19. RESTITUTION

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Introduction

19.1 The year 2002 has seen a small but significant number of cases related to the law of restitution. The most significant development was undoubtedly a decision of the Court of Appeal which, noting significant developments in other Commonwealth jurisdictions, accepted mistake of law as a basis of a claim to recover mistaken payments. Following closely on the heels of this decision was an important decision of the High Court applying the law laid down by the Court of Appeal, while noting the limits to such a claim. Other important developments relate to clarifications on the operation of the change of position defence, and a nascent judicial discretion to vary the legal consequences of a transaction affected by illegality.

Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd

Mistake of law

19.2 While it has been long established that payments made under a mistake of fact could be recovered in a claim in restitution, the position with respect to payments made under a mistake of law has been much more controversial. While some early cases have allowed recovery for payments made under mistakes of law, *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448 has often been cited as authority against such recovery. Judicial and legislative developments in other countries had prompted the Singapore Academy of Law's Law Reform Committee to recommend the abolition of this common law rule (see *Paper on Reforms to the Law of Restitution on Mistakes of Law* (9 April 2001), available on LawNet's '*Free Resources and References*' at http://www.lawnet.com.sg/freeaccess/lrcr/LRC_Mistake_Report_(Full).pdf). The Court of Appeal has, however, pre-empted legislative initiative in this matter, in the very important decision of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1.

19.3 The decision of the High Court, reported in [2001] 4 SLR 90, has been noted in last year's review (Tan and Tang, 'Equity, Trust and Restitution' (2001) 2 SAL Ann Rev 198 at paras 12.34–12.53; Phang, 'Contract Law' (2001) 2 SAL Ann Rev 118 at paras 9.48–9.49; and Teo, 'Land Law' (2001) 2 SAL Ann Rev 317 at paras 17.35–17.42). Stated briefly, the facts were these. De Beers

had applied to the Management Corporation ('MCST') for permission to subdivide their four penthouses in the building managed by the MCST. The MCST imposed a number of requirements on De Beers, including a contribution of $200,000 to renovate the lift system (as the subdivision contemplated increased usage of the lifts) and a lump sum payment of $170,000 for increased maintenance costs (as the subdivision would create additional common property). The MCST sued De Beers for arrears for maintenance, whereupon De Beers counterclaimed for the sum of $370,000 as payment made under a mistake of law.

19.4 In the High Court, Judith Prakash J allowed De Beer's counterclaim. The court found that there was no contract between the parties. The Land Titles (Strata) Act (Cap 158, 1999 Ed) did not justify the MCST's actions; the MCST had acted *ultra vires* in making the demands of De Beers. The court held that De Beers' payments were made under a mistake as to the legality of the demands, and recognised mistake of law as a valid basis of a claim in unjust enrichment. It also held that De Beers was not precluded from recovery by any change of position defence because such a defence had not been substantiated by the evidence. There was nothing to show that the subdivision caused additional maintenance and upgrading expenses to be necessary and, moreover, the MCST had acted wrongfully in making the demands. The court rejected the defence of estoppel as no representation had been proven. It held the view that although De Beers' payments were made between 1992 and 1993, the restitutionary claim was not 'founded on contract' for the purposes of s 6 of the Limitation Act (Cap 163, 1996 Ed). The court, however, considered laches as an applicable defence but found it not to have been made out on the facts. It rejected De Beers' claim based on *colore officii* as the MCST was not a public body. The MCST appealed from this decision.

19.5 The appeal was dismissed by the Court of Appeal which, in its judgment, affirmed practically every aspect of the High Court's decision. The Court of Appeal upheld the interpretation of the relevant provisions of the Land Titles (Strata) Act. Nothing more will be said here of this issue. It follows that the MCST's demands were not authorised by the statute.

Abrogation of the mistake of law bar

19.6 The Court of Appeal in the *De Beers* case noted that, hitherto, Singapore law had assumed that money paid under a mistake of law was not recoverable. Although it was not mentioned by the court, there have been some recent judicial stirrings in Singapore since the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 abrogated the rule in English common law. Before the House of Lords delivered judgment, the Singapore High Court, in the unreported case of *Minah L Mande v*

Schneider John Edward (District Court Appeal 43/1997, unreported judgment dated 28.2.1998), had the occasion to observe that the bar against recovery for mistake of law was 'too entrenched to be abolished judicially'. Not long after, however, *Kleinwort Benson Ltd v Lincoln City Council* (*supra*) was cited to the High Court in *PP v Intra Group (Holdings) Co Inc* [1999] 1 SLR 803, but it was distinguished on the facts because the issue before the court related to property claims. In interlocutory proceedings in *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 517, the Court of Appeal assumed, without deciding the issue, that a claim to recover payment made under a mistake of law was an arguable one. In subsequent proceedings, the High Court characterised the mistake as one of fact ([2000] 4 SLR 610) so the issue did not arise, but the Court of Appeal ([2001] 3 SLR 10) affirming the High Court decision, appeared to be indifferent whether the relevant mistake was one of fact or law (compare *ibid*, [24] with [29] to [32]). But any doubt as to the status of the mistake of law bar in Singapore law has now been wholly and boldly swept aside.

19.7 In the *De Beers* case, the Court of Appeal noted that the mistake of law bar had been abrogated either judicially or by statute in Australia, Canada, England, New Zealand and South Africa. In the light of these developments, the court found to be highly persuasive the reasons given by the English Law Commission in its Consultation Paper No 120 (*Restitution of Payments Made under a Mistake of Law* (1991)) that were adopted by Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council* (*supra*, at 372):

> (a) the rule was contrary to justice, which required that money paid under a mistake of law should be repaid unless special circumstances justified its retention by the payee;
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> (b) the distinction between mistakes of fact and mistakes of law could lead to arbitrary results; and
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> (c) courts had been tempted to manipulate the fact-law distinction in order to achieve practical justice, and this had led to uncertainty in the application of the rule.

The court also noted that the tide of judicial and academic opinion was in favour of abolishing the distinction between the restitutionary consequences following mistakes of law and mistakes of fact respectively.

19.8 In accepting the arguments for the removal of the mistake of law bar, the Court of Appeal rejected the argument that its abrogation would lead to too much uncertainty because closed transactions would be reopened. Mindful of this problem, however, the court attempted to sketch out the limits of and defences to a restitutionary claim based on mistake of law.

Legislative or judicial reform

19.9 Next, the Court of Appeal considered the question whether reform of the common law rule should be left to Parliament. Three reasons were given why judicial reform was appropriate: first, the mistake of law bar was a common law rule, and its abrogation would not disturb the balance of power between the legislature and the judiciary; secondly, the common law rule did not involve any issue of social policy, so the court would not be usurping the legislative function in abrogating the rule; and thirdly, the courts were not in a position to know if and when Parliament would change the law.

19.10 The court considered but rejected the arguments put forwarded by the Singapore Academy of Law's Law Reform Committee (see para 19.2 above) that the reform should be legislative. The court noted that the Committee's principal argument was that Parliament was better able to deal with the potential problem of a flood of litigation that may follow from the abrogation of the rule: in particular, Parliament was better able to answer the question whether the abrogation of the rule should be retrospective; and the question whether limitation periods should be introduced for claims founded on a mistake of law. In respect of the first issue, the Committee had recommended that legislation should allow for retrospective abrogation of the rule, so that past transactions would also have the benefit of the change in the law. On this point, the Court of Appeal thought that judicial abrogation of the rule could achieve the same effect if the court were to rule that a payment under a mistake of law could be recovered even if it had been made under a completed transaction. On the second issue, the Committee had recommended that s 29(1) of the Limitation Act be clarified to bring mistakes of law within its ambit, and to impose an overriding 12-year limitation irrespective of when the payer acquires knowledge of his claim. The Court of Appeal considered this point a non-issue. In its view, no legislative intervention was required for two reasons. First, on the face of it, s 29 already applied to mistakes of law, since it did not differentiate between mistakes of fact and mistakes of law. Secondly, there was no need to amend the Limitation Act because it only applies where a period of limitation is prescribed by the Act, and 'there was no need to extend the scope of recovery under a mistake of law further than that under a mistake of fact' (at [24]).

19.11 While the arguments raised by the court in favour of judicial action are, on balance, convincing, the last point is somewhat puzzling. It would appear that the court was referring to relief from mistakes other than claims for the repayment of money paid under a mistake of law (or for the value of services conferred under such mistakes, to the extent that such claims are allowed within the rubric of mistake of law). That this must be so is evident from the latter part of the judgment (at [32]), where the court held that an

action in unjust enrichment was not based on either contract or tort and therefore not caught by the Limitation Act. On this view, any amendments to s 29 of the Limitation Act would only affect claims like rescission of contracts for misrepresentations or mistakes of law, to the extent that such claims are allowed by the law. It is only in this context that the quote in the last sentence of the previous paragraph appears to be comprehensible. But if this is so, then it misses the point that the Law Reform Committee was making: that claims to recover payments (or conferment of benefits) made under a mistake of law should be clearly brought within the legislative regime. Thus, while the abrogation of the mistake of law is a welcome development, the actual decision leaves a hiatus in the law of limitations, notwithstanding the purported use of laches as a gap-filler, that still needs to be addressed. More on this is discussed at paras 19.42 to 19.47 below.

