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23. RESTITUTION

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Introduction

23.1 The year 2018 produced only a handful of cases on the law of unjust enrichment and restitution. However, two are seminal cases and of note to the entire common law world: *Ochroid Trading Ltd v Chua Siok Lui*[1] ("*Ochroid*") and *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[2] ("*Turf Club*"). *Ochroid* dealt with the hotly debated topic of the illegality defence against a claim in unjust enrichment for the recovery of money paid pursuant to an illegal contract. Rejecting the newly formulated *Patel v Mirza*[3] approach under English law, the Court of Appeal in *Ochroid* set Singapore law on a different path, leaving a number of questions that need to be addressed in future cases. *Turf Club*, on the other hand, laid down the principles concerning the availability of *Wrotham Park* damages for breach of contract under Singapore law. Converging with English law, it rejected the restitutionary account of the award and, diverging from English law, it enunciated a different framework of analysis.

23.2 The last case this chapter examines is the Court of Appeal's decision in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd*[4] ("*Benzline*"). The dispute concerned the recovery of an advance payment paid in anticipation of a contract that was not ultimately concluded. The claim was brought in unjust enrichment on the ground of "failure of consideration". The decision illustrates that there are no "hard and fast" rules on the proper characterisation of a deposit payment and the determination of the basis of the transaction – much would depend on the facts of the case before the court.

1 [2018] 1 SLR 363.
2 [2018] 2 SLR 655.
3 [2017] AC 467.
4 [2018] 1 SLR 239.

Ochroid: Clarifying availability of restitution where contract is illegal

23.3 The dispute in *Ochroid* arose from a series of agreements entered into between the parties that were, on the face of the contracts, concerned with the appellants making an investment – through the provision of "loans" – in the respondents' business. These "loans", according to the agreements, were to be repaid at a later specified date with a "profit". The agreements were supported by tax invoices issued by the respondents stating the kind, quantity and price of goods to which they related. Parties conceded that the agreements were not "entirely proper" and that the tax invoices were fabricated documents which did not relate to genuine transactions performed by the respondents.[5]

23.4 The Court of Appeal, agreeing with the High Court, found on the evidence that these agreements were disguised as part of a joint venture investment and that the appellants (and the second appellant's wife) had in fact always intended the transactions to be loans. As the appellants were unlicensed moneylenders, the Court of Appeal, upholding the High Court's decision, ruled that these agreements were in contravention of the Moneylenders Act[6] and thus unenforceable.

23.5 The follow-on issue that the court had to address was whether the claim in unjust enrichment for the recovery of the moneys paid under these unenforceable moneylending contracts should be allowed.[7] In dealing with this claim, the court had to consider the impact that the contractual illegality had on an independent unjust enrichment claim and more broadly, therefore, to clarify the Singapore position on the illegality defence. In particular, the court would have to confront with the question of whether Singapore law should follow the "range of factors" approach enunciated by the majority of the UK Supreme Court in *Patel v Mirza*.[8]

Current English approach: Patel v Mirza

23.6 By way of background, *Patel v Mirza* marked a "pivotal moment" in English private law[9] – it overruled the technical reliance approach in *Tinsley v Milligan*[10] and opted for a discretionary approach.

5 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [10].
6 Cap 188, 1985 Rev Ed.
7 There was also the issue of whether the appellants succeeded in establishing their claims in fraudulent misrepresentation and conspiracy to defraud against the respondents. However, the author will prescind from an analysis of this issue.
8 See para 23.1 above.
9 James Goudkamp, "The End of an Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14.
10 [1994] 1 AC 340.

The case concerned a claim in unjust enrichment for sums paid pursuant to an illegal agreement for insider trading. As it turned out, the anticipated insider information did not become available. The Supreme Court allowed the claim, although the panel of nine was divided as to what the applicable test was. Lord Toulson, delivering the majority judgment,[11] rejected a "mechanistic process".[12] He enunciated three categories of factors that the court should take into account in its exercise of discretion: the purpose of the prohibition; other relevant public policies; and proportionality.[13] He further commented that applying the "range of factors" discretionary approach would mean that it would "be rare" for an unjust enrichment claim to be barred on the basis of illegality.[14] In respect of the unjust enrichment claim brought before the Supreme Court, Lord Toulson said:[15]

> … no particular reason has been advanced … to justify Mr Mirza's retention of the monies beyond the fact that it was paid to him for the unlawful purpose of placing an insider bet.

