12. EQUITY, TRUST AND RESTITUTION

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TRUST

Express trust

12.1 The beneficiary of a trust has property. This basic and simple fact has made the express trust as familiar an institution in the commercial area as it is in the family environs. In the case of the express trust in a commercial setting where the parties involved are also in a contractual relationship, a common problem is whether the intention to create a trust is present. Often this is left to be inferred from the surrounding facts. *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 4 SLR 154 (CA); [2001] 2 SLR 556 (HC) is an example. In that case, Hinckley Singapore Trading Pte Ltd ('Hinckley') had a concessionaire agreement with Sogo Department Stores (S) Pte Ltd ('Sogo') under which Hinckley exhibited and sold its goods in a specific part of Sogo and in turn Sogo was entitled to deduct 20% of net sales from the proceeds of sale of Hinckley's goods. When customers purchased Hinckley's goods they paid for them at Sogo's cashiers and the proceeds of sale would be mixed with the proceeds of sale of goods either of Sogo or of other concessionaires. General accounting would be done every 15 days when the deduction of the 20% due to Sogo would be paid. The money collected from the sale of Hinckley's goods was never placed in a separate account and was always banked into a current account of Sogo which was used for all the business of Sogo. Sogo was placed under judicial management on 18 August 2000. Out of the sales made between May and July 2000, a sum of $212,212.99 was the net amount due to Hinckley. Hinckley claimed that this sum was held by Sogo on trust for it. This claim was resisted by the judicial managers who claimed that the sum was merely a debt owed to Hinckley. Judith Prakash J dismissed Hinckley's application and her judgment was upheld on appeal.

12.2 Both Prakash J and the Court of Appeal acknowledged that Sogo was an agent of Hinckley in regard to the sale of Hinckley's goods. However, this in itself did not mean that the sale proceeds were held by the

agent on trust for the principal, especially where there was a business arrangement over a period of time, involving a large number of goods. The intention to create a trust of the sale proceeds must either be expressly stated or the facts are such that an intention to create an express trust may be inferred (*Re Fleet Disposal Services* [1995] 1 BCLC 345, *Geh Cheng Hooi v Equipment Dynamics Sdn Bhd* [1991] 1 MLJ 293). In the instant case, facts such as the non-segregation of the sale proceeds and the absence of a particular specified cashier to handle the sales of Hinckley's goods, in the view of the judge in chambers and the Court of Appeal, did not support an inference of an express trust. Chao Hick Tin JA at 164-165 said:

> 'No general rule may be laid down in this regard. In a case where there is no express term in the agreement on the question of trust, whether the equitable rules would be implied would depend upon what may correctly be inferred to be the expectations of the parties in the light of the commercial context.'

The cases considered and followed by the Court of Appeal included *Henry v Hammond* [1913] KB 515, *Re Kayford* [1975] 1 All ER 604, *Neste Oy v Lloyds Bank* [1983] 2 Lloyd's Rep 658, *Re Holiday Promotions (Europe)* [1996] 2 BCLC 618 and *Walker v Corboy* (1990) 19 NSWLR 382. Where the intention to create a trust is not expressly spelled out, the courts have to be cautious in inferring a trust as such a finding impacts adversely on third parties such as unsecured creditors.

12.3 The facts in *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340 were different although the case too was in a commercial setting. (This case is also discussed *infra* at paras 12.9 and 12.24 and in the review on Land Law at paras 17.26-17.34). In brief, Ho Kon Kim ('Ho') was an old widow who sold and conveyed her home which was sitting on a large plot of land to Lim Gek Kim ('Betsy'). The plan was that Betsy should subdivide the land into three lots and build a house on each lot. In the beginning the intention of the parties was that Ho should retain one third of the land after subdivision and that only two thirds would be sold to Betsy. However for financing reasons, the proposal was altered and the entire piece of land was to be transferred to Betsy who would then build three houses, one on each subdivided plot and retransfer one of these to Ho. Accordingly, in the agreement for sale, Betsy agreed to transfer to Ho one of the subdivided plots after a house of not less than $700,000 in value had been built on it. The purchase price of the land reflected this future transaction as it did not include the value of the subdivided plot, which was not to exceed 5030 sq ft, to be retransferred to Ho when the house was built. The agreement for sale also gave Ho the right to lodge a caveat in respect of the plot that was to be retransferred to her. OCBC, who first financed the purchase on a legal mortgage over the entire piece of land, had knowledge of the agreement between Betsy and Ho and undertook to discharge the mortgage without any payment, on the subdivided plot to be

retransferred to Ho when a private lot number was given. By the time the sale was completed Ho had already selected the lot that she wanted, which was referred to as Plot 3 on the architect's layout plan. After the sale, Betsy obtained refinancing for the project from RHB. The mortgage to OCBC was discharged and replaced by one in favour of RHB. Eventually Betsy was made a bankrupt. The project was not completed. Ho then commenced an action against Betsy for breach of trust and against RHB for knowing receipt of trust property and against the lawyers acting for Betsy and RHB for knowingly assisting in a breach of trust. The first issue thus was whether there was a trust in favour of Ho.

12.4 At first instance the judge found that there was no trust between Betsy and Ho; the transaction was only a contractual one. The judge also dismissed the action against RHB referring to ss 47 and 49 of the Land Titles Act (Cap 157, 1994 Ed) and saying that under the Act, notice of a contractual claim did not affect the registered title. The Court of Appeal reversed this decision. The Court of Appeal found that on the facts and the circumstances surrounding the sale of the land to Betsy, a trust of the subdivided plot of the land agreed to be sold could be inferred in Ho's favour. The Court found the following facts to be significant: the plot to be transferred to Ho had been earmarked, she was allowed to lodge a caveat in respect of this plot when the lot was allotted, and the first mortgagee OCBC had agreed to discharge the plot from the mortgage without any payment when the lot was allotted. L P Thean JA said at 352:

> 'From the transaction as structured in the sale agreement it was intended that [Ho] should retain and have a beneficial interest in the plot selected by her … and in our judgment, [Ho] has a beneficial interest in that plot and [Betsy] holds the beneficial interest of [Ho] in trust for [Ho].'

12.5 The Court of Appeal also concluded that the sale agreement was closely linked to the overdraft facility provided by OCBC. The provisions of the documentation made express mention of the quantum of the money loaned which was to be used in the construction of the houses. From this the Court of Appeal also inferred that a term of the trust was that Betsy was to use the land as security only for the development of the land. Accordingly, as she subsequently discharged the mortgage to OCBC and obtained a new loan from RHB, which she used for purposes unconnected with the construction of the houses, Betsy was in breach of trust. On the back of this express trust the Court of Appeal went on to hold that RHB was a constructive trustee for Ho. It not only took the mortgage with knowledge of the trust but it also acknowledged that it would discharge the mortgage over Ho's plot when it was transferred to her. While such behaviour was not within the concept of fraud, it was unconscionable and inequitable.

12.6 It is clear that the Court of Appeal was sympathetic to the plight of Ho and through the inference of an express trust was able to assist her. Although the transaction involved was a commercial one, yet it would not

be out of place to note that the plaintiff was the kind that Equity historically strove to protect. On the issue of RHB being a constructive trustee, the Court of Appeal drew a clear line between a finding of fraud, which under the Land Titles Act requires dishonesty of some sort, and inequitable or unconscionable behaviour (*per* Thean JA at 362-366). In the context of Torrens legislation, such behaviour can also justify a personal equity or a claim *in personam* against the registered proprietor (*Frazer v Walker* [1967] 1 AC 569, *Binions v Evans* [1972] Ch 359, *Lyus v Prowsa Developments* [1982] 1 WLR 1044; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *United Overseas Finance Ltd v Victor Sakayamary* [1997] 3 SLR 211).

12.7 Apart from the inference of an express trust, it is submitted that on the facts, there was a resulting trust for Ho who transferred the entire piece of land including the plot intended for Ho. It was clear that the purchase did not include the plot earmarked for her. Thus, a resulting trust would be created. As for the obligation to construct a house for Ho, this remains a contractual matter which would be enforceable against Betsy under s 46(2)(b) of the Land Titles Act. On such a view, RHB would also be bound on the same ground of a personal equity based on its unconscionable behaviour.

Resulting trust

12.8 In *Nyo Nyo Min v Aung Khin* (Originating Summons 738/2000, HC, unreported judgment dated 28.2.2001), the plaintiff prayed for the following against her estranged husband and one Mrs Khin: (a) a declaration that he held a half share of a flat on trust for her; and (b) a declaration that a particular bank account was held on trust for her. Her claim was based on a resulting trust. However, on the evidence presented before the court, the plaintiff failed to discharge the onus of showing that she had paid for the flat and that she had contributed towards the moneys in the bank account.

