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UNJUST ENRICHMENT AND RESTITUTION IN SINGAPORE: WHERE NOW AND WHERE NEXT?

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The law of unjust enrichment and restitution is rife with academic debate, and the intense controversy surrounding it poses much headache for the uninitiated. Furthermore, the current shape and continued development of the law of unjust enrichment is the product of an ongoing conversation between academic commentators and courts, adding to the complexity of the field. In the first part of this paper, we aim to induct newcomers to the field by setting out four of the main academic debates. We then assess the present position of Singapore law on these debates. In the second part, we evaluate the Court of Appeal's recent description of unjust enrichment as a common law strict liability cause of action which is claimant-sided and focuses on the claimant's loss in *Anna Wee*. We argue that this description is too blunt, and that these broad generalisations should not be interpreted as drawing any definitive conceptual boundaries that might unduly hamstring the future development of the law of unjust enrichment.

I. INTRODUCTION

> "Those who venture into the restitution thicket not infrequently become lost. It is part of our task to see that they are heard from again."[1]

The law of unjust enrichment and restitution is rife with academic debate, and the intense controversy surrounding it poses much headache for the uninitiated. With starkly contrasting views from numerous different camps, it is unsurprising that practitioners find it difficult to plead restitutionary claims without getting lost in the thicket of literature. The position in Singapore is aptly expressed by Phang J.A. in *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock*

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1 *Snider v. Dunn* 160 N.W. 2nd 619 at 628 (Court of Appeals of Michigan 1968) (Levin J.), cited in Andrew Burrows, "Understanding the Law of Restitution: A Map Through the Thicket" in Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart Publishing, 1998) 45.

Seng, deceased):[2]

> In our view, the law in this area is still in a state of *flux*. This is perhaps not surprising as the law of both restitution and unjust enrichment are relatively "young" doctrines. Although their development has now spanned several decades, this is but a drop in the proverbial legal ocean when viewed against the backdrop of the centuries during which time various doctrines at both common law as well as in equity have developed. However, the absence of a clear consensus is unhelpful, regardless of the reasons for such a situation. And the situation is exacerbated by the fact that the various controversies and difficulties have been canvassed, in the main, in academic writings which have hitherto been unhelpful when viewed from a more practical perspective.

This paper consists of two main parts. The current shape and continued development of the law of unjust enrichment is the product of an ongoing conversation between academic commentators and courts. In the first part, we aim to induct newcomers to the field by setting out several of the main academic debates. We then assess the position of Singapore law on these debates. The debates will be addressed in the following order: (i) the relationship between unconscionability and unjust enrichment; (ii) the relationship between unjust enrichment and restitution for wrongs; (iii) whether proprietary restitution is based on unjust enrichment or vindication of property rights; and (iv) whether unjust enrichment operates on an 'unjust factors' or 'absence of basis' approach. While these are not exhaustive of all the main academic debates, they are some of the most contentious debates in the law of restitution. Furthermore, local courts have also engaged with these debates, which justifies examining them in greater detail.

In the second part, we evaluate the Court of Appeal's recent description of unjust enrichment as a common law, strict liability cause of action which is claimant-sided and focuses on the claimant's loss.[3] We argue that this description is too blunt, and that these broad generalisations should not be interpreted as drawing any definitive conceptual boundaries that might unduly hamstring its future development on a case-by-case basis.

II. Unconscionability and Unjust Enrichment

In this first part, we examine the four main academic debates in the law of restitution. The first and least difficult of these debates is the relationship between unconscionability and unjust enrichment, each of which has been proposed as alternative doctrinal tests by which a defendant is liable to make restitution to a claimant. On the two sides of this debate are the High Court of Australia and the English commentators, and the English courts. A recent judicial pronouncement points to the Singapore courts deciding firmly in favour of the English position.

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[2] [2013] 3 S.L.R. 801 at para. 144 (C.A.) [*Anna Wee*].

[3] *Ibid.* at paras. 108-110, 137-139, 146. See also Part VI below.

