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RESTITUTION, TRACING, AND CHANGE OF POSITION

Seagate Technology (S) Pte Ltd & Anor v *Heng Eng Li & Anor*[1]

I. INTRODUCTION

RESTITUTION is possibly the fastest growing area of law in many parts of the Commonwealth today. The principle that one who has been unjustly enriched at the expense of another should give up that enrichment to that other received legal recognition as an independent source of obligation in England only recently.[2] Singapore has not been unaffected by this development. Recently, there has been a number of important decisions[3] relating to the law of restitution.

The judicious transition of restitutionary claims from historical obscurity to modern application requires the availability of workable defences as a buffer to protect security of receipt. In *Lipkin Gorman* v *Karpnale Ltd*,[4] the House of Lords recognised that this was an essential strategy for the disciplined development of the law of restitution. To this end, it finally acknowledged the existence of the change of position defence. Australia[5] and Canada[6] have done the same. The High Court decision in *Seagate Technology (S) Pte Ltd & Anor* v *Heng Eng Li & Anor*[7] is a step in the right direction because it held that this defence is also part of the law of Singapore. What is curious about the case, however, is the absence of

1 [1994] 1 SLR 534.

2 *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548; *Woolwich Equitable Building Society* v *Inland Revenue Commissioners* [1992] 3 WLR 366.

3 *Hongkong and Shanghai Banking Corp Ltd* v *United Overseas Bank Ltd* [1992] 2 SLR 495 (High Court); *Borneo Motors (S) Pte Ltd* v *William Jacks & Co (S) Pte Ltd* [1992] 2 SLR 881 (Court of Appeal); *Sumitomo Bank Ltd* v *Kartika Ratna Thahir & Ors* [1993] 1 SLR 735 (High Court, pending judgment in the Court of Appeal).

4 *Supra*, note 2.

5 *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia* (1993) 109 ALR 57 (High Court, Australia).

6 *Rural Municipality of Storthoaks* v *Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1 (Supreme Court, Canada).

7 *Supra*, note 1. Hereafter, it will be referred to as *Seagate Technology*.

discussion of the cause of action in unjust enrichment. Moreover, the application of the defence is not without difficulties.

II. Facts and Decision

The plaintiffs were a Singapore company carrying on the business of the manufacture and repair of computer equipment. The first defendant was employed by the plaintiffs as a planner, and her responsibility included collation of information on materials needed by the plaintiffs, and raising purchase requisitions for, and scheduling the delivery of, such materials. By a series of subterfuges, she convinced the plaintiffs that they were buying goods from the second defendant, a sole proprietor, and persuaded the second defendant that he was buying goods from her uncle to sell to the plaintiffs, when actually no such goods existed. She accomplished this by two methods. When the company was under close supervision from auditors, she would shuffle goods bought from other suppliers from one place to another for collection by the second defendant, to be redelivered to the plaintiffs. When the supervision was relaxed, she raised invoices for spurious requirements, convincing the second defendant that the goods were being shipped directly from her uncle to the plaintiffs.

As a result, the plaintiffs paid the second defendant a total of $1,984,740 as purchase price. Of this sum, $80,850 had been retained by the second defendant as commission for acting as middleman, and the balance returned to the first defendant to be paid to her uncle. The fraud was discovered, and the first defendant was prosecuted and eventually convicted. The second defendant's commission was handed over to the police, and returned to the plaintiffs. The plaintiffs obtained a default judgment against the first defendant for the sum paid out, but it was only satisfied to the extent of $942,940.43, being the amount recovered by the police. In this action, the plaintiffs were claiming the balance of the unsatisfied judgment from the second defendant.

One claim was put as damages for conspiracy and fraud, but Goh Phai Cheng JC dismissed the claim on the ground that there was no evidence that the second defendant was privy to the first defendant's fraudulent scheme. No further comments will be made about this claim. The claim for money had and received also failed because the learned judge held that the second defendant had changed his position, so that it was inequitable to order restitution.