23.7 In *Patel v Mirza*, Lord Sumption (with whom Lord Clarke agreed), considered the majority's approach to be productive of uncertainty and would thus lead to "wasteful and unnecessary litigation".[16] He was in favour of a rule-based approach to illegality. Whilst he appreciated that parties who intend to engage in illegal activities may not study the case law to derive predictable patterns, Lord Sumption stressed that their legal advisers would desire certainty in the law so as to advise these parties on the effects of the relevant transactions.[17] In his view, although certainty is not the only value to be pursued in law, it is a pinnacle value of contract law.[18] Nor did he think that an evaluative approach was necessary. He was of the view that the exceptions to the reliance principle, countervailing policies that require the award of a remedy in certain cases, as well as the wider availability of

11 Comprising Lords Kerr, Wilson, Hodge and Lady Hale. Lord Neuberger expressed some support for Lord Toulson's approach. The minority consisted of Lords Sumption, Clarke and Mance.

12 *Patel v Mirza* [2017] AC 467 at [101].

13 *Patel v Mirza* [2017] AC 467 at [101].

14 *Patel v Mirza* [2017] AC 467 at [101].

15 *Patel v Mirza* [2017] AC 467 at [121].

16 *Patel v Mirza* [2017] AC 467 at [263].

17 *Patel v Mirza* [2017] AC 467 at [263].

18 *Cf* James Allsop, Singapore Academy of Law Distinguished Speaker Lecture 2017 "The Doctrine of Penalties in Modern Contract Law" (2018) 30 SAcLJ 1 at 4. Allsop observed:

> Normative values lie at the heart of the doctrine because (as with many legal principles) the doctrine is seeking to vindicate the human and experiential in the law – the law's humanity. This sometimes is lost sight of in the grasping for certainty by use of abstracted or theoretical rules in taxonomical structures in order to define doctrine in concrete form.

restitution, would mitigate the harshness of the operation of the principle.[19] More importantly, similarly disagreeing with a technical application of the reliance principle, Lord Sumption explained that the outcome in *Tinsley v Milligan* could be justified differently:[20]

> The true principle is that the application of the illegality principle depends on what facts the court must be satisfied about in order to find an intention giving rise to an equitable interest. It does not depend on how those facts are established. Ms Milligan was entitled to the interest which she claimed in the property because she paid half of the price and there was no intention to make a gift. That was all that the court needed to be satisfied about.

23.8 As such, on Lord Sumption's analysis, a party's reliance on illegality merely for evidentiary purposes would not necessarily defeat its claim. Applying his reinterpretation of the reliance principle, allowing the unjust enrichment claim in the dispute before the Supreme Court would not "give effect to the illegal act or to any right derived from it".[21] On the contrary, allowing the restitutionary claim would return the parties to their pre-transaction position "where they should have always been".[22]

23.9 Notably, in *Patel v Mirza*, the majority did not have to address the issue of whether Mirza could invoke the *locus poenitentiae* exception to justify his entitlement to restitution. In any event, an evaluative approach that explicitly addresses the policy considerations – of which the "range of factors" approach is certainly an example – does not need to rely on technical exceptions such as the *locus poenitentiae* principle, as these exceptions are merely "(inflexible) embodiments" of the relevant policy considerations.[23] The policy considerations may be directly examined under the "range of factors" approach.[24] Lords Neuberger and Sumption, however, consider the exception to be still relevant under English law. A long-held debate concerning this exception related to whether the withdrawal from the illegal project in question needs to be penitent (or voluntary)[25] or not.[26] On the facts of *Patel v Mirza*, the parties did not eventually carry out their illegal enterprise because of external circumstances (the non-availability of insider information), as