A. *The State of the Debate*

One of the historical concerns which hampered the development of a distinct law of unjust enrichment was the concern that it would lead to 'palm tree justice', as judges would then have the discretion to order restitution simply where it was viewed 'unjust' not to do so.[4] Over time, the English courts have consciously and rightly distanced themselves from this, and "[judges] are now not free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man' ".[5]

The debate over the relationship between unconscionability and unjust enrichment arose out of several pronouncements of the High Court of Australia over the past two decades, each of which has displayed an extreme aversion towards recognising unjust enrichment as an independent test on which to found claims in restitution.[6] This scepticism appears to be motivated by a fear that recognising unjust enrichment as an independent doctrine would "distort well settled principles in other fields, including those respecting equitable doctrines and remedies".[7] Instead, there is a preference to use unconscionability as the legal test for claims in restitution—*i.e.* the test is whether there is "unconscientious retention by the defendant of the sum claimed by the plaintiff".[8] This relegates unjust enrichment to the level of an abstract theoretical "unifying legal concept"[9] which merely performs the function of explaining when restitution is triggered, hampering its development as a well-defined set of legal rules. The recent plurality judgment of the High Court of Australia in *Equuscorp Pty Ltd v. Haxton* suggests that there could be a retreat from this approach in Australia towards an approach more similar to that taken by English academics.[10] However, at present, it is too early to say that there has been a revival of unjust enrichment in Australia.[11]

English academics, in direct opposition, have favoured the use of unjust enrichment as a concrete doctrine on which claims in restitution can be directly founded. Unconscionable retention is instead kept in the background by academic

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[4] Other historical barriers include the existence of the forms of action and the implied contract theory: see 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, 2011) c. 9.

[5] *Baylis v. Bishop of London* [1913] 1 Ch. 127 at 140 (C.A.) (Hamilton L.J.).

[6] *Roxborough v. Rothmans of Pall Mall Australia Limited* (2001) 208 C.L.R. 516 (H.C.A.) [*Roxborough*]; *Farah Constructions Pty Limited v. Say-Dee Pty Limited* (2007) 230 C.L.R. 89 (H.C.A.) [*Farah Constructions*]; *Lumbers v. W Cook Builders Pty Ltd (In liquidation)* (2008) 232 C.L.R. 635 (H.C.A.); *Bofinger v. Kingsway Group Limited* (2009) 239 C.L.R. 269 (H.C.A.).

[7] *Roxborough*, *ibid.* at para. 74 (Gummow J.).

[8] *Ibid.* at para. 89, which interpreted the action for money had and received in *Moses v. Macferlan* (1760) 2 Burr 1005 (K.B.) as equitable in origin and based on unconscientious receipt, rather than unjust enrichment.

[9] *Roxborough*, *ibid. at* para. 70, relying on Deane J.'s pronouncement in *Pavey & Matthews Proprietary Limited v. Paul* (1987) 162 C.L.R. 221 at 256, 257 (H.C.A.).

[10] (2012) 246 C.L.R. 498 at paras. 29, 30 (H.C.A.) (French C.J., Crennan and Kiefel JJ.).

[11] As was suggested in Elise Bant, "Illegality and the Revival of Unjust Enrichment Law in Australia" (2012) 128 Law Q. Rev. 341. See also Andrew McLeod, "Mistaken Payments, Change of Position and Ministerial Receipt" (2013) 129 Law Q. Rev. 339 at 342, which similarly considers such a view premature.

commentators.[12] A leading commentator, Virgo, argues that reliance on the notion of unconscionable retention should not be favoured because it is "too uncertain to constitute a cause of action" or to operate as a unifying principle to "impose liability clearly and predictably".[13] Another leading commentator, Burrows, argues that focusing on unconscionability adds nothing to the inquiry, as it will always be unconscionable to retain an unjust enrichment received, subject to recognised defences.[14] The English courts have consistently emphasised that unjust enrichment is a doctrine composed of a well-established set of rules which demands systematic sequential inquiry. In English law, the four elements necessary to establish a claim in unjust enrichment are:

(i) The defendant must have been enriched;
(ii) The enrichment must have been at the expense of the claimant;
(iii) There must be a relevant unjust factor; and
(iv) There must be no available defences.