Constructive trust

12.9 The facts of *Ho Kon Kim v Lim Gek Kim Betsy* have already been narrated above at para 12.3. Thean JA found the following facts to be material in declaring that RHB took the mortgage of the property subject to a constructive trust in favour of Ho: (a) RHB had knowledge of the agreement between Betsy and Ho; (b) RHB made an allowance of Ho's interest and discounted it in their evaluation of the property; and (c) in the agreement between RHB and Betsy, RHB acknowledged and committed themselves to honour Ho's interest in the property. In the premises, the Court of Appeal held that it was unconscionable for RHB to repudiate Ho's interest in the property. The Court of Appeal declared a constructive trust. Susan Bright has recently offered an alternative analysis to the factual

matrix above. She has argued (see Bright, 'The Third Party's Conscience in Land Law' [2000] Conv 398 at 406) that:

> '[I]t is preferable to use the language of other concepts that make the reasons for liability more clear, such as prohibition from breaking legally binding promises, and [this] reduces the scope for aberrant decision making through the assumption of strong discretionary powers. A by-product will also be greater predictability of legal outcomes.'

12.10 Bright rationalises the cases relied on by Thean JA (for example *Binions v Evans* [1972] Ch 359 and *Lyus v Prowsa Developments* [1982] 1 WLR 1044) as premised on the assumption of responsibility by the defendant. In the premises, she argues at 414 that:

> 'It is preferable to use the law of contract to explain liability because to use the language of obligations and contract tells us the reason why we are holding [the third party] liable; trusts language does not do this.'

This is a plausible hypothesis. The main hurdle to the contractual analysis is the privity problem – *ie* Ho was not privy to the agreement made between Betsy and RHB. One way to get around privity of contract is the potential application of the Contracts (Rights of Third Parties) Act 2001 (Act 39 of 2001) in future cases (see Yeo, 'When Do Third Party Rights Arise under the Contracts (Rights of Third Parties) Act 1999 (UK)?' (2001) 13 SAcLJ 34). However, the contractual analysis may not work if the Act was held not to apply.

12.11 *Koh Kim Eng v Lim Geok Yian* [2001] 4 SLR 219 involved a dispute over the ownership of a house at No. 63 Jalan Bangsawan ('the house'). The house was bought with the funds from the partnership firm of two brothers, Chua Chi Moo ('Moo') and Chua Ki Seng ('Seng'). Moo was married to Mdm Koh Kim Eng (the plaintiff) whereas Seng was married to Mdm Lim Geok Yian (the defendant). The house was originally intended to be the matrimonial home for both brothers. The house was registered in the names of the two brothers' wives as tenants in common with equal shares. A year later, the brothers used the partnership funds to purchase another property No. 19 Sam Leong Mansion ('Sam Leong Mansion'). The property was registered solely in the name of Seng's wife, Lim Geok Yian. Mdm Lim and Seng's marriage broke down. Mdm Koh alleged that Sam Leong Mansion was registered in the sole name of Mdm Lim on the clear understanding that she would in return give up her half share of the house in Jalan Bangsawan. Mdm Lim denied such an arrangement and claimed that she was solely entitled to Sam Leong Mansion and also a half share of the Bangsawan house. Tan Lee Meng J found for Mdm Koh. His Honour held that since there was a clear understanding that Mdm Lim would give up her half share in the Bangsawan house, it would be unconscionable for her to claim an interest in the said house. Tan J declared that Mdm Lim held her half share in the Bangsawan property for Mdm Koh and ordered a transfer of the same. This seems to be an

extension of the *Rochefoucauld v Boustead* [1897] 1 Ch 196 principle. In this case, Madam Lim's name was entered as the owner of Sam Leong Mansion on the condition that she was to give up her half share of the Bangsawan house. Thus, it was unconscionable for Mdm Lim to continue to assert her interest in the Bangsawan house and a constructive trust was declared accordingly. An alternative way of rationalising this case was that the Chua brothers were the beneficial owners of the Bangsawan house by way of a purchase price resulting trust. Mdm Lim and Mdm Koh were therefore the bare trustees of the legal title of the Bangsawan house. However, as the Chua brothers were not parties to the action this option was not open to the learned judge.

Variation of trusts

12.12 Section 56 of the Trustees Act (Cap 337, 1999 Rev Ed) allows the court to confer on trustees the power to sell, lease or dispose of or purchase, invest or otherwise acquire property, which they would otherwise not be authorised by the trust deed to do. This power of the court may be exercised whenever such transaction 'is in the opinion of the court expedient' in the course of 'the management or administration of any property vested in trustees'.

12.13 In *Leo Teng Choy v Leo Teng Kit* [2001] 1 SLR 256 (noted in (2000) SAL Ann Rev 178-179 and in *Developments in Singapore Law 1996-2001* at p 440), the Court of Appeal exercised its power under s 56 on the application of some of the beneficiaries of the will of Leo Ann Peng, deceased. In this case the Court of Appeal justified the exercise of its powers under the overarching intention of the testator to benefit his four sons equally notwithstanding a specific instruction that the house should only be sold with the unanimous agreement of all four sons.

12.14 In a comment on this case, Barry Crown stated that while he accepted that the decision of the Court of Appeal achieved the only possible just result on the facts of the case, yet he was uncomfortable with the thought that in order to do so the court had in effect swept aside the testator's express instructions. (Crown, 'Varying the Terms of a Trust – A New Power for the Courts?' [2001] SJLS 12). It is evident that the Court of Appeal in this case took a very liberal view of its powers under s 56(1) when compared with its earlier decision in *Rajabali Jumabhoy v Ameerali R Jumabhoy (No 2)* [1998] 2 SLR 489. In that case the Court of Appeal felt it difficult to sanction a transaction which would result in the trustees holding investments which were expressly prohibited by the trust instrument, notwithstanding that it was of the view that s 2(2) Trustees Act did not apply to the powers of the court under section 56(1). *Leo Teng Choy* was a hard case and the exercise of the court's discretion under s 56(1) there must be seen in the light of the special circumstances that prevailed there.

12.15 The High Court was again invited to consider exercising its powers under s 56 of the Trustees Act in *Re Compensation Fund established under s 75 of the Legal Profession Act (Cap 161, 2000 Ed)* [2001] 4 SLR 633. This case concerned the Law Society's scheme to realign its finances in the light of the current financial market. Under s 75 of the Legal Profession Act the Law Society is required to maintain and administer a fund to be known as the Compensation Fund. The Law Society wished to utilise $3.75 million from its Compensation Fund in payment of its outstanding mortgage loan with OCBC Bank. This withdrawal from the Compensation Fund was to be treated as a loan to the Law Society carrying an interest calculated at the average fixed deposit rates of local banks plus 0.05% per annum. The loan would be repaid in instalments from 2002 to 2007 out of the annual Building Fund levies. This scheme would benefit the Compensation Fund as it would receive more by way of interest from the loan and the Law Society would benefit from not having to pay the higher rate of interest to OCBC Bank under the mortgage. The issue, however, was whether the Law Society had the power to implement its scheme under the Legal Profession Act or whether the court should exercise its powers under s 56(1) of the Trustees Act. Tay Yong Kwang JC, having first held that the scheme was not authorised by the Legal Profession Act, went on to consider its powers under s 56(1) of the Trustees Act. First he held that the Law Society was a trustee for the Compensation Fund by way of an implied trust. Then as the proposed scheme was not within its expressed powers under the Legal Profession Act, Tay JC was of the view that it was appropriate to consider the application of s 56(1). Having first noted that the Legal Profession Act did not expressly prohibit the Law Society from doing what it proposed to do, he held that the proposed scheme was 'expedient' in the circumstances. There was a clear benefit to the Compensation Fund. Compared to *Leo Teng Choy*, this was a straightforward case.

Charities

12.16 In *Chileon Pte Ltd v Choong Wai Phwee* [2001] 2 SLR 223 the Court of Appeal affirmed the decision of G P Selvam J in the court below ([2000] 4 SLR 340 noted at (2000) SAL Ann Rev 179). Selvam J had held that s 30 of the Charities Act (Cap 37, 1995 Ed), which allows the Commissioner of Charities to sanction any action that is not provided for in the trust instrument where it is expedient in the interests of the charity, applies not only to prospective dealings but also to an action that is current. The Court of Appeal upheld this construction of s 30.

