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# 25. RESTITUTION

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## I. Introduction

25.1 The very small yield of cases on the law of restitution in 2022 notwithstanding, they address important and underexplored issues under Singapore law, including the non-applicability of the Limitation Act 1959[1] to causes of action in unjust enrichment; whether "lack of consent" should be recognised as an unjust factor; what constitutes an extraordinary expenditure for the purpose of establishing a defence in change of position; the availability of proprietary restitution; and illegality and unjust enrichment claims.

## II. "At the expense of"

25.2 In *Esben Finance Ltd v Wong Hou-Lianq Neil*[2] ("*Esben Finance*"), the Court of Appeal held that where the claimants "were used as intermediaries for channelling funds"[3] from other parties to the defendant, the benefit received by the defendant could not be said to have been received at the expense of the claimants. In that case, the claimants were offshore companies related to the WTK Group of companies which were primarily managed by Wong until his death in March 2013. The reins over the WTK Group and related companies were passed to two of Wong's brothers after Wong passed away. It was then discovered that the claimant companies' bank accounts had lower balances than expected. Investigations revealed that 50 payments had been drawn from these bank accounts and transferred to Wong's son, the defendant. These payments were made during the period when Wong was in charge of the WTK Group and related companies (including the claimants). It was not disputed that Wong had caused the payments to be made to the defendant for which the latter provided no consideration. Of the 50 payments, the defendant alleged that 11 payments were Wong's gifts to him; three payments were for directors' fees and shareholder dividends to

1 2020 Rev Ed.
2 [2022] 1 SLR 136.
3 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [148].

which he was entitled or received as gifts from Wong; and the remaining 36 payments were made pursuant to a "practice" within the WTK Group and its related companies for the purpose of evading Malaysian taxes. For the purpose of this chapter, the discussion shall focus on the unjust enrichment claim brought by the claimants.

25.3 The decision by the lower court, the Singapore International Commercial Court, has been discussed in a previous review.[4] Essentially, Henry Bernard Eder IJ found that the claims for all but the last payment were time barred under the Limitation Act.[5] Had the time bar not set in, Eder IJ commented that the claim in unjust enrichment in respect of the 11 payments and three payments would have succeeded, but the claim in respect of the 36 payments made in connection with the "practice" would have failed. The "practice" would thus have succeeded as a defence to the claim in unjust enrichment, and Eder IJ further said that this defence was not precluded by the illegality of the "practice". The claimants appealed the decision. As will be discussed below,[6] the Court of Appeal ruled that the Limitation Act did not apply to claims in unjust enrichment; nor would the doctrine of laches be applicable to such claims. It followed that the claims in unjust enrichment in respect of all 50 payments were not time barred.

25.4 A little more needs to be said about the alleged "practice" as the claimants' appeal, in part, related to whether the evidence established that the "practice" existed and, even if it did exist, whether a defence based on the "practice" would have been precluded by its illegality. As the Court of Appeal explained, the "practice" was "a way by which companies in and related to the WTK Group, including [the claimants], structured intercompany payments in order to avoid paying taxes under Malaysian law".[7] Essentially, the claimant companies were "neither the recipient nor the provider of the services in respect of which the 36 payments … were made".[8] The claimants were intermediaries for channelling funds from some companies in or related to the WTK Group to the defendant.

25.5 The Court of Appeal relied on the UK Supreme Court decision in *Investment Trust Companies v Revenue and Customs Commissioners*[9] for the principle that if a benefit is transferred from a claimant to the

4 See (2020) 21 SAL Ann Rev 770 at 780–781, paras 25.29–25.34.
5 Cap 163, 1996 Rev Ed. The first 49 payments were made between January 2001 and October 2011, more than six years before the claimants' commencement of the action.
6 See paras 25.29–25.31 below.
7 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [147].
8 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [148].
9 [2018] 1 AC 275.

defendant through an intermediary, the intermediate transactions can be ignored. The court went on to say that implicit in this principle is that the intermediaries have no right to mount a claim in unjust enrichment for the benefit. This is because the series of intermediate and closely connected transactions may be regarded as "a single transfer of value" which the defendant has received at the expense of the claimant and not the intermediaries.[10] For this reason, the 36 payments made pursuant to the "practice" could not be recovered in unjust enrichment as they were not received by the defendant at the expense of the claimants. The relevant question to ask is whether the intermediary would have received the enrichment in the first place if not for the wider scheme of transactions pursuant to which the enrichment was transferred to the intermediary.