III. Analysis

A. *Cause of Action*

1. *Money had and received*

Although the judgment was sprinkled with the word "restitution" and its variants, there was no explication of the cause of action, other than that it was an action for money had and received to the use of the plaintiffs. It was assumed that the second defendant was indeed liable for money had and received, and the only question was whether the defence of change of position was applicable on the facts.

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."[8] But to aid understanding, it is useful to attach names to causes of action, in order to understand the underlying principles and the legal rules. The action for money had and received is no more than a *form* of action, from a distant time in English legal history when plaintiffs had to take writs out in specific formats. It says nothing more than that the defendant owes the plaintiff a debt.[9] The reason for the debt is unexplained. To call the action for money had and received a cause of action is akin to calling an action for damages a cause of action. It adds nothing to the analysis.

On the other hand, there are two dangers of making an immediate switch of nomenclature from terms like "money had and received" to an "action in unjust enrichment". First, it may overextend the law of restitution. The action for money had and received, and the action for money paid, *quantum meruit* and *quantum valebat*, which are historically and collectively referred to as claims in quasi-contract, describe a set of cases which have thus far defied any coherent classification. Many of these cases can be explained by the principles of unjust enrichment, but some of them may be explicable only on other principles.[10] The linguistic leap should only be made progressively, for categories of cases which are found to be truly based on the principle of unjust enrichment.

The other danger is a temptation to abandon the cases altogether and proceed purely on first principles. The late recognition of the principle of restitution in England was largely due to a fear of "sloppiness of thought"[11] – a lack of definition in the subject. The principle must be translated into

8 *Letang* v *Cooper* [1965] 1 QB 232, 242, *per* Diplock LJ.

9 See Yeo, "Tracing and Three Party Restitution" [1993] SJLS 452, 474, for a short discussion of the theories underlying the action.

10 For example, the principle of reliance: see "Benefit, Reliance, and the Structure of Unjust Enrichment" in Beatson, *Use and Abuse of Unjust Enrichment* (1991), Ch 2.

11 *Holt* v *Markham* [1923] 1 KB 504, 513, *per* Scrutton LJ.

rules for immediate application, and for this purpose, the historical categories of cases are still important as sources of law, although they should not be conclusive. In this respect, the example set by the Canadian Supreme Court in *Municipality of Peel* v *Canada*[12] should be followed. It was stated that the correct approach should be "one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with existing categories of recovery."[13]

A restitutionary inquiry on the facts of *Seagate Technology* would have taken the following form:

First, was the second defendant enriched? Clearly he was, having received the money from the plaintiffs.

Secondly, was the enrichment at the expense of the plaintiffs? Enrichment in the subtractive sense can be found. The plaintiffs had been deprived of wealth, and the defendant had been correspondingly enriched. No enrichment by wrongdoing, which does not require a corresponding deprivation of the plaintiffs, was alleged.[14]

Thirdly, was the enrichment unjust? This is the reason why the enrichment must be reversed.

On the facts of the case, the unjust factor, though unarticulated, is possibly mistake.[15] The plaintiffs paid money to the second defendant under a mistake of fact. They thought that the second defendant had delivered goods to the plaintiffs which required payment, when actually on about ten occasions the goods delivered were the plaintiffs' own, and on the other occasions no goods were delivered at all. This is a fact going to the issue of liability of the plaintiffs to the second defendant, although it is now doubtful whether this is still significant. In Australia, it has been held that it is sufficient that the mistake caused the payment.[16] It is clear in *Seagate Technology* that the mistake caused the payments.[17]

Another possible unjust factor is failure of consideration.[18] Arguably, the moneys were paid under void contracts of sale. In the instances where goods were delivered, this would be due to a shared fundamental assumption that the goods were not those of the plaintiffs. In the other instances where

12 (1993) 98 DLR (4th) 140.

13 *Ibid*, at 153, *per* McLachlin J, delivering the judgment of the court.