12.17 Another case involving charitable trusts is *Re Lot 114-69 Mukim 22, Singapore* [2001] 2 SLR 509. In that case the applicant and his family had been in actual adverse possession of land belonging to a temple, a charity, for well over the then applicable requisite period of 12 years. The

only issue was whether adverse possession could be claimed against a charitable trust. The High Court held that there was no reason why a successful claim in adverse possession could not be made against a charity. Following *President, etc of St Mary Magdalen, Oxford v A-G* (1857) 6 HL Cas 189, Tay Yong Kwang JC reiterated that charities are trusts, and where there appears to be no surviving trustee, the Attorney General is the appropriate 'person' to sue on behalf of the charity under s 9(1) of the Limitation Act (Cap 163, 1996 Ed).

12.18 The facts of *Re Will of Samuel Emily, deceased* [2001] 4 SLR 379 could have been those of a hypothetical problem for a classroom discussion. Samuel, an unmarried woman, died leaving a will drawn up by the husband of her good friend. The will was done in a casual manner and no care was taken to give accurate descriptions of the intended beneficiaries. As she had no relatives Samuel gave bequests to beneficiaries described as 'the Lam family' and to different charities. Her will did not contain a residuary clause. The executrix, who was also a good friend of the deceased, took out an originating summons seeking the court's determination as to whether the gifts under the will failed for uncertainty. Except for two bequests to individuals, the rest of the bequests were to charities. Unfortunately, the names and addresses of the beneficiaries were imprecise and inaccurate. The court approached the matter by trying to ascertain whether the named non-existent beneficiaries could be identified with existent charities. The court took a benignant approach to the construction of the will and was able to identify the beneficiaries of most of the bequests with extensive resort to extrinsic evidence. The court considered the charities that the testatrix had associated or had connections with in her lifetime and also the names of charities as registered with the Commissioner of Charities. Since the deceased left no next of kin, the one bequest which failed for uncertainty, a gift 'for tea or lunch after church', lapsed and, together with the rest of the estate which had not been specifically given away, went to the State.

EQUITY

Specific performance

12.19 *Coastland Properties Pte Ltd v Lin Geok Choo* [2001] 1 SLR 72 is interesting on two matters. First, Choo Han Teck JC held that the remedy of specific performance is available in regard to a contract for the purchase of an apartment (see also G P Selvam J in *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592 at 610). Second, in considering whether the court ought to exercise its discretion, the court took into account the implication on the third party mortgagee if specific performance were awarded. On the facts of the case, the apartment concerned was agreed to be sold at a price that was below the redemption price. Choo JC noted that since the vendor/ mortgagor was not in a position to make up the shortfall and the purchaser

was not prepared to make up the difference, he was 'not satisfied that an order for specific performance will not prejudice the mortgagee'. Accordingly, he refused to order specific performance. However it may be pertinent to ask if the remedy should even have been considered in the circumstances as the contract for sale was subject to the mortgagee's consent which, at the time of the action, had not been obtained.

Relief against forfeiture

12.20 In any case in which there is an application for relief against forfeiture, the first issue to consider is whether the case is one which falls within the court's jurisdiction. It is accepted that relief will be granted where the object of the forfeiture clause is to secure the payment of a sum of money. It is also settled law that relief against forfeiture is applicable to forfeiture of property interests whether real or personal. In *Jobson v Johnson* [1989] 1 All ER 621, the discretionary nature of the remedy is well illustrated and relief can be granted on terms which the court thinks fit. The remedy overlaps with relief against penalties, which is a relief at common law.

12.21 *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* (Suit 623/1998, HC, unreported judgment dated 31.5.2001) confirms that in Singapore, in principle, relief against forfeiture is available where the property forfeited is personal property. In brief, the facts concerned an investment in a venture company, Nomura Regionalisation Venture Fund Ltd (the plaintiffs), which went sour on account of the 1997 financial downturn. Ethical Investments Ltd, the defendants, were among those who subscribed to the Nomura Fund. They agreed to purchase 50 units at US$100,000 per unit at a total consideration of US$5 million. Each unit comprised 10 ordinary shares at US$1,000 per ordinary share and 90 redeemable preference shares at US$1,111 per share. Under the agreement for subscription to the fund, subscribers were obliged to pay for the units in two instalments. A first instalment of US$50,000 for each unit was payable on application and a second instalment of US$50,000 was to be paid by a date falling six months after the closing of the fund. Ethical Investments Ltd paid the first instalment but failed to pay the second instalment after having been requested to do so by the plaintiffs. The plaintiffs then sued for and were granted specific performance of the agreement. However, Ethical Investments still did not perform. The order for specific performance having first been discharged at the instance of the plaintiffs, and the defendants having been given one more chance to pay the outstanding sum which they failed to do, the plaintiffs forfeited the defendants' shares as provided under the articles of association. The defendants thereupon applied for relief against forfeiture. While forfeiture proceedings were ongoing the defendants tendered the sum outstanding and indicated that they were prepared to abide with any order as to damages for late payment.

12.22 Lai Siu Chiu J granted the relief sought on the grounds that forfeiture of the shares, when the plaintiffs had already been paid US$3 million, amounted to a penalty. But in any event, following *Jobson v Johnson* [1989] 1 All ER 621 the court held that the forfeiture clause was intended as a security for the payment of money so that *prima facie*, per *Shiloh Spinners Ltd v Harding* [1973] AC 691, relief was available. Lai J then took into particular consideration the facts: (a) the plaintiffs had earlier sued for and were granted specific performance; and (b) the plaintiffs had suffered no loss (due to the financial conditions then prevailing). Applying pure equitable principles, *viz* that he who sues in equity must come with clean hands, Lai J granted the defendants relief. Her Honour also held that where forfeiture of property was involved there must be strict compliance with notice of forfeiture. On the facts the plaintiffs had not given adequate notice. While it is accepted that in considering whether or not to grant relief against forfeiture the decision is entirely at the discretion of the court, which can take into account matters including the conduct of the parties and the benefits of windfall gains, yet it is also clear that the fact that the plaintiff may have earlier obtained an order for specific performance does not make it impossible for him to rescind the contract where the defendant has failed to perform (see *Johnson v Agnew* [1980] AC 367). In any event on the facts of the case, the order for specific performance was discharged. Thus Lai J might not have been entirely correct in viewing the fact that the plaintiffs had earlier obtained an order for specific performance and then forfeiting the shares as an indication of inequitable conduct.

Dishonest assistance

12.23 The High Court's decision of *Banque Nationale de Paris v Hew Keong Chan Gary* [2001] 1 SLR 300 was reviewed last year (see (2000) SAL Ann Rev 165-168). The plaintiff bank's vice president Gary Hew misused his estranged wife's and brother-in-law's accounts with the plaintiff bank to make personal unauthorised speculative foreign exchange transactions. Substantial losses were incurred and the plaintiff brought a claim for, *inter alia*, accessory liability, tort of conspiracy and the tort of procuring breach of contract against the wife and the brother-in-law. Lai Kew Chai J dismissed the claim on two principal grounds: (a) that the defendants were not dishonest; and (b) that the chain of causation was broken by the plaintiff's failure to take due care. The Court of Appeal allowed the claim (see *Banque Nationale de Paris v Tan Nancy* [2002] 1 SLR 29). L P Thean JA, in delivering the judgment, premised the entire analysis on agency principles. His Honour held that the defendants had given Gary Hew actual and/or apparent authority to enter into the transactions. It is interesting to note that the Court of Appeal did not comment on the point of accessory liability. Therefore the points of law on dishonest assistance contained in Lai J's judgment at first instance are still arguably good law in Singapore.

12.24 At first instance in *Ho Kon Kim v Lim Gek Kim Betsy* (*supra* at para 12.3), the plaintiff also brought a claim for dishonest assistance against the solicitors acting for Betsy. The trial judge dismissed this claim. Ho did not appeal against the dismissal of her claim against the solicitors. However the Court of Appeal did say that it was arguable that equity may well impose liability on a solicitor who was involved as an accessory to a disposition of property in breach of trust.

