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24. RESTITUTION

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I. Introduction

24.1 The 2019 cases on restitution examined a broad range of topics in the law of unjust enrichment and restitution, with a high concentration of the decisions being concerned with the recoverability of payments made in anticipation of events that did not ultimately realise. Of the 11 decisions that are examined in this chapter, most involved disputes arising in the commercial context. Notably, two were handed down by the Singapore International Commercial Court presided by International Judges ruling on restitutionary issues under Singapore law. It is thus fair to say that the law of restitution has a role in the regulation of commercial life, even as contract continues to be the primary regulator. For this reason, the continued development and clarification of the principles of restitution under Singapore law is an important project.

II. Pleading a claim in unjust enrichment

24.2 An important lesson that has emerged from four High Court decisions is that the party invoking a claim in unjust enrichment must plead the facts which give rise to the claim and in particular, it must identify a relevant unjust factor that grounds the claim. A failure to do so will be fatal to the claim.

24.3 In *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd*[1] ("*MSP4GE*"), the dispute concerned the plaintiff's payment of a deposit to the defendant for the purpose of making a subsequent order of products which, according to the plaintiff, was never placed. The plaintiff thus demanded the return of the deposit payment. The plaintiff's claim in unjust enrichment was rejected for failing to plead the relevant facts to explain how the constituent elements of the claim (enrichment, at the expense of and unjust factor) were established in the case. The plaintiff merely asserted that the defendant was unjustly enriched. Interestingly, the court added that had the plaintiff taken greater pains in the pleadings, the unjust

1 [2019] 3 SLR 1348.

enrichment claim might have succeeded.[2] In this connection, the court, whilst acknowledging that it might be possible to do so, refused to infer that the claim was founded upon the ground of failure of consideration because it was not fleshed out in the plaintiff's pleadings.[3]

24.4 Similarly, in *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased*[4] ("*Red Star Marine*"), the plaintiff "simply asserted that the defendants were liable to it in unjust enrichment", without identifying a recognised unjust factor to support the cause of action.[5] The court said that this omission was fatal to the claim.[6]

24.5 *Red Star Marine* was followed in *Mookan Sadaiyakumar v Kim Hock Corp Pte Ltd*.[7] The defendant failed to identify a recognised ground of restitution in its pleadings to support its counterclaim in unjust enrichment against the plaintiff. On a generous reading of the defendant's pleadings, the court was of the view that the defendant relied on the "absence of basis" as an unjust factor, which is not presently recognised under Singapore law.[8] As such, the counterclaim was unsuccessful.

24.6 In the fourth case, *Ahmad Ebrahim s/o S M E Mohamed Sadik v Ilangchizian Manogaran*,[9] the plaintiff tried to recover a sum of money he had paid to the defendant on the basis of "money had and received".[10] The plaintiff claimed that the money was paid to the defendant for the purpose of investment, in pursuance of an alleged oral agreement between them. The court noted that the plaintiff failed to properly plead its claim in unjust enrichment by identifying the constituent ingredients.[11] Further, as the court had rejected the plaintiff's version of events on its key factual findings, the claim was unsuccessful.

24.7 This group of cases should serve as a strong caution to plaintiffs in future cases to plead all relevant facts to support their claims in unjust enrichment and to clearly identify how the constituent elements are

2 *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] 3 SLR 1348 at [149].
3 *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] 3 SLR 1348 at [149].
4 [2019] SGHC 144.
5 *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased* [2019] SGHC 144 at [51].
6 *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased* [2019] SGHC 144 at [52].
7 [2019] SGHC 230.
8 *Mookan Sadaiyakumar v Kim Hock Corp Pte Ltd* [2019] SGHC 230 at [46].
9 [2019] SGHC 167.
10 See *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [124]–[125].
11 *Ahmad Ebrahim s/o S M E Mohamed Sadik v Ilangchizian Manogaran* [2019] SGHC 167 at [146].

satisfied, instead of holding onto the hope that the court would take a generous or benevolent reading of their pleadings and infer a relevant unjust factor to support their claims.[12]

III. "At the expense of" – Indirect enrichment

24.8 The "at the expense of" element of an unjust enrichment claim shows that the enrichment has come from the plaintiff. A beguilingly simple label belies deep controversies as to what degree of connection between the enrichment and the plaintiff is required. Whilst this inquiry does not normally cause problems in a direct transfer scenario involving two parties, the analysis is more complex where the enrichment has come from a third party, as in the case of *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd*[13] ("*Anuva*").

