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25. RESTITUTION

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I. Introduction

25.1 There were not many cases on the law of restitution in 2021 but several interesting issues were raised in these few cases: for example, the concept of interceptive subtraction; the application of failure of consideration in the domestic context; exploitation of weakness as an unjust factor; restitution of benefits transferred pursuant to a judgment that is subsequently reversed; and the limitation period applicable to unjust enrichment claims.

II. A subsisting contract precludes a claim in unjust enrichment

25.2 In *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd*,[1] the General Division of the High Court ("High Court (General Division)") affirmed the well-established principle that a subsisting contract precludes a claim in unjust enrichment. In that case, the plaintiff, who was an engineering director of the first defendant and the managing director of the second defendant, resigned from both roles. Both the first and second defendants were in the same group of companies. The plaintiff commenced suit to claim, *inter alia*, unpaid fees for his referral and project managing services. His claim in unjust enrichment arose as a result of a lacuna in the contract with the second defendant in so far as the legal relationship between the plaintiff and the first defendant was concerned. This lacuna affected whether the plaintiff would be paid by another company in the group, other than the second defendant. As the High Court (General Division) came to the conclusion that the contract should be rectified such that the plaintiff would be paid by any company in the group (including the second company), the plaintiff's claim in unjust enrichment, as a matter of logic, fell away.[2]

1 [2021] SGHC 197.

2 *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197 at [72]. This case may be contrasted with the High Court (General Division)'s decision in *Tan Kian Seng v Venture Corp Ltd* [2021] SGHC 266 where the unjust enrichment

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25.3 The High Court (General Division) explained the outcome as justified by the principle of party autonomy.[3] It went on to observe:[4]

> In a similar vein, Prof Tang Hang Wu in his chapter in *Research Handbook on Unjust enrichment and Restitution* (Elise Bant, Kit Barker and Simone Degeling eds) (Edward Elgar Publishing, 2020) at pp 103–104 states that unjust enrichment 'may usually only operate if there is no valid contract between the claimant and the defendant', and that it is 'only in exceptional cases that an unjust enrichment claim may operate where there is a subsisting contract', as it is 'not for the courts to re-write the contract between the parties' and 'upset the agreed distribution of risks'. Prof Tang goes on to observe (at pp 105–106 and 107) that for unjust enrichment to apply where there is a contract between the parties, a claimant must first be able to establish that the contract is void or rescinded due to a vitiating factor or discharged due to breach, or that there is a gap in the contract. If not, 'then contractual principles should govern and the unjust enrichment argument would be a non-starter' (at pp 107–108).

III. "At the expense of": Interceptive subtraction

25.4 An "interceptive subtraction", as conceived by Peter Birks, occurs where assets were "on their way, in fact or law, to the claimant when the defendant intercepted them" and these assets were never legally owned or possessed by the plantiff.[5] Birks considered a causal connection sufficient for the purpose of establishing that the defendant's enrichment was received at the plaintiff's expense. In *Wee Chiaw Sek Anna v Ng Li-Ann Genevive*,[6] the Court of Appeal, however, rejected an approach based on causal connection and said that the benefit received by the defendant must be one that the plaintiff is legally entitled to or forms part of its assets, whether the benefit is one of traceable property or a mere value transferred.[7] Specifically, in respect of Birks' "interceptive subtraction", the court said that it lacked certainty as to the plaintiff's entitlement to the benefit.[8]

25.5 The High Court (General Division) considered the applicability of this concept under Singapore law in *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd*[9] ("*Ok Tedi Fly River Development Foundation*"), in the context of a striking-out application. The claim

claim based on mistake or failure of consideration was successful because the court found that the plaintiff had no contractual entitlement to the shares (enrichment).