25.6 Importantly, the Court of Appeal's decision did not definitively decide on the proper approach to the "at the expense of" inquiry under Singapore law. Whilst the court appeared to endorse a causal connection approach, it also made clear that the judgment did not bear on the determination of the test to be applied in three-party situations involving an indirect transfer of benefit.[11]

## III. Ignorance/lack of consent/want of authority/powerlessness

25.7 The Court of Appeal in *Esben Finance* turned to consider the claims in respect of the other 14 payments which Eder IJ had opined would have succeeded if not for the time bar issue. The court saw no reason to disturb Eder IJ's finding that these 14 payments were made "without any legitimate basis" as there was no evidential support in respect of the apparent bases alleged by the defendant.[12] Crucially, the court's analysis was focused on the unjust factor element of the claim – in particular, what was described as "a vexed issue" in the law of unjust enrichment: whether "lack of consent" (and closely related grounds) should be recognised as an unjust factor.[13] Before *Esben Finance*, whilst there was support for the recognition of this unjust factor in a few High Court decisions,[14] the justification for its recognition has not been fully examined.

10 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [148].

11 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [158]. See further analysis in Tang Hang Wu, "Limitation Period for Unjust Enrichment Claims, at the Claimant's Expense, Lack of Consent, Illegality, and Vindication of Property Rights: *Esben Finance Ltd and Others v Wong Hou-Lianq Neil*" (2022) 33 KLJ 345.

12 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [192].

13 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [193].

14 See *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636; *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819; and *Compañia De Navegación Palomar, SA v Koutsos, Isabel Brenda* [2020] SGHC 59. *Cf Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 (the Court of Appeal rejected "want of authority" as an unjust factor

*(cont'd on the next page)*

25.8 The Court of Appeal indicated that it was "not prepared at this stage to endorse the *blanket* and *unattenuated* recognition of lack of consent as an unjust factor" [emphasis in original] under Singapore law but acknowledged that it may be invoked as a ground of restitution for unjust enrichment in limited circumstances.[15] As a starting point, the court commented that a total lack of consent as a possible ground for restitution for unjust enrichment "follows *a fortiori* from the established unjust factors of mistake (vitiation of consent) or failure of consideration (qualification of consent)".[16] Its position was supported by a careful analysis of case law (including *Lipkin Gorman v Karpnale Ltd*)[17] and relevant secondary literature.[18] In particular, the court observed that the cases in Commonwealth jurisdictions appear to converge, in "a *broad* sense" [emphasis in original], in the position that restitution for unjust enrichment ought to be available in cases concerning unauthorised transfers of benefit where there was no consent to the transfer.[19] That being the case, the further question is whether the law should permit unjust enrichment to provide redress when there are other available and established causes of action.[20] This in effect is a question as to how much expansion of the scope of unjust enrichment the courts should allow under Singapore law. In this connection, the court clarified that the local courts have "generally eschewed an approach which would expand the scope of a cause of action so broadly as to cause uncertainty in the law or which would result in an encroachment on other areas of law".[21] Further, the court said that if the defendant is legally entitled to the benefit pursuant to other areas of law, there is nothing unjust to allow the defendant to keep the benefit, and it follows that an action in unjust enrichment should not lie.[22]

25.9 The court took the opportunity to address the closely associated variations of "lack of consent": ignorance, powerlessness and want of authority. In respect of ignorance, which is a ground of restitution based

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under Singapore law) and *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 (in *obiter*, Vinodh Coomaraswamy J rejected "lack of consent" as an unjust factor under Singapore law).

15 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [195].

16 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [209].

17 [1991] 2 AC 548 ("*Lipkin Gorman*"). In *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [221], the Court of Appeal endorsed a "vindication of property rights" account of *Lipkin Gorman* instead of the countervailing unjust enrichment account of the case.

18 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [199]–[208] and [215]–[241].

19 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [240].

20 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [240].

21 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [243].