24.9 In *Anuva*, X asserted a claim in unjust enrichment against Y in respect of a sum of money mistakenly paid by Z to Y. Z should have made the payment to X instead. X contended that the payment was made without its consent, a controversial unjust factor that has yet to be accepted by the Court of Appeal. More importantly, the High Court rightly identified that the crux of the dispute lied in the "at the expense of" inquiry. Given that Y had received the payment from a third party (Z), the question was "whether [Y] had been unjustly enriched at [X's] expense".[14]

24.10 According to the court, X had suffered no loss because X retained the contractual right to pursue Z for the outstanding payment.[15] In other words, Z, the mistaken payor, is left with the remedy of claiming against Y in unjust enrichment on the basis of mistake. A direct claim by X against Z is only allowed if Z's liability to X is discharged by reason of Z's payment to Y.[16] This is because in such a situation, the gain received by the defendant involved a subtraction from the plaintiff's accrued wealth.

24.11 The court also considered Burrows' suggestion to allow the plaintiff to elect whether to treat the debt owed by the third party to him

12 *Cf Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [71]–[72].
13 [2019] SGHC 244.
14 *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at [86].
15 *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at [90]. *Cf Moore v Sweet* [2018] 3 SCR 303 (SCC); see analysis in Matthew Harrington, "Leapfrogging, Risk and Unjust Enrichment in Canada after *Moore v Sweet*" (2020) 96 *Supreme Court Law Review* 191.
16 *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at [91].

as discharged or not.[17] However, as parties had not made submissions on this point, the court refrained from making "a significant and substantive departure from the orthodox position".[18]

24.12 Accordingly, *Anuva* did not depart from the legal position laid down by the Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[19] ("*Anna Wee*"). In *Anna Wee*, the Court of Appeal held that the enrichment received by the plaintiff must be one that the plaintiff is legally entitled to or forms part of the plaintiff's assets, whether the benefit is one of traceable property or a mere value transferred.[20]

24.13 It may also be observed that the current Singapore position is aligned with recent developments in England and Wales. In *Investment Trust Companies v Revenue and Customs Commissioners*,[21] the UK Supreme Court held that in cases involving indirect enrichment, "it is generally difficult to maintain that the defendant has been enriched at the claimant's expense" if it does not involve a situation of agency and the benefit does not consist of property in which the claimant has an interest or a traceable interest.[22] The UK Supreme Court identified situations where an indirect enrichment could be treated as a direct enrichment, for example, where (a) the enrichment was transferred through an agent interposed between the parties; (b) the intervening transaction was a sham; and (c) there was a series of co-ordinated transactions that formed a single scheme.[23] Lord Reed also recognised that the plaintiff's discharge of a debt owed by the defendant to a third party who transferred the enrichment to the defendant was a situation of preventing unjust enrichment, although it did not entail the effect of restoring the parties to their *ex ante* position.[24]

17 *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at [93].
18 *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at [93].
19 [2013] 3 SLR 801.
20 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [128].
21 [2017] 2 WLR 1200.
22 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] 2 WLR 1200 at [51]. See analysis in Andrew Burrows, "Narrowing the Scope of Unjust Enrichment" (2017) 133 LQR 537.
23 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] 2 WLR 1200 at [48].
24 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] 2 WLR 1200 at [49].

IV. Failure of consideration: Recovery of moneys paid in anticipation of contracts or events that did not materialise

24.14 In 2019, five cases concerned the recovery of moneys paid in anticipation of contracts or events that did not materialise. Of these five cases, four cases involved the recovery of deposits.

