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CASE COMMENTS

RESTITUTION, CHANGE OF POSITION AND COMPENSATION

Seagate Technology Pte Ltd v *Goh Han Kim*[1]

THE Singapore Court of Appeal in *Seagate Technology Pte Ltd* v *Goh Han Kim* has firmly acknowledged the principles of unjust enrichment, and has, more importantly, affirmed the availability of the change of position defence in Singapore. The writer examines the interaction between restitution and compensation, and argues that the application of the defence is correctly delimited to *bona fide* recipients. However, some reservations are expressed about the incursion of compensatory principles in the operation of the defence. Further ramifications of the *Seagate Technology* decision for the law of restitution are also examined.

I. INTRODUCTION

The Court of Appeal in *Seagate Technology* has made several important contributions to the law of restitution in Singapore. It has categorically accepted unjust enrichment as the principle underlying the action for money had and received, at least for mistaken payments, total failure of consideration and absence of consideration.[2] It provides additional authority,[3] if any is needed, that the law of restitution has to be taken seriously in Singapore. Secondly, the Court affirmed that the change of position defence is available in Singapore for restitutionary claims. The rational development of the law of restitution depends on the existence of restitutionary defences like change of position. The availability of the defence will no doubt set the pace of development for the law of restitution in Singapore. Thirdly, it decided that the change of position defence is defeated only by the dishonesty of the recipient. Finally, the relative fault of the plaintiff and the defendant may

1 [1995] 1 SLR 17. Hereafter, it will be referred to as *Seagate Technology*.

2 For a commentary on the possible bases of liability in the case see Yeo, "Restitution, Tracing and Change of Position" [1994] SJLS 138.

3 See also the authorities cited *ibid*, in footnote 3.

have a bearing on the extent to which the defendant is liable in respect of enrichment that has been extinguished by his change of position. The last two points form the main subject matter of this article.

The decision in the High Court has been noted previously,[4] and only the bare outline of facts will be set out here. The appellants' employee had deceived them into paying large sums of money to the respondent. The respondent had in turn been misled into thinking that he was acting as middleman for the employee's uncle in receiving the money. After the fraud was discovered, the appellants successfully obtained judgment against their employee but could not obtain full satisfaction and so turned their attention to the respondent for the balance. The Court of Appeal held, affirming the High Court's decision, that the respondent was strictly liable for the sum received by way of money had and received because the appellants had made a mistake of fact in paying the respondent or alternatively there had been total failure of consideration. However, the respondent was only liable for a (comparatively) small sum retained,[5] and was not liable for the money that had been paid over to the fraudulent employee because in the circumstances he had so changed his position that it would be inequitable for him to pay the full sum.

II. Compensation in Restitution

A. *Restitution and Compensation*

The law of subtractive unjust enrichment seeks to reverse the defendant's unjust gain at the expense of the plaintiff. In the ordinary situation, the defendant's gain corresponds exactly to the plaintiff's loss. But where the defendant has changed his position in reliance of the receipt,[6] there is no longer such a correspondence. In principle, the change of position can either go to the question of quantum of enrichment and therefore liability[7] or to the issue of defence to the restitutionary claim. The common law adopts

4 *Supra*, note 2.

5 The fact that the defendant had retained this sum became apparent only at the appeal stage.

6 The question of what amounts to reliance that cuts down on the quantum of benefit received is beyond the scope of this article. For a detailed consideration, see Beatson & Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U of Tor LJ 389. For present purposes, it is sufficient to note that the notion of surviving enrichment is broad enough to cover exchange value.

7 *Eg*, German law of restitution, much more developed than English law, treats the erasure of enrichment as going to the question of quantum of enrichment: Dawson, "Erasable Enrichment in German Law" (1981) 61 BULR 271. But see Lord Templeman's analysis in *Lipkin Gorman*, *supra*, note 25, which also treats change of position as going to the question of liability.

the latter conception.[8] Liability for the action of money had and received arises upon receipt of the money. As the majority in the High Court of Australia in *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia*[9] stated, "From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched."[10] Thus, formal logic denies that the defendant can be compensating the plaintiff. But from a restitutionary perspective, the change of position defence has shifted the focus of the law from the moment of initial enrichment to the question of surviving enrichment. Hence, in substance, to the extent that the defendant ceases to be enriched he has nothing to return. The question then turns on who should bear that loss. If the defendant can rely on the change of position defence, then *prima facie*[11] the loss lies on the plaintiff. Conversely, if the defendant cannot rely on change of position, he is effectively compensating the plaintiff.

An important issue resolved in the Court of Appeal decision in *Seagate Technology* but which had not been raised in the High Court was whether the respondent had such constructive knowledge of the circumstances of the payment so as to disentitle him from relying on the change of position defence. The Court of Appeal held that only improbity on the part of the respondent would bar reliance on the defence. It might be argued that, *ex hypothesi*, a dishonest recipient cannot act *on the faith* of the receipt, so that the proposition of the court becomes tautologous. That tautologous position, however, does not go far enough. There may be cases where the defendant's position has changed without any reliance,[12] and in such cases, the decision in *Seagate Technology* also denies the defence.

The reasoning of the Court of Appeal is, however, a little curious at first blush, but it is submitted that the result is correct. The Court relied on the analysis of Millet J in *Agip (Africa) Ltd* v *Jackson*[13] on the issue of knowledge required for liability for *knowing assistance* of a breach of trust. It might have been thought that the line of cases on *knowing receipt* would have been a closer analogy.[14] Knowing assistance deals essentially with the question of compensating the beneficiary for losses to the trust

8 So it has been treated in the United Kingdom, Australia, Canada, and New Zealand.

9 (1993) 109 ALR 57, 80-81.

10 See also *Agip (Africa) Ltd* v *Jackson*, *infra*, note 13, at 285; *Re Jogia* [1988] 2 All ER 328, 338.

11 Subject to potential application of compensatory principles discussed *infra*, Part III.

12 See Part IV, Section B, *infra*.

13 [1990] 1 Ch 265.