14 See, however, *infra*, under the heading *Restitution for Wrong?*

15 For cases grounding recovery for mistaken payments, see Goff & Jones, *The Law of Restitution* (4th ed, 1993), Ch 3. See also Birks, *An Introduction to the Law of Restitution* (1989 Reprint), Ch VI.

16 *David Securities*, *supra*, note 5.

17 It is not clear, however, whether the cause needs to a necessary cause, or that a sufficient cause will do. In any case the mistake in this case appears to be both a necessary and sufficient cause of the payments.

18 See Goff & Jones, *supra*, note 15, Ch 21. See also Birks, *supra*, note 15, Ch VII.

no goods were delivered, it would be because of a shared assumption that goods were in fact delivered. The consideration for the payment would have failed totally.[19] Yet another possible unjust factor is "absence of consideration". Hobhouse J in *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council*[20] held that where money passes under a void transaction,[21] the plaintiff is entitled to recover in an action for money had and received on the basis that there was an absence of consideration, not failure of consideration. Absence of consideration as a ground of restitution has a great impact on the law of restitution, by shifting the inquiry from reasons for ordering restitution to reasons for not ordering restitution.[22] This step should only be taken with the greatest caution.

2. *Tracing*

The extensive citation of Sir Peter Millet's article,[23] dealing with tracing claims, in the judgment indicated that it was treated as a tracing case. The first thing to note is that a tracing analysis, though technically feasible, is otiose. The second defendant was the immediate recipient of the funds, and there were no considerations of priority in insolvency.

If indeed the case was based on tracing it appeared to be put as common law tracing.[24] In common law tracing, the plaintiffs have to show that they had legal property to follow.[25] If the claim is for mistaken payment, then a difficult question arises as to the nature of the mistake that will prevent property from passing.[26] Goff & Jones take the position that tracing should be available for all kinds of mistakes.[27] It has been argued elsewhere that tracing can be justified only where the plaintiff had not parted with his proprietary interest through an intended transfer of property in the first

[19] For the test of when consideration would fail totally under this head of claim, see the Court of Appeal decision in *Rover International Ltd* v *Cannon Film Sales Ltd* [1989] 3 All ER 423.

[20] (1993) *The Times*, 23 February 1993.

[21] The reasoning in the case was with respect to contracts which were void because of the operation of the *ultra vires* principle, but there is no reason to confine it to that context.

[22] See Birks, "No Consideration: Restitution after Void Contracts" (1993) 23 UWALR 195.

[23] Millet, "Tracing the Proceeds of Fraud" (1991) 107 LQR 71.

[24] Because the claim was in money had and received. Equitable tracing was probably avoided because no proprietary remedies were available, there being no identifiable property to bite on, and the plaintiffs would be left with a personal action for knowing receipt of trust funds, a claim beleaguered with difficulties relating to the requisite knowledge of the volunteer recipient.

[25] *Lipkin Gorman*, *supra*, note 2.

[26] *Supra*, note 9, at 461, footnote 52.

[27] Goff & Jones, *supra*, note 15, at 130-132. They also argue that proprietary remedies should be more readily available generally.

place.[28] There are cases where the mistake will not prevent property from passing, but only found a personal action for restitution.[29] But, in principle, where the mistake is induced by fraud, the plaintiffs can, subject to third party rights, rescind the transaction and treat the proprietary interest as having been vested from the beginning for the purpose of tracing. This is certainly the case where *A* induced *B* to give money to *A*.[30] The same reasoning applies where *A* induced *B* to give money to *C*, where *C* is a volunteer.[31]

The contractual angle spawns another analysis. If money was considered to have been paid out under a void contract, the property in the money did not pass under the contract. In this case, the plaintiffs would have a tracing action, certainly in equity[32] and probably at law.[33]