Fiduciary duty

12.25 *Tai Kim San v Lim Cher Kia* [2001] 1 SLR 607 arose from the sale and purchase of the plaintiffs' shares in the Chosen Group of companies ('the Group') to the defendant who was the Managing Director of the Group. The Group listed its shares on the Stock Exchange of Singapore shortly thereafter. The plaintiffs sued the defendant for breach of fiduciary duty in failing to disclose the plans for the listing of the shares. Amarjeet Singh JC said that the existence of a fiduciary duty and the obligations it entails differ widely and will be largely dependent on the circumstances of the particular case *ie* a situation-specific approach has to be adopted to determine its existence (see also *Singapore River Cruises v Phun Teow Kie* [2000] 4 SLR 791 and J D Davies, 'Keeping Fiduciary Liability Within Acceptable Limits' [1998] SJLS 1). On the facts, the learned judge had no difficulty in dismissing the claim. The plaintiffs were experienced businessmen and were not dependent on the defendant for information. Further, the plaintiffs were eager to divest their shares and voluntarily offered to sell them to the defendant. The plans to list at that time were merely tentative and the defendant was under no obligation to disclose such plans to the plaintiffs.

12.26 In *Krishna's India Pte Ltd v Arulmozhi d/o Krishnan* (Suit 843/2000, HC, unreported judgment dated 29.6.2001), the plaintiff company alleged that its former director breached her fiduciary duties by arranging for the sale of its properties at a low price to her husband. Tan Lee Meng J found that more should have been done to market the properties, the valuation report relied on by the defendant was fundamentally flawed and that the transaction was in fact sold at an undervalue. The claim was therefore allowed.

Estoppel

Promissory estoppel

12.27 The case of *Sri Jaya (Sendirian) Berhad v RHB Bank Berhad* [2001] 1 SLR 486 was a case involving a mortgagee's conduct in the sale of a mortgaged property. The defendant tried to argue that the plaintiff was estopped from alleging that the defendant had breached its duty in the sale of the property as the plaintiff had consented to the sale at a lower price.

Rajendran J was not persuaded by this argument and his Honour held that it was not any part of the defendant's case that the plaintiff's consent had influenced the defendant's conduct of the sale. In short, there was no reliance on the alleged representation. The learned judge found that the defendant was negligent in the conduct of the sale and allowed the claim.

Issue estoppel

12.28 The case of *Official Assignee of the estate of Tang Hsiu Lan v Pua Ai Seok* [2001] 2 SLR 436 was concerned with a matrimonial dispute. Mdm Tang's former husband, Mr Lee Ee had owned a property in Margoliouth Road as joint tenants with his mother, father and two brothers. Mr Lee transferred his share of the property to his mother and two brothers without any consideration in 1992. By 1995, Mdm Tang's marriage to Mr Lee had broken down. In the division of the matrimonial property, Mr Lee was ordered to pay Mdm Tang $760,000 (this was calculated on the basis of 40% of Mr. Lee's one-fifth share in the Margoliouth property). Mr Lee failed to pay Mdm Tang. Mdm Tang obtained a writ of seizure and sale against the Margoliouth property. She filed a summons in chambers to enforce the writ of seizure and sale. Mr Lee's family in turn filed an originating summons for a declaration that Mdm Tang had no claim or interest in the Margoliouth property. The summons in chambers and originating summons were heard together by Chao Hick Tin J (as he then was). Chao J allowed the originating summons and declared that Mdm Tang had no share in the property. Mdm Tang did not file an appeal against Chao J's judgment. Instead, she filed a further originating summons praying for a declaration that Mr Lee's family held the Margoliouth property as 'constructive trustees accountable to her for 40% of 1/5 share in the said property'. The trial judge, Lai Kew Chai J dismissed the claim as he found that Mdm Tang had raised this argument before Chao J. Mdm Tang appealed to the Court of Appeal The Court of Appeal dismissed the appeal on the grounds of issue estoppel. A careful perusal of the counsel's previous written submission and further arguments before Chao J revealed that Mdm Tang had raised the issue of a constructive trust. What is noteworthy about this case is that the Court of Appeal did not comment on Lai J's view at first instance where his Honour said that recipient liability ('knowing receipt') is premised on the reversal of the defendant's unjust enrichment. It has been suggested in last year's review that there are serious conceptual problems with this view (see (2000) SAL Ann Rev 167-169).

12.29 In contrast, *Arul Chandran v Chew Chin Aik Victor* [2001] 1 SLR 505 was a case where issue estoppel was unsuccessfully invoked. The plaintiff was painted in an unfavourable light in an interlocutory judgment by the High Court of Johore instituted by one Mdm Tara Rajaratnam. The appeal to the Malaysian Federal Court of Civil Appeal was dismissed. However, on appeal to the Privy Council, the plaintiff reached a settlement

with Mdm Rajaratnam who withdrew all her allegations of fraud against the plaintiff. Further, the Privy Council took pains to make it clear that the plaintiff did not have any hand in the events leading to Mdm Rajaratnam's complaint. The defendant published certain statements about the plaintiff in Singapore. These statements were taken from the interlocutory judgment of the trial judge of the High Court of Johore. The plaintiff sued the defendant for defamation. The Court of Appeal ruled that the defendant was not entitled to rely on issue estoppel premised on the judgment of the High Court of Johore because: (a) the Privy Council had absolved the plaintiff; (b) the defendant was not a party to the earlier litigation; and (c) the judgment relied upon was a foreign judgment.

Estoppel by convention

12.30 In *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd* [2001] 2 SLR 316, the plaintiff unsuccessfully tried to invoke estoppel by convention, silence or acquiescence against the defendant insurer. The plaintiff argued that the defendant insurer was precluded from denying that it 'held covered' the cargo on a certain vessel by reason of two facsimiles sent by the plaintiff to the defendant's agent informing them of the shipment details. The defendant insurer argued that the shipment was not covered as the vessel was a 'phantom' vessel and did not comply with the classification society listed in the Institute Cargo Clauses (which were incorporated in the cover note issued). The plaintiff's argument based on estoppel was rightly rejected by the trial judge and the Court of Appeal. L P Thean JA held that it was the plaintiff's obligation to ensure that the shipment was in conformity with the cover note. There was no duty on the part of the defendant to investigate the status of the vessel nor was there a common assumption by the parties to invoke the doctrine of estoppel by convention.

12.31 In comparison, the plaintiffs in *Panwell (Pte) Ltd v Indian Bank* (Suit 422/2001, HC, unreported judgment dated 17.10.2001) had more success in invoking estoppel by convention against the defendant. The plaintiffs owed the defendant bank a large sum of money. The defendant bank initially tried to get the plaintiffs to agree to settle the matter according to the terms set out in a letter of offer in 1990 ('the 1990 letter'). The plaintiffs accepted the terms only in 1998. Subsequently in 2001, the defendant disputed that the terms in the 1990 letter governed its relationship with the plaintiffs as the offer was not accepted within the deadline of 30 days. The plaintiffs argued that the defendant was estopped from denying the terms of the 1990 letter. Tan Lee Meng J carefully assessed the evidence and found that there were many instances where the defendant bank had led the plaintiffs to believe that the offer was still open after the deadline of 30 days. In fact, the defendant did not demur when the plaintiffs accepted terms of the 1990 letter in 1998. The defendant had also acknowledged the terms contained in the 1990 letter after the plaintiffs'

acceptance. In the premises, Tan J held that the doctrine of estoppel by convention could operate to preclude the defendant from denying that the matter was settled according to the terms of the 1990 letter. There was an agreed assumption that the terms of the 1990 letter were in force, the plaintiffs had relied upon this common assumption and had changed their position accordingly. Perhaps, another way to explain this case is that there was an agreement between the plaintiffs and the defendant as per the terms of the 1990 letter. Certainly, the conduct of the parties including the defendant's conduct and the correspondence after the plaintiffs' acceptance of the 1990 letter support such an analysis. It is also interesting to note that the learned judge cited Lord Denning's judgment from *Amalgamated Property Co v Texas Bank* [1982] 1 QB 84 at 122 where Lord Denning said that there is a unified principle in the law of estoppel. This appears to be the Australian position (see *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 413). However, there is some doubt as to whether it is possible and in what manner the law of estoppel can be unified (see Evans, 'Choosing the Right Estoppel' [1998] Conv 346; Lunney, 'Towards a Unified Estoppel' [1992] Conv 239; Cooke, *The Modern Law of Estoppel* (1st Ed, 2000) pp 60-63).