A. Establishing a fresh basis for the benefit

24.15 In *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon*[25] ("*Simpson Marine*"), the Court of Appeal overturned the High Court's decision[26] on the basis of factual findings. In this case, the respondent buyer and the appellant yacht dealer signed an invoice pursuant to which the respondent paid a deposit to the appellant for the purpose of securing two specific yachts (yachts A and B) until 15 May 2013, at which time and upon the respondent's election, the deposit was to be applied for the down payment of either yacht that the respondent had chosen. However, subsequently, the respondent was informed that yacht B was sold off by the yacht maker and the next available yacht was yacht C. On 8 May 2013, the respondent met with representatives of the appellant and the yacht maker for the viewing of another yacht. The appellant contended that an agreement was reached at this meeting that the respondent's deposit would be used to secure yachts C and D until 31 May 2013, at which point and upon the respondent's election, the deposit would be transferred for the payment of the purchase price of the yacht that the respondent had chosen. The respondent disagreed that such an agreement was made. Ultimately, the respondent did not buy either yacht C or yacht D. Pursuant to a compromise agreement between the parties, half of the deposit was used to pay for another yacht that the respondent had already purchased. The balance formed the subject of the dispute.

24.16 The High Court, on examining the evidence before it, came to the conclusion that the deposit was "a holding deposit" to secure yachts A and B until 15 May 2013. This basis failed when yacht B was sold off before 15 May 2013 (the initial basis).[27] As such, the respondent was entitled to recover his deposit. Importantly, the High Court was not satisfied on the evidence that a new agreement was entered into between the parties on 8 May 2013 for the deposit to be applied for securing yachts C and D until 31 May 2013.[28]

25 [2019] 1 SLR 696.
26 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288.
27 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 at [62].
28 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 at [64]–[69].

24.17 The appellant did not contest that the initial basis for the payment of the deposit had failed. The crux of its argument lied in whether a new agreement was formed at the 8 May 2013 meeting. In this connection, the Court of Appeal disagreed with the High Court's factual finding that the parties did not enter into a new agreement on 8 May 2013. The Court of Appeal found that there was cogent evidence that the alleged new agreement had been made between the parties.[29] Indeed, it pointed out that the strongest evidence in support of the appellant's case was the fact that the appellant had remitted the deposit to the yacht maker on 9 May 2013, one day after their 8 May 2013 meeting. According to the Court of Appeal, the act must have followed from the parties' new agreement for the deposit to be applied for securing yachts C and D, "on the understanding that the [deposit] would be applied towards the purchase of either yacht once [the respondent] had made his choice".[30]

24.18 In overturning the lower court's finding of fact, the Court of Appeal was aware that an appellate court's power to review factual findings is "limited" as it is not as well placed as the trial judge in assessing the veracity and credibility of witnesses, especially where oral evidence is concerned.[31] It, however, commented that the appellate court "can and should" overturn the trial court's factual findings where the latter's assessment is "plainly wrong or against the weight of the evidence" or:[32]

> … where a particular finding of fact is not based on the veracity or credibility of the witness, but instead is based on an inference drawn from the facts or an evaluation of primary facts.

24.19 Having reassessed the facts and concluded that the parties did in fact enter into a new agreement at their 8 May 2013 meeting ("the new basis"), the Court of Appeal proceeded to consider if the new basis had failed. In the course of its reasoning, the Court of Appeal affirmed the principles laid down in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd*[33] ("*Benzline*") that an unjust enrichment claim grounded in the unjust factor of failure of consideration involves a two-stage analysis: (a) what was the basis of the transfer; and (b) did that basis fail?[34] In respect of the first inquiry, the Court of Appeal reiterated that the basis must be objectively ascertained and one that is understood by both parties, although the basis may be implied.[35] The court also commented that

29 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [65]–[78].
30 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [67].
31 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [59].
32 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [59].
33 [2018] 1 SLR 239.
34 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [48].
35 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [49].

the determination of the basis is similar to the exercise of determining contract formation and construction:[36]

> It involves inquiring into what a reasonable person in the position of the parties would have understood the words and conduct of the parties to mean.

24.20 In applying the principles to the facts of the case, the Court of Appeal opined that in order for the appellant to retain the deposit, the onus was on the appellant to show that there was a new basis for the deposit (that is, the new agreement made on 8 May 2013) and that it did not fail.[37] As both yachts C and D were kept off the market for the respondent until 31 May 2013, the court concluded that the basis did not fail and the respondent's claim in unjust enrichment for the balance of the deposit was accordingly unsuccessful.

