

RESTITUTION FOR VICTIMS OF FRAUD

*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd*¹

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I. INTRODUCTION

The Court of Appeal decision in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* raised many issues of law, including those of agency, banking, tort and restitution. This note will focus on the restitutionary issues. The Court of Appeal was put in a tough spot of having to balance the justice between two victims of fraud and this may have resulted in a decision that puts the law of unjust enrichment in a difficult position.

A. Background Facts

As the Court of Appeal has aptly described, the two appeals “tell a cautionary tale”² of two international banks which, in their keen desire to enter into a banking relationship with a prominent local blue-chip company, merely relied on representations of the said local company’s finance manager for the grant of credit facilities, and later found themselves victims of an extensive fraud orchestrated by the finance manager for a period of more than four years. The local blue-chip company is Asia Pacific Breweries (Singapore) Pte Ltd (“APBS”), a respondent in both appeals and a victim of the same fraud. Its finance manager, Chia, is the second respondent in one of the appeals.

The restitutionary claim was brought by one of the international banks, Skandinaviska Enskilda Banken AB (Publ) Singapore Branch (“SEB”) in the suit of CA 121/2009, alleging that APBS was liable to make restitution to SEB of the sum of approximately S\$29.5 million. The material facts in relation to this claim are as follows. Chia employed a ‘round-tripping’ scheme to defraud both SEB and APBS.

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¹ [2011] SGCA 22 [APBS]

² APBS, *supra* note 1 at para. 1.

The accounts with SEB were in APBS' name, with Chia being the sole signatory, but these accounts were not recorded in APBS' financials. When moneys owing to SEB under the credit facilities were due and payable, Chia would transfer funds in a genuine APBS account ("APBS Account") into the S\$ account with SEB ("SEB Account"), while explaining internally to his subordinate that APBS' funds had been transferred to an account with another bank (which was in fact a fictitious bank account) to take advantage of a higher interest rate.

Between December 2000 and October 2002, Chia transferred S\$45 million from the APBS Account into the SEB Account. In the same period, he also transferred approximately S\$45.3 million from the SEB Account into the APBS Account. A portion of APBS' S\$45 million was used to repay drawings from a credit facility extended by SEB and the said drawings from the facility constituted part of the S\$45.3 million paid into the APBS Account. An outstanding balance of approximately S\$29.5 million remained unpaid under the facility. SEB claimed that it had paid S\$29.5 million (as part of the S\$45.3 million) into the APBS Account under a mistake of law as to the validity of the contracts between SEB and APBS.

APBS denied liability to repay the S\$29.5 million and further argued both the defence of anticipatory change of position and the defence of extraordinary change of position in answer to SEB's restitutionary claim. APBS' argument, based on change of position, was that it believed the incoming funds (S\$45.3 million) represented the matured fixed deposits, because it had paid out S\$45 million in anticipation that it would be getting the same amount of money on maturity. APBS spent S\$45 million (of the \$45.3 million received) on payment of dividends, excise duties, rebates and debts and the parties could not be reversed to their original positions due to the involvement of other banks. It also mounted a counterclaim in unjust enrichment against SEB for the entire sum of S\$45 million transferred to the SEB account, but it would only pursue the counterclaim if SEB succeeded in its restitutionary claim.

B. *Proceedings Before the High Court*

To appreciate the issues on appeal to the Court of Appeal, it is important to consider the conclusions reached in the first instance. In the High Court, before Belinda Ang J., the legal issues of contention related to (a) enrichment; (b) unjust factor; and (c) the defence of change of position.³

1. *Enrichment*

Ang J. held that APBS was not *enriched* to the extent of S\$ 29.5 million because the 'adoption of benefit' principle, which was relied on by SEB to establish enrichment, did not apply in this case. The 'adoption of benefit' principle essentially provides that a lender who lent money to an agent purporting to borrow on behalf of his principal and who believed that the agent acted with authority (although that is not the case

³ *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 S.L.R.(R.) 788 at paras. 248-348 (H.C.) [APBS (HC)].

in fact) is, in equity, in the same position as if the money had been borrowed by the principal if the loan moneys had been used to discharge the principal's liabilities.⁴ Ang J. found that the funds were used to discharge Chia's liability to APBS, which arose from his misappropriation of APBS' moneys from the APBS Account, instead of being used to discharge APBS' liabilities. Ang J. therefore found that the principle was not engaged.⁵ Ang J., however, concluded that APBS had been enriched by the receipt of S\$347,671.23, that being the difference between the sum transferred from the SEB Account to the APBS Account and the sum transferred from the APBS Account to the SEB Account.