14 This assumes the conventional divide between the two lines of cases as accepted in England and in Singapore: *eg*, *Agip (Africa) Ltd* v *Jackson*, *ibid*. For a recent criticism, see Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in Waters, ed, *Equity, Fiduciaries and Trusts 1993* (1993).

due to fraud, and to the extent that it engenders restitutionary consequences, it is in restitution for wrong.[15] In this context, Millet J observed, "There is no sense in requiring dishonesty on the part of the principal while accepting negligence as sufficient for his assistant."[16] Knowing receipt, to the extent that it is restitutionary,[17] provides a closer analogy to the type of situation found in *Seagate Technology*, because such liability arguably lies within the realm of subtractive unjust enrichment, although it may also give rise to restitution for wrong on an alternative analysis.[18] The Court may have been influenced by the fact that there had been fraud in the instant case. But while fraud[19] or at least dishonesty[20] is part of the cause of action in the knowing assistance cases, in the present case the fraud is incidental to the claim. The foundation of the action is in autonomous or subtractive unjust enrichment – the appellants had made a mistake of fact, or the consideration had totally failed, albeit induced by the fraud of the employee, causing a flow of wealth from the appellants to the respondent which calls for a reversal.

The conclusion of the court[21] is justifiable, it is submitted, on the simple ground of protecting the defendant's interest in the security of receipt.[22] A similar result had been reached by an earlier unreported New South Wales Supreme Court decision,[23] where Palmer J held that the defence is defeated by actual knowledge of the facts entitling the plaintiff to restitution, or "knowledge of such facts as would reasonably raise a suspicion of wrongdoing so that the payee was put upon enquiry."[24] His Lordship stated that the requisite knowledge was that which put a third party on notice about an agent's lack of authority. This analogy is also unexplained,[25] but

15 *Eg*, in *Kartika Ratna Thahir* v *PT Pertambagan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257, it was held that an action for money had and received lies for knowing assistance of a breach of fiduciary duty, and there is a hint that restitutionary proprietary remedies can be imposed on such a knowing assistant. See also *Goh Swee Fang* v *Tiah Juah Kim* [1994] 3 SLR 881, especially the dissenting judgment of Khoo J. The majority in that case did not expressly rule out gains-based remedies altogether, but had considered it inappropriate to disturb the registered land transactions in the circumstances.

16 *Supra*, note 13, at 293.

17 This proposition is admittedly controversial. See *infra*, Section B.

18 Burrows, *The Law of Restitution* (1993), at 155-156.

19 *Tan Kok Ming Philip* v *Royal Brunei Airlines Sdn Bhd* [1994] 3 MLJ 51. But see *Postscript*.

20 *Goh Swee Fang* v *Tiah Juah Kim*, *supra*, note 15.

21 It is also consistent with the position advocated in Goff & Jones, *Law of Restitution* (4th ed, 1993), at 745.

22 Dawson, "Restitution Without Enrichment" (1981) 61 BULR 563, 576.

23 *Mercedes Benz (NSW) Pty Ltd* v *ANZ and National Mutual Royal Savings Bank Ltd* (unreported Comm D, SC NSW, Palmer J, No 50549 of 1990, 5 May 1992); [1993] RLR §18.

24 *Ibid*, transcript at 49.

25 Except to the extent that the learned judge relied heavily on the cases of agents paying

the rationale probably lies in the security of commercial transactions.[26] But whether the transaction is commercial or not, the *bona fide* recipient's reliance interest deserves protection.

Under the law set out in *Seagate Technology*, where liability is strict, if the defendant is honest, restitution is made to the plaintiff who bears any loss arising from the defendant's change of position in reliance on the receipt. If the defendant is dishonest, he makes restitution as well as compensation. The position seems eminently sensible. It serves the moral end of vindicating the virtue of honesty and the legal purpose of protecting security of receipt. The dishonest recipient forfeits security of receipt. To make the defendant liable for compensation apart from dishonesty assumes that he owes a duty of care to the plaintiff to prevent economic loss.[27] It is difficult to see how this duty can arise in the absence of exceptional facts. If indeed it could be shown that the defendant did owe the plaintiff a duty of care in tort, and has breached it, then the loss rightly falls on the defendant. But if a tort can be made out in the first place, a more straightforward course is to sue in negligence for losses so incurred.[28]

B. *Law and Equity*

The further implications that this aspect of the decision in *Seagate Technology* has for the law of restitution in a wider context cannot be ignored. It is unrealistic to refrain from a consideration of cases in equity on personal liability for knowing receipt when analysing a problem in receipt-based restitutionary claims. The problems surrounding the requisite level of knowledge for liability for knowing receipt are well-documented.[29] But it seems, at least with respect to the English common law, that there is growing

over money to their principals without notice of the wrongdoing leading to their receipt. But, although this line of cases was relied upon in *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548 as one of the pillars supporting the defence, it has been recognised that special rules apply to them: Goff & Jones, *supra*, note 21, at 751. Moreover, the level of knowledge required in such cases is inconclusive (see, *eg*, *D Owen & Co* v *Cronk* [1895] 1 QB 265, where it was said that notice suffices, but it was not explained what that meant).

26 Reynolds, *Bowstead on Agency* (15th ed, 1985), at 303-308.

27 *Contra* American Law Institute, *Restatement of the Law of Restitution* (1936) which denies the change of position to the recipient who has acted tortiously (§142). Even so, it is arguable that the tortious conduct must bear a sufficient causal link with the loss to the plaintiff, and that the omission to warn the plaintiff of possible fraud by third parties (assuming such a tortious duty exists) is insufficient: *Mercedes Benz (NSW) Pty Ltd* v *ANZ and National Mutual Royal Savings Bank Ltd*, *supra*, note 23, transcript at 49, 51. See also *infra*, note 97.