19 *Patel v Mirza* [2017] AC 467 at [264].
20 *Patel v Mirza* [2017] AC 467 at [238].
21 *Patel v Mirza* [2017] AC 467 at [268].
22 *Patel v Mirza* [2017] AC 467 at [268].
23 Man Yip, "The Restitutionary Aftermath of Contractual Illegality" [2015] RLR 106 at 119.
24 Graham Virgo, "*Patel v Mirza*: One Step Forward and Two Steps Back" (2016) 22 T&T 1090 at 1097.
25 See, *eg*, *Bigos v Bousted* [1951] 1 All ER 92.
26 See *Tribe v Tribe* [1996] Ch 107 at 135.

opposed to their voluntary withdrawal. Importantly, to say that the exception requires penitent withdrawal is to say that the law looks at the moral merit of the parties. Lord Sumption did not think that the law should introduce "a spurious moral gloss on the principle" of *locus poenitentiae* by requiring that the withdrawal be penitent/voluntary.[27]

Ochroid*: Rejection of discretionary approach in favour of rule-based approach*

23.10 Turning back to *Ochroid*,[28] the Court of Appeal flatly declined to follow the *Patel v Mirza* "range of factors" approach on the grounds that it introduces unprincipled discretion and uncertainty and is unnecessary to achieve remedial justice.[29] The court reaffirmed the approach laid down in *Ting Siew May v Boon Lay Choo*[30] ("*Ting Siew May*"). Post-*Ochroid*, under Singapore law, where contractual illegality is concerned, the Singapore courts will apply a two-stage approach.

23.11 Under the first stage, the court will ask whether the contract is prohibited and the *Ting Siew May* principles will guide the court's search for the answer to this question. If the contract is prohibited by statute or is found to be illegal at common law, there can be no recovery of benefits transferred under the contract in contract law. *Ochroid*'s contribution to the jurisprudence related to the clarification of the principles applying at the second stage concerning recovery of the benefits transferred under the illegal contract through an independent claim in unjust enrichment.

23.12 At the second stage, the court emphasised that *Ting Siew May* has rejected a *procedural and formal* application of the reliance principle.[31] Post-*Ting Siew May*, similar to Lord Sumption's approach in *Patel v Mirza*, Singapore law applies a *normative and substantive* understanding of the reliance principle.[32] In other words, the substantive reliance principle is only engaged (and offended) if one "seeks to directly enforce and profit from an illegal contract"; an *independent* claim in unjust enrichment for restitution of the benefits transferred under the contract would not offend the principle.[33]

27 *Patel v Mirza* [2017] AC 467 at [253].
28 See para 23.1 above.
29 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [114]–[125].
30 [2014] 3 SLR 609.
31 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [132].
32 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [137].
33 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [137].

23.13 The court further clarified that restitution in unjust enrichment for benefits transferred under an illegal contract would ordinarily be available notwithstanding the illegality if the elements of the cause of action are made out.[34] Importantly, illegality is not the operating unjust factor in such cases. The plaintiff would have to look at the facts and identify a recognised unjust factor, for example, failure of consideration.[35] The court also affirmed that the independent claim in unjust enrichment is subject to the normal defences, such as change of position.[36]

Ochroid*: Illegality defence to unjust enrichment claim – Concept of stultification*

23.14 The court then went on to consider the broader issue of the impact of illegality on the independent claim in unjust enrichment, which the court highlighted as a separate question from the impact of illegality on the underlying contract. In this connection, the court favoured[37] Birks' approach of anchoring the defence of illegality to an unjust enrichment claim in the concept of stultification.[38] The core idea is this: there should be consistency between the different branches of the law. As such, the court must consider:[39]

> … whether allowing the claim in unjust enrichment would make nonsense of the law's condemnation of the illegal contract in question and of its refusal to enforce the illegal contract.