Further, Ang J. rejected the 'running account' method of quantifying the enrichment, which is applied in the English interest rate swap cases on the basis that claims by victims of fraud are not the same as cross-restitutionary claims arising from an invalid contract.⁶ This method of quantification, if applied, would have given the same numerical result.

2. *Unjust Factor*

Ang J. held that there was no operative mistake on the facts because SEB, by failing to carry out its own due diligence to verify Chia's authority, had voluntarily undertaken the risk of fraud and should thus bear the ensuing consequences.⁷ She was of the further view that even if an operative mistake was shown, recovery would be denied because SEB's payment to APBS had discharged Chia's liability to the extent of S\$45 million.⁸ The enrichment of S\$347,671.23 could however be recovered on the ground of total failure of consideration.⁹

3. *Defence of Change of Position*

Finally, Ang J. held that APBS failed in establishing a defence of change of position on the facts.¹⁰ An anticipatory of change of position was not made out because it was not sufficiently shown that APBS had paid money to SEB in "clear expectation of an imminent payment in" from SEB.¹¹ An extraordinary change of position was also not made out because APBS was unable to demonstrate that its expenditure would not have occurred but for the receipt of the said S\$45.3 million.

C. *The Court of Appeal's Decision*

The Court of Appeal reversed Ang J.'s conclusions on enrichment and unjust factor, but upheld her conclusions on the defence of change of position. Notwithstanding the reversal of results on the aforesaid legal issues, the Court of Appeal reached the

⁴ *Bannatyne v. D. & C. MacIver* [1906] 1 K.B. 103 (C.A.); *Reid v. Rigby & Co* [1894] 2 Q.B. 40.

⁵ *APBS* (HC), *supra* note 3 at paras. 269, 275 and 282.

⁶ *APBS* (HC), *supra* note 3 at para. 301.

⁷ *APBS* (HC), *supra* note 3 at para. 287.

⁸ *Ibid.*

⁹ *APBS* (HC), *supra* note 3 at para. 291.

¹⁰ *APBS* (HC), *supra* note 3 at paras. 322-330.

¹¹ *APBS* (HC), *supra* note 3 at para. 322.

same result that APBS was only liable to make restitution of S\$347,671.23 to SEB, which is really a modest sum compared to the quantum of the claim of \$29.5 million. The judgment was delivered by Chan Sek Keong C.J. and the gist of his decision is summarised below.

1. *Enrichment*

On enrichment, there are two issues that were raised on appeal. The first issue was whether the S\$45.3 million paid into the APBS Account discharged Chia's liability and the second issue concerned the applicability of the 'adoption of benefit' principle in the case. On the first issue, the Court of Appeal agreed that the payment was for the discharge of Chia's liability because his intention was to replenish the APBS Account so as to continue with his 'round-tripping' scheme.¹² Chia's intention is key to determining the purpose of the payment.¹³

Further, the Court of Appeal was of the view that APBS did not adopt the benefit of S\$45 million out of the S\$45.3 million paid into the APBS Account and as such, it did not adopt the benefit of S\$29.5 million as claimed by SEB. The Court of Appeal distinguished the case at hand from the case law on 'adoption of benefit' on the basis that those cases did not involve *cross-payments* between two parties who were both victims of fraud¹⁴ and opined that the test applied by the courts in those cases was "whether the defendant would [have been] left worse off if it [had been] ordered to make restitution of the alleged benefit received".¹⁵ If APBS was required to make restitution of the S\$29.5 million, it would be left worse off. APBS could not be said to be enriched by the S\$45 million (out of the S\$45.3 million) from SEB because the payment was stolen from SEB to replenish the same amount stolen from APBS earlier, akin to the case of a thief stealing from two parties and using one party's money to repay the other party so as to cover his tracks.¹⁶

2. *Quantification of Enrichment*

The Court of Appeal, disagreeing with Ang J., held that the 'running account' method was appropriate for determining the quantum of enrichment and pointed out that Ang J. had only quoted a portion of Birks' discussion in Peter Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2005).¹⁷ The Court of Appeal opined that no distinction should be drawn between interest rate swap cases and cases of fraud, as both involve parties with potential restitutionary claims against the other for cross-payments made. As such, the claims should be tied together and restitution should be allowed, subject to pecuniary counter-restitution to achieve restitution of the difference.