3 *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197 at [75].
4 *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197 at [75].
5 Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at p 75.
6 [2013] 3 SLR 801.
7 *Wee Chiaw Sek Anna v Ng Li-Ann Genevive* [2013] 3 SLR 801 at [128].
8 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [117]–[123].
9 [2021] SGHC 205.

in unjust enrichment was struck out on the basis that the elements of "at the expense of" and "unjust factor" were "plainly and obviously unsustainable".[10]

25.6 The background facts to the dispute are fairly complex. Pursuant to a class action brought against the first defendant ("OTML"), the owner and operator of the mine in Papua New Guinea, and BHP Group (which held 52% shares in OTML) for breach of a settlement agreement entered in relation to proceedings for environmental damage caused by the mining activities, BHP Group commenced a plan to exit as the shareholder of OTML. It suffices to highlight that the second defendant ("PNGSDP"), a Singapore incorporated company limited by guarantee, was set up for the purpose of holding 52% shares in OTML (divested by BHP Group), receiving dividends and other money arising from the shares ("the Distributions") and applying the Distributions to promote sustainable development in Papua New Guinea and to advance the general welfare of the people of Papua New Guinea (particularly those of the Western Province) through certain programmes and projects.[11] According to the "Program Rules" (a schedule to the articles of association of PNGSD), which had the effect of a statutory contract between PNGSDP and its members, PNGSDP was obliged, *inter alia*, to set up a fund ("the Long Term Fund")[12] and to apply the Distributions for the benefit of the people of the Western Province and the people of Papua New Guinea.

25.7 The unjust enrichment in the case was brought by the plaintiffs[13] against the second defendant, PNGSDP, and it must be understood against the plaintiffs' claim in deceit against OTML. In essence, the plaintiffs alleged that OTML had made certain representations about BHP Group's exit plan to members of the affected communities ("the Share Offload Representations") which meaning and effect were that: the 52% shares in OTML and Distributions would belong beneficially to the members of the affected communities; these aforesaid assets would be held on trust for the members of the affected communities and/or for the purpose of ameliorating the environmental damage caused by

10 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [140].

11 See PNGSDP's objects as set out in *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [22].

12 The Long Term Fund was to hold two-thirds of all Distributions and the accumulated income earned on the Long Term Fund.

13 Comprising representatives of members of certain communities in the Western Province of Papua New Guinea which have been adversely affected by the environmental damage caused by mining activities.

the mining activities; and/or the 52% shares would be unencumbered.[14] The members of the affected communities relied on the Share Offload Representations to execute the relevant forms to opt out from the class action ("the Opt-Out Forms"). The plaintiffs also took the position that the members of the affected communities only discovered that the Share Offload Representations were false in April 2019 in that the 52% shares in OTML and Distributions were not held on any trust, nor were they unencumbered.

25.8 Turning now to the plaintiffs' unjust enrichment claim, the essence of their argument was that PNGSDP was unjustly enriched by retaining assets (the 52% shares and the Distributions) that should have been applied for the benefit of the members of the affected communities. They contended that the shares were "meant for" them by reason of the Share Offload Representations which they relied on to execute the Opt-Out Forms, but the shares were intercepted by PNGSDP. Although the plaintiffs did not use the label of "interceptive subtraction", the High Court (General Division) observed that their argument was essentially based on that concept. It went on to hold that even if a factual entitlement (as opposed to a legal entitlement) to property would suffice, the plaintiffs' case was "plainly and obviously unsustainable"[15] because the plaintiffs could not show that the members of the affected communities had a factual entitlement to the assets held by PNGSDP.[16] In the main, even if the deceit claim against OTML was successful, the members of the affected communities would only be entitled to damages and not the fulfilment of the Share Offload Representations.[17] As to the Distributions, the Program Rules precluded any assertion of factual entitlement and, most importantly, PNGSDP could apply the earmarked funds for programmes and projects which benefited "the people of the Western Province of Papua New Guinea", which was a wider set than the members of the affected communities.[18] There was therefore no certainty that any application of the Distributions would or must benefit the members of the affected communities. Finally, in respect of the Long Term Fund, the Program Rules similarly precluded any assertion of factual entitlement by

14 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [41].
15 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [146].
16 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [154].
17 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [148].
18 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [149].

the members of the affected communities.[19] The members of the affected communities also did not have a contractual right to those assets.[20]

