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24. RESTITUTION LAW

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I. Introduction

24.1 There was only a handful of cases on the law of restitution in 2023. These cases dealt with issues concerning the relationship between contract and unjust enrichment, the burden of proof on the claimant to establish the unjust factor of a claim in unjust enrichment, the unjust factors of lack of consent and failure of consideration, as well as the unavailability of proprietary relief for unjust enrichment claims. We turn to examine these cases in detail below.

II. Subsisting contract precludes claim in unjust enrichment

24.2 The dispute in *2253 Apparel Inc v Medico Titan Pte Ltd*[1] arose against the background of the worldwide shortage of gloves during the COVID-19 global pandemic. The defendant was appointed as a Thai manufacturer's official representative and reseller of "SKYMED" nitrile gloves that the latter manufactured. The defendant in turn sought buyers of the gloves and Faylez Berhad ("Faylez") was one such direct buyer. Pursuant to their agreement, Faylez was under a contractual obligation to pay a deposit amounting to 30% of the total purchase price to the defendant. Faylez onsold 30 million boxes of the gloves to Ikari Global Sdn Bhd ("Ikari"), which onsold a portion to the plaintiff. Pursuant to the contract between Ikari and Faylez, Ikari was required to transfer 30% of the purchase price to the defendant. Pursuant to the contract between the plaintiff and Ikari, the plaintiff was obliged to pay a 30% deposit into the defendant's bank account which the plaintiff did accordingly. The plaintiff claimed that it did not thereafter hear from the defendant, Faylez or Ikari. Nor did the plaintiff receive any gloves. The plaintiff commenced civil proceedings against the defendant, alleging, amongst others, that there was a failure of consideration or mistake of fact justifying restitution for the moneys paid to the defendant.

1 [2023] SGHC 104.

24.3 The General Division of the High Court ("General Division") denied the plaintiff's claim in unjust enrichment. The principal reason being that the plaintiff could not sidestep its contract with Ikari and sue the defendant directly, as this would undermine the contractual allocation of risks between the plaintiff and Ikari.[2] The General Division further explained:[3]

> The law does not require the defendant, having obtained the money pursuant to a contract with a third party, to then disgorge it to the plaintiff on the basis that the defendant provided no benefit to the plaintiff.

This was because the defendant had a legal right to retain the money received. In the circumstances, the plaintiff's recourse would be to sue Ikari for breach of contract on Ikari's invoice.[4]

24.4 The General Division also held that there could not have been any mistake of fact because the plaintiff was indeed obliged under its contract with Ikari to pay the 30% deposit into the defendant's bank account.

III. Unjust factors – burden of proof

24.5 *Thong Soon Seng v Magus Energy Group Ltd*[5] serves to remind litigants and their counsel that the burden of proving the elements of an unjust enrichment claim is firmly on the claimant. In this case, the claimant sued the defendant to recover the $4m which the former had paid the latter in September and October 2016. He put forward a primary claim in debt and alternatively a claim in unjust enrichment, on the basis of mistake or failure of basis (also commonly referred to as failure of consideration). However, the claimant was unable to discharge his burden of proving the existence of loan agreements that would support his version of events, namely that the $4m was paid to the defendant as loans.[6] For this reason, the claim in debt failed. As to the claim in unjust enrichment grounded in mistake, in view of the claimant's failure to prove the existence of the loan agreements, the claimant's alleged mistake as to the authority of one Mr Ho's authority to enter into the said agreements on behalf of the defendant was a non-starter. The claimant "pleaded no other mistake of fact" and the court would not find a mistake of fact for the claimant based on the facts.[7]

2 *2253 Apparel Inc v Medico Titan Pte Ltd* [2023] SGHC 104 at [105]–[106].
3 *2253 Apparel Inc v Medico Titan Pte Ltd* [2023] SGHC 104 at [106].
4 *2253 Apparel Inc v Medico Titan Pte Ltd* [2023] SGHC 104 at [109].
5 [2023] SGHC 5.
6 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [17]–[24].
7 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [43]–[44].