¹² *APBS*, *supra* note 1 at para. 118.

¹³ *APBS* (HC), *supra* note 3 at para. 119.

¹⁴ *APBS* (HC), *supra* note 3 at para. 121.

¹⁵ *Ibid.*

¹⁶ *APBS* (HC), *supra* note 3 at paras. 121 and 122.

¹⁷ *APBS*, *supra* note 1 at paras. 126-129.

3. *Unjust Factor*

The Court of Appeal disagreed with Ang J. only in relation to her judgment on causative mistake, but not in relation to her conclusions on the applicability of the total failure of consideration doctrine to the sum of S\$347,671.23.¹⁸ The Court of Appeal held that the SEB's carelessness and imprudence did not amount to a voluntary assumption of the risk that the documents, which Chia tendered to prove his authority, were forged.¹⁹ As such, there was an operative mistake on the facts.

4. *Defence of Change of Position*

The Court of Appeal also rejected APBS' pleas of the defence of extraordinary change of position and the defence of anticipatory change of position. In respect of the former, the Court of Appeal held that the causal link could not be established, as APBS was at all material times unaware of Chia's 'round-tripping' of funds and as such, it could not have "consciously or deliberately" spent the money following the receipt of S\$45.3 million.²⁰

On the defence of anticipatory change of position, the Court of Appeal overruled Ang J.'s ruling that the expectation of an *imminent* payment is a requirement for the operation of the defence. However, the Court of Appeal concluded that the defence failed for two other reasons.²¹ First, the Court of Appeal was not satisfied that the co-signatories had authorised the transfer of S\$45 million from the APBS account in anticipation of repayment with interest because they, being accustomed to signing cheques to withdraw funds, signed the cheques as a matter of course. Second, the Court of Appeal held that the defence only applied if the defendant suffered a detriment, but that in this case, the cheques were signed with the belief that its position would change for the better.

The discussion below will reflect on the reasoning of both the High Court and the Court of Appeal, focusing on the latter in four areas: (1) the element of 'at the expense of'; (2) quantification of enrichment; (3) the unjust factor of total failure of consideration; and (4) the defence of change of position.

II. FOUR REFLECTIONS

A. *'At the Expense of'—Concession on a Point of Law*

It is noteworthy that the entire claim could have been easily resolved on the basis that the common law cannot trace through mixed funds because the identity of the funds would be lost upon mixing.²² The issue of tracing is relevant to establishing that APBS was enriched *at the expense* of SEB, an element to be proved for a successful

¹⁸ APBS, *supra* note 1 at para. 135.

¹⁹ APBS, *supra* note 1 at para. 140.

²⁰ APBS, *supra* note 1 at paras. 145-147.

²¹ APBS, *supra* note 1 at paras. 143-144.

²² *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch. 265 at 285, *per* Millet J. In Singapore, there is suggestion that the rules of tracing at common law and in equity are not fused: see *O'Connor Rosamund Monica v. Potter Derek John* [2011] SGHC 53 at para. 47, *per* Lai Siu Chiu J.

claim in unjust enrichment. On the facts of the case, the SEB Account was a mixed fund account into which loans from SEB (and other banks) and cheques drawn on the APBS Account were paid. As such, the claim would have failed. However, the parties did not make submissions on this issue and Ang J., despite having spotted the issue, took the view that “it [was] not for the court to concern itself with [the issue]”.²³

This is reminiscent of the English case of *Lipkin Gorman v. Karpnale Ltd*²⁴, in which the defendant conceded that the mixing of funds did not defeat the plaintiff’s title to the money.²⁵ Without the concession, the restitutionary claim would have failed. In *APBS* (HC), the parties might be treated as having impliedly conceded on the same point or they might have simply overlooked the significance of the issue of tracing. But the parties should not be permitted to concede on points of law and if they have overlooked an important issue of law, the presiding judge should invite the parties to make submissions on the point. As Virgo rightly pointed out, “[j]udges, especially in appellate courts, do not just decide the case before them; they clarify and rationalise the law for the benefit of those who do not or cannot go to court”.²⁶

This issue became water under the bridge for the appeals to the Court of Appeal. But the point made here is that had the High Court invited parties’ submissions on the issue and given the issue proper consideration, the case can be resolved very simply with the court arriving at exactly the same practical result, instead of having to go down the more difficult path.