22 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [250].

on the lack of intention to benefit, the court said it ought to be rejected because it "does not account for cases where the plaintiff has knowledge of the transfer but does not consent to it".[23] To recognise "powerlessness" to provide restitution in cases not covered by "ignorance" – that is, where the claimant has knowledge of the transfer but does not consent to it – would lead to the undesirable outcome of a "'proliferation of grounds'".[24] As to "want of authority", the court opined that the label implies an agency relationship and would not cover most cases of theft.[25] Three-party scenarios involving a third-party agent acting outside of his authority could be adequately dealt with by the unjust factor of "lack of consent".[26] For these reasons, the court was only prepared to recognise "lack of consent" in circumstances where the defendant is not entitled in law to retain the enrichment, and where no alternative and established cause of action is available to the claimant.[27]

25.10 Hence, under Singapore law, the "lack of consent" unjust factor can only be invoked where an action in unjust enrichment is "the *only* cause of action which is available on the facts" [emphasis in original].[28] The court also provided a helpful summary of its views for guidance in future cases:[29]

> (a) There is in principle no reason why lack of consent ought not to be recognised as an unjust factor; to hold otherwise would result in defendants who have received stolen property or value benefiting from windfall.
>
> (b) However, the recognition of lack of consent as an unjust factor cannot be blanket and uncircumscribed because this would result in unacceptable encroachments on other areas of law, denuding them of their legal significance. In addition, *legally valid* transfers of the claimant's property or value without his consent, or the *retention by the defendant* of the claimant's property or value to which the defendant is *legally entitled*, cannot be said to have been unjust.

23 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [206]. The court referred to an example given by Swadling in William Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 OxJLS 627: in the case of theft, there can be no claim in unjust enrichment because the title of the property remains vested in the victim of theft.

24 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [206], citing *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 8-09.

25 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [207].

26 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [207].

27 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [240].

28 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [240].

29 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [251].

(c) Thus, an unjust enrichment action on the basis of the unjust factor of lack of consent would *generally not* be available where:

(i) the transfer of the property or value in question from the claimant is a *legally valid one*;

(ii) the defendant is *legally entitled* (under a legal principle, rule or defence to *any* claim) to retain the property or value which is the subject matter of the claim; and

(iii) the claimant has any other available cause of action for recovery of the property or value in question under established areas of law (for example, the vindication of property rights). This follows from the need to prevent unjust enrichment from encroaching on or making otiose established areas of the law, or denuding them of much of their legal significance.

25.11 On the facts, the unjust enrichment claim in respect of the 14 payments made without legitimate basis and without authority[30] was dismissed. As the 14 payments were transferred without authority and the bank could not rely on the directors' apparent authority, the court held that the claimants retained property in the moneys and had a proprietary claim against the defendant.[31] It was thus unnecessary to recognise an unjust enrichment claim grounded on lack of consent. The court emphasised that the law of unjust enrichment should be "developed *incrementally* on a case-by-case basis" and left "the issues of whether there may be lack of consent situations in which a claim in unjust enrichment ought to be allowed, and whether there are *other* limits to recognising novel unjust factors" [emphasis in original] for future determination.[32]

25.12 It has been commented that the *Esben Finance* decision demonstrates a distinctive vision of the law of unjust enrichment which no other common law jurisdictions share: in Singapore, the law of unjust enrichment plays "an independent but only interstitial role".[33]

30 *Cf* Rachel Leow & Timothy Liau, "A Pyrrhic Victory for Unjust Enrichment in Singapore? *Esben Finance Ltd v Wong Hou-Lianq Neil*" (2023) 86 Mod L Rev 518 at 526–528. Leow and Liau argue that the bank had acted with apparent authority in the case; therefore, it could not be said that the claimants retained property in the moneys transferred to the defendant entitling them to a proprietary claim.

31 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [253].

32 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [252].

33 Rachel Leow & Timothy Liau, "A Pyrrhic Victory for Unjust Enrichment in Singapore? *Esben Finance Ltd v Wong Hou-Lianq Neil*" (2023) 86 Mod L Rev 518 at 530.