24.6 Turning to the unjust enrichment claim grounded in failure of basis, as the claimant could not prove the existence of the loan agreements, the claimant failed to discharge his burden of proving that there was a *basis* (*ie*, that there was a contract constituting the basis for the payment of $4m) which failed. The claimant did not put forward an alternative basis. Importantly, the General Division rejected the claimant's argument that even if the payment was not based on a contract (which would include provisions on payment of interest), it was paid to the defendant on a "common understanding" that the moneys would need to be repaid.[8] The court gave five reasons why the claimant could not rely on this "common understanding". First, the claimant did not plead this alternative basis – specifically, he did not:[9]

> … attempt, in his statement of claim, to separate the loan agreements into their constituent obligations and to suggest that the basis for the payments which failed was just one of those constituent obligations taken alone and recharacterised as a freestanding understanding somehow falling short of a contractual obligation.

Second, this point on a "common understanding" was not put to Mr Ho during his cross-examination.[10] Third, quite apart from the first two reasons, that the claimant failed to prove the existence of the alleged loan agreements meant that it could not persuade the court that any loan agreement comprised the three constituent obligations.[11] As a result, the claimant did not discharge his burden of proving the existence of the common understanding. Fourth, the court considered the claimant's alleged "common understanding" as resting on the now-rejected and "discredited 'implied obligation' theory of the law of restitution".[12] Finally, accepting the claimant's argument would be tantamount to turning a mere understanding between parties without contractual force into a binding legal obligation, notwithstanding the absence of consideration to support the finding of a contract.[13]

IV. Lack of consent

24.7 The decision in *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd*[14] ("*B High House*") considered the availability of a claim based on the unjust factor "lack of consent". In that case,

8 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [52].
9 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [54].
10 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [55].
11 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [56].
12 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [57].
13 *Thong Soon Seng v Magnus Energy Group Ltd* [2023] SGHC 5 at [58].
14 [2023] SGHC 12.

the plaintiff was a company in the business of managing and collecting payments for a group of companies, which service included processing payment transactions. It sued the first defendant, a global financial services provider, for breach of contract, alleging that a contract had been entered into between the parties pursuant to which the first defendant was obliged to provide payment processing services on behalf of the plaintiff to the plaintiff's customers. The plaintiff sued the second defendant for inducing the first defendant's breach of contract with the plaintiff. The first and second defendants contended that there was no contract between the plaintiff and the defendant and that the contract was entered into between the plaintiff and one Mr Berger (the third party to the suit). The first defendant further contended that Mr Berger was not its agent. On the plaintiff's account of events, Mr Berger was a sales representative who referred online merchant clients to the first defendant for a commission. Relying on Mr Berger's representations, the plaintiff engaged the first defendant as its processing entity. Subsequently, the first defendant began making late and deficient settlement payments in respect of certain accounts which ultimately led to the plaintiff ceasing all payment processing through the first defendant. The plaintiff claimed that the first defendant owed the plaintiff US$2,680,53.21 in total and that the first defendant had misappropriated or diverted the funds. The plaintiff mounted various claims against the defendants,[15] including a claim in unjust enrichment based on the unjust factor of lack of consent or failure of consideration.

24.8 The plaintiff's claim in unjust enrichment failed. Following the Court of Appeal's decision in *Esben Finance Ltd v Wong Hou-Lianq Neil*[16] ("*Esben Finance*"), as the plaintiff had advanced various claims against the defendants, this meant that there were alternative and established causes of action available to the plaintiff.[17] Hence, an unjust enrichment claim based on the unjust factor of "lack of consent" should not be available to the plaintiff.

24.9 Notably, the General Division had dismissed the plaintiff's other claims.[18] In other words, these alternative and more established claims were only theoretically available to the plaintiff. This raised the question as to whether the restriction on the availability of "lack of consent" as

15 Against the first defendant, other than its claims in unjust enrichment, the plaintiff also claimed for breach of contract, breach of fiduciary duties, constructive trust and unlawful means conspiracy.

16 [2021] 3 SLR 82.

17 *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd* [2023] SGHC 12 at [297].

18 For a discussion of the claim in unjust enrichment based on total failure of consideration, see para 24.10.

an unjust factor is limited to cases where at least one of the alternative and established causes of action would have succeeded. This important question has yet to be seriously considered by the Singapore courts. The answer would elucidate upon the gap-filling role of "lack of consent" as an unjust factor – does it fill a practical gap in justice or does it fill a conceptual gap in justice?