In particular, the court endorsed Birks' "lever argument" and the "safety-net argument" as relevant factors which the court should take into account in deciding the question of stultification: whether permitting the claim would "undermine the *fundamental* policy that rendered the underlying contract void and unenforceable in the first place" [emphasis in original].[40]

23.15 The court also gave some *obiter* guidance on the scope of the concept of stultification as applied in other contexts, for example, in relation to an independent proprietary claim in tort law or in the law of trusts. The court tentatively suggested that if they do depart from the

34 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [139].
35 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [140]–[141].
36 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [142].
37 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [145] and [147].
38 Peter Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155.
39 Peter Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155 at 202.
40 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [158].

technical reliance approach in *Tinsley v Milligan*[41] in these proprietary contexts, the court retains the power to bar the independent property claim by applying the principle of stultification.[42]

23.16 This part of the *Ochroid* judgment warrants two comments. First, there is no basis to apply the procedural/technical application of the reliance principle in the proprietary context, given the reasons for its rejection in the non-proprietary context. As such, the abolition of the *Tinsley v Milligan* approach seems inevitable. Second, the court, as it has acknowledged in *Ochroid*,[43] appears keen to lay down a coherent approach to the law relating to recovery of benefits/proprietary interests pursuant to an independent cause of action. Indeed, as has been observed elsewhere, Australian law has already achieved a coherent approach to illegality in private law.[44] English law, save in the area of torts,[45] has also propounded a coherent (albeit controversial) approach to illegality in private law post-*Patel v Mirza*. The Singapore law's aspiration appears slightly more modest (and understandably cautious): to lay down a coherent approach for the recovery of benefits/rights by an independent cause of action where the underlying contract is illegal. It remains to be seen, as local case law continues to develop, whether Singapore law would take on a more ambitious scope in its reform of the illegality principles in private law. Third, whilst the principle of stultification appears to be a "hard and fast" rule, the principle in operation requires the court to engage in an exercise of deciding whether allowing the claim would *undermine* the policy of the law which gives rise to the illegality in question. This is neither a straightforward nor simple exercise. Where the illegality arises in respect of an underlying contract, the *Ting Siew May* two-stage approach would be employed, and the principle of stultification operates at the second stage in determining whether the independent claim should be allowed. Where the facts do not involve an underlying illegal contract (as in the case of *Tinsley v Milligan*), it appears that the outcome of the case would depend solely on the application of the principle of stultification. More guidance from the courts is required.

41 See para 23.6 above.

42 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [168].

43 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [158].

44 Man Yip, "The Restitutionary Aftermath of Contractual Illegality" [2015] RLR 106 at 119.

45 *Cf Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841; [2018] 3 WLR 1651 at [87]–[91]. In the view that *Patel v Mirza* [2017] AC 467 ("*Patel*") raised contractual and unjust enrichment issues, the Court of Appeal held that the *Patel* test did not apply to a claim against another for negligence by an individual who killed her mother while undergoing a psychotic episode. The case was appealed before the UK Supreme Court and the judgment is expected to be released shortly.

Ochroid*: Not* in pari delicto*;* locus poenitentiae

23.17 Finally, by way of providing obiter guidance for future disputes, the court expressed some views on the application of the legal principles of "not *in pari delicto*" (parties not being equally at fault) and *locus poenitentiae* – the traditionally recognised exceptions to the technical reliance principle.

23.18 On the not *in pari delicto* principle, the court said that the law is "relatively well-settled" and that it would apply to situations such as class protection statutes; fraud, duress or oppression; and where the transaction was entered into as a result of mistake.[46] The court highlighted that some of these situations which bring the not *in pari delicto* principle into play would also give rise to recognised "unjust factors" to constitute the cause of action in unjust enrichment. In these cases of overlap, the court clarified that the stultification concept is inapplicable because awarding restitution to a less blameworthy plaintiff would not undermine the fundamental policy of the law and in some cases, the award would indeed further the policy of the law.