24.21 The result is clearly right. But what merits further consideration is the Court of Appeal's placing of the legal burden on the appellant (the enrichee) to show that it was entitled to retain the money by showing that there was a new basis and that it did not fail. Whilst it would be tactically advantageous for the appellant to lead evidence on there being a new basis for the deposit which did not fail, the legal burden ought to be on the respondent (as the plaintiff in invoking the restitutionary claim) to show that the basis had failed, which consequently entitled him to restitution. If he failed to do so, the appellant would be entitled to keep the payment. The placing of the burden on the enrichee is reminiscent of the civilian model of unjust enrichment, which requires the recipient of an enrichment to justify why he is enitled to retain it.

B. Characterisation of the deposit payment

24.22 The High Court decision in *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd*[38] ("*Pegaso*") explains the difference between a pre-contractual deposit and an earnest payment. The case concerned a claim for the recovery of a payment that was initially made by the first plaintiff to the first defendant as a deposit under a rig purchase agreement for the purchase of two rigs, pending the execution of another set of contracts concerned with the construction of the rigs. The latter contracts were never entered into. The deposit payment was then to be applied for a specific investment which did not come into

36 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [49].

37 *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [60]. The Court of Appeal had referred (at [52]) to Belinda Ang Saw Ean JC's judgment in *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR(R) 791 at [76].

38 [2019] SGHC 47.

fruition. The first plaintiff's primary claim was in contract pursuant to which terms, the first defendant had no right to forfeit the deposit and was accordingly obliged to return it to the first plaintiff.

24.23 The first plaintiff's claim in unjust enrichment was thus an alternative claim. The High Court followed the principles laid down by the Court of Appeal in *Simpson Marine*[39] and *Benzline*.[40] What is of note regarding the *Pegaso* decision was how the court would go about characterising the nature of a deposit payment. According to the previous High Court decision in *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd*,[41] a pre-contractual deposit is *prima facie* recoverable if the anticipated contract did not ultimately materialise, but a payment made on or after the conclusion of the contract serves both as an earnest payment and part payment of the purchase price.

24.24 In *Pegaso*, the defendants argued that the deposit was not a pre-contractual deposit but an earnest payment for the first plaintiff's performance of the rig purchase agreement as well as a *quid pro quo* payment for the first defendant's reservation of the two rigs for the first plaintiff.[42] The High Court said that the characterisation of the deposit would be dependent on the terms of the rig purchase agreement. Canvassing the terms of the rig purchase agreement, the court concluded that the deposit payment was in the nature of a pre-contractual deposit. First, nothing in the terms stipulated that the deposit would be forfeited if the first plaintiff committed a breach of the rig purchase agreement.[43] In fact, the terms stated that the deposit could only be forfeited if the second set of contracts relating to the construction of the rigs were not entered into for a reason attributable to the first plaintiff. As such, the said terms did not support a characterisation of the deposit being an earnest payment. Second, nothing in the rig purchase agreement provided an obligation on the part of the first defendant to reserve the rigs for the first plaintiff for a length of time.[44] As such, the defendants' characterisation was untenable.

24.25 The High Court further held that as the basis for the pre-contractual deposit – that is, the execution of the second set of

39 See para 24.15 above.
40 See para 24.19 above.
41 [2003] 1 SLR(R) 791 at [71]–[77].
42 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [139].
43 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [140].
44 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [141].

contracts for the construction of the rigs – had failed, the plaintiffs were entitled to the restitution of the deposit payment.[45]

C. The totality requirement

24.26 In *Lim Choo Eng v Koh Siew Eng*[46] ("*Lim Choo Eng*"), the High Court had the opportunity to consider the totality requirement in the unjust factor, "total failure of consideration". In that case, in the plaintiff's version of the facts, the plaintiff paid to the defendant a sum of money for the purpose of jointly investing in land in China with the defendant. The land was to be leased through Lu, the defendant's acquaintance, from the village committee. At some point, after Lu obtained a 70-year lease over the land from the village committee, Lu signed a document granting the plaintiff a 70-year sublease over part of the land, although this document was considered as "highly suspect" by the court.[47] It was vaguely drafted, with no stipulation on the consideration or the location within the plot. On the evidence, the court also found that the defendant had paid the money received from the plaintiff onward to Lu. Subsequently, the plaintiff discovered that the defendant had not invested in the land herself. The plaintiff thus commenced action against the defendant, mounting a primary claim under s 2 of the Misrepresentation Act[48] for rescission or damages. The plaintiff's alternative claim lay in unjust enrichment for the restitution of the money paid to the defendant. The plaintiff argued that there was a total failure of consideration in the case because she "only obtained a sublease and not title to the land which remained undeveloped to date, and [the defendant] was not a joint investor".[49]

24.27 In a characteristically brief judgment, the High Court ruled that the plaintiff's claim failed because the failure of basis was not total: she had received a sublease (which legitimacy was not challenged).