Test for liability

19.12 The Court of Appeal (at [25]) approved of the test of liability laid down in the English case of *Nurdin & Peacock plc v D B Ramsden & Co Ltd* [1999] 1 All ER 941 at 963, that:

> '[I]n order to found a claim for repayment of money paid under a mistake of law, it is necessary for the payer to establish not only that the mistake was made but also that, but for the mistake, he would not have paid the money.'

The Court of Appeal found the requirements to be satisfied in the case. First, there was a mistake: De Beers was under the impression that the MCST had the statutory authority to make the demands. Secondly, De Beers would not have paid the sums but for that mistake. The court thus appeared to take the position that it is *sufficient* to show that there had been a mistake and the mistake caused the payment in the sense that payment would not have been made but for the mistake. This is consistent with Goff J's classic exposition of the law in relation to recovery of payments made under mistakes of fact in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 692, that it is enough to show that a mistake caused a payment to show that the money is *prima facie* recoverable subject to defences (see also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353). There have been alternative formulations in the literature of a mistake that is 'fundamental' or a mistake as to legal liability to pay, and some writers have questioned whether Goff J's formulation may be too wide, particularly in the context of gifts in family and social contexts. Although *De Beers* was a commercial case, its reasoning appears to be of general application. It remains to be seen in subsequent cases whether the test will need to be qualified in other contexts.

Defences

19.13 The MCST's liability having been established, the Court of Appeal went on to consider possible defences. The decision of the court in this respect is rather wide-ranging, reflecting the range of the defences raised by counsel, and no doubt also the need that it felt to lay down guidance for future cases. The conclusion of the court is helpfully summed up at [60]:

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

None of the applicable defences were found to have been made out. The importance of this decision requires that each of the defences be examined more closely.

Settlement of honest claim

19.14 The Court of Appeal held that on the facts there was neither a settlement of an honest claim nor a compromise. Unfortunately, the guidance of the court in this respect is somewhat short. The elements of the defence of settlement of honest claim were said to be (at [40]):

> '(1) the payee honestly believes that he can legitimately demand payment; and
>
> (2) the payer knows or believes that the payee's claim has no legal basis.'

The court held that the first element was satisfied, but the second was not, since De Beers had paid precisely because they believed that the MCST's claim *had* a legal basis. However, the court did not provide any explanation why the defence of settlement of honest claim was defined by these two elements. What appears to be clear is that the court treated the defence of settlement of honest claim to be distinct from the defence of compromise. This is evident in the references to the plural 'defences' even though they are discussed under the same heading, and in the crucial semi-colon distinguishing the two in the conclusion of the court (at [60], quoted above). In so far as the 'settlement of honest claim' envisages a contract of compromise, it would be caught by the latter defence.

19.15 The rationale of the first requirement appears to be based on ruling out the application of the defence being raised by payees acting in bad faith. In fact it is the honesty of the claim that lends the defence its name. The second

requirement is puzzling, especially in the context of the present case. If the payer knows or believes that the payee's claim has no legal basis, then the payer has not made a mistake of law. The curious effect is that the defence is thus self-defeating: to bring himself within the defence, the payee must deny the payer's cause of action; if it succeeds, the defence is unnecessary.

19.16 Outside the contractual context, it is suggested that the settlement of an honest claim defence only makes sense as part of a larger defence of risk assumption: the payer has assumed the risk that the transfer of wealth may be defective. Thus in *Kelly v Solari* (1841) 9 M & W 54 at 59; 152 ER 24 at 26, Parke B said:

> 'If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it …'

But if this is so, then to ask whether the payer had known or believed the legality of the payee's demands is too narrow an inquiry. The inquiry should be focused on whether the payer had acted in such a way that he has manifested an intention to pay in any event, what is commonly called a 'voluntary' payment. In the English High Court decision of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 934, where the plaintiffs were claiming back sums paid under void contracts on the basis of failure (or, more controversially, absence) of consideration, Hobhouse J held that the principle of voluntary payments could not apply unless the payer was consciously aware that the contracts *were* or *might* be void. This would be a better indicator of the relevant intention of the payer, and would not be inconsistent with a mistake of law causing the payment in the first place.

Compromise

19.17 The Court of Appeal held that, in order to rely on the defence of compromise, it must be shown that the payer was indifferent as to whether the payee's claim had a legal basis, and that the payee's state of mind was irrelevant. While it is not clear from the judgment itself what was meant by 'compromise', it was said to be taken from the House of Lords' decision in *Kleinwort Benson Ltd v Lincoln City Council* (*supra*), and the House of Lords clearly intended to mean, in this context, a contractual compromise. If so, then, while the elements of contractual formation are too obvious to require restatement, it is curious that the Court of Appeal required the payer's indifference as to the validity of the payee's claim as an element of the defence.

19.18 It was not surprising therefore to see this statement causing difficulty subsequently in the case of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (noted at paras 19.48 to 19.65 below), where Lai Kew Chai J (at [116] to [117]) noted that this statement has to be understood in the context of the case: *ie* there was no dispute to be compromised at all since both De Beers and the MCST both believed in the legality of the demands. It is not clear how this explains why the Court of Appeal searched for the payer's indifference; it may be that it would at least be a *factual* starting point (though not necessarily the only one) to locate a dispute to be the subject of a compromise.

19.19 Similarly, the relevance of the payee's state of mind seems rather summarily dismissed by the Court of Appeal. It is clear that the state of mind of the payee is generally irrelevant if the question is whether a contract of compromise has been formed. However, the state of mind of the payee may be relevant if the question is whether the compromise has been procured by duress.

Change of position

19.20 The Court of Appeal accepted the formulation of the change of position defence set out in its earlier decision in *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17 (noted by this reviewer in 'Restitution, Change of Position and Compensation' [1995] SJLS 209):

(a) the payee has changed his position;

(b) the change is *bona fide*; and

(c) it would be inequitable to require him to make restitution or to make restitution in full.

19.21 The court held that in respect of the first payment, although the MCST's position had changed in spending the money to improve the lifts, and it had acted *bona fide* in doing so, the expenditure was something that it would have incurred anyway. It was therefore not inequitable for the MCST to be required to make restitution in full. The defence failed in respect of the second payment because no evidence was adduced even to show how the money was spent.

Honest receipt

19.22 The Court of Appeal considered but rejected the defence of honest receipt to a claim for the recovery of money paid under a mistake of law. The existence of this defence has the sole support of Brennan J in *David Securities Pty Ltd v Commonwealth Bank of Australia* (*supra*), but has not been adopted

by other courts. The Court of Appeal accepted Lord Goff's criticism of this defence in *Kleinwort Benson Ltd v Lincoln City Council* (*supra*) as being too wide, precluding recovery in most cases of payments under a mistake of law where the mistake was likely to have been shared. Additionally, the preclusion of claims in cases of honest receipt by the defendant may well frustrate the purpose of statutory provisions that may have been intended by the legislature to protect the payer.

19.23 It is thus clear that honest receipt is not a defence to restitution claims based on mistake of law under Singapore law.

Estoppel by convention

19.24 The Court of Appeal rejected the MCST's plea of estoppel by convention as a defence to the restitutionary claim on the facts. However, the court went further to reject the defence as a matter of law. The defence failed on the facts for three reasons:

(a) the parties were not in a contractual relationship;

(b) it was not unconscionable for De Beers not to give effect to any common assumption held by the parties; and

(c) the estoppel could not be raised to deny one the protection afforded by a statute the terms of which cannot be circumvented by contract, and the provisions in this case fell into this category.

19.25 Stating that the scope of estoppel by convention is unclear, the court thought that it 'was not appropriate at this juncture to accept it as a defence' (at [43]). Thus, as a matter of Singapore law at present, estoppel by convention cannot be raised as a defence to a claim for the recovery of money paid under a mistake of law. This statement of the law, however, is puzzling in two respects.

19.26 First, as the scope of estoppel by convention is unclear, it is perplexing why the court confined its applicability to parties already in an existing contractual relationship. While this may be the most common context in which the estoppel occurs, there is nothing to suggest that it is so confined. In *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, the English Court of Appeal applied estoppel by convention on the footing that the parties had shared an assumption during their *pre-contractual* negotiations. That it is not so confined is evident in Dixon J's exposition of the law in *Thompson v Palmer* (1933) 49 CLR 507 at 547:

> 'Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in

> occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct ... or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.'

19.27 More recently, it can be seen from *Actionstrength Limited v International Glass Engineering IN GL EN SpA* [2003] 2 WLR 1060 that estoppel by convention is capable of operating to disallow one party from denying the *existence* of a contractual relationship with another (but on the facts the estoppel could not apply because it would have contravened the statutory requirement for the agreement to be in writing).