25.13 Interestingly, a decision by the General Division of the High Court ("High Court (General Division)") in *Ice Messaging Pte Ltd v Ng Chee Heung*[34] ("*Ice Messaging*") did not cite *Esben Finance* in its analysis of the unjust enrichment claim that was based on "lack of consent". In *Ice Messaging*, the plaintiff company claimed against the defendants for unauthorised commissions paid to the latter. The defendants were not the plaintiff's employees but employees of another company, Ice Mobile Sdn Bhd. The board of directors of both companies did not know about and had certainly not authorised the payments from the plaintiff to the defendants. The plaintiff advanced a claim in unjust enrichment against the defendants for the recovery of the unauthorised commissions paid to them. In three brief paragraphs, the High Court (General Division) held that the elements of enrichment, "at the expense of" and the unjust factor had been established on the facts. As to the applicable unjust factor, the court said that lack of consent was established on the evidence. There was no investigation as to whether the plaintiff company had a proprietary claim in the case which would have precluded an unjust enrichment claim grounded in "lack of consent". The facts were not dissimilar to *Esben Finance* in that the payments made to the defendants were unauthorised. Pertinently, the High Court (General Division) had found that the defendants' conduct was "dishonest but not fraudulent in the legal sense" because they "cannot have assumed (wrongly) that they were entitled to be paid by the Plaintiff when they well knew they were not the Plaintiff's employees".[35]

## IV. Failure of consideration

25.14 Failure of consideration continues to be the most frequently invoked unjust factor to ground a claim in unjust enrichment. Three cases decided in 2022 were argued on the basis of failure of consideration. The disputes generally arose from a factual pattern concerning payment being made for a promised outcome (that is, the basis for the transfer of benefit) that did not ultimately materialise.

25.15 In *Simran Bedi v Montgomery, Mark A*,[36] there was a contract to sell shares in Company X by the defendant to the plaintiff. The plaintiff had paid the purchase price but the defendant did not transfer the shares to her. The plaintiff also did not sign the Deed of Ratification and Accession ("DRA") which effect, if executed, was to bind the plaintiff to a supplemental shareholders' agreement that had been pre-signed by

34 [2022] SGHC 22. The decision was handed down 18 days after *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136.
35 *Ice Messaging Pte Ltd v Ng Chee Heung* [2022] SGHC 22 at [125].
36 [2022] SGHC 67.

Company X's shareholders prior to the parties entering the share sale and purchase contract. Subsequently, the plaintiff's solicitors informed the defendant of the latter's repudiatory breach of the contract and that his repudiation had been accepted by the plaintiff. The plaintiff claimed the return of the purchase price paid to the defendant on three grounds, including an alternative claim in unjust enrichment on the basis of failure of consideration. In response to the claim in unjust enrichment, the defendant argued that he had changed his position and, in the alternative, the plaintiff was estopped from bringing a restitutionary claim. Both defences failed.[37] The High Court (General Division) ruled in favour of the plaintiff and allowed her claim for reliance losses for breach of contract. Crucially, the High Court (General Division) did not find that the signing of the DRA was a term of the contract between the parties or a precondition to her receiving the shares.

25.16 As to the claim in unjust enrichment, the High Court (General Division) was satisfied that there had been a total failure of consideration. Based on the evidence, it characterised the basis of the transfer of the purchase price simply as being the expected transfer of the shares of Company X.[38] It rejected the defendant's argument that the failure was partial because the plaintiff had received some benefits from being associated with Company X which were to be considered as part of the basis for the transfer of the purchase price. The court noted that these benefits were not the benefits which the plaintiff had bargained for under the contract,[39] and some benefits received were not conferred upon her in her capacity *qua* shareholder of Company X.[40]

25.17 In *Zaiton bte Adom v Nafsiah bte Wagiman*,[41] ("*Zaiton*") the unjust enrichment claim based on failure of consideration arose in the domestic context. The plaintiff sought to recover S$250,359.80 from the defendants on a variety of legal grounds, including on the ground of failure of consideration in unjust enrichment. The defendants were married to each other but later divorced, and the second defendant subsequently married the plaintiff. The defendants were the co-owners of a flat. In 2015, before the defendants divorced, the plaintiff alleged that she handed S$250,359.80 to the second defendant to enable the latter to pay the same to the first defendant so that the second defendant could buy over the flat and become the sole owner.[42] Pursuant to the divorce between the defendants, a property division order in relation to the flat

37 The defence of change of position will be discussed at paras 25.25–25.28 below.
38 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [79].
39 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [77].
40 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [79].
41 [2023] 3 SLR 533.
42 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [11].

was made by the Syariah Court and upheld by the Appeal Board. The defendants remained as co-owners pending the implementation of the order, and the order remained unimplemented at the time the case was heard by the High Court (General Division). The plaintiff sought to recover the payment on various grounds, including in unjust enrichment and/or as proprietary restitution. The High Court (General Division) ultimately allowed the plaintiff's unjust enrichment claim against the second defendant and issued written grounds of decision as both parties have appealed its decision.