These four elements have been firmly and repeatedly affirmed by English courts[15] (although there still remains academic debate as to whether English law should adopt an 'absence of basis' or 'unjust factors' approach).[16] There is then a set of detailed sub-rules which determine whether each element has been established on the facts. For example, under the enrichment inquiry, there is a three-stage process. One must first ask whether a defendant has been objectively enriched. If so, one then asks whether the defendant can subjectively devalue it.[17] One must then look at whether the claimant can overcome subjective devaluation by, for example, showing incontrovertible benefit or free acceptance. Similarly, for the other three constituent elements of 'at the expense of', unjust factor and available defences, there is an equivalently systematic line of detailed inquiry which must be undertaken. These rules are developed on a case-by-case basis, as is consistent with common law methodology.

B. *The Position in Singapore*

In Singapore, the Court of Appeal in *Anna Wee* demonstrated clear agreement with the approach of English courts over that of the High Court of Australia. In a statement

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[12] Graham Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 56 [Virgo, *Principles of the Law of Restitution*]; Andrew Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 37 [Burrows, *The Law of Restitution*].

[13] Virgo, *Principles of the Law of Restitution*, *ibid.* at 55.

[14] Burrows, *The Law of Restitution*, *supra* note 12 at 37.

[15] *Banque Financière de la Cité v. Parc (Battersea) Ltd.* [1999] 1 A.C. 221 at 227 (H.L.) [*Banque Financiere*]; *Cressman v. Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47 at para. 22; *Chief Constable of the Greater Manchester Police v. Wigan Athletic AFC Ltd* [2007] EWCA Civ 1449 at paras. 38, 54, 62; *Rowe v. Vale of White Horse DC* [2003] EWHC 388 (Admin) at para. 11.

[16] See Part V below.

[17] But now see *Benedetti v. Sawiris* [2013] UKSC 50, where the majority (Lords Clarke, Kerr and Wilson) adopted this framework at paras. 15-25. Lord Reed disapproved of the concept of subjective devaluation, instead preferring an analysis of enrichment based on the defendant's choice of benefit: *ibid.* at para. 117, while Lord Neuberger expressed no view on which was correct: *ibid.* at para. 118.

which substantially echoed Virgo's thesis,[18] unconscionability was held to be "capable of different shades of meaning and... too uncertain to be applied as a doctrine or test".[19] It was recognised that "unconscionability is often used as an overarching *justification or rationale* undergirding the whole of equity"[20] and that it "does not operate as a free-standing doctrine but expresses the rationale which underpins the doctrine or test being applied."[21] Given the importance of this judgment for the future development of unjust enrichment in Singapore, it merits further quotation in full:[22]

> Given the myriad circumstances in which the concept of unconscionability is used to express the justification or conclusion of the tests and doctrines applied, we are unable to find that unconscionability can be used as a "catch-all" doctrine which grounds and determines the application of unjust enrichment. Unconscionability is, at best, an overarching rationale which attaches to equitable doctrines, including (where applicable) that of unjust enrichment (which, however, is a doctrine that is recognised in both common law and equity); however, the two are not equivalent. *Unjust enrichment has acquired its own shape through the development in the case law, and contains distinct elements which must be met before a claim in unjust enrichment can be established*.

The Singapore Court of Appeal has thus firmly rejected the High Court of Australia's scepticism, leaning in favour of a doctrinal, case-by-case development of the law of unjust enrichment. Thus, in this area, practitioners will find it more helpful to refer to English rather than Australian case law. If practitioners do consult Australian case law, they should be extremely careful in bearing in mind the distinction between the Australian and English approaches.

III. Unjust Enrichment and Restitution for Wrongs

The second issue is the relationship between unjust enrichment and restitution for wrongs. There has been a debate over whether each belongs to two separate categories, or whether they can both be put under one single category. In Singapore, the approach appears to be that unjust enrichment and restitution for wrongs are two separate categories.

A. *The State of the Debate*

The starting point for the debate is a taxonomical framework developed by Peter Birks. Birks, one of the founding fathers of the modern law of restitution and unjust enrichment, proposed three different views of the law of restitution, recanting from his previous view each time he adopted a new one. This debate concerns the first two of Birks' views.