IV. Failure of consideration

A. Shared basis and indirect transfer

25.9 In *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch*[21] ("*Symphony Ventures*"), the High Court (General Division) considered an unjust enrichment claim based on failure of consideration in the context of an application for leave to amend the statement of claim to introduce a new claim. In that case, the defendant acted on behalf of a number of corporate entities (including X and Y (X's parent company)) to obtain indications of interests from possible lenders (including the plaintiff) for a bridging loan to purchase an oil rig. The plaintiff and X entered into a term loan agreement, which was guaranteed by Y, pursuant to which moneys were provided to X for payment of the deposit for the oil rig and associated expenses. X subsequently defaulted on repayment of the loan. There was no contract between the plaintiff and the defendant, and the plaintiff sought to claim against the defendant in unjust enrichment to recover the advisory fee received by the defendant on the basis that there had been a total failure of consideration. The advisory fee was paid to the defendant directly by Dvergsten and/or Y out of the loan which the plaintiff had extended to X.

25.10 The High Court (General Division) held that the new claim in unjust enrichment sought to be introduced by the plaintiff disclosed no reasonable cause of action.[22] This was because an indirect transfer through third parties, which were separate entities and not in any agency relationships with one another, would not generally involve a shared basis for the transfer. In particular, the court found that the parties each occupied a different role in the transaction and had their respective motivations for the transfer and/or receipt of the payment. As it explained:[23]

19 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [150].

20 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [154].

21 [2021] 5 SLR 1213.

22 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 at [65].

23 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 at [65].

> … the plaintiff stood in the position as a lender, Traxiar and Treatmil were the borrower and guarantor respectively, and the defendant was the arranger of the loan. The transfers interposed between the plaintiff's advancement of the loan moneys and the defendant's eventual receipt of any part of the sum in the form of advisory fee, would each be predicated on a different 'basis' between the respective transferor and transferee. Accordingly, the reasons for the plaintiff's payment of moneys and the defendant's receipt of any part of that sum would be different. Nothing in the plaintiff's arguments or amendments raised any viable exception to this requirement for a jointly understood 'basis' of transfer.

25.11 *Symphony Ventures*[24] thus confirmed that a shared basis is required in respect of an indirect enrichment received by the defendant in a multiple-party case. What is less clear is what the exceptions to this requirement are. Presumably, one exception is where the parties are in agency relationships with one another.

B. Domestic context

25.12 Although many unjust enrichment claims based on failure of consideration arise in the commercial/contractual context, such a claim may sometimes arise in the domestic context. As with the commercial/contractual context, in order for the unjust enrichment claim to succeed, there must be a basis for the transfer of the enrichment which has failed. In the domestic context, where parties' intentions are rarely recorded in writing, the court would have to divine parties' intentions based on oral communications and conduct. The decision-making is thus usually focused on the evidence. For these reasons, coupled with the fact that parties often contend over proprietary entitlement to the property, property disputes arising in the domestic context are far more often dealt with through the doctrines of an *inter vivos* gift, common intention constructive trust, resulting trust and proprietary estoppel than a claim in unjust enrichment.

25.13 *Lyu Jun v Wei Ho-Hung*[25] concerned a dispute between a couple whose "love burned hot and fast, dying out before they could marry as they had vowed to do so"; the court was thus "left to rake through the ashes to decide what belongs to each of them as they part ways" without the benefit of matrimonial law to guide the difficult exercise.[26] The plaintiff claimed in unjust enrichment in respect of his payments towards the discharge of a property mortgage, surrogacy arrangements

24 The outcome was upheld on appeal to the Appellate Division of the High Court: *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2022] 1 SLR 498 at [16].

25 [2021] SGHC 268.

26 *Lyu Jun v Wei Ho-Hung* [2021] SGHC 268 at [1].

in the US and investments made in two clinics. He relied on total failure of consideration as the unjust factor. The High Court (General Division) dismissed his claim in respect of the discharge of a property mortgage, finding that, on the facts, the payment had been made to reduce her stress and was not linked to a marriage that did not materialise as alleged by the plaintiff.[27]

25.14 As to the claim in respect of payments for surrogacy arrangements in the US, the court took the view that "[s]urrogacy is clearly a shared project on the part of both intended biological parents".[28] In other words, that was the shared basis of the plaintiff's payments. As the surrogacy never took place, the court ruled that the defendant was liable to repay the payments to the plaintiff.