28 See *eg*, *Mercedes Benz (NSW) Pty Ltd* v *ANZ and National Mutual Royal Savings Bank Ltd*, *supra*, note 23, transcript at 51, where Palmer J held that that the cause of action in negligence affects the claim in unjust enrichment only if the defendant had in any case the requisite knowledge of the plaintiff's right to restitution.

judicial support for the standard of improbity.[30] As against the restitutionary school of thought[31] that argues for strict liability or at least a lower standard of liability than dishonesty, there remains the school that argues that the liability attaches on the conscience of the recipient in order to shift the loss from the trust to the recipient, so that some kind of fault is necessary.[32] It may well be that in certain situations, equity ought to act on the conscience of the stranger to the trust who had the power to prevent loss to the trust, and sufficient knowledge to exercise that power. However, apart from questions of symmetry with the common law,[33] it might be asked whether the retention of a benefit innocently but unjustly gained should not also provoke equity to act.[34] The urgency of an answer to this question is more apparent now that, in other contexts, the personal liability in equity is being pressed into the service of the law of restitution, even where no wrongdoing is involved.[35]

Given the possibility of putting the defendant out of pocket, it is not surprising that the courts have been concerned to impose liability only on dishonest defendants.[36] Where liability is imposed without the change of

29 For a recent review, see Birks, "Persistent problems in misdirected money: a quintet" [1993] LMCLQ 219. See also Yeo, "Tracing and Three Party Restitution" [1993] SJLS 452, 480-481.

30 *Ibid*.

31 See principally, Birks, "Misdirected funds: restitution from the recipient" [1989] LMCLQ 296. This has received some measure of judicial acceptance: In *El Ajou* v *Dollar Land Holdings plc* [1993] 3 All ER 717, 739, Millet J opined that dishonesty was not required (reversed on other grounds [1994] 2 All ER 685), and see his Lordship's article, "Tracing the Proceeds of Fraud" [1991] 107 LQR 71, 82, where strict liability is argued. See also *Nimmo* v *Westpac Banking Corp* [1993] 3 NZLR 219, 224-225, and *Powell* v *Thompson* [1991] 1 NZLR 597, 608, where although the basis of liability appears to lie in restitution, some fault of the recipient is still necessary for equity to intervene. But see *infra*, note 34.

32 Finn, *supra*, note 14, at 195.

33 Birks, *supra*, notes 29, 31.

34 See *eg*, Davies, "The Re-Awakening of Equity's Conscience: Achievements and Problems" in Goldstein, ed, *Equity and Contemporary Legal Developments* (1992). The "conscience" in equity is a flexible concept, the contents of which vary with the context. For example, in New Zealand, "conscience" has been used against the negligent recipient of funds: *Nimmo* v *Westpac Banking Corp*, *supra*, note 31, at 227. Furthermore, the conscience of the recipient can be affected even when the injustice of the transaction lies with a factor affecting only the plaintiff's intention to transfer: *Baker (GL) Ltd* v *Medway Building and Supplies Ltd* [1958] 1 WLR 1216.

35 See the interest swap cases: *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council* [1993] 1 WLR 938, 950, *per* Dillon LJ; *South Tyneside Metropolitan Borough Council* v *Svenska International plc* [1995] 1 All ER 545, 557, *per* Clarke J; *Kleinwort Benson Ltd* v *South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972, 977, 992, *per* Hobhouse J. See also *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council* [1994] All ER 890, 940, *per* Hobhouse J. Calling the defendant in an arms' length commercial transaction a "fiduciary" to justify equity's intervention in these cases is, it is submitted, a conclusion rather than a reason.

position defence, the defendant is obliged to make restitution of the surviving enrichment,[37] and compensation to the extent of erasure of the benefit.[38] Where the defendant had been dishonest, the outcome is acceptable. But one side-effect is that where the defendant is honest, he keeps the windfall, subject to any proprietary remedies that may be available to the plaintiff in respect of property still in the hands of the defendant. In many cases the end result is that the defendant disgorges surviving property, and is personally liable for the balance if he has been dishonest. This will be the case where, for example, the defendant receives trust money, in an account (with no other monies so that no question of mixture arises) and spends part of it on a holiday. However, the defendant may have intended to spend money in another account on a holiday anyway (so that no detrimental change of position has taken place), but quite fortuitously uses all the trust money in the first account, we can assume, innocently. In such a case, the proprietary tracing remedy yields nothing,[39] and the plaintiff will be left to his personal remedy.

It is perhaps timely to think about the implications of the change of position defence on the question of liability for this line of cases. If the standard of liability and defence are coincident, then the defence will never be called into operation. This will sustain the questionable divide between the common law and equitable restitutionary actions.[40] As Hobhouse J observed in a slightly different context, in *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council*,[41] "... there is no need, in the context of restitution for unjust enrichment, to treat the action for

[36] *Contra* the position in New Zealand, where negligence can ground liability for knowing receipt: *Powell* v *Thompson*, *supra*, note 31; *Equiticorp Industries Group Ltd* v *Hawkins* [1991] 3 NZLR 700. This may in part be due to the availability of the change of position defence. But the writer is not aware of any authority in New Zealand that has applied this defence outside of mistaken payments at law. See also, *infra*, note 73.

[37] This refers to enrichment in the broad sense, where the defendant can be said to retain some benefit even though there is no surviving property that is traceable under equitable rules. Indeed Finn, *supra*, note 32, at 211, footnote 87, argues that tracing rules should be rationalised to trace surviving benefit in this broad sense. This in fact closes the gap between personal and proprietary remedies, and will subject the recipient to potential proprietary remedies irrespective of knowledge. This goes further than the position argued for by the restitutionary school.

[38] In so far as liability is found in restitution for wrongs, there is an indisputable compensatory element in respect of expended benefit, but this has never caused any difficulties because there is no problem in subjecting wrongdoers to the rigours of both restitutionary and compensatory policies in the law. That is the reason why dishonest recipients of funds are not entitled to the change of position defence. Where the threshold for liability in restitution for wrong is lower, some problems may arise: see, *infra*, Part IV, Section C.

[39] Subject to the point made by Finn, *supra*, note 37.

[40] To the extent that such actions are restitutionary: see Birks, *Restitution – The Future* (1992), Ch 2, and *supra*, notes 29, 31.

money had and received and an action for an equitable remedy as any longer depending upon different concepts of justice." On the other hand, if liability in equity were strict, then the *bona fide* change of position defence will still continue to do the work of protection of receipt, *but only in so far as the enrichment has been expended in reliance on the security of the receipt*.[42] If the requisite level of knowledge for the applicability of the change of position defence is maintained at the test of probity, the recipient will feel the impact of any change in the liability rules principally in relation to the unexpended enrichment, which had always been a windfall for the recipient anyway.