23.19 It would be difficult to disagree with the court's observations. However, case law in other common law jurisdictions reveals that courts have treated parties as not being equally at fault in other situations: for example, where one party is a lay person and the other is a solicitor, and the dispute centered on the latter's breach of professional rules.[47] It was said that the lay person was less at fault because he could not be presumed to have knowledge of the prohibition in the professional rules. Another example would be where the relevant legislative regime imposes the obligation of compliance on one party and that party's non-compliance was said to be an instance of being more at fault than the other party.[48] In this connection, it has been suggested that courts should more openly investigate the interface between the *in pari delicto* elements of the case with the relevant background statute(s) in its reasoning as to why the principle of *in pari delicto* supports an award of restitution.[49] In cases involving statutes protecting a weaker class of persons, restitution should be allowed not because the defendant is actually more blameworthy than the plaintiff (as a person falling within the statutorily identified weaker class), but because the statutory policy requires/supports it. This justification does not readily (or always) apply

46 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [170]. At [43], the court seemed to confine the application of the not *in pari delicto* principle to just these three categories.

47 *Mohamed v Alga & Co* [2000] 1 WLR 1815.

48 *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.

49 Man Yip, "The Restitutionary Aftermath of Contractual Illegality" [2015] RLR 106 at 111.

to other cases where the court is actively canvassing the facts to determine who is more at fault in fact. In *Turf Club*,[50] the court indicated that the not *in pari delicto* principle "does not entail a broad examination of the relative blameworthiness of each party".[51] This suggests that Singapore law may not follow the path laid by the courts of other common law jurisdictions.

23.20 As to the *locus poenitentiae* exception, differing from Lord Sumption's preferred approach, the court favoured a narrow account of the exception that is rooted in moral merit – that is to say, the withdrawal must be penitent.[52] According to the court, this narrow account is consistent "with the policy of the law that people should be encouraged to withdraw from their illegal projects" and only in such situations would restitutionary awards pose "no threat of stultification".[53]

Application to facts

23.21 Given the court's conclusion under the first stage that the agreements were prohibited and unenforceable under the Moneylenders Act, the question under stage two was brought into play: whether the payments made under these unenforceable agreements could be recovered by an independent claim in unjust enrichment. The court was of the view that the elements of the claim were made out – in particular, the applicable unjust factor was failure of consideration.[54]

23.22 The court, however, ruled that the claim in unjust enrichment would be barred by the operation of the stultification principle. This is because the recovery of the principal sums would undermine the "fundamental social and public policy against unlicensed moneylending which undergirds the [Moneylenders Act]".[55]

Ochroid *approach and "range of factors" approach compared*

23.23 For completeness, it is helpful to compare the *Ochroid* two-stage approach against the *Patel* "range of factors" approach. In *Ochroid*, the Court of Appeal iterated that the *Ochroid* approach towards contractual illegality under stage one confines the exercise of discretion only in relation to the category of contracts which are not prohibited (expressly or impliedly) by statute *per se*, but are nevertheless illegal for being

50 See para 23.1 above.
51 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [43].
52 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [174].
53 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [174].
54 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [214].
55 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [219].

entered into with the object of committing an illegal act.[56] In respect of the aforesaid category of contracts, the court is to assess what would be a *proportionate* response by reference to a list of policy factors:[57]

> (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the paties; and (e) the consequences of denying the claim …

The court said that the "range of factors approach", by contrast, would be applied "across the board in all cases of illegality at *common law*" [emphasis in original].[58] In the court's view, thus, the *Ochroid* approach tolerates a more limited degree of discretion, as compared with the *Patel v Mirza* "range of factors" approach. It should follow that any uncertainty arising from the balancing exercise would be more constrained under the *Ochroid* approach. Indeed, under stage two, Singapore returns to a rule-based approach (the principle of stultification) in deciding whether benefits transferred under the unenforceable contract may be recovered by an independent cause of action.

Turf Club: Endorsing a compensatory account of *Wrotham Park* damages

23.24 The author now turns to consider *Turf Club*.[59] In that case, the plaintiffs and defendants were involved in a venture project to develop land that was subject to a state lease granted to the defendants. Under this project, the defendants would grant subleases to the joint venture companies, which would in turn let the premises out for income. A shareholder dispute subsequently arose between the parties while the site was being developed, but it was eventually settled. The settlement agreement (recorded in a consent order) provided for a bidding exercise, pursuant to which the higher bidder would buy over the lower bidder's shares; and the parties behind the lower bid would then resign from office of directorship. The point of this process was to enable a clean break between the parties. However, before the bidding exercise took place, the defendants, on obtaining a renewal of the state lease, refused to grant corresponding subleases to the joint venture companies as they previously did. The development resulted in a substantial diminution of the companies' share value, thereby frustrating the bidding exercise. The