B. ‘Running Account’ Method—Defence of Counter-Restitution or Quantification?

The issue of whether the ‘running account’ method of quantifying the enrichment is appropriate for the case at hand merits some further consideration. The so-called ‘running account’ method of quantification referred to by the High Court and the Court of Appeal is the effect achieved by the defence of counter-restitution. The burden of proving a defence lies with the defendant, although the successful invocation of a defence may certainly affect the quantum of the award. The discussions of the ‘running account’ method of quantification in the High Court as well as the Court of Appeal appear to suggest that it is purely a matter of valuation, which would put the burden on the plaintiff, although the courts did not explicitly address the issue of burden of proof.

More fundamentally, the defence of counter-restitution does not apply in a case involving cross-payments between victims of the same fraudster. The rationale of the defence is premised on an *exchange of benefits*, as described by Birks in the following terms:

The search for that separate rationale begins with the observation that where there has been an exchange it must be true that, if one side recovers the value which

²³ *APBS* (HC), *supra* note 3 at paras. 262-264.

²⁴ [1991] 2 A.C. 548 (H.L.).

²⁵ *Ibid.* at paras. 372-373.

²⁶ Graham Virgo, “The Law of Unjust Enrichment in the House of Lords: Judging the Judges” in James Lee, ed., *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford: Hart Publishing, 2010) 173.

he has transferred, the basis of his own receipt of the exchange-benefit must also have failed... I give you gold in exchange of money. The contract is invalid. The basis of my receipt of the money fails. You can claim restitution. But, necessarily, the basis of your receipt of the gold also fails.²⁷

Burrows made the point even clearer by highlighting that the situations in which the defence applies and the underlying rationale behind the principle:

Where a contract is rescinded for, for example, duress, undue influence, or misrepresentation, the claimant's entitlement to restitution is subject to the claimant making 'counter-restitution' to the defendant for the benefits the claimant has received from the defendant. Similarly, where restitution of money has been awarded under a void contract, there has been an insistence that the claimant gives counter-restitution of the money it has received from the defendant.

...

The requirement of counter-restitution appears to be an unjust-related defence which rests on recognizing that the defendant has a counterclaim for the claimant's unjust enrichment at the defendant's expense grounded most obviously on total failure of consideration. That is, the basis upon which the defendant rendered benefits to the claimant has been removed by the rescission and consequent restitution for the claimant or, in a void contract, by the restitution of money paid by the claimant to the defendant. On this approach, to treat counter-restitution as a defence may therefore be doing nothing more than applying the general law that a counterclaim may operate as a set-off defence.²⁸

Put simply, in the case of an invalid contract, A's conferral of benefit is in exchange for B's conferral of benefit and *vice versa* and as such, if A could succeed in a claim of restitution against B for the benefit conferred, B must necessarily succeed in a claim of restitution for the benefit it conferred on A. The defence of counter-restitution simplifies the process and achieves a set-off. The situation of cross-payments between victims of the same fraudster is not analogous to the case of parties to an invalid contract because in the former case, the cross-payments are not made on an exchange basis. Although victims of the same misfortune, the parties' claims are independent and do not rest on a shared basis. Factual commonality does not translate to the same legal analysis.

The proper analysis should have been that each party has a claim in unjust enrichment against the other, subject to any right of set-off that may arise.²⁹ Under Singapore law, three types of set-off are recognised: (a) legal set-off; (b) abatement; and (c) equitable set-off.³⁰ In particular, a legal set-off, which requires that the cross-claims are mutual and capable of being liquidated or readily ascertained at the time of pleading, is likely to apply in the circumstances of this case. An equitable

²⁷ Peter Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2005) at 225.

²⁸ Andrew Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2010) [Andrew Burrows] at 569.

²⁹ Rules of Court (Cap. 332, 2006 Rev. Ed. Sing.) [2006 Rules], O. 18 r. 17. The defence of set-off must be specifically pleaded: see 2006 Rules, O.18 r. 8(1).