B. *Defence*

1. *Change of position*

Having established restitutionary liability, the next question is whether there are any good reasons to deny restitution. In *Seagate Technology*, the second defendant correctly refrained from arguing the *bona fide* purchaser defence, since the only "consideration" provided, if at all, was the plaintiffs' own goods. Neither could estoppel be argued, since mere payment never amounts to a representation of entitlement.[34]

The arguments were thus rightly centred on the change of position defence. The learned judge had no doubts about the applicability of the defence in Singapore law. This is in accord with the principle of unjust enrichment that if, without default of the defendant, the enrichment is expunged, it is inequitable to make the defendant pay out of his own pocket. It is not clear that it is available to all restitutionary claims.[35] Nonetheless,

28 *Supra*, note 9.

29 *Chambers* v *Miller* (1862) 13 CB (NS) 125 (143 ER 50).

30 See *Lonrho Plc* v *Fayed (No 2)* [1991] 4 All ER 961, 971, for the position in equity. The position is more apparent in equity than at common law, but at law, fraud renders a transaction voidable, and so the same principle should apply by analogy. This can explain the tracing that followed from the action in money had and received in the case of *Chartered Bank* v *Sin Chong Hua* (unreported, Suit No 3888 of 1983, High Court, Singapore, 3 September 1991).

31 See *Huguenin* v *Baseley* (1807) 14 Ves 273 (33 ER 526), in the context of undue influence. See comments, *ibid*.

32 *Sinclair* v *Brougham* [1914] AC 398; The *Westdeutsche* case, *supra*, note 20.

33 *Supra*, note 9, at 460-462, subject to rules of identification.

34 *R E Jones* v *Waring & Gillow Ltd* [1926] AC 670. It would not be possible to set up estoppel by negligence by mere carelessness: *Moorgate Mercantile Co Ltd* v *Twitchings* [1977] AC 890.

35 Note the guarded language of Lord Goff in *Lipkin Gorman*, *supra*, note 2, at 580.

there are authorities to support its application in this case,[36] whether put as a tracing claim,[37] a claim for mistaken payment,[38] or a claim for failure or absence of consideration.[39]

The precise principles and mechanics of the defence have not been worked out.[40] The House of Lords, in creating the defence in *Lipkin Gorman*,[41] had deliberately left the defence vague for future judicial development. Lord Goff's statement gives little more guidance than that the equities of all the circumstances must be considered. There is a danger of the defence getting out of control, if it gives the court too much discretion. In turn, this may impede the development of the law of restitution.

In the circumstances of the case, what the judge thought most relevant was the fact that the plaintiffs were at fault in not detecting the fraud much earlier. In contrast, the second defendant was said to have been drawn innocently into the first defendant's scheme. The carelessness of the plaintiffs may well have a bearing on the question of *liability* itself, if the cause of action is based on mistaken payment,[42] but sadly the issue was not raised. Recently the Singapore Court of Appeal had affirmed that "carelessness or negligence" on the mistaken payer's part will not defeat a restitutionary claim.[43] Perhaps, in this case, the plaintiffs were merely negligent. But it remains to be seen when conduct goes beyond mere carelessness and negligence, so as to amount to an intention to pay in any event.[44]

The approach of the learned judge was to balance the fault of the plaintiffs and the second defendants. This weighing approach, although not without authority,[45] is fraught with difficulties.[46] In this case, the second defendant

[36] Subject to what is said below about waiver of tort: see under heading *Restitution for Wrong?*

[37] *Lipkin Gorman*, *supra*, note 2. It is also available for equitable tracing claims: The *Westdeutsche* case, *supra*, note 20.

[38] *Dicta* in *Lipkin Gorman*, *supra*, note 2, at 580, and in *Citibank NA* v *Brown Shipley & Co Ltd* [1991] 2 All ER 690.

[39] The *Westdeutsche* case, *supra*, note 20. Though that case decided the applicability in "absence of consideration" cases, Hobhouse J had attempted to put the failure of consideration cases relating to void contracts under the same rubric.