Estoppel per rem judicata

12.32 In *Lee Hiok Tng (in his personal capacity) v Lee Hiok Tng (executors and trustees of the estate of Lee Wee Nam, deceased)* [2001] 3 SLR 41 there had been earlier proceedings involving a partnership set up in the 1920s by three brothers (Kheng, Nam and Kiat). Kheng's beneficiaries had previously brought an action for breach of trust against the executors and trustees of Kheng's estate. Kheng's beneficiaries had also sued Nam's estate for failing to wind up the partnership after Kheng's death and failing to give an account of the partnership assets to the estate of Kheng. The court had found that certain shares (including some Overseas Union Bank shares) belonged to the partnership and had ordered the estate of Nam to account for the same. In the present suit, the executors and trustees of Nam's estate instituted an originating summons to determine the issue of a gift of 27 Overseas Union Bank shares purportedly made by Nam to one Tng in 1962. Three beneficiaries of Nam's estate intervened and alleged *inter alia* that the matter was *res judicata*. Chao Hick Tin JA did not find that the matter was *res judicata* as the parties, issues and the subject matter of dispute in the earlier suit were different from the present suit. However, on the facts, the Court of Appeal found that Tng was not entitled to the shares as there was no requisite intention to make the gift on Nam's part.

12.33 The reliance on *res judicata* was successful in the case of *Mangamal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90. The defendant attempted to raise certain arguments during the assessment of damages. These arguments were previously raised at the summary judgment proceedings and an earlier application to set aside the writ of distress. It

was unsurprising that Rajendran J held that the defendant was precluded from re-canvassing the same points.

RESTITUTION

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

12.34 Since the landmark decision of *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, the law of restitution has been something of a 'growth area' (see Jones, 'Unresolved Problems in the Law of Restitution' in *Hochelaga Lectures 2000* (1st Ed, 2001) p 1). In Singapore the recent case of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2001] 4 SLR 90 is an extremely significant decision on the law of restitution. In this case, the development concerned was People's Park Complex ('the Complex'). De Beers owned four penthouses in the Complex and wanted to subdivide the penthouses into eighteen maisonettes. In order to do so, De Beers had to seek approval from the Management Corporation ('MC'). When De Beers approached the MC, the MC imposed *inter alia* the following charges on De Beers as a condition of the MC's approval: (a) a contribution of $200,000 to modernise the lift system as it was envisaged that the subdivision would increase the usage of the lift; and (b) a lump sum payment of $170,000 representing the increase in maintenance costs as the proposed subdivision would create additional common property. Subsequently, the MC sued De Beers for arrears of maintenance fees. De Beers counterclaimed for the payment made *ie* the $370,000 on the grounds that it had paid the said sum under a mistake of the law. This part of the review will not be concerned with the issues that arise from the Land Titles (Strata) Act (Cap 158, 1999 Ed). It is sufficient to note for the purpose of review in this part that the learned trial judge found that the MC was not entitled to demand such payments (see also paras 17.35-17.42 in the review on Land Law).

Limitation period and laches

12.35 Since the payments to the MC were made in 1992 and 1993, there was uncertainty as to the relevant time bar provision to apply. In *De Beers*, the claim against the MC was pleaded as a mistake to take advantage of a more generous limitation period (as in the case of *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349). On the other hand, the MC argued that by virtue of s 6 of the Limitation Act (Cap 163, 1996 Ed) the action was time-barred as it was not brought within 6 years. The MC argued that De Beers' claim for the sum of $370,000 was based on the cause of action of moneys had and received and was an action founded on contract. It is in this context that Judith Prakash J had to investigate the juridical basis of the action.

12.36 The learned judge emphatically held that the juridical basis of the action in restitution was not founded in contract or in equity. The learned judge seemed to have accepted the proposition that restitutionary claims are *usually* based on the principle of unjust enrichment (at 113). Prakash J's judgment effectively rejects the fiction that the action for reversal of unjust enrichment is based on an implied contract (see *Sinclair v Brougham* [1914] AC 398; overruled by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669). The learned judge disagreed with Woo Bih Li JC's decision in *Ching Mun Fong v Liu Cho Chit* [2000] 4 SLR 610 at 624 where Woo JC said that the words in s 6 of the Limitation Act 'are wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise'. Her Honour said at 114 that '[u]ntil the legislature intervenes, it would appear that there is no applicable limitation period for restitutionary claims which have no grounding in contract'.

12.37 While Prakash J's rejection of the implied contract theory is correct, her observation that there is no limitation period applicable to restitutionary claims is too broad. It is true that for claims premised on mistake, the limitation period is extended by s 29 of the Limitation Act. However, it does not follow that the Limitation Act does not govern *all* restitutionary claims. With respect, it is submitted that her Honour's interpretation of s 6 of the Limitation Act is unduly restrictive. First, the *De Beers* decision did not refer to the authority of *Re Diplock* [1948] Ch 465 at 514 where Lord Greene MR (in the context of s 2(1)(a) of the UK Limitations Act 1939, now s 5 of the UK Limitation Act 1980, which states that 'actions founded on simple contract' are barred after six years) held that these words must be interpreted to 'cover actions for money had and received though the words used cannot be regarded as felicitous' (see also Goff and Jones, *The Law of Restitution* (5th Ed, 1998) at pp 846-849). *Re Diplock* was followed in *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at 942-943 where Hobhouse J held that the words of this section (s 5 of the UK Limitation Act 1980) 'are sufficiently broad to cover an action for money had and received'. This decision was not challenged in the English Court of Appeal. It was in this context that Kleinwort Benson renewed their alternative cause of action in mistake to take advantage of a more generous limitation period that led to the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. As Virgo noted in *The Principles of the Law of Restitution* (1st Ed, 1999), at p 768:

> 'This is artificial and harks back to the implied contract theory, but since no specific provision is made for this type of restitutionary claim in the Limitation Act, it seems to be the best solution available. It is certainly better than concluding that such restitutionary actions are subject to no limitation period at all. In fact this conclusion is consistent with the

> Limitation Act 1623, section 3 of which provided a limitation period of six years for all assumpsit claims and this provision continued to apply until 1939.'

Thus, on balance, it is submitted that Woo JC's decision in *Ching Mun Fong v Liu Cho Chit* (*supra*) that there is primary limitation period of six years is preferable. It must be noted that Woo JC's view of the applicable limitation period was upheld by the Court of Appeal (see [2001] 3 SLR 10).

12.38 Further as a matter of policy, a restrictive interpretation of s 6 of the Limitation Act is undesirable. This is because the absence of a period of limitation is too favourable to the plaintiffs. A defendant would have no security of receipt whatsoever. The lack of time bar places an unfair burden on the defendant after a long period of time to justify that she has changed her position. It is notoriously difficult to prove change of position. To cast it solely on the defendant is unreasonable. As Dagan perceptively noted in 'Mistakes' [2001] Texas Law Review 1795 at 1806:

> 'But such an inquiry (change of position) is almost never straightforward. It requires interpreting changes in the recipient's pattern of spending before and after the mistake. At times – especially when the type of the recipient's expenditure has not been changed by the mistake, but its magnitude arguably has been – it also requires access to the recipient's subjective utility function.'

See also Beatson in *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1st Ed, 1991) at pp 139-141; and Hedley in *Restitution: Its Division and Ordering* (1st Ed , 2001) at pp 27-32):

12.39 It is unsurprising that the MC was unable to prove a change of position. Thus, there is a strong case why there is an urgent need to re-look at ss 6 and 29 of the Limitation Act. Perhaps, a fairer solution in balancing the protection of the plaintiff's autonomy and the defendant's security of receipt is to have a primary limitation period of 3 years running from the date of discoverability and a longstop limitation period of 10 years (see The UK Law Commission (Law Com No 270, 2001), *Limitation of Actions* paras 4.76-4.78). It is submitted that the 12-year limitation period suggested by the Law Reform Committee of the Singapore Academy of Law in 'Reforms to the Law of Restitution and Mistakes of Law' is impractical and disproportionately favourable to the plaintiff.

12.40 Further, De Beers did not seek the advice of a lawyer on the legality of the conditions imposed by the MC before making the payment. Prakash J did not seem to think that this fact was material to De Beers claim. With respect, it is submitted that this factor should be relevant in applying s 29 of the Limitation Act in order to ascertain the date of discoverability of the mistake. As the Court of Appeal said in *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10 at 23 that as far as s 29 of the Limitation Act is concerned

'it is the plaintiff's means of ascertaining the mistake … that is relevant in determining when the limitation period begins to run'. In this case, the mistake could have been discovered by obtaining competent legal advice from the very start. Should the payer not undertake at least the minimum mistake avoidance cost? Is a payer who is ignorant of the law by reason of a failure to seek legal advice really mistaken? Why should the law save this payor from its own indolence? Therefore, it is humbly submitted that s 29 of the Limitation Act should not have been used to extend the time bar indefinitely.