25.15 Finally, in respect of the plaintiff's payments towards the investments in two clinics, the court found that, in both instances, the payments were not meant as gifts and the investments did not proceed.[29] It thus followed that the plaintiff was entitled to recover the payments.

V. Exploitation of weakness

25.16 In *Ok Tedi Fly River Development Foundation*,[30] the High Court (General Division) made some *obiter* observations regarding the unjust factor of exploitation of weakness without deciding whether it was a recognised unjust factor under Singapore law.[31] First, endorsing the discussion of the unjust factor in *The Law of Restitution*,[32] the High Court (General Division) said that it "seeks to protect a plaintiff who suffers from a weakness (whether mental or arising from the plaintiff's circumstances) which is not so extreme to constitute an incapacity".[33]

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27 *Lyu Jun v Wei Ho-Hung* [2021] SGHC 268 at [62]–[66].

28 *Lyu Jun v Wei Ho-Hung* [2021] SGHC 268 at [76].

29 *Lyu Jun v Wei Ho-Hung* [2021] SGHC 268 at [74]–[75] and [89]–[90]. In respect of the payments for the investment in the second clinic, the defendant had repaid part of the moneys to the plaintiff. The plaintiff was thus entitled to recover the balance sum.

30 See para 25.5 above.

31 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [164]–[173]. The court did not have to decide whether exploitation of weakness was part of Singapore law because the plaintiff's pleadings did not discuss its arguments based on exploitation in the way as framed in the restitution treatise authored by Andrew Burrows.

32 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 300

33 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [165].

25.17 Second, to establish this unjust factor, the plaintiff must show three elements: (a) that he has a mental or circumstantial weakness; (b) disadvantageous terms; and (c) that he did not have independent advice.[34]

25.18 Third, the High Court (General Division) noted that Burrows' concept of exploitation of weakness "corresponds to the doctrine of unconscionability" endorsed by the Court of Appeal in *BOM v BOK*.[35] It thus commented that if exploitation of weakness is a recognised unjust factor under Singapore law, the plaintiff who relies on this unjust factor must be able to satisfy the requirements of the *BOM v BOK* narrow doctrine of unconscionability.[36] In particular, the plaintiff's weakness must fall within the form of infirmities recognised by the Court of Appeal under the narrow doctrine of unconscionability which does not include unequal bargaining power.[37]

25.19 On the plaintiffs' pleadings, their arguments on exploitation of weakness "appear[ed] to be an alleged misrepresentation" which was not a recognised form of weakness to bring this unjust factor into play.[38] The plaintiffs' pleadings also did not address the other two elements of the unjust factor.[39] It followed that their claim based on exploitation of weakness was unsustainable.

VI. Ignorance

25.20 In *Ok Tedi Fly River Development Foundation*, the High Court (General Division) decided that the plaintiffs' unjust enrichment claim based on ignorance was unsustainable even if ignorance was a recognised unjust factor under Singapore law. However, it was careful to stress that it did not decide whether this unjust factor was part of Singapore law.[40] The plaintiffs' claim on the ground of ignorance failed because they had

34 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [165].
35 [2019] 1 SLR 349. See *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [167].
36 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [168].
37 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [169] and [172].
38 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [170].
39 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [173].
40 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [179].

no legal or factual entitlement to the shares or the Distributions, which meant that there was no obligation on OTML, PNGSDP or BHP Minerals Holdings Pty Ltd (a BHP Group company) to obtain the consent of the members of the affected communities to make a transfer of the shares to PNGSDP.[41]

25.21 Pertinently, the High Court (General Division) also observed, by way of *obiter*, that a distinction needs to be drawn between a lack of consent (for example, a theft) and vitiated consent (for example, a mistake).[42] It explained that ignorance is concerned with a lack of consent and not vitiated consent.[43] The High Court (General Division) highlighted that the plaintiffs' case was one of vitiated consent as they "*did* intend to release their right to sue OTML, BHP Minerals and BHP Group" [emphasis in original] but their consent was defective.[44]