19.28 Secondly, if the scope of the estoppel is unclear, it is also puzzling why the defence was rejected outright as a matter of law. Even if estoppel by convention is confined to parties in a contractual relationship, it is not obvious why estoppel by convention can never apply, as it is conceivable that one contracting party may have made a mistaken overpayment to the other. There is a clear conflict of policies between the law that protects reliance on conventions and the law that allows recovery of payments made under a mistake (whether of fact or of law) that needs to be resolved. The third reason stated above why the court rejected the defence on the facts hints at why it was rejected as a matter of law. Of course, estoppel must be rejected if it is contrary to statutory intention. But as it was a matter of *statutory construction* that to allow the estoppel would be against statutory intention, the outright rejection of the defence as a matter of law appears to be too widely stated.

19.29 The Court of Appeal proceeded to consider a few other defences which were raised in argument, but which the court did not think necessary to rule upon. These were: payment under a closed transaction; payment under a settled view of the law; estoppel by representation; and passing on the burden of the payment.

Payment under a closed transaction

19.30 The Court of Appeal opined that the fact that the transaction under which the mistaken payments were made had closed did not constitute a defence. Noting that there are legitimate concerns about protecting the stability of closed transactions, the court gave three reasons why the defence should not apply under Singapore law. First, it runs against the policy behind the law that one or more of the parties had been mistaken about. Secondly, it

would be arbitrary to distinguish between closed and open transactions. Thirdly, the issue of stability of transactions can be addressed at least to some extent by the defence of payment under a settled view of law, which the court would accept as part of Singapore law.

19.31 The first argument applies only to limited cases, given that the court accepted that a causal mistake is sufficient to ground liability in restitution. X may have paid money to Y under a mistake of law that Y was under a legal obligation to pay Z; but for that mistake, X would not have paid Y. Under the causal test of liability accepted by the court, X can recover the payment from Y. But it is not obvious that denial of restitution to X would run contrary to the legal policy behind Y's obligation or lack thereof to Z. Nevertheless, where it applies, it is a powerful argument.

Payment made under a settled view of the law

19.32 The Court of Appeal noted the division of views on this issue in the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* (*supra*). The majority had taken the view that judges merely declare the law and do not change the law, that they merely correct an incorrect view of the law. The correct view of the law is therefore retrospectively imposed, so that the payer's belief at the time of the payment, which may be correct at that time, is deemed incorrect on hindsight. Hence if there was indeed a mistake of law, the plaintiff should recover. On the other hand, the minority took the view that the declaratory theory of the law is artificial, and that it should be recognised that judges do change the law. Even if the change is retrospective, it does not affect the state of mind of the payer at the time of the payment. Moreover, allowing a claim in such cases would undermine the finality of closed transactions.

19.33 The Court of Appeal preferred the minority view, and endorsed the recommendation of the Law Reform Committee of the Singapore Academy of Law that the plaintiff should not recover payments made under a settled view of the law that subsequently turned out to be wrong. The court would adopt the Committee's recommendation on the definition of 'settled law' and its change:

> '(1) "Settled law" means:
>
> (a) there is binding judicial authority on the specific point; and
>
> (b) if there is no such authority, a lawyer who was reasonably experienced in the relevant field would have advised the payer to make the payment.
>
> (2) A change in the settled law can only be brought about by judicial decision.'

19.34 While the court stated a strong case for disallowing the claim under such circumstances, curiously it is characterised as a defence. The logical corollary of the court's reasoning is that the plaintiff cannot prove a mistake at all. The difference in characterisation may have an effect on the burden of proof in litigation. In this context, the decision in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488, especially at [107] (noted at paras 19.48 to 19.65 below), which treats this issue as one going to whether there was indeed a mistake in the first place, is a welcome clarification.

Estoppel by representation

19.35 Although the judgment of the court referred to this defence as 'promissory estoppel' four times, it is clear from the context of the discussion in the judgment that it was actually referring to estoppel by representation. The court opined the view that estoppel should be rejected as a defence to a restitutionary claim because the change of position defence already exists and is a more flexible defence, while estoppel cannot operate *pro tanto*.

19.36 Three points may be noted. First, the reason for the Court of Appeal's rejection of the estoppel defence was based on the applicability of the defence of change of position. There is judicial support from other countries for the proposition that the more flexible defence of change of position should supersede estoppel: *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230; *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 825–826; *Scottish Equitable plc v Derby* [2001] 3 All ER 818. It is not clear that the change of position defence applies to all restitutionary claims. The Court of Appeal's rejection of estoppel by representation as a defence is confined to the context of payment under a mistake of law. This observation of the court does not rule out the operation of the estoppel defence where change of position is not applicable.

19.37 Secondly, the case should not be read as the rejection of the applicability in principle of promissory estoppel where the context for its application is appropriate. The substance of the court's reasoning must take precedence over the terminology used. The reason for the rejection of estoppel by representation does not apply to promissory estoppel. Promissory estoppel *can* operate *pro tanto*, as the purpose of the doctrine is to obviate the detriment in the reliance on a promise. Moreover, the objective of promissory estoppel is to enforce a promise to the extent necessary to protect detrimental reliance, while change of position serves to control the quantum of recovery of unjust enrichment. However, as long as the applicability of promissory estoppel remains confined to a promise not to enforce an existing contractual right, it is theoretically inapplicable to restitutionary claims. However, it is

possible that promissory estoppel may be developed (as has happened in Australia: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) in the future beyond the promise not to enforce contractual rights to other types of promises, in which case it may become relevant to restitutionary claims. It is thus important not to close this important route that may be necessary for the course of justice to take.

19.38 Thirdly, it is arguable that estoppel by representation serves a different function from change of position, and may be relevant in some cases even where the change of position defence is applicable (Fung and Ho, 'Change of Position and Estoppel' (2001) 117 LQR 14). The ambit of the change of position defence is not very clear, but generally it applies whenever circumstances have changed such that it would be inequitable to order the defendant to make restitution. On the other hand, the basis of estoppel lies in the injustice of allowing the representor from resiling from a representation.

Passing on the burden of the payment

19.39 When X has been enriched at Y's expense, Y can sometimes pass on the burden to third parties, for example, by charging higher prices to its customers. In such cases, it is arguable that (at least some of) the enrichment has not been at the expense of Y, because the burden of the payments has been 'passed on' to third parties. In the context of claims for recovery of mistaken payment against public bodies exercising *ultra vires* powers, such a defence has been acknowledged as valid in Canada (*Air Canada v British Columbia* [1989] 1 SCR 1161) and the European Union (*Amministrazione delle Finanze dello Stato v San Giorgio SpA* [1985] 2 CMLR 658 at 688-689; *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1981] 2 CMLR 714) but was rejected in Australia (*Mason v New South Wales* (1959) 102 CLR 108; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51). While there are indeed special considerations of constitutionalism and public policies involved in such claims, a majority of the High Court of Australia held that the reasoning in private or public law claims is the same: the law of restitution is only concerned with the enrichment of the defendant, not the loss of the plaintiff (*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335).

19.40 The Court of Appeal was content to state that the defence is not available in the context of private law claims, incorporating by reference the reasoning of Evans LJ in *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380. However, this statement by the Court of Appeal is ambiguous because there were two lines of reasoning in the judgment of Evans LJ. The first was that the defence is not available *in principle* because the law of restitution is about the reversal of unjust enrichment, while the so-called

defence of passing on is a principle of compensation. The second was that the 'passing on' of the burdens of the payments were *on the facts* too remote. Thus, Evans LJ had not unequivocally rejected the passing on defence as a matter of law. It should be noted that the Court of Appeal was merely making an observation in passing, and the issue is likely to receive greater ventilation when it actually arises for consideration.

19.41 However, the Court of Appeal tentatively accepted the validity of the defence in the context of non-private claims. Although no reasons are given, it may be inferred from the judgment of Evans LJ that public law considerations may require a different answer. What that answer is, however, does not appear clearly from his judgment. Evans LJ alluded to further difficulties relating to whether the taxpayer can be regarded as collecting tax from his customers on behalf of revenue authorities and whether any such moneys collected are held on trust by the taxpayer for his customers. In view of these complications and the conflicting conclusions of the highest courts of Canada and Australia, the acceptance of the defence by the Court of Appeal for non-private law claims has to be regarded as very tentative indeed.

Limitation

19.42 The Court of Appeal held that claims to recover payments made under mistakes of law were not based on either contract or tort, nor was it a case where equitable relief was sought, so such claims fell outside the ambit of s 29 of the Limitation Act. Such claims would instead be subject to the equitable doctrine of laches.

