subject to the two exceptions found in s 22(1). In contrast, if the present case involved a Class 2 constructive trust, the claims would be time-barred by virtue of s 6(7) of the Limitation Act instead (*Panweld* at [51] and [69], and also *Eugene Phoa* at [85]). For ease of reference, s 6(7) of the Limitation Act is as follows:

> **Limitation of actions of contract and tort and certain other actions**
>
> **6.**—…
>
> …
>
> (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.

92 The effect of s 6(7) of the Limitation Act is that the entire s 6 applies to all claims for equitable relief, whether these be founded upon contract, tort, a trust or other grounds in equity, and a Class 2 constructive trust falls within this ambit. Consequently, the six-year time bar under s 6 of the Limitation Act will also apply to Class 2 constructive trusts (*Panweld* at [51] and [69], and also *Eugene Phoa* at [85]).

93 The claimants contend that the present case involved a Class 1 constructive trusteeship. According to the claimants, the 1st defendant, as a director of EATCO, owed fiduciary duties to the deceased who was a shareholder. Consequently, the 1st defendant was a trustee of the EATCO shares when the 2014 transfer was effected, and the 1st defendant dealt with those shares in breach of trust when he failed to return them to the deceased when the deceased asked for the shares back.[59]

94 I disagree with the claimants' contentions. Even by taking their case at its highest and assuming every fact pleaded is proved, it is clear that, at best, the 1st defendant was a *Class 2* constructive trustee. Although in principle, it is possible for the interests of the shareholders of the company to, in some cases, be equated with the interest of the company (*Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [70] and [106]), this, of course, does not mean that directors owed a fiduciary duty to shareholders in all circumstances. In my mind, on the present facts, there is no factual or legal basis to the argument that the 1st defendant held the deceased's shares in the position of a trustee *prior* to the share transfer. The 1st defendant's liability, if any, arose squarely as a result of the 2014 transfer, and not by virtue of any underlying relationship.

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[59] 27 June CWS at [33].

95 In fact, the issue of the 1st defendant's directorship is a complete red herring on this specific matter. The 2014 transfer had, strictly speaking, nothing to do with the 1st defendant's directorship. Based on the claimants' own case, the 1st defendant would have been equally liable for the shares even if he was not a director of EATCO at the time of the 2014 transfer. As such, the material issue is not the 1st defendant's capacity at the time of the transfer, but what the 1st defendant purportedly said or represented to the deceased at the time of the transfer. Put another way, the constructive trust, if any can be proved, would only arise in this case by virtue of the purported circumstances of the 2014 transfer, and it is that which gives rise to the breach of trust.

96 Even in making their submissions before me, the claimants brought the case of *Eugene Phoa* to my attention but elected not to make any submissions on it. The claimants appeared to accept that that decision contradicted their reasoning but counsel nevertheless felt himself to be duty-bound to highlight what he assessed to be a relevant (adverse) decision for my consideration.[60] As outlined earlier (see above at [89]–[90]), in *Eugene Phoa*, Goh Yihan J applied *Panweld* and I agree with the reasoning underlying Goh J's decision in relation to how one may understand Class 1 and Class 2 constructive trustees.

97 As such, I find that the 1st defendant is, even on the claimants' own case, a Class 2 constructive trustee. The other 2014 transfer claims are thus subject to s 6(7) of the Limitation Act and the six-year time bar prescribed by s 6.

98 In these circumstances, it is undisputed that the cause of action would have been time-barred even before the deceased had passed. I would only add that, as the AR also noted, the death of the deceased does not vary this analysis

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60 Minute Sheet at p 13.

since the existence of such ability to recover such trust property assumes that the cause of action existed immediately before his death (see, in this connection, s 10 of the Civil Law Act). If such a claim had already been extinguished by the time the deceased passed, then there is no basis to take action to protect or preserve the estate's asset since such a claim of that estate would have been long extinguished by then. In that sense, s 22(1)(*b*) of the Limitation Act cannot be a way to artificially "restart" the clock for limitation periods and to re-animate otherwise extinguished claims. Limitation periods do not, for obvious reasons, operate in an ambulatory fashion such that causes of action can be extinguished and be revived with time.

Whether the claim on the basis of non est factum fell within the ambit of s 6 of the Limitation Act

99 I finally turn to the claimant's contention that the claim that the 2014 transfer is void on the basis of *non est factum* is one not founded on a contract such that s 6 of the Limitation Act does not apply. On its face, there is a superficial attraction to the argument as was advanced by the claimants. After all, if the claim is successful and renders the contract void *ab initio*, the claim "is not founded on contract as such, but rather on the non-existence of a contract".[61] According to the claimants, it thus follows that the limitation period under s 6 does not apply.