III. Compensation in Change of Position

But if the compensation problem has been held in abeyance by using honesty as the touchstone for the *availability* of the change of position defence, it appeared to have crept back in by the *operation* of the defence. The Court of Appeal in *Seagate Technology* approved of the approach taken in the High Court, where the learned judicial commissioner had compared the fault of the plaintiff with that of the defendant.[43]

The conceptual underpinnings of the change of position defence have yet to be judicially established. Accepting that restitutionary liability is concerned only with the unjust enrichment of the defendant, there is room for the view that compensation still has a role to play at the defence stage. The nebulous language in *Lipkin Gorman v Karpnale Ltd*[44] admits of possible analyses apart from the pure enrichment approach. As Lord Goff said, "[T]he defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."[45] Birks has pointed out, with some misgivings, that the defence, for example, could be based on yet unarticulated notions of "unjust".[46]

A. *Enrichment Perspectives*

Three points, none admittedly conclusive, can be made in favour of an enrichment-linked view. First it has been emphasised in *Lipkin Gorman*

41 [1994] All ER 890, 914. Hobhouse J was comparing the action for money had and received with the equitable proprietary tracing remedy, but the analogy with the personal equitable remedy is telling (at 940). See generally, *supra*, note 35.

42 See also, *supra*, note 6.

43 Discussed in Yeo, *supra*, note 2, at 143-146.

44 *Supra*, note 25.

45 *Supra*, note 25, at 580. The Court of Appeal in *Seagate Technology* accepted this formulation: *supra*, note 1, at 29.

and cases following it that the defence is not a discretionary one.[47] While this emphasises the need for clarity and certainty in its application, it does not by itself necessarily limit the defence to restitutionary principles.

Secondly, there have been a number of statements of principle in the authorities that the defence is primarily, if not exclusively, an enrichment related one.[48] In *David Securities Pty Ltd* v *Commonwealth Bank of Australia*, the majority in the Australian High Court stated that the "defence of change of position is relevant to the enrichment of the defendant precisely because its central element is the defendant has acted to his or her detriment on the faith of the receipt."[49] A bolder statement comes from a recent English High Court decision. In *Kleinwort Benson Ltd* v *South Tyneside Metropolitan Borough Council*,[50] the defendants were attempting to invoke the defence of passing on[51] to a restitutionary claim. After referring to Lord Goff's statement in *Lipkin Gorman*,[52] that restitutionary claims can only be defeated "on the basis of legal principle",[53] Hobhouse J stated:

> If the plaintiff is to be denied his remedy in respect of the sum which he has paid to the defendant and which it is unjust that the defendant should retain, it must be upon a basis that is relevant to the law of restitution and not some principle borrowed from the law of compensation.[54]

The third point is that the defence as applied so far in English,[55]

46 Birks, *supra*, note 40, at 127-128, 143-147.

47 *Lipkin Gorman*, *supra*, note 25, at 578; *South Tyneside Metropolitan Borough Council* v *Svenska International plc*, *supra,* note 35; *Kleinwort Benson Ltd* v *South Tyneside Metropolitan Borough Council*, *supra*, note 35.

48 See also, Goff & Jones, *supra*, note 21, at 744.

49 *Supra*, note 9, at 81.

50 *Supra*, note 35.

51 The defence is based on the argument that the plaintiff had passed on his loss to third parties, and so the enrichment of the defendant to that extent was no longer at the expense of the plaintiff. This is a different defence from change of position, but they are analogous in the need to go beyond the question of the defendant's enrichment. Indeed the passing on defence, in going to the question of "at the expense of", arguably has closer links to the law of restitution than the fault-based view of the change of position defence.

52 *Supra*, note 25, at 578.

53 On this, see also, *supra*, note 1, at 146.

54 *Supra*, note 31, at 987. See also, at 984-985.

55 *Lipkin Gorman*, *supra*, note 25; Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473, 488; *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council supra*, note 41, affirmed [1993] 1 WLR 938; *Kleinwort Benson Ltd* v

Australian[56] and Canadian[57] law is enrichment-based. The crux of the inquiry is the extent to which the defendant has ceased to be enriched in reliance on the receipt. In the decided cases in the major Commonwealth jurisdictions,[58] the courts have scrupulously scrutinised the circumstances relating directly to how the defendant had altered his position. For example, in *Lipkin Gorman* v *Karpnale Ltd*,[59] the inquiry centred on how the defendants' position had changed in light of the nature of the gambling transactions entered into by the defendants. In *Rural Municipality of Storthoaks* v *Mobil Oil Canada Ltd*,[60] the question was whether the defendants had really relied on the receipt of the money in changing its position. Where the fault of the recipient lies in the alteration of position as such, it may be relevant to the question of whether there had actually been *reliance* on the receipt. In *Swiss Bank Corporation* v *State Bank of New South Wales*,[61] it was held that the defendant bank had not changed its position in reliance on the receipt from the plaintiff bank because, as a matter of banking practice the defendant, in acting outside the terms of the instructions accompanying the electronic inter-bank remittance and thereby allowing the funds to leave the banking system, could not be said to be relying on the receipt. Generally, one cannot expect too high a standard of conduct from the defendant in relation to money that in all appearances is his to dispose of. *Swiss Bank Corporation* is exceptional because in the circumstances the integrity of inter-bank transactions required the receiving bank to act strictly on the terms of payment.

B. *Compensation Perspectives*

On the other hand, several arguments can be canvassed for going beyond the induced effacement of enrichment. It may be argued that the compensation element arises from issues of risk allocation irrespective of the basis of liability. Ultimately, the change of position defence is concerned with the allocation of risk.[62] But there is force in the view that normally the risk

South Tyneside Metropolitan Borough Council, *supra*, note 31.