19.43 This conclusion is unexpected for three reasons. First, in the very decision upon which so much reliance had been placed by the Court of Appeal, *ie* the House of Lords decision in the *Kleinwort Benson Ltd v Lincoln City Council* (*supra*), one of the points that piqued the members of the House of Lords centred on the applicability of the English equivalent of the limitation provision to such claims, creating a limitation regime which practically allows mistake of law claims to run indefinitely because the time runs only from the time of reasonable discovery of the mistake. Lord Goff, in particular, gave a closely reasoned argument why the provision did apply to claims for recovery of payments made under a mistake of law (at 387–389).

19.44 Secondly, ten months previously, the Court of Appeal had held that claims for payments made under a mistake of fact, and claims for recovery of payments for total failure of consideration, were both caught by the Limitation Act. More specifically, the court applied s 29 to payments made under a mistake of fact (*Ching Mun Fong v Liu Cho Chit (No 2)* [2001] 3 SLR 10 at [27] to [32]). Indeed, on one view, the application of s 29 to the facts

was considered on the footing that the mistake was one of law. Be that as it may, in theory, these claims, like the claim for the recovery of payments made under a mistake of law, are neither based on contract or tort, nor are they claims for equitable relief. Indeed, the legal effect of the abrogation of the mistake of law bar in *De Beers* itself is to assimilate claims for recovery of payments made under mistakes of fact and mistakes of law. It is regrettable that the result of the Singapore Court of Appeal's landmark decision that assimilates the two types of mistakes for the purpose of establishing liability has the result, when read with its earlier judgment, of distinguishing the two for the purpose of limitation. Given that the limitation legislation was drafted at a time when the principle of unjust enrichment had not been recognised as an independent principle of law, much less written about, it is suggested that the more robust interpretation in the light of modern understanding of the law of obligations as taken in the court's earlier decision is to be preferred.

19.45 Thirdly, the use of laches as a defence to a claim that is not founded on an equitable right and not for equitable relief is unhistorical and sets a somewhat dangerous precedent. It is not clear to what extent laches, and indeed other equitable defences like unclean hands and conditional relief, can now apply to common law claims seeking common law remedies. This aspect of the decision is discussed fully in Chapter 12 of this volume (see also (2001) 2 SAL Ann Rev 198 at para 12.42).

19.46 Limitation issues continue to be of grave concern for this area of the law, given firstly that there is no explicit reference to the law of unjust enrichment in the statutes, and secondly that many mistakes of law are not likely to be reasonably discoverable until long after the payment; the spectre of prolonged suspension of the limitation period is a serious one. The first problem was alluded to by the English Law Commission, *Consultation Paper No 151: Limitation of Actions* (1998) at para 5.3:

> '[W]hen it comes to the bulk of restitutionary claims the Limitation Act 1980 does not explicitly apply. This means that the central choice facing the courts has been to construe the 1980 Act, albeit artificially, as applying to these claims; or to conclude that no limitation period applies to common law restitutionary claims and that any equitable restitutionary claims should be left to the doctrine of laches.'

The second problem was highlighted by the Law Reform Committee of the Singapore Academy of Law, but it was brushed aside as irrelevant precisely because of the first problem that the Committee highlighted: the Limitation Act is couched only in terms of obligations known to the drafters at the time of drafting, and that did not expressly include claims in unjust enrichment.

19.47 In the context of the choices stated succinctly by the English Law Commission quoted above, the solution adopted in Singapore, comprising a

combination of an acceptance of the first choice for some common law restitutionary claims and the second for others, and the application of laches to some common law restitutionary claims but possibly not to others, is an innovation that is likely to generate confusion.

Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)

19.48 Following on the heels of the landmark decision in *Management Corporation Strata Title No 473 v De Beers* [2002] 2 SLR 1 is a High Court decision on the scope of recovery of payments made under mistakes of law. The facts of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488, stated shortly, are these. In 1992, the Telecommunications Authority of Singapore, predecessor to the plaintiffs, the Info-communications Development Authority of Singapore ('IDA'), granted Singapore Telecommunications Ltd ('SingTel') monopoly rights to operate certain telecommunications services in Singapore. In 1993, the licence was modified by IDA to specify that it had the right to grant licences to other operators to provide certain telecommunication services if they were ancillary and incidental to the services provided by the licensees. IDA wanted to accelerate the liberalisation of the telecommunications market, and began negotiations with SingTel in January 1996 to bring forward the cessation of SingTel's monopoly over basic telecommunication services from 2007 to 2000. The parties had different interpretations of the 1993 modification, and came up with vastly different estimations on the appropriate amount of compensation that IDA should pay SingTel for the loss of monopoly rights (the IDA's estimation was between $1.4b to $2.4b, while SingTel's was $5.4b to $6.4b). In May 1996, IDA served notice on SingTel under s 28 of the Telecommunications Authority of Singapore Act (Cap 323, 1993 Ed), informing SingTel that it would pay $1.5b as compensation for ending SingTel's monopoly in March 2000. IDA also sent a letter to Singtel informing Singtel that the said sum would be 'full and final payment' for the change of conditions in the licence. In October 2000, IDA learnt that the Inland Revenue Authority of Singapore ('IRAS') had ruled that the sum awarded in compensation would not be subject to income tax. IDA then sued SingTel for the sum of $388m, on the basis that that it was an overpayment made under a mistake of law.

19.49 Lai Kew Chai J dismissed the claim. The judge found that on the evidence there was a contract of compromise between the parties, both agreeing not to re-open the matter by way of representation or appeal under the Act, and that payment was in full and final compensation for the modification of SingTel's licence. In the course of negotiations, there were only passing references to, but no concerted discussion on, the issue of tax,

and there was no evidence to indicate that the parties had agreed to anything other than the payment of a single global sum in compensation. The judge also held that there was no mistake in the payment under the statutory notice; the relevant mistake, if any, related to the formation of a pre-existing transaction pursuant to a statutory procedure. The contract of compromise was valid and could not be set aside for mistake; there was no mistake as to the tax component as the parties had agreed on a global lump sum. IDA had made a misprediction and not a mistake. Moreover, IDA had failed to pursue an obvious line of inquiry by obtaining a ruling from IRAS or by consulting tax advisors. IDA had assumed the risk as to how the tax authorities would view the taxability of the compensation. In any event, the defence of compromise applied; the parties had contractually settled their differences on the quantum of compensation. On the other hand, the defence of estoppel could not succeed because no specific representations could be made out to support an estoppel argument, and the defence of change of position would have failed because SingTel's alleged expenditure took place before the receipt of the payment. In view of the judge's view of the facts, the issue whether estoppel could apply at all when change of position was applicable (see discussion above at paras 19.35 to 19.38 on *MCST No 473 v De Beers*) did not arise for consideration. Finally, the tax component could not be severable from the contract to found a separate cause of action in restitution for total failure of consideration.

Contract and restitution

19.50 The starting point of analysis for the court was the distinction between a mistake relating to the formation of a pre-existing transaction, and a mistake relating to the payment itself. The former is only relevant to the question whether the pre-existing contractual relationship can be rescinded, declared void or set aside in equity as a necessary precursor to recovery under the law of restitution. On the other hand, the law of restitution is concerned only with mistakes operative at the time of payment, not a mistake in the formation of the transaction by reference to which a payment is later made. The judge emphasised that the law of restitution should not be allowed to disturb contracts and transactions which have not been set aside at law or in equity.

19.51 While one can draw a clear conceptual line between a mistake operating in respect of a prior transaction, and a mistake operating at the time of payment, the same mistake could operate as a matter of fact at both levels. If IDA had been mistaken about the taxability at the time of negotiations, that same mistake *could also, as a matter of fact*, be operative at the time of the payment. Indeed, quite apart from the obligation arising from the contract and the statutory notice, it could well be that but for this mistake as to

taxability which continued to exist in the minds of the payer at the time of payment, the payment would not have been made. This would have satisfied the 'but for' test accepted by the Court of Appeal in the *MCST No 473 v De Beers* case (*supra*). The denial of the correctness of the restitutionary route of analysis in the case could be justified on two possible bases. First, *as a matter of fact*, the mistake did not cause the payment; the 'but for' test was actually not satisfied. Secondly, *as a matter of law*, even if as a matter of fact there was an operative mistake at the time of payment, the payment discharged a valid obligation, and so no restitutionary rights could follow from that payment. It is clear that the court took the latter route in this case, so there was no need to examine further the factual 'but for' question.

19.52 The alleged mistake on the facts was in respect of the taxability of a portion of the sum paid, and that was an issue resolved in the contract of compromise. This finding indicates that the mistake related to the pre-existing transaction rather than the payment, so that the law of restitution had no role to play. The payment was made under the statutory notice, or pursuant to a contract of compromise. There was no mistake about either. However, IDA had pleaded its case as one of mistaken payment, and had indeed argued that there was no contract between the parties. To the judge, this was an important omission since there was clearly a contract on the court's view of the facts. Nevertheless, the judge proceeded to analyse IDA's claim from the standpoint of the law of restitution.