56 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [39].
57 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [38].
58 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [40].
59 See para 23.1 above.

plaintiffs thus brought a number of claims against the defendants, including breach of contract. The Court of Appeal found that repudiatory breaches of contract were established in an earlier decision.[60] In *Turf Club*, the Court of Appeal dealt with, amongst other issues, the question of what remedies should be awarded for the breaches of contract. In this connection, the parties focused on the nature and applicability of an award of *Wrotham Park* damages, as well as a disgorgement award, as they were in agreement that it would be difficult to quantify the financial loss caused by the contractual breaches.[61] For the purpose of the present discussion, the author will focus on the *Wrotham Park* damages award.

23.25 The court affirmed that Singapore law recognises *Wrotham Park* damages. Converging with English law, the court endorsed a compensatory account of the award.[62] But declining to follow the English approach established in *One Step (Support) Ltd v Morris-Garner*,[63] the court said that under Singapore law, there are three requirements for the award of *Wrotham Park* damages for breach of contract. First, the award would only be ordered if there is a "remedial lacuna". In short, a remedial lacuna occurs where the plaintiff has sustained no financial loss for which traditional compensation may be awarded and specific relief is unavailable on the facts of the case. Second, as a general rule, a breach of negative covenant must be established. Thirdly, the hypothetical bargain, on which the award is measured, must not be one that is "irrational or unrealistic" for parties to make.[64]

23.26 Applied to the facts, the court held that the *Wrotham Park* damages claim failed because the plaintiffs were not able to establish the first and the third requirements. The court ordered traditional compensation for breach of contract instead. A comparison between the Singapore and English approaches has been undertaken elsewhere.[65] For now, the author will turn to focus on the court's rejection of a restitutionary account of *Wrotham Park* damages for breach of contract.

60 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12.
61 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [91].
62 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [179].
63 [2018] UKSC 20; [2018] 2 WLR 1353.
64 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [246].
65 Man Yip & Alvin W-L See, "One Step Away from *Morris-Garner*: *Wrotham Park* Damages in Singapore" (2019) 135 LQR 36.

Nature of Wrotham Park *damages for breach of contract*

23.27 Unlike English law which has for some time endorsed a compensatory account of *Wrotham Park* damages,[66] the position under Singapore law was unsettled before the *Turf Club* decision. In fact, the Court of Appeal's *obiter* comments in *ACES System Development Pte Ltd v Yenty Lily*[67] ("*Yenty Lily*") appear to favour a restitutionary analysis of the user principle.[68] To recall, the user principle measures damages on the basis of reasonable hire of the property that has been unlawfully detained or used by the defendant. The user awards are generally considered as closely related to *Wrotham Park* damages.

23.28 In *Turf Club*, the court explained that *Wrotham Park* damages are *descriptively restitutionary* but not *normatively restitutionary*.[69] In essence, the *Wrotham Park* awards measures compensation by reference to the defendant's gains (restitutionary in a descriptive sense) but the rationale for the award is not based on the goals of punishment and deterrence (restitutionary in a normative sense). The court pointed out that the goal of punishment is generally inconsistent with the law of contract.[70] The court further distinguished *Wrotham Park* damages for breach of contract from the disgorgement award ordered in *Attorney-General v Blake*[71] ("*Blake*").[72] The former remedy does not involve the partial disgorgement of the defendant's actual gains. According to the court, the defendant's actual gains may be considered in the assessment of the *Wrotham Park* damages "merely ***as a matter of evidence in providing a good estimate*** *of the anticipated profit* at the time of the breach" [emphasis in original].[73] Indeed, the court commented that the loss for which *Wrotham Park* damages are awarded to compensate is "*the loss of the performance interest itself*" [emphasis in original], as opposed to pecuniary loss.[74]

23.29 As for *Yenty Lily*, the court insisted that its views on the nature of the *Wrotham Park* damages for breach of contract do not contradict the views expressed in the earlier case in relation to the user principle.[75]

66 *Cf Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm); [2017] ICR 791 at [198].
67 [2013] 4 SLR 1317.
68 (2013) 14 SAL Ann Rev 465 at 477–480, paras 22.33–22.40.
69 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [191].
70 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [198]. See also *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [135].
71 [2001] 1 AC 268.
72 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [199].
73 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [199].
74 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [199].
75 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [212].