³⁰ *Hua Khian Ceramics Tiles Supplies Pte Ltd v. Torie Construction Pte Ltd* [1991] 2 S.L.R.(R.) 901 at para. 9 (H.C.).

set-off may also arise on the facts of this case, although there is no direct authority on the point.³¹ The precise formulation of the test for equitable set-off is somewhat controversial,³² but in Singapore, the courts have generally adopted the language suggesting the requirement of a close relationship or connection between the two cross-claims, where it would be inequitable not to allow a set-off.³³ Whether there is sufficient proximity between the claims depends on whether “it would offend one’s sense of fairness or justice to allow one claim to be enforced without regard to the other”.³⁴ It is arguable that the cross-claims are closely connected as they arose from the same fraudulent scheme perpetuated by Chia, and therefore it would be unfair and unjust not to permit a set-off.

C. Unjust Factor—Total Failure of Consideration

As the Court of Appeal in *Ooi Ching Ling v. Just Gems Inc*³⁵ put it, “[f]ailure of consideration occurs when one party has not enjoyed the benefit of any part of what it bargained for”.³⁶ Consideration is to be understood as a basis, a purpose or a contemplated state of affairs.³⁷ Regarding the recovery of S\$347,671.23 in restitution on the ground of total failure of consideration, the Court of Appeal interpreted Ang J.’s decision as resting on the basis that “APBS had not provided any consideration for its receipt of S\$347,671.23”.³⁸ The Court of Appeal could do with some elaboration here; otherwise, its very brief comments may lend itself to the interpretation that total failure of consideration means total failure of *contractual consideration*, which is incorrect.

At the High Court, Ang J.’s decision seems to have been based on the fact that APBS had no reason or basis to retain the sum of S\$347,671.23 because it was paid into the APBS Account “to give the appearance of interest on deposit when in fact there was no such deposit”.³⁹ This is mildly reminiscent of Birks’ ‘absence of basis’ approach⁴⁰ or the Canadian ‘juristic reasons’ approach⁴¹ to the ‘unjust’ inquiry which is focused on the defendant’s reasons for the retention of the benefit.⁴²

³¹ The cases concerning a fraudulent claim on a contract may provide useful guidance; see discussion in Rory Derham, *Derham on the Law of Set-off*, 4th ed. (Oxford: Oxford University Press, 2010) [*Rory Derham*] at 143.

³² *Ibid.* at 79-93.

³³ See *Abdul Salam Asanaru Pillai v. Nomanbhoy & Sons Pte Ltd* [2007] 2 S.L.R.(R.) 856 at para. 26 (C.A.) [*Abdul Salam*]; *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v. Motorola Electronics Pte Ltd* [2011] 2 S.L.R. 63 at para. 40 (C.A.); and *United Overseas Bank Ltd v. Tru-Line Beauty Consultants Pte Ltd* [2011] 2 S.L.R. 590 at para. 43 (H.C.). Cf. *Pacific Rim Investments Pte Ltd v. Lam Seng Tiong* [1995] 2 S.L.R.(R) 643 at para. 27 (C.A.): in this case, the Court of Appeal adopted the traditional formulation of impeachment of the plaintiff’s title as the basis for an equitable set-off to arise.

³⁴ *Abdul Salam, ibid.* at para. 28.

³⁵ [2003] 1 S.L.R.(R.) 14 (C.A.) [*Ooi Ching Ling*].

³⁶ *Ibid.* at para. 43.

³⁷ *Roxborough v. Rothmans of Pall Mall Australia Ltd* (2001), 185 A.L.R. 335 at 340 (*per* Gleeson C.J., Gaudron J. and Hayne J.) and 365 (*per* Gummow J.) (H.C.A.) [*Roxborough*].

³⁸ *APBS, supra* note 1 at para. 135.

³⁹ *APBS* (HC), *supra* note 3 at para. 291.

⁴⁰ Peter Birks, *supra* note 27 at 129.

⁴¹ *Garland v. Enbridge Gas Distribution Inc.* [2004] 1 S.C.R. 629.

⁴² Peter Birks, *supra* note 27 at 129.