56 *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia*, *supra*, note 9; *Swiss Bank Corporation* v *State Bank of New South Wales* (No 50693 of 1989, unreported, SC NSW, Rogers CJ, Comm D, 30 April 1993); [1994] RLR §21; *Mercedes Benz (NSW) Pty Ltd* v *ANZ and National Mutual Royal Savings Bank Ltd*, *supra*, note 23.

57 *Rural Municipality of Storthoaks* v *Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1 (SC Canada); *RBC Dominion Securities Inc* v *Dawson* (1994) 111 DLR (4th) 230 (CA NFL).

58 Except New Zealand. See main text, *infra*, preceding note 73.

59 *Supra*, note 25. See also *South Tyneside Metropolitan Borough Council* v *Svenska International plc*, *supra*, note 35.

60 *Supra*, note 57. See also *RBC Dominion Securities Inc* v *Dawson*, *supra*, note 57.

61 *Supra*, note 56.

62 Beatson & Bishop, *supra*, note 6; Visser, "Responsibility to Return Lost Enrichment"

of reliance losses should lie with the person seeking restitution, in order to protect the good faith receiver from the harm he would suffer if required to pay compensation for enrichment consumed in reliance on the receipt.[63] It may further be argued that to the extent that the defendant has been careless, he ought to bear some of the loss. But if security of receipt is the primary aim of the change of position defence, then it may be putting too onerous a burden on the recipient of funds to take due care in respect of what appears to be money to which he is entitled. If in making the payment, the plaintiff's autonomy is recognised to be impaired even if he has been careless, so entitling him to restitution,[64] then in the defence the defendant's impaired autonomy in acting on the receipt ought to be given equal legal recognition.[65]

To that it might be answered that carelessness of the plaintiff is not relevant at the stage of liability, just as the carelessness of the defendant is not relevant to the question of the availability of the defence of change of position. It might then be argued that the carelessness of both parties becomes relevant at the stage of dealing with the equities of the situation in the operation of the defence. One rationale for considering relative fault lies in the argument that the change of position defence goes beyond the question of security of receipt, to the question of blameworthiness.[66] The question is whether this moral ideal[67] can be pursued within the framework of the law of unjust enrichment without causing too much uncertainty in the law. Another justification is that economic efficiency requires that each party has to bear some responsibility for the loss to give them an incentive to prevent the loss, because such losses are inefficient.[68] This approach assumes that the adjudication costs and the social costs of uncertainty do not outweigh the benefits arising from the incentive to the payee to watch

[1992] *Acta Juridica* 175, 198.

63 See Dawson, *supra*, note 7, at 275, citing German authorities. One controversial exception may be the statutory regime for frustrated contracts where restitution and compensation go hand in hand in adjusting post-frustration rights and liabilities. However, the justification for loss-apportionment in such cases has also been questioned: Stewart & Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" [1992] CLJ 67.

64 See Yeo, *supra*, note 2, at 144.

65 Birks, *An Introduction to the Law of Restitution* (1989 Reprint), at 412-415. Some measure of judicial support for this may be found in the statement of Hobhouse J in *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council*, *supra*, note 41, at 947, where he states that the change of position defence exists because in assessing the plaintiff's claim for unjust enrichment, "it is essential that, in evaluating the equity of the position, the court should take into account the position of the defendant as well as that of the plaintiff."

66 See §142 of the American Restatement, *supra*, note 27. See also Palmer, *The Law of Restitution* (1978), Vol 3, at 524, and Cohen, "Change of Position in Quasi-Contracts" (1932) 45 Harv L Rev 1333.

67 As an abstract ideal of justice, compared with practical concerns with the immediate impact of putting the recipient out of pocket.

out for payments to which he might not be truly entitled, so that the enrichment can be reversed before any reliance takes place.[69] Moreover economic analysis cannot be conclusively determinative of the content of the law.[70] Although the fault-balancing approach is promulgated in the American Restatement of Restitution, it has been noted that the American courts have not really utilised it.[71]

C. *Reconciling Restitution with Compensation*

Quite apart from questions of efficiency, the issue of the desirability of imposing on the recipient a duty, apart from honesty, to take care not to cause losses to the plaintiff must be regarded with circumspection. Where common law is concerned, it has been earlier argued that one should not impose such duties apart from the law of negligence. Equity presents greater difficulties, because first, unlike the common law, equity is wont to act on a multiplicity of principles in a single action, and secondly, because the juridical foundation of the personal liability of a recipient of trust funds has yet to be settled judicially. But to the extent that the liability is based on the fault of the recipient causing loss to the trust, the restitutionary defence of change of position is *ex hypothesi* irrelevant, and the only question is one of equitable compensation by a stranger to a trust, subject possibly to contributory negligence. Both are difficult areas, and outside the scope of this article, but it suffices for the present purposes to press the suggestion that the problem of compensation ought to be addressed on its own terms rather than within the framework of restitutionary liability.

The Court of Appeal in *Seagate Technology* recognised that the inquiry into the change of position must centre on the conduct of the defendant.[72] It also noted that all circumstances relating to the defendant's change of position must be taken into account. However, in going beyond the circumstances directly relating to the defendant's change of position and taking the fault of the parties to be relevant, *Seagate Technology* appears to be taking the approach of the New Zealand courts, although no New Zealand cases were cited in the judgment. In New Zealand, section 94B of the Judicature Act 1908 encapsulates the change of position defence. Although it is arguably wider than the judicial defence because the statute

[68] At least with respect to mistaken payments: Beatson & Bishop, *supra*, note 6.

[69] The incentive to the payor is always present, since he will always bear the burden of litigation, so that the marginal incentive will lie principally with the payee.

[70] As admitted by one proponent of such analysis for change of position: Beatson, "Mistaken Payments in the Law of Restitution" in Beatson, *Use and Abuse of Unjust Enrichment* (1991), at 173-174.

[71] Goff & Jones, *supra*, note 21, at 743, footnote 24. See also Dawson, *supra*, note 22, at 571.

enjoins the court to have "regard to all possible implications in respect of other persons" apart from the defendant, the judges in the New Zealand Court of Appeal in the leading case of *Thomas* v *Houston Corbett & Company*[73] merely saw themselves as applying equitable principles.