25.18 The High Court (General Division) took the view that the elements of enrichment and "at the expense of" were straightforwardly established on the facts.[43] As to the unjust factor, the court held that there was a failure of basis, and the basis was that the second defendant would become the flat's sole legal and beneficial owner.[44] As the flat remained registered in the joint names of the defendants and the Appeal Board awarded 100% of the proceeds of sale of the flat (upon sale) to the first defendant, the basis on which the plaintiff handed the money to the second defendant had failed. It did not matter that the failure was not attributable to any fault on the second defendant's part. The court also took the view that no defence was available to the second defendant in the case.[45]

25.19 The High Court (General Division) further clarified that allowing the claim in unjust enrichment was not inconsistent with its rejection of the *Quistclose* claim.[46] That there was a basis for the transfer of money from the plaintiff to the second defendant was not the same as saying that the basis constituted the "*sole or exclusive* purpose" [emphasis in original] for which the moneys could be used.[47] Perhaps what the court had in mind was the distinction between the expected outcome for the transfer of the money (that is, that basis) and for what exclusive purpose the money should be used. On the facts, the expected outcome was for the second defendant to become the flat's sole owner. The parties had, however, not agreed on exactly how the money was to be used to bring about that outcome.

43 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [193] and [194].
44 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [195].
45 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [197].
46 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [195].
47 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [196].

## V. Mistake

25.20 *CRI v CRJ*[48] raised the interesting issue as to whether a mistake as to the paternity of children could constitute a mistake of fact to ground a claim in unjust enrichment. This issue was considered in the context of an application for pre-action discovery and interrogatories. The background to the application was that the applicant claimed that he had advanced a very substantial sum of money to the respondent, who claimed to have given birth to twins, to cover their medical expenses on the assumption that the twins were his biological children. Subsequent events raised suspicions that he had been deceived and that the twins did not exist or were not his children. The application was thus made by the applicant to seek information about the existence of the twins and their paternity. The applicant argued that if the twins did not exist or were not his biological children, he would have a cause of action in unjust enrichment or the tort of deceit.

25.21 The High Court (General Division) had to decide how the information sought by the applicant was relevant to establishing his intended causes of action. On unjust enrichment, the court accepted[49] that a mistake as to the paternity of children could constitute a mistake of fact, citing *BMM v BMN*.[50] However, the court refrained from commenting on the wider proposition made by Tang Hang Wu in *The Principles of the Law of Restitution in Singapore*,[51] which cited *BMM v BMN* as the authority:[52]

> It is suggested that where there are multiple causative factors motivating the transfer of an enrichment, restitutionary recovery should not be allowed if it is shown that only one of the factors turned out to be untrue …

Essentially, Tang's point is that, in the process of human decision-making, where there are multiple factors that have contributed to the final decision and one factor is in fact a mistaken belief, it cannot be shown that the mistake *caused* the enrichment.

48 [2022] 5 SLR 796.
49 *CRI v CRJ* [2022] 5 SLR 796 at [19].
50 [2017] 3 SLR 1315.
51 Academy Publishing, 2019.
52 Tang Hang Wu, *The Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at para 04.051.

## VI. Proprietary restitution

25.22 Proprietary restitution is a notoriously controversial territory in the law of unjust enrichment.[53] The issue of when proprietary restitution is available under Singapore law came up for decision in *Zaiton*.[54] The High Court (General Division), quoting from *Alwie Handoyo v Tjong Very Sumito*[55] ("*Alwie Handoyo*"), explained that proprietary restitution could refer to the "existence of a continuing – or retention of – proprietary interest in property" or the creation of new proprietary rights as a remedy to reverse unjust enrichment.[56]