VII. Illegality

25.22 In *Ang Jian Sheng Jonathan v Lyu Yan*,[45] the plaintiff entered into a contract with the first defendant ("D1") to transfer money in renminbi ("RMB") from her bank account in China to her bank accounts in Singapore and the funds were to be received in US dollars. The first remittance handled by D1 was completed smoothly. The second remittance, which formed the subject matter of the dispute, involved D1 and the second and third defendants ("D2" and "D3" respectively). In this second transaction, the plaintiff transferred RMB21,075,000 from her Chinese bank account to various bank accounts as instructed by D1 which included bank accounts in the names of D2 and D3. However, the plaintiff never received the funds in US dollars, nor was she repaid the funds in RMB. The plaintiff, D1 and D3 attempted to resolve the matter over a WhatsApp discussion which included a party named "Allan" who was, unbeknownst to the plaintiff at the material time, a fictitious person. "Allan" assured the plaintiff that the relevant transfers would be made but the plaintiff did not receive further responses from him several days later. The plaintiff also did not receive the funds. By that time, D1 had received his commission of RMB105,000. The plaintiff commenced proceedings

41 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [175].
42 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [176].
43 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [177].
44 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 at [177].
45 [2021] 1 SLR 1091.

against D1, D2 and D3 to recover her moneys, mounting various claims including a claim in unjust enrichment based on failure of consideration. D2 and D3 contended that the funds were passed over to "Allan" who absconded with the money.

25.23 The Court of Appeal did not directly address whether a shared basis was required in a multiple-party scenario, as the two issues on appeal were: (a) whether the High Court erred in finding that "Allan" did not exist; and (b) whether the rule in *Foster v Driscoll*[46] was engaged. In relation to the first issue, the Court of Appeal held that D1, D2 and D3 failed to discharge their burden that "Allan" existed, as a mere assertion of his existence would not suffice.[47] As to the second issue, the court took the view that the *Foster v Driscoll* rule was not engaged because the plaintiff did not know or intend for the second transaction to violate Chinese law.[48]

25.24 Relevantly, on account that the plaintiff's claim was in unjust enrichment,[49] the Court of Appeal went on to make some *obiter* observations in relation to the interplay between the rule in *Foster v Driscoll* and the making of a non-contractual claim to recover benefits transferred under an illegal contract pursuant to Singapore law principles set out in *Ochroid Trading Ltd v Chua Siok Lui*[50] ("*Ochroid Trading*"). It commented that the rule in *Foster v Driscoll*, applied on its own, only bars contractual claims.[51] It also said that the *Ochroid Trading* framework would only be read together with the rule in *Foster v Driscoll* if the illegal contract is governed by Singapore law.[52] In such a situation, in deciding whether the non-contractual claim could succeed, the court would also apply the principle of stultification.[53]

25.25 The Court of Appeal nevertheless acknowledged that such a view would give rise to a possible anomaly between contracts governed

46 Derived from the English Court of Appeal decision of *Foster v Driscoll* [1929] 1 KB 470.
47 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [11].
48 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [21].
49 The defendants erroneously thought that the rule in *Foster v Driscoll* [1929] 1 KB 470 would bar all non-contractual claims: *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [29].
50 [2018] 1 SLR 363.
51 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [26].
52 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [31]. The court did note (at [30]) that if the rule in *Foster v Driscoll* [1929] 1 KB 470 "is one pertaining to the conflict of laws, then one possible argument is that it is *separate and distinct* from the *Ochroid Trading* framework and that both should consequently not be read together" [emphasis in original].
53 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [28].

by Singapore law and contracts governed by foreign law, as it would appear that recovery via a non-contractual claim would be broader in the latter category of cases due to the non-applicability of the *Ochroid Trading* framework and the stultification principle.[54] It merely expressed "concerns with whether this possible disconnect or anomaly should be permitted" but did not go on to make a conclusive determination in the case.[55]