If indeed this is the path charted by the Singapore Court of Appeal, two points ought to be highlighted. First, in the present case the plaintiff was found to bear the entire blame, so that it was an easy one to resolve. What will be the outcome if the defendant had also been found to be at fault? Three solutions may be examined.[74] First it may be that once the defendant is found to be at fault, he bears the entire loss. But this outcome effectively means that the defendant is not entitled to rely on the change of position defence at all, and that is inconsistent with the earlier holding of the court that only dishonesty will have that result. Secondly, the plaintiff bears the loss unless the defendant is more at fault than the plaintiff.[75] In this solution the person bearing the greater responsibility for the loss will absorb it entirely. Thirdly, and this is the solution adopted by the New Zealand case above, the plaintiff and defendant bear the loss in accordance with their proportionate blameworthiness that had contributed to the loss. A similar problem arises if both parties are found to be equally blameless. The risk of the loss could lie on either the plaintiff, or the defendant, or equally on both.

Secondly, the inquiry into the question of apportionment can regress to speculations into psychology, ethics and causation. McGregor J in *Thomas* v *Houston Corbett & Company*[76] admitted that "[t]he quantum is not capable of precise calculation. It is a matter of discretion on which opinion may differ to some extent."[77] In that case, the respondent's employee had deceived the respondent into paying money to the appellant, and the appellant had been deceived into paying a portion of the money so received to the employee. In the High Court, Speight J held the appellant entirely to blame, for being "too trusting" and "a trifle foolish" and so the loss was totally borne by him.[78] On appeal, North P and McGregor J decided that the appellant was one third to blame, because although he was excessively trusting and a little foolish, the respondent, although innocent, was in a better position to prevent the fraud. Turner J, who did not think that the appellant was

72 *Supra*, note 1, at 29.

73 [1969] NZLR 151. A similar fault-balancing approach was applied by Barker J in *Farmers' Mutual Insurance Ltd* v *QBE Insurance International Ltd* [1993] 3 NZLR 305, 315-316, where the approach was said to be based on the principle of reasonable expectations of the parties. For a criticism, see Watts, "Restitution" [1993] NZRLR 424, 430-431.

74 Beatson & Bishop, *supra*, note 6.

75 There is some tentative support for this position from Burrows, *supra,* note 18, at 430.

76 *Supra*, note 73.

77 *Supra*, note 73, at 178.

any more foolish than the respondent, was inclined to split the loss equally, but in the event he deferred to the majority opinion. Little by way of guidance is given as to the weight to be assigned to factors like being too trusting, or too foolish, or indeed the power to prevent the loss.

Neither argument is necessarily fatal to a fault-balancing approach. As to the first point, it is just a matter of choosing a particular approach. So far as the second point is concerned, it might be said that the balancing of fault is something which the court is competent to do, and which it does all the time in contributory negligence.[79]

In the final analysis it is a matter of policy choice by the courts whether, in considering the change of position defence, it is appropriate to impose a duty on a recipient of funds that are potentially subject to a restitutionary claim to safeguard the interests of the payor. Nevertheless, it has been the suggestion in this article that there is merit in segregating restitutionary obligations from compensatory ones. Moreover, it can be said that a defence that is centred on the enrichment will be more certain in application,[80] and work more effectively in protecting the security of receipt. From a wider perspective, a defence that is uncertain in application or is perceived to take inadequate notice of the recipient's reliance interest may retard the development of the law of restitution. Whether the fault-balancing approach in the Court of Appeal in *Seagate Technology* is *ratio decidendi* or *obiter dictum* depends on how one reads the case. On one reading, the reasoning used to arrive at the conclusion that the change of position defence succeeded in the case was based on fault-balancing.[81] On a narrower interpretation, which is the approach preferred by this writer, all that the Court had decided was that there was nothing inequitable to prevent the payee from relying on change of position if the payor had been at fault and the payee had not.

IV. Further Reflections on *Seagate Technology*

A few other questions remain to be asked about the ramifications of the decision in *Seagate Technology* for the law of restitution in general.

78 Cited by Turner J in the Court of Appeal, *supra*, note 73, at 170.

79 See, *eg*, Visser, *supra*, note 62, at 201-202.

80 See also Birks, *supra*, note 40, at 146-147; Goff & Jones, *supra*, note 21, at 744; Dawson, *supra*, note 22, at 571-573; Dawe, "The Change of Position Defence in Restitution" (1994) 52 UTFLR 275.

81 On the assumption that the *ratio decidendi* of a case includes the *reasoning process* used in arriving at the answer: *Indo Commercial Bank Society (Pte) Ltd* v *Ebrahim* [1992] 2

A. *The End of Estoppel?*

Now that the change of position defence is firmly in place in Singapore, what will happen to the defence of estoppel?[82] This question did not arise in *Seagate Technology*, but with the advent of the change of position defence, the relationship between the two defences is a priority issue. The unsatisfactory nature of the estoppel defence was one motivating force in the development of the change of position defence. It proves too little: the estoppel defence seldom succeeds because of the need to prove clear and unequivocal representation, and it is clear from the authorities that mere payment cannot amount to a representation.[83] At the same time, it also proves too much: where the defendant successfully pleads estoppel, no liability results even if substantial enrichment is left in the hands of the defendant. However, a total rejection of the estoppel defence to mistaken payment, as occurred in a recent Newfoundland decision,[84] is perhaps premature. No satisfactory doctrinal explanation is given for the outright rejection in the decision, and at least in the English context,[85] practical difficulties may be caused. The English High Court has recently held that as a general rule, the change of position defence is not available where the defendant spends money in anticipation of but before receipt.[86] The defence of estoppel is still required to fill in the lacuna in such cases where the defendant may have relied on the representations or conduct of the plaintiff.

The availability of the change of position defence provokes doctrinal questions about the nature of the estoppel plea. The estoppel has been the product of both common law and equitable development. At common law it is a rule of evidence that protects the representee by preventing the party estopped from departing unjustly from an assumption of fact that he had caused another party to accept for the purpose of their relationship. This evidentiary principle holds the representor bound to the represented state of affairs,[87] and can therefore defeat the plaintiff's entire cause of action. In equity, the source of the doctrine is the prevention of detriment[88] and it is thus flexible enough to be moulded to operate *pro tanto*. The English Court of Appeal in *Avon County Council* v *Howlett*[89] had accepted, though

SLR 1041, 1047.