12.41 It is also important to realise that mistakes in the real world do not happen in a vacuum. The correction of mistakes impacts on third party rights. Therefore, the courts should be keenly aware and sensitive to the following policy considerations in formulating a mistake rule: (a) the security of the defendant's receipt; (b) the risk of concoction of claims; and (c) the relative costs of avoiding the mistake (see Virgo, *The Principles of the Law of Restitution* (1st Ed, 1999) at p 135). As noted above, the generous application of s 29 of the Limitation Act (Cap 163, 1996 Ed) has the effect of eroding the security of the defendant's receipt and may also give rise to the danger of fabrication of claims.

12.42 Prakash J then went on to consider whether the equitable doctrine of laches applied to the facts of the case. Her Honour reviewed De Beers' conduct and found that De Beers was not barred on the ground of laches. With respect to the learned judge, the application of laches to this claim is controversial. This is because laches is an equitable doctrine and De Beers' claim was grounded in common law. As the High Court of Australia forcefully said in *Orr v Ford* (1989) 167 CLR 316 at 340: 'Laches … is not available in answer to a legal claim' (see also McGhee, *Snell's Equity* (30th Ed, 2000) at p 33). The orthodox position is that laches is an equitable doctrine and should only apply where the plaintiff is seeking an equitable remedy such as an account of profits, recission and other equitable proprietary remedies (see *Syed Ali Redha Alsagoff v Syed Salim Alhadad* [1996] 3 SLR 410; *Scan Electronics v Syed Ali Redna Alsagoff* [1997] 3 SLR 13; and McLean, 'Limitation of Actions in Restitution' [1989] CLJ 472 at 481-482). Despite some authorities that suggest that the doctrine of laches apply equally to legal and equitable rights (see *Shaw v Applegate* [1977] 1 WLR 970; *Habib Bank Ltd v Habib Bank AG Zurich* [1982] RPC 1; *Hoover plc v George Hulme (Stockport) Ltd* [1982] FSR 565; *Ind Coope Limited v Paine & Co Ltd* [1983] RPC 326; *Genelabs Diagnostics Pte Ltd v Institut Pasteur* [2001] 1 SLR 121; Kwek, 'The Biotechnology Era: Ramifications of *Genelabs Diagnostics v Institut Pasteur* (2001) 13 SAcLJ 89 at 113-115), a leading Australian work has described the application of laches to legal claims as being a heresy (see Meagher, Gummow & Lehane, *Equity Doctrines and Remedies* (3rd Ed, 1992) at pp 801-802). It is therefore submitted that the better view to take is that the doctrine of laches does not apply to a common law claim.

Juridical basis of the cause of action

12.43 Quite apart from the time bar issue, Prakash J's analysis is laudable because unlike the other Singapore decisions in the past (see for example *Seagate Technology (S) Pte Ltd v Heng Eng Li* [1994] 1 SLR 534; *Star Cruise Services v Overseas Union Bank* [1999] 2 SLR 412) it was not bogged down with the term 'money had and received' (though regrettably the head note was sprinkled with this term). As Yeo explained in 'Restitution, Tracing and Change of Position' [1994] SJLS 138 at 140:

> 'The action for money had and received is no more than a *form* of action, from a distant time in English legal history when plaintiffs had to take writs out in specific formats. It says nothing more than that the defendant owes the plaintiff a debt. The reason for the debt is unexplained. To call the action for money had and received a cause of action is akin to calling an action for damages a cause of action. It adds nothing to the analysis.'

12.44 However, it is not entirely clear whether the learned judge accepted an all-embracing theory of unjust enrichment. In England, there is some judicial support that unjust enrichment is the third limb in the law of obligations in addition to contract and tort; see for example *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 *per* Lord Steyn:

> '[U]njust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations.'

In comparison, Barker and Smith, in *Law's Future* (1st Ed, 2000) at p 412 argue that the concept of unjust enrichment is 'a broad organisational tool or 'umbrella' beneath which a series of sometimes quite different actions for unjust gain can defensibly be collected'. Lord Steyn's *dicta* in *Banque Financiere* should be contrasted with the restrained attitude of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 185 ALR 335. Gummow J expressed considerable scepticism to an all-embracing theory of unjust enrichment. He said that restitutionary actions should be developed like the rules in equity and be seen as a series of innovations to fill gaps in the rest of the law. Thus, it remains to be seen whether the Singapore Courts will accept an all-embracing theory of unjust enrichment or adopt Gummow J's 'gap filling' approach to restitutionary claims.

Elements of the cause of action in unjust enrichment

12.45 On the assumption that an all-embracing theory of unjust enrichment was accepted by the learned judge, another important inquiry that has not been resolved by the *De Beers* decision is the identification of the elements of the cause of action. In England, the analysis would take the following form (see *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227; *BP Exploration Co (Libya) Ltd v Hunt* [1979] 1 WLR

783 at 839; also Goff and Jones, *The Law of Restitution* (5th Ed, 1998) at p 15; and Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399 at 408):

(a) the defendant must have been enriched;

(b) the enrichment must be gained at the plaintiff's expense;

(c) it must be unjust to allow the defendant to retain that benefit (termed 'the unjust factor'); and

(d) are there any defences?

12.46 In Canada, the inquiry is slightly different. A plaintiff must show (see *Rathwell v Rathwell* [1978] 2 SCR 436 at 455; *Sorochan v Sorochan* [1986] 2 SCR 38; and McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights in the Law of Restitution' (1999) 37 Alberta Law Review 1):

(a) an enrichment of the defendant;

(b) a corresponding deprivation on the part of the plaintiff; and

(c) an absence of juristic reason for the enrichment.

12.47 The main difference between the English model and the Canadian model is point (c). The English model defines the justification for the law's intervention in terms of instances of unjustness whereas the Canadian model pre-supposes a presumption of recovery unless the defendant can show a juristic reason for the enrichment. It could be argued that Prakash J in *De Beers* accepted the English model of unjust enrichment as she explained at length that the recovery of the monies was due to a payment made under a mistake of law which could be construed as the unjust factor.

The unjust factor

12.48 De Beers argued that the basis of its claim was: (a) that the payments were made in respect of '*colore officii*' demands; or alternatively (b) that the payments were made under a mistake of law (see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349). The learned judge did not find the first argument to be persuasive as her Honour was of the view that the MC was not a public authority.

12.49 De Beers had more success with the second argument. Prakash J held that De Beers made the payments by reason of the mistaken belief that the MC was legally entitled to ask for the funds as a pre-condition of the MC's approval. The learned judge then proceeded to consider the common law rule that unlike payments made under a mistake of fact, payments made under a mistake of law were not recoverable. After reviewing the developments in other Commonwealth jurisdictions and the Report of the Law Reform Committee of the Singapore Academy of Law entitled 'Reforms to the Law of Restitution on Mistakes of Law', her Honour

found no justification for this distinction. Prakash J boldly swept away this rule and said, 'The mistake of law rule was itself a mistake' (at 107). In this regard, it seems that Lee Seiu Kin JC in *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 3 SLR 296 (discussed *infra* at para 16.20) also thought that the distinction between a mistake of fact and mistake of law was abrogated in Singapore.

12.50 While the anomalous distinction between a mistake of law and a mistake of fact is indefensible in principle, there is some uncertainty as to whether the learned judge was empowered to depart from the rule. Prakash J noted that the mistake of law rule was accepted in Singapore in *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 and *Borneo Motors (S) v William Jacks & Co* [1992] 2 SLR 881. Also, the abolition of the mistake of law rule was apparently argued in *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10 at 22 but there was no evidence in the judgment that the Court of Appeal agreed with this submission.

12.51 Further, the question remains as to why a claimant's mistake should be a source of rights against others? Does the answer lie (see Birks, *An Introduction to the Law of Restitution* (revised Ed, 1989), at p147; Dagan, 'Mistakes' [2001] Texas Law Review 1795 at 1798-1803) in protecting the autonomy of the plaintiff? In short, the law corrects the involuntariness of the plaintiff and secures his integrity of will. Some commentators have challenged this view (see Matthews, 'Money Paid under Mistake of Fact' (1980) 130 NLJ 387; Butler, 'Mistaken Payments, Change of Position and Restitution' in Finn (ed.), *Essays on Restitution* (1st Ed, 1990) at p 87). For a powerful critique of the mistake rule see Hedley in *Restitution: Its Division and Ordering* (1st Ed, 2001) at pp 1-33. They argue that the cases on mistake are better interpreted as instances of 'a failure of basis'. This is an equally plausible characterisation. It could be argued that the basis of the payments made to the MC had failed. This is because there was simply no basis for *De Beers* to make the payment. It can be argued that this analysis is supported by the decision of *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10. In this case, the plaintiff was claiming from the defendant for moneys paid under a mistake. The plaintiff paid the defendant pursuant to a sale and purchase of a property. It turned out that the defendant had no title to the property. The moneys were paid on 23 April 1981. The plaintiff tried to argue that they paid the moneys under a mistake of law and therefore the limitation period was extended by s 29 of the Limitation Act. The Court of Appeal rejected the plaintiff's characterisation of the claim and held that the claim was premised on a total failure of consideration.