[40] For discussion of potential principles of change of position, see "Mistaken Payments in the Law of Restitution", in Beatson, *supra*, note 10, Ch 6, and Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473, 487-490.

[41] *Supra*, note 2.

[42] *Kelly* v *Solari* (1841) 9 M & W 54 (152 ER 24).

[43] *Borneo Motors (S) Pte Ltd* v *William Jacks & Co Pte Ltd* [1992] 2 SLR 881.

[44] In the early cases, this would be described as a "voluntary payment". Unfortunately, this archaic phrase still survives today: *David Securities*, *supra*, note 5.

[45] See, *eg*, the New Zealand case of *Thomas* v *Houston Corbett & Co* [1969] NZLR 151, though it is based on the specific statutory wording of the defence in s 94B, Judicature Act 1908.

[46] This was acknowledged by the English Law Commission, *Restitution of Payments Made Under a Mistake of Law*, Consultation Paper 120 (1991). Indeed it is not certain what happens

was found to be "innocent", so that the fault appeared one-sided. There are some difficulties with this conclusion, and these will be adverted to below.[47] Be that as it may, it is more likely to find cases where blame is more evenly distributed between the parties.

There are two possible justifications for adopting a balancing approach. One reason is to enable society to achieve an optimal level of economic efficiency so that such resources that are allocated to the prevention of mistakes[48] and the immediate reversal of mistaken transactions[49] do not exceed the cost of unravelling the consequences of such mistakes.[50] Whether one subscribes to this economic theory or not may depend on one's view whether the law of restitution lies purely in corrective justice, or that it has a role to play in distributive justice as well. It is also doubtful whether courts are sufficiently equipped to undertake this exercise. An alternative justification is to apportion the loss according to moral blameworthiness. Inevitably, the *effect* of applying the defence is to divide the deadweight loss, but the question is whether it should be the *objective* as well. No doubt the law of subtractive unjust enrichment concerns loss as well as gain. The reason for restitution lies in the defendants' gain being causally linked to the plaintiff's loss. The popular perception of the law of unjust enrichment as a gain-based obligation[51] suggests, however, that the plaintiff's loss plays a subsidiary role. If this conception is valid,[52] then there is something to be said for the proposition that the central element of the change of position defence is how it affects the enrichment of the defendant.[53] Indeed, Lord Goff explained the rationale of the change of position defence as being "where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring

if the defendant should be found to share some of the blame. One result is to say that he forfeits the defence altogether, provided that he is more at fault than the plaintiff. The other is to distribute the loss accordingly.

47 See *infra*, under the heading *Good Faith*.

48 On the part of the plaintiff, to guard against making mistakes.

49 On the part of the defendant, to guard against other people's mistakes.

50 Beatson, "Mistaken Payments in the Law of Restitution" in Beatson, *supra*, note 10.

51 See Burrows, "Contract, Tort, Restitution – A Satisfactory Division or Not?" (1983) 99 LQR 217.

52 If it is accepted that cases on disgorgement of gains are part of the law restitution, then there is further support for this conception, for these cases are independent of losses of the plaintiff.

53 In *David Securities*, *supra*, note 5, at 81, the majority stated that the central element of the change of position defence was the defendant's acting to his detriment on the faith of the receipt. Of course, the counter-argument can be made that the change of position defence need not operate on purely restitutionary concerns: Beatson, *supra*, note 50. But in the nascent stages of its development, there is something to be said for the view that the defence should be kept simple: Burrows, *The Law of Restitution* (1993), 430.

him so to repay outweighs the injustice of denying the plaintiff restitution."[54]

His Lordship's approach in *Lipkin Gorman* itself is instructive. Foremost was the emphasis that the defence is a matter of legal principle.[55] This is not conclusive, for the legal principle itself could be one of comparative fault. However, in the context of a situation where Lord Goff was trying to put the point across that the doctrines in unjust enrichment are certain enough for judicial acceptance, it is unlikely that he was putting forward such a discretionary exercise at the defence stage. Secondly, the issue of whether the plaintiffs were entitled to restitution (liability) was examined discretely from the issue of whether the defendants had to return the sum received in full or in part (defence). A balancing process in the defence stage obfuscates this line, because in taking the fault of the plaintiffs into account, the court is questioning their entitlement to restitution in the first place. Thirdly, in applying the defence, Lord Goff looked at matters solely from the defendants' point of view. There was no inquiry as to whether the plaintiff solicitors' firm had been at fault in allowing the fraudulent partner to plunder their funds.