24.28 In determining whether there is a *total* failure of consideration, it is a question of construing the shared understanding between the parties, which in many cases is contained in a contract.[50] The precise terms of the contract are thus important. In the case of *Lim Choo Eng*, however, there was no contract, oral or otherwise, between the plaintiff and the

45 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [143].
46 [2019] SGHC 192.
47 *Lim Choo Eng v Koh Siew Eng* [2019] SGHC 192 at [8].
48 Cap 390, 1994 Rev Ed.
49 *Lim Choo Eng v Koh Siew Eng* [2019] SGHC 192 at [14].
50 See an erudite explanation in Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at paras 06.037–06.039.

defendant.[51] It made it more difficult for the court to properly construe the basis of the transfer.[52] It is not clear from the judgment whether the grant of a sublease of only part of the land was in the parties' initial contemplation. From the plaintiff's evidence, which the court accepted as credible, she felt pressured into accepting the sublease granted by Lu because she had paid money to the defendant but "had nothing in 'black and white' to show for her investment".[53] What this seems to suggest is that the grant of the sublease was not within the parties' original contemplation, at least, on the plaintiff's version of what happened. Overall, it is unclear from the judgment how the court ascertained the basis of the transfer of payment. The court might have been constrained from the limited amount of evidence before it, as well as the lack of details in the plaintiff's pleadings.[54]

24.29 Finally, what is worth mentioning in respect of the requirement of totality is that it can be subject to courts' manipulation.[55] The court may construe the basis very narrowly in order to find a total failure of consideration.[56]

D. Money paid for a specific purpose: Failure of consideration and Quistclose *trust*

24.30 It may be observed that in cases where money has been advanced for a specific purpose – for example, in anticipation of the execution of a contract or for the purchase of specific property – the party seeking the recovery of the payment when the anticipated event did not materialise would often invoke a claim in unjust enrichment (on the ground of failure of consideration) and a claim for a *Quistclose* trust. Although the principles of a *Quistclose* trust should be investigated by a chapter dedicated to trust law, the present analysis is focused on the relationship between the unjust enrichment claim and the trust claim.

24.31 In *HE & SF Properties LP v Rising Dragon Singapore Pte Ltd*,[57] Eder IJ, sitting as the single judge in the Singapore International

51 *Lim Choo Eng v Koh Siew Eng* [2019] SGHC 192 at [15].
52 In fact, one may argue that the fact that there was no contract between the parties meant that they had no shared understanding as to the basis of the payment. That said, a shared understanding may still exist even though a contract is not formed, for example, where there is no consideration.
53 *Lim Choo Eng v Koh Siew Eng* [2019] SGHC 192 at [11].
54 See *Lim Choo Eng v Koh Siew Eng* [2019] SGHC 192 at [11] and [12].
55 See analysis in Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at para 06.043.
56 See *Rowland v Divall* [1932] 2 KB 500.
57 [2019] 4 SLR 149.

Commercial Court, considered precisely such a case where both unjust enrichment and trust claims were advanced by the plaintiff. The facts of the case may be simply stated for present purposes. The plaintiff transferred moneys to the defendant for the purpose of purchasing shares which were not ultimately received by the plaintiff. The unjust enrichment claim succeeded on the basis of failure of consideration[58] but the *Quistclose* trust claim failed.

24.32 On the *Quistclose* claim, more specifically, Eder IJ said that an express or resulting *Quistclose* trust (both of which are recognised under Singapore law)[59] could arise in a case where the moneys transferred are required to be segregated and placed into a designated account. However, on the facts of the dispute before him, Eder IJ said that they did not support the finding of a *Quistclose* trust. The obligation to segregate money (for example, by placing it in a designated account marked as "trust account") appears key to the finding of a *Quistclose* trust. In the context of an express *Quistclose* trust, where there is no explicit wording in the documentation referring to a "trust", the obligation of segregation of funds would indicate an intention to create a trust. In the context of a resulting *Quistclose* trust, this obligation indicates that there is an absence of intention to confer beneficial ownership of the money on the transferee as the money is clearly not intended to be at the free disposal of the transferee.