The elements of a claim in unjust enrichment

19.53 Lai J accepted that a claim to restitution raises the following questions: '(1) Has the defendant been enriched? (2) If so, is the enrichment unjust? (3) Is the enrichment at the expense of the plaintiffs?' (at [136]).

19.54 While these are elements underlying a claim in unjust enrichment, there is nothing, however, to suggest that there is no longer a need to look to precedents to found claims within recognised categories in the law. The content of the law of unjust enrichment continues to be defined by precedents. The questions raised state the principles that define the boundaries of the law. So in this case, for example, the cases on mistaken payments define the scope of the restitutionary claim relevant to this case, but the principles define the structure of the claim and assist the court in defining the appropriate boundaries of such claims. Thus, for example, once it is recognised that the rationale for the recovery for mistaken payments lies in the reversal of an unjust enrichment of the defendant at the expense of the plaintiff, it becomes difficult to see why there should be a distinction between a mistake of fact and a mistake of law, and indeed courts around the world then have acted on this improved vision.

Mistake of law

19.55 The court held that there was no mistake of law for three overlapping reasons: the plaintiffs had made a misprediction and not a mistake; there was no settled legal position falsified by a court of law at the time of payment to constitute a mistake of law; and the plaintiffs had assumed the risk of mistake in the payment.

19.56 Relying on *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, Lai J held that mispredictions as to future events at the time of payment, as distinguished from mistakes as to an existing legal justification, cannot ground a restitutionary claim. On the facts, IDA's assumption was that SingTel was going to have to pay tax on the compensation sum at some future time. The tax liability was dependent on an administrative decision on the part of IRAS, subject to an appeal process. There were other variables in the form of fiscal policies to be announced by Parliament in future years. Further, in IDA's calculations of the appropriate compensation payable to SingTel, assumptions were made as to future tax rates. Thus, IDA had made a misprediction, and not a mistake, in miscalculating the occurrences of future events.

19.57 The judge did not appear to accept counsel's argument that the running of a risk 'knowingly' is a crucial feature of a misprediction. On the other hand, he accepted that the basis of precluding recovery for misprediction is the assumption of a risk by the payer as to occurrence of a future event. He accepted Lord Hoffmann's statement in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 401 that '[t]here is room for a spectrum of states of mind between genuine belief in [the] validity [of the contracts], founding a claim based on mistake, and a clear acceptance of the risk that they are not [valid]' as an accurate statement of the law. The judge appeared to take the view that a misprediction necessarily involves an assumption of risk that is sufficient in the law to preclude restitutionary recovery.

19.58 Thus, a sharp line is drawn between existing and future phenomena. In the case of the former, whether there is sufficient risk-taking that precludes restitutionary recovery is a question of fact to be ascertained in each case. Indeed, the court will be slow to find sufficient assumption of risk. Carelessness in the failure to ascertain the correct facts does not preclude recovery (*Kelly v Solari* (1841) 9 M & W 54; 152 ER 24, *Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd* [1992] 2 SLR 881). In the case of the latter, it is assumed as 'of course' that there is sufficient assumption of the risk to preclude recovery. This situation appears ironic because it is clearly much more difficult to be right about future events than about existing ones. The

rationale appears to be that as the payer cannot be wrong about future phenomena, therefore the payer's consent at the time of the payment is not vitiated in any way; in every case he must have taken a gamble that he *may turn out to be wrong in the future*. This suggests that the correct analysis for mispredictions may lie in the different unjust factor failure of consideration, but the recovery on this ground is probably constrained by the need for the basis to be conveyed and accepted by the payee. On the other hand, it can be difficult to distinguish between existing and future phenomena, especially in relation to metaphysical constructs like the law. A perception that the law is X cannot be verified as physical observation, but by applying norms of recognition of what constitutes rules of law; and one of these norms is that the authoritativeness of the law is determined by the recognition as such by courts of law according to the hierarchy of the court system.

19.59 In this context, Lai J sought to set out a 'mistake of law' (at [113]):

> 'In the absence of a settled legal position (falsified by a court of law) as to taxability at the time when the payment of compensation was made in favour of SingTel, it would not be possible in principle to conclude that [IDA] was labouring under a mistake of law.'

Based on this passage, the two key elements for finding a mistake of law are a settled legal position and the falsification of such position by a court of law. Lai J was concerned that if the law was not clear (as was the case on the facts relating to the issue of taxability of the compensation), there can only be competing interpretations of the law; there is no reference point by which a mistake could be said to have been made, so at best there is a misprediction. If there was a settled view of the law, there can be no mistake of law unless that view is contradicted by a subsequent court (*ie*, falsification); otherwise there is no mistake even if most reasonable lawyers think that settled view to be wrong. At best there is a correct prediction of how a subsequent court would act (in which case there is no cause for complaint) or a misprediction of the same.

19.60 However, there are several reasons why Lai J's statement should not be read as an exhaustive statement of what constitutes a mistake of law. First, Lai J earlier in the judgment said that 'it would have assisted IDA's cause substantially' if there had been a definitive ruling from a court of law. This suggests that the judge was only dealing with one possible scenario. Secondly, the situation of a settled view of law falsified by a subsequent court of law is precisely the kind of situation in which the Court of Appeal had earlier envisaged applying the 'settled law' 'defence'. On the judge's own view expressed in an earlier part of the judgment (at [107]), it would not have been a case of mistake at all since the falsification is actually a *change* in the law. Thirdly, situations can be envisaged outside this narrow situation where

mistakes can be made. For example, if the settled law is A, but the payer thinks it is B, then in the absence of any falsification, the payer has clearly made a mistake (that the law is B). If there is no settled law at all, but the payer thinks that the settled law is A, then without any falsification, the payer has made a mistake (that there is indeed settled law). Fourthly, the falsification can be misleading in some cases, on the Singapore courts' view of the effect of the rejection of the declaratory theory on mistakes of law. If the payer paid out on the basis that the law was A, and the settled law at that time was actually B, then a subsequent court's falsification of B and substitution of it with A, would render the situation at first sight to appear to be a case of non-mistake, when it was actually a case of mistake.

Assumption of risk

19.61 Lai J also dealt with the issue of assumption of risk at length. The judge found that IDA's failure to pursue several obvious lines of inquiry, like seeking a preliminary ruling from IRAS or seeking specific advice on that issue, indicated that it had undertaken the risk that the assumption of taxability of the sum may turn out to be false. Lai J held that 'With an assumption of risk, there can be no operative mistake' (at [129]). This is because the cause of the payment is not the mistake, but the intention to pay whether or not the underlying assumption turns out to be true or false.

19.62 It is a question of fact in every case whether the payer had assumed such a risk. In this context it should be pointed out that there is a distinction between being careless and actually waiving further investigations: *Kelly v Solari* (*supra*); *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at [19] to [25]. In the latter case, it appeared that the court would require a conscious assumption of the risk – a 'deliberate waiver of inquiry' (at [24]). On the facts, the judge inferred the assumption of the risk from the failure to make inquiries, as well as the desire of both parties to reach closure and finality.

19.63 Further, it should be noted that this appears to be an alternative reason for rejecting IDA's claim. On the main reasoning, discussed above, that there was merely a misprediction as to a future event, that by itself appears to be a sufficient reason for the court to hold that IDA had made such a voluntary assumption of risk as to amount to an intention to pay in any event.

Change of position

19.64 The defence of change of position was only briefly considered by the court, since in its view there was no liability. In the event, Lai J thought that if liability had indeed been established, SingTel would not have been able to rely

on the change of position defence. In Lai J's view, for the change of position defence to succeed, four elements must be satisfied (at [140]):

> '(1) the payee has changed his position;
>
> (2) the change is *bona fide*;
>
> (3) it would be inequitable to require him to make restitution or to make restitution in full; and
>
> (4) there must be a causal link between the receipt of the overpayment and the payee's change of position.'

It is to be noted that Lai J's formulation appears to be different from that of the Court of Appeal in *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17, confirmed in *Management Corporation Strata Title No 473 v De Beers* [2002] 2 SLR 1 at [35]). While the Court of Appeal required only the first three elements to be satisfied, treating the question of the causal link between the receipt of the payment and the payee's change of position as part of the inquiry whether it would be inequitable to order restitution of the whole or part of the payment, Lai J appeared to treat it as a separate and distinct requirement. The distinction may be important because in the former it may be an important factor to be considered, but in the latter, it is a necessary condition to establish the defence. Lai J, however, did not suggest that he was departing from the Court of Appeal's formulation. Moreover, Lai J had relied on *Scottish Equitable plc v Derby* (*supra*), where the court had taken a very wide view of the causal link between receipt and expenditure that is required to establish the change of position defence. The rationale of the requirement of the causal link is to render irrelevant hardship factors like the poverty or ill-health of the defendant. Thus, the formulation of Lai J is best viewed as a refinement of the Court of Appeal's statement of the defence. It should now be noted that the Court of Appeal in *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* [2003] 2 SLR 103 has since restated the first three elements as the requirements of the change of position defence. The difference of expression appears to be one of semantics rather than substance, if the causal requirement of Lai J is read very broadly.