82 See generally, Goff & Jones, *supra*, note 21, at 746-747.

83 See Jones, "Change of Circumstances in Quasi-Contract" (1957) 73 LQR 48.

84 *RBC Dominion Securities Inc* v *Dawson*, *supra*, note 57.

85 In some other context, it may well be that the problem may be overcome by broader rules of change of position.

86 *South Tyneside Metropolitan Borough Council* v *Svenska International plc*, *supra*, note 35.

87 *The Commonwealth* v *Verwayen* (1990) 170 CLR 394, 409, *per* Mason CJ.

88 *Ibid*, at 412, *per* Mason CJ.

not very enthusiastically, that the common law evidential rule was applicable, but a recent High Court judge had, in view of the existence of the change of position defence, in an *obiter dictum*, expressed his attraction to the view that estoppel should operate *pro tanto*.[90] Suggestions made in earlier English decisions that the court may have the jurisdiction in exceptional circumstances to extract an undertaking from the recipient to return the unconsumed balance[91] run up against the same doctrinal problem: whilst it is possible to demand that he who comes to equity does equity, in the traditional learning one cannot demand the same of those who invoke the common law. When the time comes for a decision, it is hoped that some attention will be paid to the learning of Deane J and Mason CJ in the Australian High Court decision of *The Commonwealth* v *Verwayen*,[92] in the related context of promissory estoppel. The two learned judges expressed in slightly different ways the central idea that estoppel is a doctrine comprising substantive principles that transcends the divide between law and equity, and that there must be proportionality between the remedy sought and the detriment suffered.[93]

B. *The Role of Reliance?*

The Court in *Seagate Technology* took the English lead in not emphasising the element of reliance, in contrast to the Australian, Canadian and New Zealand attitude. This means that the defence by Singapore law may not require detrimental reliance, at least in exceptional circumstances. For example, if the money received by the payee is stolen by a third party, there has been no detrimental reliance but the change of position defence may still succeed.[94] If the true basis of the change of position defence is to protect security of receipt, then it seems that the risk of such events should properly fall on the plaintiff. However, the exception, if it exists, is probably confined to acts of nature or acts of third party that are reasonably beyond the control of the defendant.[95] To extend it any further will probably lead to too much discretion and uncertainty.

89 [1983] 1 WLR 605.

90 *South Tyneside Metropolitan Borough Council* v *Svenska International plc*, *supra*, note 35, at 567-568.

91 See *Avon County Council* v *Howlett*, *supra*, note 89, *per* Slade and Everleigh LJJ; *RE Jones Ltd* v *Waring & Gillow Ltd* [1926] AC 670, *per* Viscount Cave LC.

92 *Supra*, note 87.

93 *Supra*, note 87, at 412-413, *per* Mason CJ, at 442, *per* Deane J.

94 Goff & Jones, *supra*, note 21, at 741. See also *South Tyneside Metropolitan Borough Council* v *Svenska International plc*, *supra*, note 35, at 563-564. *Contra* Birks, *supra*, note 40, at 141-143.

95 It is recognised that the word "reasonably" here can cause difficulties, but they must be confronted so long as the exception exists. Where the disappearance of enrichment is caused

C. *Whither the Wrongdoer?*

In discussing the forfeiture of the change of position defence, the emphasis of the court was on the knowledge of the payee of the circumstances entitling the payor to restitution, and not on whether the payee is a "wrongdoer" as such. This emphasis will hopefully clarify one of the doubtful areas in the operation of the change of position defence. A defendant may have committed a tort of conversion against the plaintiff's property, and is therefore a "wrongdoer" liable in restitution for wrong or "waiver of tort", but his *bona fides* may still be unquestionable, because conversion is a strict liability tort.[96] One can hopefully reach the result that such defendants are not denied the benefit of the defence when the plaintiff decides to waive the tort.[97] Indeed, the defence is available to an agent who commits conversion but pays over the benefit to his principal.[98] Although the agency cases are said to have their own special rules,[99] this is one rule that ought sensibly to be shared with the general defence of change position for non-intermediaries.

D. *Objectivity in Honesty?*

In *Seagate Technology*, the standard of improbity accepted appears to be a subjective test.[100] Even if the behaviour of the defendant had fallen below the standards of the reasonable person, he is still entitled to rely on the change of position defence so long as he is an honest man. In contrast, at least in knowing receipt cases, there is some room for objectivity. In *Cowan de Groot Properties Ltd* v *Eagle Trust Plc*, Knox J, although deciding that dishonesty was requisite for liability, nevertheless said that the court would be prepared to *impute* the necessary knowledge in cases where the defendant had been guilty of "commercially unacceptable conduct in the particular context involved."[101] In these cases, it is likely that the court can also *infer* the necessary knowledge to satisfy the subjective test as well,[102] so that an objective gloss may also be applied to the question of knowledge in the change of position defence as well.

by the act or default of the recipient, see, *supra*, main text following note 61.

96 See Yeo, *supra*, note 2, at 148.

97 *Contra* §142(3)(a) and Illustration *d* of the American Restatement, *supra*, note 27, where even strict liability torts bar the change of position defence. It is submitted that the position adopted in the Restatement is too extreme. See also *supra*, note 27.

98 *Bintai Kindenko Private Ltd* v *The Sanwa Bank Ltd* [1994] 3 SLR 459.

99 *Supra*, note 25.

100 *Supra*, note 1, at 30.

101 [1992] 4 All ER 700, 761.