24.33 In *MSP4GE*,[60] the unjust enrichment claim was rejected for the plaintiff's failure to plead the claim sufficiently, but the *Quistclose* trust claim was held to be successful. In that case, the High Court doubted whether Singapore law should recognise an express *Quistclose* trust[61] but putting that debate to one side, it ultimately concluded that the trust was established because the money paid "was never intended to be at the free disposal of the 1st Defendant".[62] It is not entirely clear from the judgment how the court came to this conclusion. In particular, the court did not investigate as to whether there was any obligation to segregate the funds. It seemed to have placed weight on the fact that the balance sum was agreed between the parties to be applied for the specific purpose of making a second order of products (which was never placed). However, a contractual restriction on the use of the moneys paid by one contracting

58 *HE & SF Properties LP v Rising Dragon Singapore Pte Ltd* [2019] 4 SLR 149 at [93].
59 See *Attorney General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [114].
60 See para 24.3 above.
61 *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] 3 SLR 1348 at [110].
62 *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] 3 SLR 1348 at [113].

party to another does not give rise to a trust.[63] On the parties' dispute as to whether this second order was placed, the court found on the evidence the balance sum remained in the first defendant's accounts approximately two years after the payment was received and that it was treated as an item of liability (and not revenue) on the first defendant's financial records.[64] The court thus drew the conclusion that only one order of products was placed. Perhaps, this same evidence also went some way in showing that the money was not meant to be at the free disposal of the first defendant. In any event, viewing the matter holistically, it could be that the failure of the unjust enrichment claim had influenced the court to take a more generous view as to whether the *Quistclose* trust claim had been established.

24.34 More generally, Tang argues that the *Quistclose* trust is "usually necessary" in a situation where the defendant is insolvent but it would be "an overly broad remedy" where the defendant's insolvency is not a consideration.[65] Following the logic of his suggestion, where the defendant is not insolvent and the facts of the case do not clearly support a trust claim, a personal claim in unjust enrichment would be a sufficient remedy. Whilst Tang's suggestion is underlined by consequentialist reasoning, it has the merit of helping courts to restrict the availability of proprietary remedies.

E. Legal compulsion and necessity

24.35 In *Kay Swee Pin v Ng Kong Yeam*,[66] the High Court considered the unjust factors, legal compulsion and necessity. The facts were fairly straightforward. The plaintiff commenced action against her former partner, the defendant, for the reimbursement of two sums of moneys that she had paid on his behalf: first, a payment she made to the Inland Revenue Authority of Singapore ("IRAS") on his behalf for the payment of his 2013 taxes ("tax payment"); and second, a payment for legal fees in relation to Hong Kong proceedings initiated by the defendant and in which she was appointed as his litigation representative.

24.36 The payment for legal fees may be quickly dealt with. On the evidence, the court found that only part of the fees was paid at the

63 Robert Chambers, "Restrictions on the Use of Money" in *The Quistclose Trust: Critical Essays* (William Swadling ed) (Hart Publishing, 2004) ch 5.

64 *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] 3 SLR 1348 at [72]–[76].

65 Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at para 06.040.

66 [2019] SGHC 223.

plaintiff's expense in her capacity as a litigation representative.[67] This part of the fees could be recovered on the basis of an indemnity from the defendant's estate. As for the remaining legal fees which the plaintiff claimed to have paid on behalf of the defendant, the court ruled that they were "unreasonably incurred" by the plaintiff herself and the defendant could not be said to have been enriched at the plaintiff's expense.[68] There was also no basis to support the claim in unjust enrichment.

(1) Legal compulsion

24.37 In respect of the ground of compulsion, the court followed[69] the principles laid down in *Cosmic Insurance Corp Ltd v Ong Kah Hoe*[70] – the plaintiff must show that:

> (a) he has been compelled or was compellable by law to make the payment;
>
> (b) he did not officiously expose himself to the liability to make the payment; and
>
> (c) his payment discharged a liability of the defendant.