V. Total failure of consideration

24.10 In *B High House*,[19] the General Division also dismissed the plaintiff's claim in unjust enrichment based on the unjust factor of total failure of consideration. Even assuming that the plaintiff could prove that it had entered into a contract with the first defendant, there was no *total* failure of consideration. On the evidence, it was clear that the plaintiff had received "at least some of the settlement funds due to it".[20]

24.11 In *Safie bin Jantan v Zaiton bte Adom*,[21] the Appellate Division of the High Court ("Appellate Division") upheld the decision of the General Division, namely that the claim in unjust enrichment, which arose in the domestic context, was successful. In this case, the first and second defendants were married to each other and were co-owners of a flat. The defendants later divorced, and the second defendant then married the plaintiff. In 2015, before the defendants divorced, the plaintiff handed a cheque and a cashier's order amounting to $250,358.80 to the second defendant to enable the second defendant to buy over the first defendant's share in the flat and become the sole owner of the flat. The second defendant handed the cheque and the cashier's order to the first defendant who then deposited the same into her Central Provident Fund ("CPF") account on the second defendant's instructions. The first defendant withdrew $125,717.15 from her CPF account to pay off the loan on their flat. Pursuant to the divorce between the defendants, a property division order in relation to the flat was issued by the Syariah Court which was upheld by the Appeal Board. The property division order included an order that the second defendant would receive the entire net sale proceeds of the flat. The defendants remained co-owners pending the implementation of the order. The plaintiff commenced a civil action before the General Division to recover the payment on multiple claims, including in unjust enrichment (failure of consideration) and/or as proprietary restitution. The property division order remained unimplemented at the time the

19 *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd* [2023] SGHC 12.

20 *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd* [2023] SGHC 12 at [298].

21 [2023] 1 SLR 52.

case was heard by the General Division. The General Division allowed the claim in unjust enrichment but dismissed the plaintiff's other claims.[22] Both the plaintiff and the first defendant appealed.

24.12 The Appellate Division dismissed the appeal, affirming that the second defendant was unjustly enriched and was liable to repay the moneys to the plaintiff. The second defendant had requested the moneys from the plaintiff and the plaintiff had intended to pay the moneys to the second defendant on the assumption that "[the second defendant] was her husband and they were acting as a team planning to acquire ownership over the [flat]".[23] The moneys received by the second defendant from the plaintiff had gone into the equity of the flat. The second defendant had used the moneys "in ways he thought would benefit him", without appreciating the risk that he might be awarded no interest in the flat upon his divorce with the first defendant. Nor did the second defendant take up the opportunity to intervene in the proceedings in the Syariah Court regarding the property division order. It was not for the High Court to review the merits of the Syariah Court's decision.[24]

24.13 The third decision concerning the unjust factor "failure of consideration" is *Carlsberg South Asia Pte Ltd v Pawan Kumar Jagetia*.[25] The dispute arose out of an employment contract between Carlsberg South Asia Pte Ltd ("Carlsberg") and Mr Jagetia. The latter was appointed as Senior Vice President at Carlsberg between 1 April 2018 and 26 June 2019. Carlsberg sued Mr Jagetia to recover sums paid to him under his employment contract (the Annual Benefits Package) allegedly pursuant to an implied term that obliged him and his family to relocate to Singapore. In the alternative, Carlsberg advanced a claim in unjust enrichment grounded in failure of consideration. It was argued that the basis was the relocation of Mr Jagetia and his family to Singapore and because that did not happen, the basis had failed. The General Division dismissed Carlsberg's claims to recover the Annual Benefits Package.[26] Carlsberg appealed.

24.14 The Appellate Division allowed the appeal. In particular, the court found that Carlsberg succeeded in its claim in unjust enrichment.[27]

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22 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533. See Yip Man, "Restitution Law" (2022) 23 SAL Ann Rev 720 at paras 25.17–25.19.

23 *Safie bin Jantan v Zaiton bte Adom* [2023] 1 SLR 52 at [12].