25.26 However, the Court of Appeal had resiled from its provisional views on the rule in *Foster v Driscoll*[56] in the later case of *Esben Finance Ltd v Wong Hou-Lianq Neil*[57] ("*Esben Finance*"). In *Esben Finance*, the court observed that the rule in *Foster v Driscoll* and the rule in *Ralli Brothers v Compañia Naviera Sota y Aznar*[58] are underlined by the principle that "a claim ought to be unenforceable if it offended the principle of international comity".[59] It also noted that these cases were decided at a time before the modern law of unjust enrichment was established.[60] The court went on to express the provisional view that the same principle based on international comity should apply also to claims in unjust enrichment.[61]

VIII. Limitation periods for unjust enrichment claims

25.27 The applicable limitation period for an unjust enrichment claim grounded on the unjust factor "failure of consideration" was considered in two decisions. In *United Petroleum Trading Ltd v Trafigura Pte Ltd*[62] ("*United Petroleum*"), the appellant sought to recover from the respondent, who had agreed to trade futures contracts on the former's behalf, three payments on the basis that, *inter alia*, the respondent had failed, omitted and/or neglected to do so. The respondent applied to strike out the claims for the first two sums, alleging that they were time barred because the appellant commenced the suit more than six years after the respondent's receipt of the payments. It was common ground between the parties that where an unjust enrichment claim was based on total failure of consideration, s 6(1)(*a*) of the Limitation Act[63] was

54 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [32]–[34].
55 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [34].
56 Discussed at paras 25.23–25.24 above.
57 [2022] 1 SLR 136.
58 [1920] 2 KB 287.
59 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [168].
60 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [168].
61 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].
62 [2021] 2 SLR 1232.
63 Cap 163, 1996 Rev Ed.

applicable.[64] The Appellate Division of the High Court ("High Court (Appellate Division)"), disagreeing with the court below, held that the cause of action would only accrue when the basis failed.[65] It noted that in some cases, the failure of basis might coincide with the receipt of the enrichment, as had happened in *Ching Mun Fong v Liu Cho Chit*.[66]

25.28 In *United Petroleum*, the High Court (Appellate Division) observed that the appellant, who had the burden of proving that its claims fell within the limitation period, failed to plead the relevant facts as to when the respondent had failed to perform its obligation. Following *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat*,[67] the High Court (Appellate Division) disagreed that the matter should be resolved in trial and held that its case was unsustainable.[68]

25.29 The second case was *Symphony Ventures*,[69] in which the High Court (General Division) similarly accepted that the six-year limitation period provided under s 6(1)(*a*) of the Limitation Act applied to the claim in unjust enrichment based on a total failure of consideration.[70] The plaintiff unsuccessfully invoked s 29 of the Limitation Act, which postpones the running of the limitation period to a later date when the fraud or mistake is discovered or could with reasonable diligence have been discovered, if the plaintiff's action is based on fraud, the right of action is concealed by fraud or the action is for relief from the consequences of a mistake.[71] The High Court (General Division)'s holding on the issue of limitation period was upheld on appeal to the High Court (Appellate Division).[72] The High Court (Appellate Division)'s only disagreement with the lower court's decision was in respect of the date of accrual of the cause of action for unjust enrichment. Whilst the High Court (General Division) took the view that the action accrued at the date when the defendant invoiced Dvergsten and/or Treatmil Holdings Ltd for the advisory fee, the High

64 *United Petroleum Trading Ltd v Trafigura Pte Ltd* [2021] 2 SLR 1232 at [6].
65 *United Petroleum Trading Ltd v Trafigura Pte Ltd* [2021] 2 SLR 1232 at [9]–[11].
66 [2001] 1 SLR(R) 856.
67 [2020] 2 SLR 272.
68 *United Petroleum Trading Ltd v Trafigura Pte Ltd* [2021] 2 SLR 1232 at [13]–[14].
69 Discussed at paras 25.9–25.11 above.
70 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 at [16], citing *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [41]; *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 856 at [27]. *Cf MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [32]. See further the discussion in Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at paras 12.002–12.004.
71 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 at [22]–[24].
72 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2022] 1 SLR 498 at [7]–[8].

Court (Appellate Division) observed that the action accrued when the payment was received by the defendant and even on this finding, the claim would still be time barred.[73] Presumably, the High Court (Appellate Division) took this position because that was when the enrichment was received, and enrichment was an element of the claim. The disagreement between the two levels of the High Court is, however, immaterial as they were in agreement that the cause of action was not legally sustainable. This meant that no cause of action actually accrued on the facts.