19.65 Lai J also stated that for the defence to succeed, the change of position must occur after the receipt of the payment. Since the relevant expenditure by SingTel had occurred before the receipt of the payment, the defence would have failed on the facts. Lai J relied on *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545 for this principle. It is curious that, on this issue, his attention was not brought to *Dextra Bank & Trust Co Ltd v Bank of Jamaica* (*supra*) which was relied upon for the different point of misprediction earlier. The Privy Council in this case held that expenditure incurred in anticipation of receipt could constitute change of position. The requirement of a causal link does not

necessarily rule this out. As the Privy Council pointed out (at [38]), when comparing the case of expenditure after receipt and the case of expenditure in expectation of the receipt:

> 'It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes said, on the faith of the payment.'

Lai J's statement of the law was made *in obiter*, and somewhat tentatively, and he did note the criticisms of the *South Tyneside* case in Goff & Jones, *The Law of Restitution* (5th Ed, 1998) at p 823.

19.66 This issue was in fact considered afresh by the Court of Appeal in *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* (*supra*), which held that a payment by a defendant in clear expectation of an imminent payment by the plaintiff could constitute a valid change of position defence.

Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd

19.67 Two main issues were addressed in *Parkway Properties Pte Ltd v United Artists Theatres Pte Ltd* [2003] 1 SLR 791 (HC); [2003] 2 SLR 103 (CA): the recovery of pre-contractual deposits for failure of consideration, and the elements and operation of the change of position defence. Each formed the main basis of the High Court and Court of Appeal decisions respectively.

19.68 The parties were negotiating the proposed development of a cinema complex. For the purpose of this discussion, no distinction needs to be drawn between the individual plaintiffs and defendants. The plaintiffs managed cinemas in Singapore. The defendants owned and managed the property proposed to be developed. The negotiations came to an end when they sold their interest in the property to a third party. In the course of negotiations spanning over seven years, the plaintiffs had paid over four sums at different times totalling $1.8m to the defendants. The plaintiffs sought to recover the sums paid as money had and received. Of these sums, there was an alternative claim in respect of $346,900 based on a contractual agreement to repay. The defendants alleged that the sums were the plaintiffs' partial payment of their share of the agreed contribution towards the differential premium payable by the defendants to the Land Office for the development of the land, and cross-claimed for the outstanding sums under the agreement. Alternatively, the defendants also argued that the plaintiffs had made the payments in consideration for an opportunity to negotiate a lease from the defendants. In respect of the restitution claims, the defendants argued that they had changed their position in paying the sums over to the Land Office.

Recovery of pre-contractual deposits

19.69 At first instance, Belinda Ang JC (as she then was), summarised the law relating to pre-contractual deposits succinctly:

> (a) Whether a payee is entitled to retain a pre-contract payment depends in each case on the construction of the documents or correspondence under which that payment is made.
>
> (b) The *prima facie* rule is that a pre-contract deposit is recoverable if the prospective contract in connection with which the payment is made does not come into existence.
>
> (c) The onus is on the payee to displace this *prima facie* rule.
>
> (d) If the *prima facie* rule is not displaced, a pre-contract payment would in law be made on terms which require that if a formal contract is executed, the money is to be applied and treated as a contract deposit and a part payment on the transaction so contracted for; and if there is no executed contract, the money is to be returned to the payer.

19.70 Applying the law to the facts, the judge identified the key question (at [69]) as:

> 'What was the intention and purpose behind the four payments in question as between the plaintiffs and defendants and upon what terms were the four payments made?'

The judge held that:

> (a) There was no contract between the parties to share the cost of the differential premium.
>
> (b) There was an agreement to refund the sum of $346,900 if the contract did not materialise. But the parties subsequently agreed that this sum was to be treated as part of the deposit paid by the plaintiffs to the defendants during the negotiations.
>
> (c) The payments were intended as pre-contractual deposits. There was no agreement on what would happen to the sums if the contract failed to materialise.
>
> (d) The consideration for the payments failed when the negotiated contract failed to materialise, and the sums were recoverable as money had and received to reverse an unjust enrichment.
>
> (e) There was no consideration to support a contract for an opportunity to negotiate a lease because such a contract would be uncertain and incomplete.

(f) The defence of change of position had not been made out on the facts.

19.71 Two points are worth highlighting from this decision. First, there are two possible legal bases for the return of the deposit in such cases. The first is that there is an implied agreement between the parties that it should be so returned if a formal contract does not materialise. This is a contractual analysis. The second is that the deposit is recoverable on a restitutionary basis, because the consideration for the payment has failed. The analysis of the court follows these two strands logically. If there is an implied agreement whether to retain or return the money in such cases, such an agreement would be given effect to. In the absence of such an agreement, the principles of restitution come into play. On the facts, having found no agreement, the judge expressly relied on restitutionary principles, grounding the recovery on the principle against unjust enrichment (at [215] to [216]), more specifically, for total failure of consideration.

19.72 Secondly, in the context of the restitutionary claim, the judge emphasised the objective intentions of the parties that the payment was understood to be earnest money, the retention of which was conditional upon the formation of the contract. It would appear from the approach of the court that the basis of the payment needs to be objectively communicated to and accepted by the payee. In this respect, the line between contract and restitution tends to be blurred in practice.

19.73 The defendants' appeal from this decision was dismissed by the Court of Appeal. The main arguments on appeal were that the plaintiffs' payments were made pursuant to an agreement to contribute in part to the differential premium, and alternatively, that the defendants had changed their position in paying the differential premium. On the first point, the court found that there was no basis on the evidence to infer an agreement between the parties that the plaintiffs would contribute to the differential premium. The judgment of the Court of Appeal concentrated on the second point.

Change of position

19.74 The Court of Appeal re-affirmed the three elements of the change of position defence (see para 19.64 above). The approach of the court to the issue of change of position is significant in three respects.

19.75 First, it accepted that anticipatory reliance could constitute change of position. This is a reversal of the tentative position stated by Lai Kew Chai J in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 just a few months before.

But it is a welcome development that is in line with developments elsewhere (see *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193). Thus, the fact that some of the payments of the plaintiffs were made to the defendants after the defendants had paid the differential premium to the Land Office was not necessarily fatal to the defence. The court held that so long as the payment by the defendants was in clear expectation of an imminent payment in by the plaintiffs, the first element of change of position could be satisfied. However, the court found that on the facts, the first element was not satisfied because the payment to the Land Office was made irrespective of expectation of any imminent reimbursement from the plaintiffs.

19.76 Secondly, the court was equivocal whether the defendants had acted *bona fide*, assuming that they had changed their position. The defendants ran into difficulties with the second and third elements of the defence. The court placed much weight on the fact that both parties understood the plaintiffs' payments were not intended to go towards defraying the differential payment, and that the defendants were very much aware that the negotiations were 'subject to contract'. Thus they would have realised that all the negotiations could come to nothing if no final agreement was reached on the lease, in which case they would be obliged to refund the deposit. If the court did not expressly state that the defendants were not acting *bona fide* in changing their position while being aware of the possibility of having to make restitution of the deposit, it came close to saying so. In such cases, there is no question of dishonesty or even carelessness.

19.77 It may be that the change of position defence simply does not apply to cases where money is paid over for particular purposes or on specific conditions known to and accepted by the payee. This was assumed to be the case in *Martin v Pont* [1993] 3 NZLR 25. However, the defence has been assumed to be applicable in other cases of total failure of consideration (see A Burrows, *The Law of Restitution* (2002) at p 524). In *Goss v Chilcott* [1996] AC 788 (Privy Council appeal from New Zealand), the defendants had taken out a loan from the plaintiffs that turned out to be invalid. The Privy Council assumed (without deciding the issue) that change of position was a defence to the plaintiffs' restitutionary claim based on failure of consideration, but held that the defendants, in making a further unsecured loan to a third party, had not changed their position. Knowing of the circumstances that they would have to repay the money to the plaintiffs, they had knowingly taken the risk that the third party could not repay them, in which case, they would have had to pay the plaintiff out of their own pockets. It is difficult to characterise this as an absence of *bona fides*, and it is easy to see why the court is reluctant to characterise the defendants as having acted with a lack of good faith. It is suggested that the assumption of risk by the defendants in the circumstances

provides a better explanation why the change of position defence does not operate, and this insight from *Martin v Pont* should not be overlooked.

19.78 Given the observation of the Court of Appeal in *Management Corporation Strata Title No 473 v De Beers* [2002] 2 SLR 1 on the relationship between estoppel by representation and change of position (see paras 19.35 to 19.38 above), it becomes important to characterise the situation as one where the change of position defence is applicable but cannot be satisfied or as one where the change of position defence cannot apply at all. It is only in the latter case that on the view of the earlier Court of Appeal, estoppel has any role to play at all. Yet, the distinction appears to be artificial if the change of position defence can *never* apply because the payee is always made aware of the basis or purpose of the payment, and the result may be unfair if the payee relies to his detriment on a representation of the payer in relation to the failure or otherwise of the basis or purpose of the payment.