25.23 As the plaintiff had "parted with her entire property in the two cashier's orders and their proceeds in favour of the second defendant, and ultimately the first defendant", proprietary restitution based on vindication of proprietary rights was not available to her.[57] Thus, the plaintiff's claim for proprietary restitution was essentially one for the creation of proprietary rights to reverse unjust enrichment. In this connection, the High Court (General Division) noted that there are two competing accounts of the outcome in *Foskett v McKeown*[58] (a seminal case on the law on tracing in equity) reflecting the two meanings of "proprietary restitution",[59] even though the majority in the case had explained the outcome as an instance of vindication of proprietary rights.[60] As to *Lipkin Gorman*,[61] the High Court (General Division) noted that the Court of Appeal in *Alwie Handoyo* refrained from deciding if the case was one in which proprietary restitution was awarded to reverse unjust enrichment.[62] The court, however, did not refer to *Esben Finance*[63] where the Court of Appeal, in the context of discussing whether "lack of consent" and its closely associated formulations should be recognised as unjust factors under Singapore law, appeared to favour the "vindication of property rights" account of *Lipkin Gorman*.[64]

53 See generally *Goff & Jones on Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (London: Sweet & Maxwell, 2022) ch 37. See also Andrew Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 LQR 412.
54 See para 25.17 above.
55 [2013] 4 SLR 308.
56 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [201].
57 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [211].
58 [2001] 1 AC 102.
59 Highlighted at para 25.22 above.
60 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [203].
61 See para 25.8 above.
62 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [205].
63 See para 25.7 above.
64 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [234] and [236].

25.24 As to awarding proprietary restitution to reverse unjust enrichment, having considered English cases and leading academic literature, the High Court (General Division) commented that this area of law is "developing"[65] and there is some consensus (albeit with differing reasons) that courts should not award proprietary restitution where the event of unjust enrichment arises from a failure of basis.[66] Regrettably, the plaintiff did not grapple with the difficult issues surrounding proprietary restitution or make arguments justifying awarding more than personal restitution in the case.[67] The court thus saw no reason to award proprietary restitution to the plaintiff.

## VII. Change of position

25.25 In *Simran Bedi*,[68] the High Court (General Division) considered two interesting aspects of the defence of change of position. First, the court explored what constitutes an extraordinary expenditure under the defence. In the case, the defendant sought to show that he had spent the payment received from the plaintiff by producing in court as evidence his DBS account statement for May 2017 and various "miscellaneous receipts and documents".[69] The court was not ultimately satisfied that the defendant had discharged the onus of proving the authenticity of the documents.[70] Further, the court took the view that the alleged expenditures were not extraordinary in that there was "insufficient evidence of a causative link" between the expenditure and the payment received from the plaintiff.[71]

25.26 Specifically, the High Court (General Division) observed that the defendant only having a balance of S$396.97 in his DBS account immediately prior to the receipt of the payment from the plaintiff "did not necessarily show the *entirety* of his means, nor does it indicate that he would not have incurred the expenditure of S$207,565.71 *but for* the payment received from the plaintiff" [emphasis in original].[72] The court astutely pointed out that he drew an annual salary of S$250,000 in 2016 and 2017, and that he had at least two bank accounts.[73]

65 *Zaiton bte Adom v Nafsiah bte Wagiman* [2022] SGHC 189 at [206].
66 *Zaiton bte Adom v Nafsiah bte Wagiman* [2022] SGHC 189 at [206]–[209].
67 *Zaiton bte Adom v Nafsiah bte Wagiman* [2022] SGHC 189 at [210].
68 See para 25.15 above.
69 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [87].
70 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [94].
71 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [95].
72 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [95].
73 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [94].

25.27 The court also considered the specific items of expenses. It held that the mere fact that a defendant was not under a legal obligation to make the relevant payment did not by itself prove that the expenditure would not have been incurred in the ordinary course of things. Further, the court held that loans cannot be characterised as extraordinary expenditure for the purpose of the defence of change of position because they are not "irretrievable loss".[74]

25.28 Second, the High Court (General Division) held that a defendant who spends away a benefit despite knowing that the benefit was transferred to him upon the condition of performance of a contractual obligation is precluded from invoking the defence of change of position. The High Court (General Division) sought to bring greater clarity to this aspect of the law of unjust enrichment by identifying the possible justifications for this proposition. It took note that there are two possible explanations: first, it goes to the question of the defendant's *bona fides* (specifically, whether he has spent the benefit with an "honest belief"); or second, it goes to the broader question as to whether it would be inequitable in the circumstances to allow restitution.[75] However, the court did not decide which was the more appropriate justification as it was unnecessary for it to make such a determination in the case.