102 In the passage from *Agip (Africa) Ltd* v *Jackson*, *supra*, note 13, at 293, that was cited

E. *Wider Application of Improbity Standard?*

In adopting Millet J's analysis in *Agip (Africa) Ltd* v *Jackson*,[103] it may appear that the Court has accepted, albeit by way of *obiter*, improbity as the standard of liability for knowing assistance cases. Generally, this position has the support of academics,[104] but the authorities are not unanimous, although the recent ones incline towards this standard.[105] Further, from the Court's approach in using the knowing assistance analogy for change of position on the ground that "the true distinction is between honesty and dishonesty",[106] it can be inferred that the test of honesty may be of wider application,[107] bearing in mind that different circumstances may call for different standards of conduct, presumably owing to the need to protect the conduct of commerce.[108] Hence it is arguable that the same distinction be drawn for the *bona fide* purchaser defence in equity (apart from land transactions).[109] The corresponding common law defence already draws the line there.[110] However, it does not necessarily follow that should a question of knowing receipt arise before the Court, the same standard of improbity will be used as a standard of liability. In such cases, as suggested above, issues of security of receipt are more sensitively handled at the defence stage.

F. *Restitution for No Consideration?*

There is *obiter* support in the judgment for the restitutionary cause of action based on the absence of consideration.[111] It suffices to say that in the light of the severe academic criticisms levelled against this new basis of liability,[112] it should be subject to a judicious scrutiny before it is adopted as a general ground of restitutionary liability.

with approval by the Court of Appeal in *Seagate Technology*, *supra*, note 1, at 30, Millet J held that it was essentially a jury question (*ie*, a matter of inference of fact) whether a person has the necessary knowledge to support a finding of dishonesty.

[103] *Supra*, note 13.

[104] See, *eg*, Birks, *supra*, note 29, at 223; Norman, "Knowing assistance – a plea for help" (1992) 12 LS 332.

[105] See Birks, *supra*, note 29, at 223-224.

[106] *Supra*, note 1, at 30.

[107] See, *eg*, *Cheong Kim Hock* v *Lin Securities (Pte) (in liquidation)* [1992] 2 SLR 349 where the Court of Appeal applied a similar test in determining whether the defendant is affected by the undue influence of a third party.

[108] On which, see, *eg*, *Manchester Trust* v *Furness* [1895] 2 QB 579; *London Joint Stock Bank* v *Simmons* [1892] AC 201.

[109] *Polly Peck International* v *Asil Nadir and Ors* [1992] 2 Lloyd's Rep 238, read with the cases on knowing receipt. See Yeo, *supra*, note 29, at 486-489.

[110] Goff & Jones, *supra*, note 21, at 761. See also Yeo, *supra*, note 29, at 483.

[111] *Supra*, note 1, at 26. See also the cases cited in *supra*, note 35.

V. Conclusion

The recognition of the change of position defence is the first significant step towards a rational development of the law of restitution. To that extent, *Seagate Technology* marks a milestone for Singapore law. But it is only the first of many, because to be an effective defence its content and operation must, but has yet to, be worked out clearly. In working out the details of the defence, one is invariably drawn into questions of the divisions in the law of obligations and the rift between law and equity.

It is in principle correct that a recipient of funds should be disentitled from relying on the change of position defence upon proof of dishonesty. Apart from such cases, there is no reason not to focus only on the surviving enrichment. This prevents an overlap with compensatory policies. Compensatory policies are not unimportant, but it has been suggested that they are better handled on their own terms rather than within the framework of restitutionary liability. This posture of the law also means that the change of position defence can never be a defence in cases of personal liability for knowing receipt of trust funds, so long as the liability threshold is held at the level of dishonesty. This is not a problem in itself but it is symptomatic of the difficulties surrounding the basis of the equitable cause of action itself. It has been argued that there is room for restitutionary policies to operate in such cases.

Important judicial decisions are still awaited with respect to the operation of compensatory policies in the restitutionary defences. Clear policy directions have been set in New Zealand, where compensation will be considered. New Zealand's legal system is arguably the most advanced in all the jurisdictions considered in terms of the integration of law and equity and rights and remedies, and indeed in terms of substantive legal principles.[113] Her view of the change of the position defence is probably consistent with this basic philosophy.[114] Outside of this framework, the conflation of restitutionary and compensatory principles may not be so acceptable. In England, and Australia, first instance courts have been less enthusiastic about integration. It remains for Singapore to make its position clear. It has been suggested that *Seagate Technology* has not made an unequivocal stand on this issue, and the question therefore persists. It has also been submitted that it is better to keep compensatory and restitutionary principles apart, not only for the sake of conceptual clarity, but also to facilitate a more rational development of the law.

[112] Birks, "No Consideration: Restitution after Void Contracts" (1993) 23 UWALR 195; Swadling, "Restitution for No Consideration" [1994] RLR 73; Burrows, "Restitution of Payments made Under Swap Transactions" (1993) 143 NLJ 480; Ho "Beyond Restitution and into Public Law" [1993] SJLS 582.

[113] One evidence of this is the emergence of the doctrine of "reasonable expectations".

Many other facets of the change of position defence are still not totally clear. This is hardly surprising given that the House of Lords only gave its nod of approval to such a defence in 1991. One particular aspect that demands attention is its relationship to the defence of estoppel. This problem has cast a shadow on the unhappy co-existence of legal and equitable doctrines of estoppel.[115] Some rationalisation is probably necessary, and hopefully when the courts confront that problem more light will be shed on the shared principles of law and equity.

YEO TIONG MIN*

Postscript

After returning the proof of this article, the writer was alerted to the Privy Council decision in *Royal Brunei Airlines Sdn Bhd* v *Tan Kok Ming Philip* (24 May 1995, Brunei), which decided that accessorial liability or "knowing assistance" is dependent only on the dishonesty of the accessory and independent of whether the breach of trust or fiduciary obligation was fraudulent or innocent. It is not possible to do justice to the case in this short postscript, but it suffices for present purposes to point out that the Privy Council accepted that accessorial liability rested on a different basis from "knowing receipt" cases, the latter of which is restitution-based, and that it was wrong to impose a duty of care apart from honesty on a third party to a trust to prevent losses to the trust.

[114] See *supra*, note 73.

[115] Though not the first – see, *eg*, in the context of promissory estoppel: Priestley, "Estoppel: Liability and Remedy?" in Waters, ed, *Equity, Fiduciaries and Trusts 1993* (1993).

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