25.30 Importantly, the Court of Appeal decision in *Esben Finance*[74] is now the authority in this area of the law. The Court of Appeal, disagreeing with the prevailing English approach, has firmly held that claims in unjust enrichment "do *not* fall within the ambit of the Limitation Act" [emphasis in original].[75] It further said that until there is legislative intervention to address the limitation gap for unjust enrichment claims, these claims are not time barred and this ought to sound "an urgent clarion call for legislative intervention".[76]

IX. Restitution of benefits transferred pursuant to a judgment that is subsequently reversed

25.31 In *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd*,[77] the Court of Appeal was confronted with a claim for restitution of benefits conferred pursuant to a judgment that was subsequently reversed. In that case, five Crest entities (including VMIII) were jointly and severally liable (along with other parties) to the respondents in the sum of $12.6m. It was agreed, pursuant to negotiations, that VMIII would pay (on behalf of all Crest entities) $10.3m to the respondents in settlement of the judgment debt and interest accruing thereon by way of three instalments. After VMIII's (and another Crest entity, VMF3's) appeals were allowed, VMIII asked for repayment of the sums paid to the respondents, basing its claim on the established principle that restoration of money and property transferred would follow from a successful appeal.[78] It grounded its claim in legal compulsion – that is, it paid the moneys out of legal compulsion due to (a) the enforcement proceedings against it; and (b) its joint and

73 *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2022] 1 SLR 498 at [8].
74 See para 25.26 above.
75 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [53].
76 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [86] and [123].
77 [2021] 2 SLR 424.
78 See *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 26-02.

several liability for the judgment sum. However, the other three Crest entities were unsuccessful in their appeals.

25.32 The Court of Appeal explained that the principle of restitution when a judgment is subsequently reversed is not based in the law of unjust enrichment but is a rule of judicial policy: "a practical instrument through which the court can undo the judgment below and the results thereof".[79] On that footing, the court went on to hold that as the $10.3m was meant to discharge the joint and several liability of all five Crest entities, and the lower court's ruling in respect of three of them remained correct, the full reimbursement of the entire sum to VMII would mean that the risk of non-payment of the judgment debt would then fall on the respondents.[80] On the facts, the court was of the view that the risk of non-payment should be borne by VMIII instead as the money was paid at a time when the notice of appeal was filed and it would have been apparent to VMIII and VMF3 that their appeals were not aligned with the appeals of the other three Crest entities.[81] VMIII should have taken the opportunity to protect itself by requesting contributions from the other Crest entities before paying to the respondents. In the circumstances, the proper course was for VMIII to seek contributions from the Crest entities which remained liable to the respondents.[82]

25.33 The court also considered the alternative unjust enrichment rationalisation for VMIII's claim, making brief observations on the applicability of the unjust factors of failure of basis, mistaken payment or legal compulsion. It emphasised that whilst the respondents had been enriched at the expense of VMIII, the "key question" was whether the enrichment was unjust.[83] The court found that there was no total failure of basis as the basis of the payment was to discharge the joint and several liability of all five Crest entities, and three entities remained liable.[84] Partial failure of basis would not suffice under Singapore law. As to mistake, the court said there was no operative mistake – which required "a 'mistaken conscious belief' or an 'incorrect tacit assumption' about a state of affairs" – because the lodgement of the appeals indicated that none of the Crest entities was mistaken or held any incorrect assumption as to the correctness of the decision below.[85] Finally, in relation to the unjust factor of legal compulsion, the court pointed out that the unjust

79 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [11] and [13].
80 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [18].
81 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [19].
82 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [20].
83 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [21].
84 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [23].
85 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [24].

factor typically applies in a three-party situation where the claimant was compelled to pay a third party to discharge a joint and several liability shared with a defendant.[86] Legal compulsion would thus support VMIII's claim against the three Crest entities that lost their appeals. As against the respondents, on the other hand, the compulsion was legitimate "to prevent further recourse to legal process which is a normal incident post-judgment".[87]

86 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [25].
87 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 2 SLR 424 at [25].