England and Australia still apply the traditional ‘unjust factors’ approach, although some instability in the law has been noted in both jurisdictions.⁴³

An ‘unjust factors’ approach is concerned with the reasons entitling the plaintiff to restitution. Specifically, for total failure of consideration, the plaintiff is entitled to restitution because the defendant has been enriched as a result of the plaintiff’s *qualified intention*.⁴⁴ As such, if Ang J. was applying total failure of consideration as an unjust factor, she should have examined the basis upon which SEB had allowed the payment of S\$45.3 million into the APBS account, instead of APBS’ mistaken assumption of the state of affairs. Clearly, SEB had transferred the money in the erroneous belief that there was a valid contract in place, but a void contract does not automatically lead to a total failure of consideration because the unjust factor is concerned with the failure of performance and not the invalidity of the promise.⁴⁵

Given that some moneys from the S\$45 million transferred from the APBS Account into the SEB Account were applied for the repayment of moneys due under the credit facility, there is still the issue of whether there was a *total* failure of consideration, which is required under Singapore law.⁴⁶ It is noteworthy that this requirement has been subject to considerable objections from various commentators.⁴⁷ It could have been an opportunity for the Court of Appeal to reconsider the rationality of this requirement, and thus whether to abandon it or to recognise exceptions to it. In particular, SEB could rely on the Privy Council decision in *Goss v Chilcott*.⁴⁸ In that case, restitution of the loan moneys was allowed, notwithstanding that two repayments of interest had been made. In Lord Goff’s view, even if the capital sum had been partially repaid, restitution could still be allowed, as long as apportionment can be carried out without difficulty.⁴⁹

D. Defence of Change of Position

Regarding the two different species of change of position discussed in APBS, it should be noted that they are usually labelled as ‘anticipatory change of position’ and ‘subsequent change of position’. The words ‘anticipatory’ and ‘subsequent’

⁴³ In England, the ‘absence of basis/juristic reasons’ approach has not been definitively affirmed by the House of Lords in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue Commissioners* [2007] 1 A.C. 558 (H.L.) [*Deutsche Morgan*], but the door is not fully closed: see *Deutsche Morgan* at para. 21 (*per* Lord Hoffmann) and paras. 152-158 (*per* Lord Walker of Gestinghope). In Australia, the High Court of Australia affirmed the ‘unjust factors’ approach: see *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992), 175 C.L.R. 353 at 379 (H.C.A.) [*David Securities*]; *Farah Construction Pty Ltd v. Say Dee Pty Ltd* (2007), 230 C.L.R. 89 at para. 150 (H.C.A.). However, there are judicial statements that appear to support the ‘absence of basis/juristic reasons’ approach; see: *David Securities* at 392 (*per* Brennan J. (dissenting)); *CSR Ltd v. Hornsby Shire Council* [2004] N.S.W.S.C. 946 at para. 14 (*per* Gzell J.). Also see the commentary in James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Australia: Oxford University Press, 2006) at 151-158.

⁴⁴ James Edelman and Simone Degeling, “What is an Unjust Factor?” in Simone Degeling and James Edelman, eds., *Unjust Enrichment in Commercial Law* (Sydney: Thomson Reuters Australia, 2008) 183.

⁴⁵ Andrew Burrows, *supra* note 28 at 385-387.

⁴⁶ *Ooi Ching Ling*, *supra* note 35 at para. 44. See *Roxborough*, *supra* note 37.

⁴⁷ For example, see Andrew Burrows, *supra* note 28 at 330-334 and Felicity Maher, “A New Conception of Failure of Basis” [2004] R.L.R. 96 at 105-106.

⁴⁸ [1996] 3 W.L.R. 180 (P.C.).

⁴⁹ *Ibid.* at 798.

differentiate the two types of changes of position by reference to the timing of the change of position in relation to the receipt of the enrichment. Labels aside, the Court of Appeal's conclusions on the inapplicability of the defences on the facts are open to challenge.

1. *Subsequent Change of Position*

The Court of Appeal held that the defence failed because APBS, being unaware of Chia's fraudulent scheme of 'round-tripping' the funds between the bank accounts, would not have knowledge of the incoming transfer of S\$45.3 million into the APBS Account and as such, it could not have "consciously or deliberately" changed its position following its receipt of the sum.⁵⁰ In other words, the requisite causal link was not established. Clearly, the Court of Appeal did not attribute the knowledge of Chia in relation to the receipt of S\$45.3 million to APBS, notwithstanding that a company can only acquire knowledge and act through its agents.