19.79 Thirdly, the Court of Appeal held that it would not be inequitable to order restitution because on the evidence, the value of the differential premium was clearly factored into the purchase price of the property sold to the third party. Thus, even if the defendants had changed their position, they had obtained a benefit in return which was actualised in the circumstances of the sale. On the findings of the court, the defendants could not have argued subjective devaluation of the benefit.

Cendekia Candranegara Tjiang v Yin Kum Choy

Recovery of pre-contractual deposit

19.80 The issue of recovery of pre-contractual deposits was also raised in *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 4 SLR 48. This case reinforces the point (see paras 19.71 and 19.72 above) that it can be difficult in practice to distinguish between the contractual and restitutionary analyses of the basis of such claims.

19.81 The plaintiff, an Indonesian businessman, was a prospective investor in a Singapore company under the control of the defendant, a judicial manager. The parties entered into a Memorandum of Understanding ('MOU') in relation to the purchase of the company's assets by the plaintiff. The MOU provided for the plaintiff to enter into relevant agreements with the defendant and the directors of the company and its associated companies. After signing the MOU, the plaintiff paid the defendant $460,000 as earnest money for the transaction. Subsequently, the defendant sent the plaintiff, beyond the deadline set under the MOU, a series of draft agreements containing many new and significant terms that had not been contemplated

under the MOU, and the plaintiff sent back counter-proposals in return. The plaintiff also had some disagreement with the directors. The parties could not resolve their differences and fell out. The plaintiff then sued the defendant for the recovery of the deposit. The defendant in turn sued the plaintiff for the outgoings of a new company that had been set up to implement the terms of the parties' agreement.

19.82 MPH Rubin J, finding that the MOU did not constitute a binding agreement, allowed the claim but denied the counterclaim. He decided that the plaintiff was entitled to recover the earnest money as he could not be shown to have been at fault in the collapse of the negotiations, and that the plaintiff could not be liable for the expenses of the new company when there was no agreement that the plaintiff would be responsible for the cost. In respect of the claim, Rubin J considered a clause in the MOU which stated that the money should not be refundable if the plaintiff decided not to sign the contracts. He held that on the evidence it was not the fault of the plaintiff that the contracts were not signed. The main cause of the collapse of the negotiations came from the defendant and the directors making many demands beyond what had been contemplated by the parties under the MOU.

The relevance of fault

19.83 The reasoning of the court appears at first blush to be contractual: the court relied on the general rule in contract law that a contract term providing for the forfeiture of the deposit upon a buyer's default is valid. On this analysis, the court found that the plaintiff had not been in default. However, the court had found that the MOU did not amount to a binding contract. If so, then the forfeiture clause cannot be binding on the parties, and neither could a term be implied for the return of the deposit. It could be that there was a valid agreement with respect to that clause, even if the MOU itself was not binding, but there was nothing in the judgment to indicate that this was so. More likely, the basis of the recovery was restitutionary – there was a failure of the basis of the payment since no contract materialised from the negotiations. But if this is the correct view of the facts, then the relevance of the plaintiff's default or otherwise may raise more difficult issues. Fault may have a role to play in a claim in restitution for benefits conferred on another in the course of negotiations after which the parties failed to reach an agreement: *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880. It is less clear what principles underlie this reference to fault: it may be an aspect of risk allocation by the court in such claims, or a manifestation of some inchoate doctrine of good faith in pre-contractual negotiations. On the facts, the explanation is probably more straightforward. The deposit was paid on the basis (as found by the court), accepted by the payee, that it would be

returnable if the negotiations went off without the fault of the payer. Thus, on these facts, the absence of fault of the payer is part of the condition for recovery. The non-contractual allocation of risk, as manifested by the intentions of the parties through the MOU, was thus a defining element of the basis of the payment, and was capable of excluding a claim in restitution in the same way that a contractual allocation can.

Ooi Ching Ling Shirley v Just Gems Inc (No 2)

Recovery of purchase price

19.84 Restitution for failure of consideration was the main issue in *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14. Ooi was the director and shareholder of Pacific Rim Trading ('PRT'). PRT's only assets were 4.5 million shares in Agate Technologies Inc, a Californian company. Jamilah was the sole shareholder of Just Gems Inc ('JG'), a company incorporated in the British Virgin Islands. Jamilah and Ooi were ex-colleagues. Ooi entered into an arrangement with Jamilah where the latter would invest in Agate by buying 22% of the shares of PRT for USD500,000. The purchase price was to be paid in instalments, and it was understood between the parties that Jamilah would be using JG to make the investment, and that JG would be the registered owner of the PRT shares. The parties subsequently signed a stock purchase agreement as representatives of PRT and JG respectively. Payment was made by Jamilah's husband to Ooi, but the shares were mistakenly registered in Jamilah's name rather than JG's. Jamilah demanded that Ooi arrange to have the shares transferred to JG, but Ooi wanted an indemnity for doing so, which Jamilah refused to provide. Jamilah also realised that her husband had overpaid Ooi by USD50,000. After much correspondence, the shares were never transferred to JG, and JG brought a suit against Ooi personally, for the return of USD50,000 as an overpayment, and USD500,000 on the basis of total failure of consideration.

19.85 In the High Court (Suit 1479/1999, unreported judgment dated 31.1.2002), Judith Prakash J made the following findings:

> (a) there was a contract between JG and Ooi under which JG would invest USD500,000 in PRT, to be paid to Ooi, and Ooi would arrange for JG to obtain a 22% stake in PRT;
>
> (b) JG had paid a total of USD550,000 to Ooi on account of the agreement to purchase shares in PRT;
>
> (c) The failure to register JG as a shareholder of PRT was the result of the breach of contract by Ooi, and not due to the default of JG or Jamilah; and

(d) JG had mistakenly overpaid Ooi by USD50,000 as a result of a miscalculation of the amounts owing to Ooi.

As a result, the court held that JG could recover the mistaken payment of USD50,000, and could elect to recover the purchase price of USD500,000 because JG did not receive any of the benefit it had bargained for under the contract, *ie*, there was total failure of consideration.

19.86 The judgment was affirmed on appeal. The Court of Appeal affirmed the findings of the High Court that Ooi was a party to the contract, and that there was indeed an overpayment of USD50,000 due to an oversight. The court also found that JG did not get anything that it had bargained for, as a result of which it was entitled to elect to sue for the recovery of the purchase price on the basis of total failure of consideration. Finally, the court observed that there was nothing on record to show that the share certificates had indeed been issued in Jamilah's name, but noted that to the extent that Jamilah had received any shares, she should do everything within her power to restore the shares to Ooi.

'Total' failure of consideration

19.87 The Court of Appeal emphasised that for a plaintiff to succeed in a claim for a refund of purchase price, there must be a *total* failure of consideration (especially at [44]). On the facts it was clear that the plaintiff failed to get any part of what it had bargained for. However, nowadays, as noted in Treitel, *The Law of Contract* (10th Ed, 1999) at pp 977–979, the requirement of 'total' failure has been much qualified. Where the consideration is clearly severable, partial failure can ground restitutionary recovery of part of the price paid (*Whincup v Hughes* (1871) LR 6 CP 78 at 81; *Goss v Chilcott* [1996] AC 788). This might still be described as a 'total' failure of a severable or discrete part of the consideration (*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335). However, it is not clear then how 'total' adds to the analysis; every failure is 'total' in respect of the part that has failed. The reason for the restitution is the failure of the basis or condition of the payment. Whether the failure is total or partial has a significant bearing on the issue of restitutionary recovery depending on the facts of the case. Stating 'total' as a legal requirement may obfuscate the real issues that need to be addressed, *ie*, the severability of the consideration and the feasibility of apportionment, and the danger of distorting contractually allocated risks.

Colombo Dockyard Limited v Athula Anthony Jayasinghe

Repudiation of illegality

19.88 The main issue determined in *Colombo Dockyard Limited v Athula Anthony Jayasinghe* [2003] 1 SLR 869 is the effect of illegality on the recovery of payment made by a principal to an agent for a purpose that has not been fulfilled. The plaintiffs, a Sri Lankan corporation, were majority shareholders of Ceylon Shipping Agency ('CSA'), a Singapore company. The defendant was the managing director of Oriental Pearl ('OP'), also a Singapore company, and carried on business under the name of Metro Maritime Services ('MMS'). The plaintiffs appointed Oriental Pearl to act as managing agents for CSA. The defendant took over the management of CSA. In 1997, the plaintiffs remitted USD650,000 to a bank account held in the name of MMS. The plaintiffs argued that the money was to be used by the defendant to promote the plaintiffs' business according to the plaintiffs' instructions. The plaintiffs' witnesses admitted that the money was intended to be an incentive for ship crews, in order to attract work for the plaintiffs. The plaintiffs sought to recover the sum paid (after deductions for bank charges) from the defendant for failure to disburse the money according to their instructions. Two defences were raised. First, it was argued that the money had been disbursed according to the plaintiffs' instructions. Secondly, it was argued that the remittance was for the illegal purpose of bribing captains and ship crews in connection with the plaintiffs' business.