Change of position

12.52 As mentioned above, the MC could not substantiate any change of position on its part. The learned judge found that it would have incurred

the expenditure of modernising the lifts even if De Beers had not made the payment of $200,000. Further, the MC could not substantiate that the $170,000 was used for any other purpose. However, there is one aspect of Prakash J's judgment on change of position that merits some comments. Her Honour cited Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 540 at 880 where he said:

> '[T]he defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.'

12.53 Prakash J said that the change of position defence was inapplicable, *inter alia*, due to the fact that the MC had made a wrongful demand. With respect, it is suggested that this is a too restrictive view of the defence. On the facts, there was no suggestion of bad faith on the part of the MC. Such a restrictive reading of the defence would mean that the change of position defence would not be open to almost *all* restitutionary claims. This is undesirable as it would lead to a regime that excessively favours the plaintiff. Therefore, it is submitted that the concept of bad faith should be taken to connote some form of moral reprehensibility such as where the defendant committed fraud or duress or was involved in illegal transactions.

Mistake and the remedial constructive trust

12.54 In *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10 the plaintiff claimed that he paid the defendant pursuant to a sale and purchase of a property while harbouring under a mistake *ie* he erroneously thought that the defendant had ownership of the property. The moneys were paid on 23 April 1981. The plaintiff contended that he only knew of the mistake after the Court of Appeal's decision in 1998 in a sister suit (see *Fook Gee Finance v Liu Cho Chit* [1998] 2 SLR 121). Therefore, the plaintiff argued that the limitation period was extended by reason of s 29 of the Limitation Act. The plaintiff also argued that the mistaken payment gave rise to a remedial constructive trust. The plaintiff's claim was dismissed by Woo Bih Li JC in [2000] 4 SLR 610 at first instance. This decision was reviewed last year (see (2000) SAL Ann Rev 169-170).

12.55 The Court of Appeal did not agree with the plaintiff's characterisation of the issues. L P Thean JA, who gave the judgment of the Court of Appeal, held that s 6(1)(a) of the Limitation Act applied. The claim for recovery of this sum was barred by 22 April 1987. The Court of Appeal also found that s 29 of the Limitation Act (Cap 163, 1996 Ed) did not extend the limitation period as there was ample evidence that the plaintiff could have discovered the mistake before the limitation period expired. As noted above, what is interesting about this decision is that although the Court of Appeal rejected the mistake of law argument by

counsel, it did not say one way or the other whether the mistake of law rule was to be abrogated in Singapore.

12.56 Counsel for the plaintiff also argued for a remedial constructive trust. He submitted that although the money paid under a mistake did not trigger off a remedial constructive trust, the retention of the monies by the defendant after discovery of the mistake gave rise to a constructive trust. This argument seems to be premised on the rationalisation of *Chase Manhattan Bank NA v Israel British Bank (London) Ltd* [1981] Ch 105 by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. The authority of *Chase Manhattan Bank* was applied in Singapore by Goh Joon Seng J in *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd* [1995] 3 SLR 863.

12.57 In *Chase Manhattan Bank*, the claimant, a New York bank, paid a London bank the same sum twice. The London bank became insolvent thereafter. Goulding J held at 119 that the payer 'retains an equitable property in it and the conscience of [the recipient] is subjected to a fiduciary duty to respect his proprietary right'. In the premises, he granted a claim *in rem* in favour of the claimant. Lord Browne-Wilkinson in *Westdeutsche Landesbank* did not agree with this analysis. However, Lord Browne-Wilkinson said that *Chase Manhattan Bank* 'may well have been rightly decided' (see [1996] AC 669 at 714) – the defendant bank knew of the mistake two days after the receipt of the moneys. Lord Browne-Wilkinson thought that this might be the proper foundation of the decision. Retention of moneys after the recipient learnt of the mistake 'may well have given rise to a constructive trust'.

12.58 It is submitted that the analysis above is suspect. Lord Browne-Wilkinson's explanation of equitable principles in *Westdeutsche Landesbank* as being premised on conscience is controversial (see Swadling, 'Property and Conscience' (1998) 12 Trust Law International 228 for a thorough analysis of trusteeship arising without knowledge and wrongdoing of the defendant). In contrast, in *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214 at 233, the Supreme Court of Canada said that the concept of 'good conscience' lies at 'the very foundation of equitable jurisdiction'. See also Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238 where he characterises 'good conscience' as the underlying value of equity. However, this issue is beyond the scope of this review. For the purposes of our inquiry, it is sufficient to say that Lord Browne-Wilkinson's reasoning that knowledge of a mistaken payment could be the foundation of a constructive trust is inaccurate. If his analysis is right, then it follows that knowledge by the recipient of *any* vitiation of intent of the transferor will create a proprietary remedy. Stevens, in 'Simple Interest Only? Autonomous Unjust Enrichment and the Relationship between Equity and the Common Law' [1996] LMCLQ

441 at 444 argues that the rationalisation of *Chase Manhattan Bank* is 'specious'. This would generate an intolerable proliferation of 'off balance sheet' proprietary liabilities that Lord Browne-Wilkinson feared. Further, there are formidable problems with the knowledge/fault analysis (see Virgo, *The Principles of the Law of Restitution* (1st Ed, 1999) at pp 630-634). Two aspects need to be worked out – what is the degree of knowledge/ fault required and at what point must the defendant's conscience be affected? The degree of knowledge/fault inquiry seems to lead us unhappily to the quagmire that has plagued the area of knowing receipt. It is important to note that Lord Browne-Wilkinson's explanation of *Chase Manhattan* was couched in very tentative terms. Thus, in light of the conceptual and practical difficulties, it is submitted that the conscience-based analysis should be rejected. The case of *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd* [1995] 3 SLR 863 which accepted the authority of *Chase Manhattan Bank* can also be re-interpreted accordingly. The plaintiff bank issued a letter of credit in favour of the first defendant. It was clear that the first defendant was out to defraud the plaintiff bank and the purchaser. Instead of generators, the first defendant shipped bricks. The transaction was permeated with fraud. The learned judge could have granted a Mareva injunction against the second, third and fourth defendants instead of holding that the plaintiff was entitled to trace the payments into the bank accounts held by the defendants. It was therefore unnecessary for Goh J to say that the 'plaintiffs are also entitled to trace the money founded on a persistent equitable proprietary interest'.

12.59 In *Ching Mun Fong*, Thean JA did not reject the conscience-based analysis. His Honour said at 25 that '[i]n order for a remedial constructive trust to arise, the payee's conscience must have been affected, while the moneys in question still remains with him'. It seems from the judgment that for a defendant's conscience to be affected there must be some form of dishonesty. His Honour rejected the prayer for a remedial constructive trust because he found no dishonest conduct on the defendant's part and that there was no identifiable fund for the trust to bite on. Thus, it may be argued that a Singapore court would not be averse to declaring a remedial constructive if dishonest conduct and an identifiable fund representing the plaintiff's payment can be established. There remains a lot of work to be done in this area. If the courts are to recognise a remedial constructive trust, it would still have to address the following pressing issues:

(a) why does a constructive trust arise?

(b) do they operate to give priority if the defendant is insolvent? (see *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812; *In re Omegas Group Inc* 16 F 3d 1443 (1994) at 1452 and *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171)

(c) if so, why do they give priority to this particular plaintiff? and

(d) how do you identify the fund representing the plaintiff's payment *eg* by way of tracing?

Mistaken payments to liquidators

12.60 The case of *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 3 SLR 296 raises many fascinating issues. OCBC bank over-credited the account of PCChip on 24 June 1998 in the sum of US$85,200 and US$590. The money was mixed with other funds of the company which totalled about S$747,521. Thereafter, there were various withdrawals made from that account. On 18 October 1998, PCChip was wound up. The liquidators wrote to the bank to close the account. OCBC bank, without realising its error, paid the moneys into PCChip's account with United Overseas Bank. OCBC bank subsequently discovered its mistake and notified PCChip's liquidators on 31 May 1999. The liquidators took the view that the bank did not have any proprietary right to the said money, whether legally or equitably and merely ranked as an unsecured creditor of the company.