The problem with this part of the Court of Appeal's reasoning concerns the principle of imputation of knowledge and the 'fraud exception' in the law of agency, which is admittedly a rather disordered territory of the law. To put in simple terms, the law may impute the knowledge of the agent to the principal but such knowledge is not imputed where it is acquired by an agent defrauding the principal in the same transaction.⁵¹

However, a distinction must be drawn between the context of consensual dealings (for example, a contract) and the context of imposition of liability for tort or restitution. This is clearly stated in *Bowstead & Reynolds on Agency*:

Further confusion has been created in this area by the repeated failure to differentiate cases concerned with the scope of contractual obligations, inter partes, from cases in a delictual or restitutionary context. It may well be appropriate in particular contractual contexts not to impute to a party the knowledge (or conduct) of a fraudulent agent, and indeed in some cases it may be inappropriate to impute knowledge even where the agent's conduct is not fraudulent, or if fraudulent the conduct does not involve a fraud being practised on the principal. Such cases are always context specific, and are strictly of no application outside the contractual context.⁵²

Watts has explained that the rationale of the distinction is based on how the obligations arise. Contractual dealings require consent of the principal and "people are not normally taken to have assented to something that is intended to harm them", but tortious or restitutionary liability can arise without consent and does not depend on the agent's intent to benefit the principal.⁵³

As such, Chia's knowledge of the incoming funds would be imputed to APBS, but because Chia's fraudulent intent would also be attributed to APBS, Chia's said

⁵⁰ *APBS*, *supra* note 1 at para. 140.

⁵¹ For details, see Peter Watts and Frances M.B. Reynolds, eds., *Bowstead & Reynolds on Agency*, 19th ed. (London: Sweet & Maxwell, 2010) at paras. 8-207- 8-213 [*Watts and Reynolds*].

⁵² *Ibid.* at para. 8-213.

⁵³ Peter Watts, "Agency, Forgery and the Land Register" (2008) 124 Law Q. Rev. 519 at 531. Also, see a more radical but well-reasoned view advanced by the same author in Peter Watts, "Imputed Knowledge in Agency Law—Excising the Fraud Exception" (2001) 117 Law Q. Rev. 300.

knowledge did not mean that APBS would succeed in the defence. As such, the requirement of good faith for the operation of the defence of change of position was not satisfied.

2. Anticipatory Change of Position

The Court of Appeal was right to reject the requirement of “clear expectation of an imminent payment”⁵⁴, as long as a causal link can be established between the change of position and the enrichment. Timing should not be of the essence. However, the grounds for rejecting the defence of anticipatory change of position need to be reconsidered. First, the Court of Appeal held that the co-signatories were “accustomed to signing cheques to withdraw money from the [APBS Account] for deposit with other banks; therefore, they would have signed the OCBC Cheques as a matter of course, and would have taken it for granted that the money deposited... would be returned with interest upon maturity”.⁵⁵ This evidence reinforces the fact that the co-signatories authorised the withdrawal on the basis that there would be interest earned. Why is this not an anticipation of the receipt of a benefit in due course?

Second, the Court of Appeal held that there was no resultant detriment, a key ingredient of the defence, because the co-signatories believed that APBS would change its position for the better, given that they were led to believe that the payment would be deposited with another bank to earn higher interest. But a mistaken assumption of the result of a change of position is not the same as the actual result of a change of position. The defence is concerned with the latter.

The defence of anticipatory change of position may, however, fail on two other bases. Given that Chia was one of the signatories authorising the withdrawal, there is a question as to whether his knowledge or dishonesty would be attributed to APBS, thereby disqualifying the plea of change of position for want of good faith. The situation regarding agents of a company is not straightforward and merits careful consideration. Another possible basis is that APBS did not actually receive the anticipated enrichment (interest), a key component for the working of the defence of anticipatory change of position.⁵⁶ As explained by Bant, without this requirement, the defence has the effect of “obliquely” enforcing a defendant’s expectations, instead of protecting his security of receipt.⁵⁷

III. CONCLUSION

In *APBS*, the Court of Appeal has the unenviable task of going down a difficult path of balancing justice between two victims of fraud. To make matters worse, the facts were complex and the restitutionary claim was complicated by issues of agency and fraud. But the Court of Appeal had come to the right result, which is a positive outcome for the victims of the fraud. However, it is hoped that the Court of Appeal may, in a suitable case in the future, revisit some of the points discussed in this note.

⁵⁴ *APBS*, *supra* note 1 at para. 145.

⁵⁵ *APBS*, *supra* note 1 at para. 143.

⁵⁶ *Dextra Bank & Trust Co Ltd v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193 at 204 (*per* Lord Goff).

⁵⁷ Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at 155-157.