## VIII. Limitation

25.29 In *Esben Finance*,[76] the Court of Appeal has boldly held that claims in unjust enrichment "do *not* fall within the ambit of the Limitation Act" [emphasis in original];[77] nor does the doctrine of laches apply to unjust enrichment claims which the court considers to arise at common law exclusively.[78] The court firmly disagreed with the English pragmatic approach of interpreting the provisions of its Limitation Act as applying to restitutionary claims on the artificial and fictive interpretation that restitutionary claims are quasi-contractual claims and could thus be treated as contractual claims for the purpose of limitation period.[79] The court was of the view that the statutory language could not accommodate unjust enrichment claims and, importantly, quasi-contractual claims are conceptually distinct from contractual claims. On the modern understanding of the law, what were historically characterised as quasi-contractual claims would now be characterised as unjust enrichment

74 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [98].
75 *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 at [104].
76 See para 25.2 above.
77 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [53].
78 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [122]–[123].
79 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [55]–[56].

claims, rendering "any reliance on there being a claim in 'quasi-contract'" misplaced and unjustified.[80] The court 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".[81]

25.30 As to restitutionary claims for wrongs, the Court of Appeal clarified that these are remedies claimed in respect of wrongdoing, and whether they fall within the ambit of the Limitation Act would depend on the nature of the underlying wrong.[82]

25.31 Tang commented that the Court of Appeal's holding on the limitation issue would mean that "the Singapore courts may potentially be looking at many claims which arose more than 6 years ago", and "only time will tell whether such a flood of claims will result".[83] Ultimately, the Court of Appeal has opted for a principled approach and resisted the temptation to go for quick fixes of the legislation. That legislative amendments and reforms take place far more quickly in Singapore may explain the apex court's bold approach.

## IX. Illegality

25.32 By way of *obiter*,[84] the Court of Appeal in *Esben Finance* observed that the rules in *Foster v Driscoll*[85] and *Ralli Brothers v Compañia Naviera Sota y Aznar*,[86] conventionally understood as rules that deal with foreign illegality arising in the contractual context, ought to apply to bar non-contractual claims as both rules are underlined by the common thread of international comity (labelled the "Comity Unenforceability Principle").[87] On this basis, the court went on to express the provisional view that "there are indeed merits to the view" that the stultification principle applies to both claims and defences in unjust enrichment.[88] The court's inquiry was "whether the *outcome* of a particular case would be in breach of the

80 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [65].
81 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [86] and [123].
82 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [70].
83 Tang Hang Wu, "Limitation Period for Unjust Enrichment Claims, at the Claimant's Expense, Lack of Consent, Illegality, and Vindication of Property Rights: *Esben Finance Ltd and Others v Wong Hou-Lianq Neil*" (2022) 33 KLJ 345 at 353.
84 The claims in unjust enrichment in the case did not *succeed*.
85 The rule was derived from *Foster v Driscoll* [1929] 1 KB 470.
86 The rule was derived from the English case of *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287.
87 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [163]–[184].
88 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [190].

policy of international comity" [emphasis in original].[89] The focus is on the merits of the claim and not whether it was a claim or a defence.[90]

25.33 Nevertheless, the court tentatively suggested that the considerations which apply to whether illegality bars defences in the law of contract differ from those which apply to defences to restitutionary claims. It explained:[91]

> It may well be the case that in so far as *contractual* claims are concerned, the distinction between claims and defences might not (often at least) arise because a contract, being an *agreement* between the parties, would almost invariably be confined to issues of enforcement in relation to *claims*, with any argument from illegality being mounted (again, almost invariably) in the form of a defence. Put simply, the argument from illegality in a contractual context would almost invariably (and perhaps even naturally) focus on the claim rather than on the defence and (as just mentioned) would almost invariably be, in fact, the *defence itself*. However, in the context of claims in unjust enrichment, the argument from illegality has to be viewed in a more holistic and integrated manner, with the focus being on whether the underlying policy recognised by the courts has been *stultified* – with the result that the argument from illegality often tends to *straddle and overlap* in so far as both claims and defences are concerned. However, as this issue does not arise in the present case, we do not say anything more on it. [emphasis in original]

89 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [184].
90 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [185].
91 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [191].