24 *Safie bin Jantan v Zaiton bte Adom* [2023] 1 SLR 52 at [13].

25 [2023] SGHC(A) 29.

26 *Carlsberg South Asia Pte Ltd v Pawan Kumar Jagetia* [2022] SGHC 74.

27 The Appellate Division of the High Court dismissed the primary claim in contract: see *Carlsberg South Asia Pte Ltd v Pawan Kumar Jagetia* [2023] SGHC(A) 29 at [89]–[93].

Whilst recognising that restitutionary principles "are ordinarily supplemental to the law of contract where the parties are in a contractual relationship", the court affirmed that a claim in unjust enrichment could arise exceptionally where there is total failure of consideration even where the contract remains on foot.[28] In this case, the court held that the basis of the payment of the Annual Benefits Package was the relocation of Mr Jagetia and his family to Singapore. As they did not relocate to Singapore, the basis had failed.

VI. Proprietary remedies for claim in unjust enrichment

24.15 The General Division considered the controversial issue as to whether proprietary remedies are available for a claim in unjust enrichment in the case of *Ho Dat Khoon v Chan Wai Leen*.[29] The case concerned a dispute between two factions of the family with competing claims in respect of a private landed residence (the "Property"). The plaintiff claimed that she had transferred the Property as a purported gift to the second defendant, the plaintiff's grand-niece, in circumstances where she was not fully aware of what she was doing when she signed the instrument of transfer as a result of her medical conditions.[30] She also said that she was "a very simple, gullible, vulnerable, and unsophisticated person" and had not intended to make an *inter vivos* gift to the second defendant.[31] The defendants contended that the plaintiff was holding the Property on trust for the family of Mdm Ho Tat Noor (the plaintiff's sister and the second defendant's paternal grandmother) and had executed the transfer in accordance with this alleged trust. The plaintiff sought to reverse the transfer of the property on the bases of total failure of consideration, mistake, unconscionability and undue influence.

24.16 The General Division found that the plaintiff had mental capacity at the time of the execution of the instrument of transfer.[32] It held that the transfer should be set aside for mistake because the plaintiff had intended to make a testamentary gift of the property, and not an *inter vivos* gift of the same, to the second defendant.[33]

28 *Carlsberg South Asia Pte Ltd v Pawan Kumar Jagetia* [2023] SGHC(A) 29 at [83].
29 [2023] SGHC 326.
30 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [10].
31 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [10].
32 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [21]–[26].
33 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [28]. The court did not consider it necessary to deal with other vitiating factors and in any event, it was not satisfied that these other grounds were made out.

24.17 Turning to the claim for proprietary relief for unjust enrichment, the court said that this claim was "misconceived".[34] Following the Court of Appeal's decision in *Esben Finance*,[35] the court explained that "a proprietary claim is separate and distinct from a claim in unjust enrichment, which is a personal claim giving rise to the remedy of restitution in monetary terms".[36] Noting that the issue as to whether proprietary relief is available for unjust enrichment claims remains a subject of debate in other jurisdictions,[37] the court took the view that the position in Singapore law "leans strongly towards the non-recognition of proprietary remedies for claims in unjust enrichment".[38] One would certainly agree that there is such strong leaning in the Singapore cases. Beyond *Esben Finance*, the Court of Appeal had suggested that the resulting trust may not be used as a vehicle for proprietary restitution generally.[39] In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*,[40] the Court of Appeal also distinguished a claim for a remedial constructive trust from a claim for unjust enrichment:[41]

> The fact giving rise to the court's discretion to impose [a remedial constructive trust] was therefore not the fact of unjust enrichment, but the *knowing retention* of the moneys in a way that affects the recipient's conscience. This arises separately from a strict liability claim in unjust enrichment, although the facts giving rise to [a remedial constructive trust] may arise *subsequent* to or *concurrently* with this aforementioned claim. [emphasis in original]

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34 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [70].
35 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82.
36 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [70].
37 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [72]–[73].
38 *Ho Dat Khoon v Chan Wai Leen* [2023] SGHC 326 at [40].
39 *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 76 at [35] (endorsing Lord Browne-Wilkinson's comments in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716); and *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [43] and [48].
40 [2013] 3 SLR 801.
41 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [184].