The reconciliation appeared to proceed on the basis that the court's reference to "restitution" in *Yenty Lily* was a reference to *descriptive* restitution, as opposed to normative restitution.[76] The court, however, did not go on to endorse a compensatory account of the award. It merely distanced the user awards from a normatively restitutionary analysis. It is not clear that the court would be prepared to characterise user damages as compensation. It regarded user damages as awards to "*[protect] property rights in themselves*"[77] [emphasis in original] – language which is not at first sight in line with compensation for any form of loss. It remains to be seen how the court would characterise user awards when the issue is brought squarely before it in future litigation.

23.30 Finally, it should not be missed that the court considered[78] its categories of "descriptive restitution" and "normative restitution" as corresponding directly to James Edelman's two categories of restitution: restitutionary damages and disgorgement damages.[79] This observation merits some brief remarks. Edelman's taxonomy of restitution is not based on normative reasoning (deterrence or corrective justice); it is based on the phenomenon of assessing monetary awards by reference to the defendant's gains. The label "restitution", used in either category, is thus legally significant, even though it is *descriptive* of the awards being gains-focused. The law of restitution – whether arising in response to the event of unjust enrichment, to reverse transfers of value in the context of wrongs, or for the purpose of disgorging gains made by the defendant by reason of his wrongdoing – is focused on gains received by the defendant. As he explains in his monograph:[80]

> The response of restitution, reversing as a result of unjust enrichment, therefore operates in an identical manner to restitutionary damages which reverse transfers as a result of wrongs.

On the other hand, the court's use of the label "restitution" in the true legal sense post-*Turf Club* appears to be very restrictive, referring only to awards for the disgorgement of profits. This brings to question whether "restitution for unjust enrichment" is truly (normatively) restitution or merely descriptive restitution, or something else altogether. The terminology of "descriptive restitution" and "normative restitution" is also likely to cause confusion.

76 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [213].
77 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [213].
78 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [186].
79 James Edelman, *Gains-Based Damages* (Hart Publishing, 2002) ch 3.
80 James Edelman, *Gains-Based Damages* (Hart Publishing, 2002) ch 3 at p 93.

Blake *damages*

23.31 In *Turf Club*, the court also made provisional observations on the availability of *Blake* disgorgement awards under Singapore law. It observed that:[81]

> … the primary difficulty with recognising *AG v Blake* damages as a part of Singapore law is the *uncertainty of the legal criteria* to be applied in awarding such damages. [emphasis in original]

The court highlighted that the concept of "legitimate interest" is "rather general and perhaps even vague".[82] The court suggested that it may be possible to rationalise *Blake* damages as "an *exceptional remedy*" [emphasis in original] confined to cases where the law has a legitimate basis – upholding public interest/governmental interest that "go beyond the private interests of the parties themselves" – for punishing the defendant and or deterring non-performance of the contractual obligation. [83] Alternatively, the court considered that it may be possible to reinterpret *Blake* as a case of awarding an account of profits for breach of a quasi-fiduciary obligation.[84]

23.32 On either rationalisation, the court's message is clear: going forward, *Blake* damages, if they are to be recognised as part of Singapore law, would be "confined to truly *exceptional* cases" [emphasis in original].[85] More generally, it appears that Singapore courts would not allow the law of restitution, which was developed belatedly, to indiscriminately disturb the established remedial regime of contract law.