Furthermore, a change of position defence that balances relative faults would devalue the utility of the defence and generate uncertainty about its application. Thus, it is suggested that the change of position defence, as a matter of principle and policy, should operate only to determine the extent to which the defendant will be prejudiced by the order for restitution.

2. *Good faith*

The formulation of the change of position defence invariably requires the defendant to have altered his position in good faith.[56] Goh JC had expressly found, for the purposes of the conspiracy claim, that the second defendant was not privy to the designs of the first defendant. However, from the evidence, it appeared that the second defendant knew that the goods which he was repacking and delivering to the plaintiffs had come from the plaintiffs' premises. The second defendant told the court that his suspicions had initially been aroused, but he had dismissed them on the basis that the plaintiffs, being an American firm, could not be so lax in security that they would allow their own goods to be taken out in this manner. That may be sufficient to say that there was no *agreement* between the defendants to cheat the plaintiffs,[57] but there was no express finding that a reasonable man in the circumstances would have been satisfied with the self-supplied explanation,

[54] *Lipkin Gorman*, *supra*, note 2, at 579.
[55] *Lipkin Gorman*, *supra*, note 2, at 578.
[56] See, *eg*, *Lipkin Gorman*, *supra*, note 2; *David Securities*, *supra*, note 5.
[57] For the purpose of the conspiracy claim.

and would have made no further enquiries. In other words, there is room for argument that the second defendant had constructive knowledge of the plaintiffs' interest in the goods.[58]

The question whether constructive knowledge[59] of the plaintiff's interest affects the defendant's plea of change of position has not been judicially considered in England.[60] There has been much debate on how to resolve this issue in the context of liability rules for personal actions after a tracing exercise.[61] It is difficult to evade the debate in the context of change of position, and it is likely to be equally controversial. Perhaps the point is that the fundamental question of the extent to which the defendant ought to bear responsibility for looking after the plaintiff's affairs is not going away without a struggle.

Assuming that the same infamous doctrine of constructive knowledge is to apply in change of position, then, where proprietary remedies are available, it makes no difference whether liability is strict subject to a change of position defence, or liability is fault-based without a change of position defence, because the enrichment remaining can be recovered by proprietary means, where the liability is strict,[62] anyway.[63] In such a case, the shift of the debate to the defence stage is merely a matter of principle.[64] The substantive advantage of the defence lies in purely personal actions, where the focus is correctly on whether the defendant should pay for the enrichment consumed.

[58] The statement in the judgment that the second defendant was "innocently drawn into the first defendant's scheme" is ambiguous, since it is not explained in what sense the second defendant had been "innocent".

[59] See the infamous *Baden Delveaux* case [1983] BCLC 325, which discussed five possible types of knowledge: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

[60] But see *Mercedes-Benz (NSW) Pty Ltd* v *ANZ and National Royal Mutual Bank* (5 May 1992), unreported, New South Wales Supreme Court, noted in [1993] RLR 55, §18, where Palmer J said that the defendant was disqualified from the change of position in good faith defence if the facts were such as would reasonably raise a suspicion of wrongdoing so that the payee was put upon enquiry.

[61] See the commentator's modest contribution in Yeo, *supra*, note 9, at 479-489, and the references cited therein.