12.61 OCBC bank contended that it was entitled to be repaid on three alternative grounds: (a) the bank was entitled to trace the moneys into the hands of the liquidators as it never belonged to the company. The moneys did not form part of its assets for distribution to its creditors; (b) the liquidators held the moneys as constructive trustees for the benefit of the bank; and (c) under the principle in *Ex parte James* (1874) LR 9 Ch App 609, the court should order the liquidators to return the moneys. Lee Seiu Kin JC, did not consider, in his written judgment, counsel's submission on constructive trust and tracing and proceeded to decide the matter entirely on the rule in *Ex parte James* (see Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, who argues that the rule is premised on the principle of unjust enrichment).

12.62 If the matter was considered using constructive trust and tracing principles, the following issues would have to be considered before the bank can assert a proprietary claim:

(a) the identification of the payment attributed to the over-crediting of the account;

(b) whether the bank had an equitable interest over the moneys paid out or transferred; and

(c) whether the bank can successfully trace into the moneys paid out or into substituted assets acquired by such payment.

The learned judge, however, did not investigate what happened to the proceeds of payment after it was paid to the United Overseas Bank account.

12.63 The issue at the heart of the matter, in a case like this, involving an over-payment to a party who has since become insolvent, is really a question of whether such a mistaken payer should be granted priority over the general body of unsecured creditors. It is suggested that this was the underlying basis of Lee JC's decision. His Honour said that 'the liquidators

have suffered no prejudice but will gain a windfall if the court does not act'. It is submitted that the learned judge should have developed this line of reasoning more fully.

12.64 There are two formidable arguments to support why the mistaken payer should be granted priority. First, unlike the other unsecured creditors, it is often said that the mistaken payer did not take the risk of the payee's insolvency (see for example Sherwin, 'Constructive Trusts in Bankruptcy' [1989] University of Illinois Law Review 297). Second, if the mistaken payer was not granted priority this would result in an unjustified 'windfall' gain to the unsecured creditors. In other words, in the absence of a proprietary claim, the unsecured creditors would be unjustly enriched at the expense of the claimant.

12.65 However, it is contended that upon closer scrutiny, both arguments are rebuttable. Non-acceptance of the risk of insolvency *per se* by a creditor cannot be the sole justification why the unjust enrichment claimant should obtain priority (see Rotherham in *Restitution and Insolvency* (1st Ed, 2000), at pp 129-130). Proof of this proposition is the fact that the tort victim who, by no stretch of imagination could be said to have assumed the risk of insolvency of the tortfeasor, is not afforded any priority whatsoever. Advocates for a proprietary claim for the mistaken payer would be quick to distinguish the tort victim from the mistaken payer. It could be argued that quite apart from non-assumption of the risk of insolvency, the mistaken payer has enriched the estate of the debtor. The tort victim in contrast has not enriched the estate of the debtor – his claim is simply for compensation for a civil wrong done to him. Thus, the mistaken payer should be given a proprietary claim, because not only has he not assumed the risk of insolvency, he has enlarged the worth of the estate of the debtor. Therefore, the rationalisation for a proprietary claim is a combination of two arguments: the lack of assumption of insolvency and the unjust enrichment of the insolvent's estate.

12.66 *Prima facie*, the thesis that a proprietary claim is necessary to prevent the unjust enrichment of the unsecured creditor is attractive. However, it is not immune to attack. There is the real practical problem of establishing that the estate has been enriched. The argument that if the insolvent has been unjustly enriched, his estate would be enriched accordingly, is too simplistic. Such an assertion would necessarily be premised on the 'swollen assets theory' *ie* that once the claimant is able to establish that the insolvent was enriched by X amount, the insolvent's estate must also be 'swollen' in the same amount. The only support for this 'swollen assets' theory is by way of *obiter dicta* by Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072. However, this *dicta* has been strongly criticised in *Re Goldcorp Exchange Ltd* [1994] 2 All ER 806 and *Bishopsgate*

Investment Management Ltd v Homan [1995] Ch 211 at 217-218 and does not appear to be part of English law. Thus, in order to support the assertion that the insolvent's creditors would be unjustly enriched at the expense of the claimant, the claimant would have to demonstrate a causal determination of the enrichment to the estate. This is costly and difficult to establish (see Sherwin, 'Constructive Trusts in Bankruptcy' [1989] University of Illinois Law Review 297 at 333-334 on the difficulties of embarking on a causal determination of the net enrichment on the bankrupt's estate). A compromise would be for the claimant to show that the insolvent had retained the enrichment in the form of a particular asset. This would involve a transactional method of tracing (see Kull, 'Restitution in Bankruptcy: Reclamation and Constructive Trust' [1998] 72 American Bankruptcy Law Journal 265 at 283-285; and Rotherham in *Restitution and Insolvency*, (1st Ed, 2000), at pp 130-131). In summary, for the claimant to assert that a proprietary remedy should be granted to reverse the unjust enrichment of the insolvent's creditors, the claimant has the formidable evidential burden of establishing either a causal determination of the enrichment to the estate or at the very least embark on a transactional tracing exercise to show that the insolvent had retained the enrichment in the form of a particular asset. It is not enough for the claimant to say that the insolvent had been unjustly enriched.

12.67 Quite apart from the difficulties of establishing that the estate has been enriched, there is also the real fear of enlarging 'off-balance sheet' proprietary liabilities if a mistaken payer is given a proprietary claim. If one accepts the thesis that an unjust enrichment claimant should be granted priority, then why stop with the mistaken payer? As Bridge said, it is highly dubious why the law should aid such claimants. These claimants are usually large financial institutions. He notes that this would hardly be an inducement to take proper precautions and to maintain professional standards (see Bridge, 'Failed Contracts, Subrogation and Unjust Enrichment: *Banque Financiere de la Cite v Parc (Battersea) Ltd*' [1998] JBL 323 at 328). It would also seem to the authors that other subtractive unjust enrichment claimants deserve more sympathy. Indeed, Burrows has argued that where there is a vitiation or absence of intent involved in the transfer of property, *eg* mistake, duress or undue influence or ignorance (see Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412 at 426), a proprietary claim should be granted. He argues that this is because it cannot be said that such claimants have assumed the risk of insolvency.

12.68 Another factor that militates against expanding the list of proprietary claimants is that it is envisaged that this will hinder the efficient distribution of the insolvent's estate. It is salutary to say that one of the fundamental tenets of insolvency law is to facilitate an orderly means of distribution. Claims involving absence or vitiation of consent are highly factual disputes that would involve lengthy hearing dates at great expense to the insolvent's

estate. This may result in a disastrous diminution of the insolvent's estate due to the legal costs incurred. Further, it is unrealistic to expect an insolvent party who is distressed financially to be able to stave off such claims. It is not unforeseeable that the threat of prolonged litigation could put the insolvent party *in terrorem* and thereby induce an unfavourable settlement.

12.69 Finally, the most serious objection to the courts creating a proprietary remedy in favour of the unjust enrichment claimant is that the judges may have no power to do so in the face of a clear and unambiguous statutory scheme of distribution. In order to recognise a proprietary right in favour of the unjust enrichment claimant, the courts would have to declare a remedial constructive trust on the insolvent. A creation of such proprietary rights *via* the remedial constructive trust may be tantamount to an illegitimate re-write of the statutory scheme of distribution. In the case of *In re Omegas Group Inc* 16 F 3d 1443 (1994) at 1452, the Sixth Circuit said:

> 'The equities of bankruptcy are not the equities of the common law. The constructive trusts are anathema to the equities of bankruptcy since they take from the estate and thus directly from competing creditors, not from the offending debtor.'

Kull in 'Restitution in Bankruptcy: Reclamation and Constructive Trust' [1998] 72 American Bankruptcy Law Journal 265 argues that this case contradicts a century of bankruptcy law including Supreme Court authority. However, Mummery LJ has noted in *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 at 827:

> 'If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in the liquidator, the administrators or *the court* to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person … who enjoys no preference under the statutory scheme.' [emphasis added]

Thus, aside from an express amendment by Parliament, there is doubt as to whether the courts have the prerogative to create such proprietary rights in favour of unjust enrichment claimants.