Benzline: Characterisation of deposits and failure of consideration

23.33 *Benzline*[86] is the third and last judgment that will be considered in this chapter. The High Court decision[87] has been examined in a previous review.[88] The claim concerned the recovery of a payment made in advance of the execution of a contract which was not ultimately concluded. Benzline held the Singapore master dealership rights for Lorinser cars, which were manufactured by Daimler AG. While the

81 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [252].
82 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [253]. See generally Solene Rowan, "The 'Legitimate Interest in Performance' in the Law on Penalties" (2019) Camb LJ (forthcoming).
83 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [254].
84 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [255].
85 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [255].
86 See para 23.2 above.
87 *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281.
88 (2016) 17 SAL Ann Rev 614 at 628, paras 23.43–23.45 and 23.50–23.52.

parties to the dispute, Benzline and Supercars, were undergoing negotiations for an exclusive car sub-dealership agreement, Supercars ordered a batch of cars with Benzline. After the receipt of the first draft of the agreement to be entered into between Benzline and Lorinser – which was intended to form the basis of the sub-dealership agreement between Benzline and Supercars[89] – Supercars (the plaintiffs) made an advance payment to Benzline in respect of its orders, pursuant to Benzline's request. Benzline and Supercars eventually failed to conclude the anticipated exclusive sub-dealership agreement by reason of their disagreements, including a disagreement pertaining to a clause which required Supercars to provide a stand-by letter of credit to Lorinser. Supercars sued Benzline to recover the advance payment in unjust enrichment on the ground of failure of consideration. Benzline argued that the advance payment amounted to part payment for Supercars' order of cars and was thus non-refundable.

23.34 The Court of Appeal disagreed with the High Court's ruling that the advance payment was to be characterised as a payment to show good faith and seriousness and was thus recoverable when the anticipated contract was not concluded. The Court of Appeal was of the view that the payment was made by Supercars to avoid delay in the supply of cars which it ordered. The evidence showed that Benzline had urgently asked Supercars for the payment as it was under pressure to pay Lorinser, who needed the funds to pay the required deposit to Daimler AG for Daimler AG to commence manufacturing of the cars ordered by Supercars.[90] It was clear that neither Benzline nor Lorinser was willing to pay Daimler first. Based on the communications between the parties, Supercars was also aware of the reason why the advance payment was requested.[91]

23.35 As to the basis of the advance payment, the court stressed that "not every expectation which a party has in making a transfer forms part of the basis of that transfer".[92] The basis must be objectively determined based on the communications exchanged between the parties; subjective thoughts of the parties which had not been communicated would be disregarded.[93] Whilst accepting that the basis of the transfer may be implied, the court said that:[94]

89 They were meant to be back-to-back agreements.
90 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [65].
91 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [61].
92 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [51].
93 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [51].
94 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [51].

> … implication must be based on objective features of the transfer and its context, and not merely on a fortuitous overlap between the unexpressed expectations of the parties.

The court further accepted that there may be more than one basis to a transfer.[95]

23.36 On the facts, the court found that there was no express understanding between the parties that the conclusion of the exclusive sub-dealership agreement formed part of the basis of the payment.[96] Instead, the court found that the implied basis of the transfer was that Benzline would offer Supercars the exclusive sub-dealership agreement "on terms which correspond in material ways" to the draft agreement between Benzline and Lorinser, a copy of which was supplied to Supercars.[97] This is because Supercars made the advance payment after "having had sight" of the draft agreement between Benzline and Lorinser, which indicated that the terms in the said draft were on the whole acceptable to Supercars.[98]

23.37 Having determined the implied basis of the transfer, the court ruled that the basis did not fail in the case. In the court's words, whilst Benzline was prepared to move forward with the exclusive sub-dealership agreement, "it was Supercars which threw a spanner in the works" by refusing to provide the required stand-by letter of credit and thereafter suggesting that it contract directly with Lorinser instead.[99]

23.38 Finally, it is also important to note that the court proceeded with its reasoning on the basis that the law requires *total* failure of consideration. It, however, explicitly caveated that it did so without "necessarily foreclosing the possibility of future developments" under Singapore law to recognise partial failure of consideration.[100]

95 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [52].
96 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [67].
97 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [68].
98 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [68].
99 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [69].
100 *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [54].