19.89 MPH Rubin J rejected both defences. The judge found that there was no convincing evidence that the money had been paid out in accordance with instructions from the plaintiffs. Further the judge found that, to the extent that the remittance was for the illegal purpose of bribery, the intention had only been incipient and not executed as there was no evidence that the money had been so used; the plaintiffs' repudiation was both timely and voluntary, and the plaintiffs were therefore entitled to the recovery of the sum. In passing, the judge approved of the statement of Millett LJ in *Tribe v Tribe* [1995] 3 WLR 913 at 938–939, that it was not necessary to show genuine repentance to base restitutionary recovery of sums paid for an illegal purpose, so long as there was voluntary and timely repudiation of the illegal purpose.

Sinnathamby Rajespathy v Lim Chong Seng

Recovery of deposit and illegality

19.90 *Sinnathamby Rajespathy v Lim Chong Seng* [2002] 4 SLR 375 raises the question of the return of a deposit when an illegal agreement for the sale and purchase of a flat goes awry. The appellants wanted to buy the

respondents' flat, but the respondents could not sell it yet because they had not occupied the flat for the minimum period of time under s 49A of the Housing and Development Act (Cap 129, 1997 Ed). The housing agent got the parties to enter into an arrangement under which the appellants would lease the flat from the respondents for the remaining term of their statutory occupation, with an option to purchase it thereafter. A deposit of $38,000 was payable by the appellants. The agent obtained an authorisation from the respondents to act as the respondents' exclusive agent for commission. The appellants paid an initial $5,000 under this arrangement. The outstanding $33,000 was paid to the solicitor at his office where all the parties were present to sign the agreement. The appellants handed the sum in cash to the solicitor who then handed the money to the agent in the respondents' presence. The agent issued a receipt to the solicitor for the money, and the respondents signed the receipt of the money at the agent's request. The appellants sued the respondents in the District Court for the recovery of the $33,000. The trial judge held that the respondents had not received the money, and that in any event, the appellants had to rely on the contract to recover the sum, which contract was illegal and void under statute, so the claim failed. The appellants alternatively claimed for money had and received and for mistake of law, but the arguments were rejected by the trial judge as the claims had not been pleaded. An appeal was brought to the High Court.

19.91 Choo Han Teck JC (as he then was) dismissed the appeal. The judge affirmed the trial judge's finding that the respondents had not received the money, in spite of the receipts; the court was entitled to go behind the receipts where the facts indicated otherwise.

19.92 The judge also affirmed the trial judge's holding that the appellants were obliged to rely on their contractual rights to claim for the recovery of the money, and that the underlying 'lease with option to purchase' contract fell foul of the Housing and Development Act as it was in effect an agreement to sell, and was therefore null and void. The judge also affirmed the trial judge's rejection of alternative claims on the basis of money had and received and a further alternative of mistake of law because they were not pleaded, noting that, in any event, the claim was being made against the wrong party.

19.93 Although the distinction between the contractual and restitutionary basis of recovery of the deposit was not discussed (*cf*: *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR 791), it appears that the court proceeded on the basis that the appellants' claim was based on a contractual right of recovery, and that they had failed to plead the restitutionary cause of action. On the last point, it may be added that even if the restitutionary claim had been properly pleaded and the respondents had indeed received the money, the claim is still unlikely to succeed on the view of

the court of the illegality involved in the underlying transaction, as the parties appeared to be *in pari delicto*.

Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd

Illegality and judicial discretion

19.94 *Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd* [2003] 1 SLR 34 raises an interesting question about the discretion of the court in the aftermath of an illegal transaction. The plaintiffs, owners of industrial premises, entered into a sale and leaseback arrangement with the defendants. Such arrangements were not permitted by the Jurong Town Corporation ('JTC'), so the parties submitted a bogus joint venture proposal to justify the sale of the premises. The JTC gave in-principle approval to the proposal but required the plaintiffs to furnish a Certificate of Statutory Completion ('CSC') for the construction works on the premises. When the plaintiffs were not able to obtain the CSC by the completion date, they alleged that the defendants had agreed to the extension of the date, while the defendants denied any agreement. The plaintiffs obtained the CSC by the new alleged completion date and were ready to complete. However, the defendants refused, arguing that the plaintiffs were in breach of the sale agreement and demanded the return of the money paid.

19.95 Lee Sieu Kin JC (as he then was) found the following facts: The defendants had paid the plaintiffs $17,000 (1% of the purchase price) to buy the option to purchase the land, and in exercise of the option, they had paid a further $153,000 (9% of the purchase price) to the mortgagees of the property as stakeholders pending completion of the sale and purchase agreement, the balance to be paid on completion. In turn, the plaintiffs had paid the defendants a total of $75,000 as deposit and rental.

19.96 The judge held that the plaintiffs were not in breach of contract and that the defendants were in breach of contract in refusing to complete. However, the plaintiffs' claim for damages failed for two reasons. Firstly, it was impossible to assess the plaintiffs' loss because it would not have been possible for the plaintiffs to have legally secured a sale and leaseback agreement in relation to which their losses, if any, could be assessed. Secondly, the sale agreement was conditional upon JTC's approval, which had been obtained by deception; if the parties had presented the truth to JTC, the agreement would have been null and void on its own terms. In other words, it would be against public policy to allow the plaintiffs' claim.

19.97 On the question of the defendants' counterclaim for the return of the deposit, the judge considered that ordinarily, the losses would lie where they

fell in such situations. However, on the facts, the judge noted that the stakeholders require an order of court to deal with the money in their hands. The judge was of the view that the court had a discretion in the matter and proceeded to 'weigh the relative equities of the parties'. Holding that the parties were *in pari delicto*, the judge held that they should be returned to their original positions as far as possible, by reversing all the payments. Counsel for the parties agreed that this would be achieved by an order to the stakeholders to pay $58,000 ($75,000 – $17,000) to the plaintiffs and the balance of $95,000 to the defendants.

19.98 Three points are noteworthy in this case. Firstly, while the judge considered that the general rule would be to leave the losses where they fell, it was not stated *where* the losses fell on the facts. This was probably because the judge felt that it could apply a discretion to alter the rights of the parties in any event. It may be that if money has been deposited with a stakeholder to abide the result of an illegal transaction, the depositor has the right to recover the deposit from the stakeholder before the stakeholder has paid over the deposit in accordance with instructions given by the parties: *Hampden v Walsh* (1876) 1 QBD 189.

19.99 Secondly, the judicial discretion to divide the deposit held by the stakeholder appears to be unprecedented under Singapore law. No authorities were cited in support. However, the Australian High Court case of *Nelson v Nelson* (1995) 184 CLR 538 may provide some support. There, the court allowed relief to the plaintiff in respect of a trust even though the claim was tainted by illegality, but imposed as a condition of relief that the plaintiff should pay her ill-gotten gains to the authority that had been deceived into giving the plaintiff monetary benefit. However, in the present case, it is not clear why, if the court has a discretion to alter legal entitlements to the deposit held by the stakeholder, that power should not also extend to all cases of deposits whether held by a stakeholder or not, or indeed, why the power should be restricted to the recovery of deposits at all. The judicial power exercised by Lee JC also appears to share a limited similarity to the proposed statutory power to vary the consequences of illegal transactions that the Law Reform Committee of the Singapore Academy of Law has recommended in *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) (available at: http://www.lawnet.com.sg/freeaccess/lrcr/relief.pdf).

19.100 Thirdly, it is not clear whether the judge, in finding the parties to be *in pari delicto*, meant that they were equally at fault, or equally innocent. It seems more likely to be the former, in view of the finding that both parties had deliberately deceived a public authority with their charade of a joint venture. Since the parties were equally at fault, it is not clear why, under the current law, the default position of leaving losses where they fall should not

apply. After all, it is only when the parties are *non in pari delicto* that the illegality bar is lifted in respect of certain restitutionary actions. It is not clear on what basis the discretion was being exercised. It may well be that the statutory policy in this particular case is not especially strong, so that unwinding the transaction even though the parties had in fact deceived the authorities would not be inconsistent with the statutory intention. If the court is to assume such a judicial discretion, clearer guidelines are required, lest the discretion be perceived as a charter for palm tree justice. This decision does not appear to weaken the case for statutory reform.

Proprietary restitution

19.101 A number of cases are significant for their discussion on the availability of proprietary remedies. These are *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241; *Re Pinkroccade Educational Services Pte Ltd* [2002] 4 SLR 867; and *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 4 SLR 537. The reader is directed to the full discussion at Chapter 12 (Equity and Trust).