24.38 Applied to the tax payment, the court ruled that the unjust enrichment claim on the basis of legal compulsion was not established because the plaintiff was not compellable by law to make the payment.[71]

(2) Necessity

24.39 However, the court found that the claim in unjust enrichment succeeded on the ground of necessity in respect of the plaintiff's tax payment. The court took the view that there was "urgency" in the case as the payment was made four days before the taxes were due and the plaintiff had acted reasonably by making the payment on behalf of the defendant in the circumstances, having regard to their former relationship.[72]

24.40 A little bit more should be said about the unjust factor of necessity as its development in the common law is rather impoverished compared with civil law systems, which boast an established doctrine of *negotiorum gestio*. First, both necessity and legal compulsion are justified by "pressure affecting the voluntariness of the claimant's actions" but only the latter

67 *Kay Swee Pin v Ng Kong Yeam* [2019] SGHC 223 at [16].
68 *Kay Swee Pin v Ng Kong Yeam* [2019] SGHC 223 at [19].
69 *Kay Swee Pin v Ng Kong Yeam* [2019] SGHC 223 at [8].
70 [1997] 3 SLR(R) 1 at [30].
71 *Kay Swee Pin v Ng Kong Yeam* [2019] SGHC 223 at [9].
72 *Kay Swee Pin v Ng Kong Yeam* [2019] SGHC 223 at [11].

ground involves threats made against the claimant.[73] For necessity, the claimant experiences pressure that arise from the urgency of the situation. Second, the claimant's *voluntariness* is a guiding principle in determining if he/she has acted out of necessity.[74] That is to say, if the claimant's actions are voluntary in nature, he/she has not intervened out of necessity and should thus be barred from claiming in unjust enrichment against the defendant. The court would consider the urgency of the situation (for example, for the protection of life, health or property); whether it was impracticable for the claimant to obtain the defendant's consent/instructions before intervening; whether the claimant is an appropriate person to make the intervention (for example, whether there is a pre-existing relationship between the parties); and whether the claimant's intervention was reasonable in the circumstances by considering various factors, including the consequences of non-intervention and the costs of intervention relative to the benefit gained by the defendant.[75]

V. Valid contract precludes a claim in unjust enrichment

24.41 Finally, in *B2C2 Ltd v Quoine Pte Ltd*,[76] Simon Thorley IJ, presiding over the Singapore International Commercial Court, heard a dispute concerning virtual currency trades in which a claim in unjust enrichment was raised. The plaintiff traded virtual currencies on the defendant's currency exchange platform. Owing to a prior technical glitch in the platform, it resulted in trades in which the plaintiff sold Ethereum for Bitcoin at a rate that was approximately 250 times the then prevailing market rate. On the defendant's discovery of the technical glitch and the trades that had been made as a result, it unilaterally cancelled the trades and reversed the debit and credit transactions. The plaintiff sued the defendant for breach of contract and breach of trust. The defendant invoked a number of defences, including unilateral mistake at common law and in equity as the bases for avoiding the trades. It also claimed that the plaintiff had been unjustly enriched by the trades on the grounds of mistake and lack of consent.[77]

73 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 292.

74 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at pp 290–292 and 294–295.

75 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at pp 293–294.

76 [2019] 4 SLR 17. The case went on appeal before the Court of Appeal: *Quoine Pte v B2C2 Ltd* [2020] SGCA(I) 2. The Court of Appeal upheld Simon Thorley IJ's decision in respect of the unjust enrichment claim.

77 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [247]–[248].

24.42 Thorley LJ astutely pointed out that the unjust enrichment claim would only accrue if the plaintiff succeeded in its action against the defendant and received the enrichment that it should have had if the defendant had not unilaterally reversed the trades. Moreover, the action would accrue to the counterparties, and not the defendant.[78]

24.43 Importantly, Thorley IJ held that in general, a valid contract would bar a claim in unjust enrichment.[79] In view of his conclusion that the trading contracts were valid and unenforceable, the unjust enrichment claim could not succeed. He did not think that the case before him was an exceptional one that a claim in unjust enrichment ought to be allowed to succeed in spite of the existence of a valid contract. He commented:[80]

> B2C2 was enriched because Quoine failed to take any of the steps necessary to protect itself or the margin traders identified in [212] above and the Counterparties did not take any sufficient steps to ensure that their beliefs were correct. This is not a case of B2C2 getting an unjustified windfall, it is the inevitable result of the way the parties have chosen to trade with each other.

78 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [242].
79 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [252].
80 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [252].