100 On closer analysis however, the veneer of the principle quickly unravels: if such a claim is not a cause of action founded on *contract*, then what precisely is it? At the hearing before me, when invited to answer such question, the claimants were unable to actually proffer an alternative characterisation of the

[61] 27 June CWS at [39].

claim.[62] The intuitive (though perhaps, not all that well-considered) response might be that the cause of action is that of "restitution". However, that is no answer at all, since the word "restitution", as used in the present context, is nothing more than a "response to an event" (*Alwie* at [126]). Put differently, restitution is the *remedy* and cannot simultaneously be the *event*. The question then remains: what then is the "event" or the cause of action that informs the remedy of restitution? In this regard, it is conventionally understood that restitutionary remedies only arise one of two ways: (a) in unjust enrichment; and (b) as restitution for wrongs (Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at [01.001] and [09.001]–[09.005]).

101 Based on that analytical framework, fatally for the claimants, there is no answer that would appear to assist the claimants. Indeed, in my judgment, it is clear why the claimants cannot characterise any claim outside of contract. It is because the most conventional (and obvious) answer would be, even assuming no cause of action in contract existed, that the cause of action would conceivably be tortious. This is because what is being demanded, at bottom, is restitution for wrongs since it is the claimants own case for *non est factum* that the 2014 transfer was the direct result of "wrongful conduct" on the part of one of the defendants.[63] As observed in *Esben Finance* at [73], the "restitution for wrongs relates *only* to the remedial response to a civil wrong, and that the claim is therefore founded on the civil wrong *itself*" [emphasis in original]. On this front, it may be that the wrongs that have been alleged can take various forms such as the tort of deceit or (perhaps somewhat less plausibly) that of conversion. However, neither of these get the claimants very far as any permutation of these

62 Minute Sheet at p 13.

63 C2 Affidavit at [30].

claims would be time-barred (being in essence, tort claims) by virtue of s 6(1) of the Limitation Act. Indeed, quite presciently, *Leow & Liau* highlighted that such an outcome in the factual matrix that presents itself here appears to be inevitable if one accepts the logic of *Esben Finance*, observing as follows (at 532–533):

> A claimant who is induced to pay a defendant by his fraudulent misrepresentation has at least two possible claims, one in unjust enrichment for mistake and another in the tort of deceit. If subsidiarity entails rejecting concurrence of different causes of action, the law of unjust enrichment in Singapore is set to shrink [as such claim in unjust enrichment can no longer be pursued].

102 In the same vein, if the contention is that the cause of action is neither in contract nor tort, but instead the facts gives rise to some other equitable relief upon any trust or other ground in equity, this itself would similarly be time-barred under s 6(7) of the Limitation Act.

103 As the Court of Appeal in *Esben Finance* noted (at [75]), claims which were once characterised as *quasi*-contractual are now primarily grounded in unjust enrichment. Consequently, even if the "event" that informs the remedy of restitution here can *concurrently* be unjust enrichment, that brings us back to square one; namely, for the reasons discussed *in extenso* earlier in this judgment, unjust enrichment would have no scope for application where an alternative course of action exists.

104 All that said, it is not necessary for me to come to a conclusive determination on the matter of the characterisation of the claim. This is particularly the case given that the claimants themselves realise that there is no way out of the conundrum (see above at [100]) and elected not to even suggest any such characterisation. The simple point is that, even taking the claimants'

case at its highest, and assuming that the claim on the basis of *non est factum* is not a contractual one, there are *other self-evident* ways to characterise the cause of action under the rubric of the traditional categories of tort or equity that would once again lead us to the very limitation issues that they are seeking assiduously to avoid. That these traditional causes of action continue to apply would also concurrently mean that there is again no scope for the doctrine of unjust enrichment to apply. In short, no matter which path the argument traverses and which cause of action one ultimately lands on, they lead to the same destination: that the cause of action would be legally unsustainable.

Conclusion

105 For the above reasons, I agree with the decision of the AR and dismiss the appeal in its entirety. I will deal with the issues of costs separately.

106 It leaves me finally to record my appreciation to the claimants' instructed counsel (both Mr Gerard Quek and Mr Glenn Chua, as they both argued discrete portions of the many legal aspects of the case before me) who capably fleshed out a fair number of the issues I highlighted above in some detail and placed before me the best possible arguments in support of their clients' case. While, as indicated above, I did not agree with much of what has been canvassed on their clients' behalf, my conclusions should not detract from the fact that their arguments were advanced in a careful, nuanced and thoughtful fashion, with one eye to what the law is or should be. I derived much assistance in understanding an undeniably complex area of the law from the arguments that have been canvassed at length by both of them. I also commend them for the candour displayed in highlighting an adverse decision (see above at [96]) for my consideration. Such a desire to be candid with the court, while nonetheless advancing the best possible arguments available on behalf of their

clients, speaks well of their fidelity to discharging their role as officers of the court.

Mohamed Faizal
Judicial Commissioner

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