[62] At law the remedies are found in the proprietary torts, which are generally strict liability actions. In equity, liability is strict at least as against a volunteer. As against purchaser, *Polly Peck International* v *Asil Nadir and Ors* [1992] 2 Lloyd's Rep 238 complicates the matter somewhat by suggesting that knowledge goes to the issue of liability rather than defence.

[63] There may be a difference in the burden of proof, though.

[64] See, *eg*, Yeo, *supra*, note 9, at 479-489.

C. *Restitution for Wrong?*

One interesting question that arises from the facts is whether the plaintiffs could have sued the second defendant for conversion of their goods, and waive the tort to sue for proceeds of the wrong.[65] The damages for conversion would have been nominal, since the goods had been returned without any depreciation in value.[66] By waiving this tort,[67] the plaintiffs can sue for the sums paid out to the second defendant, not because they had paid the money, but because the second defendant had received that sum of money as a result of the wrong. In *Lipkin Gorman*, Lord Goff said that the change of position defence would not be available to wrongdoers.[68] It would be an anomaly if the plaintiffs could circumvent the restitutionary defence by pleading a strict liability tort. It is true that property interests are at stake,[69] but it is still difficult to justify denying the *bona fide* defendant the change of position defence.[70] Perhaps the *dictum* of Lord Goff in *Lipkin Gorman* is a little too widely phrased. If it meant that the defence is unavailable to wrongdoers as a legal rule, then the rule is questionable. If it meant that the wrongdoer is disqualified from the defence because his *bona fides* are *ex hypothesi* lacking, then that assumption is equally doubtful.

IV. Conclusion

For a case presenting such a fascinating factual matrix, surprisingly little had been argued and decided. This case raises four important issues relating to the change of position defence. First, is the defence part of the law of Singapore? Its walkover victory is perhaps a reflection of the wave of restitutionary thinking that is sweeping across many Commonwealth countries. Secondly, how does the defence actually operate? The assumption in the case that it is based on comparative negligence is not necessarily the only approach, and it is at least arguable that the defence is only concerned

65 See *Lamine* v *Dorrell* [1701] 2 Ld Ray 1216 (92 ER 303) where Holt CJ held that the plaintiff could sue for the proceeds of conversion.

66 *Loosemore* v *Radford* (1842) 9 M & W 657 (152 ER 277).

67 Once it is established that a tort can be waived, the plaintiff has a *right* to elect for a measure that is either based on the plaintiff's loss or the defendant's gain: *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1.

68 *Supra*, note 2, at 580. "Wrongdoer" was not defined. If it means anyone whose *bona fides* are lacking then the statement is tautologous. It is more likely that it means someone who has committed a legal or equitable wrong.

69 And hence, the law has been most indulgent with the plaintiff, awarding damages for conversion based on value at the time of the conversion, not on actual loss, regardless of the state of mind of the defendant.

70 For a criticism of the policy of overprotection in the context of damages, see Tettenborn, "Damages in Conversion – The Exception or the Anomaly?" [1993] CLJ 128.

with the defendant's position. Thirdly, what is the effect of constructive knowledge on the operation of the defence? Fourthly, is the defence available when the plaintiff is suing in restitution for a strict liability wrong? These are all issues of critical importance delimiting the scope and operation of the defence. It is disappointing that the last two were not addressed. It is also unfortunate that the cause of action in unjust enrichment was passed over. In the past, cases on unjust enrichment contained little discussion of the underlying cause of action, but that was because the status of the principle was uncertain. This is a lame excuse today, if the principle is accepted as a distinct source of obligations. It has not been explicitly accepted in the law of Singapore, but the language used in recent cases indicates that the courts are receptive to it.[71] The responsibility of refinement and development must come with the acceptance of the principle.

YEO TIONG MIN*

[71] See especially, *Hongkong and Shanghai Banking Corp Ltd* v *United Overseas Bank Ltd*, *supra*, note 3; *Sumitomo Bank Ltd* v *Kartika Ratna Thahir & Ors*, *supra*, note 3.

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