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[18] On this point, the Court of Appeal in *Anna Wee*, *supra* note 2, explicitly cited Virgo with approval at para. 107.

[19] *Ibid.* at para. 100.

[20] *Ibid*. at para. 101.

[21] *Ibid*.

[22] *Ibid*. at para. 103 [emphasis removed and changed].

Category of Event / Response	**Consent**	**Wrongs**	**Unjust Enrichment**	**Other**
Compensation				
Restitution				
Punishment				
Other Goals				

Birks' taxonomy of the law of obligations[23]

Birks grouped the law of obligations between persons into a taxonomy of 'events' and 'responses'. Events trigger legal responses. He identified four categories of events: consent, wrongs, unjust enrichment, and 'others'. Examples of consent include contracts, while wrongs include torts and breaches of contracts. The legal responses to these events which Birks identified were compensation, restitution, punishment, and other goals. Initially, Birks argued that *only* the event of unjust enrichment could trigger the response of restitution, *i.e.* to give up gains. So there could be no remedy of restitution unless one first proved an event/cause of action of unjust enrichment. This was termed the 'quadration' thesis, in that the response of restitution was always triggered by the event of unjust enrichment. By quadration, he meant that unjust enrichment and restitution "[name] the same area of law from different sides of the square".[24]

Unjust enrichment

	by subtraction	by a wrong
Restitution		

Birks' quadration thesis[25]

However, later, Birks recanted from this earlier view, arguing instead that in addition to the event of unjust enrichment, wrongs and other events could also trigger the response of restitution.[26] This can be termed the 'separation' thesis, in that a

[23] Adapted from James Edelman & Elise Bant, *Unjust Enrichment in Australia* (Melbourne: Oxford University Press, 2006) at 28.

[24] Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 26.

[25] *Ibid*.

[26] Peter Birks, "Misnomer" in W. R. Cornish *et al*., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) c. 1.

restitutionary response is also available for events other than unjust enrichment, *i.e.* wrongs and other events.

Category of Event / **Response**	**Consent**	**Wrongs**	**Unjust Enrichment**	**Other**
Compensation			x	
Restitution		√	√	√
Punishment			x	
Other Goals			x	

Birks' separation thesis[27]

There are practical implications as to the choice between Birks' first 'quadration' thesis and his second 'separation' thesis. Claims for restitution for unjust enrichment and claims for restitution for wrongs should be pleaded and proven differently if we adopt the separation thesis.[28] Unjust enrichment is a distinctive cause of action, with its own elements that must be pleaded and proven. As described earlier, these are the requirements that (i) the defendant is enriched; (ii) the enrichment is at the claimant's expense; (iii) there is an unjust factor; and (iv) there are no defences.

In contrast, this same framework is not used for pleading and proving claims in restitution for wrongs, since the cause of action in unjust enrichment is different from the cause of action for the commission of a wrong. The commission of a wrong ordinarily gives rise to compensatory damages, which are assessed according to the claimant's loss. However, the commission of a wrong can also give rise to gain-based damages[29] in some instances. Claims for such gain-based damages are claims in restitution for wrongs. For most wrongs, this gain-based measure would be exceptional.[30] In order to make out a claim for restitution for wrongs, it is clear that the following two elements must be pleaded and proven. First, the defendant must have committed a relevant[31] wrong. Second, the claimant must specifically claim damages on a restitutionary basis, *i.e.* measured by the defendant's gain. The claimant may also claim damages on a compensatory basis, but he will have to elect between compensatory and restitutionary remedies where they are inconsistent.

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27 Edelman & Bant, *Unjust Enrichment in Australia*, *supra* note 23.

28 *Cf.* Burrows, who insists that claims in unjust enrichment and restitution for wrongs should be proven differently, despite appearing to adopt the quadration thesis.

29 Terminology in this area is notoriously tricky. For one view of what 'gain-based damages' means, see James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002), who argues that there are two types of gain-based damages. Edelman argues that the first type is concerned with recovery of the defendant's receipt of gains wrongfully transferred from the claimant, while the second type is concerned with the stripping of profits from the defendant's hands. However, this paper does not adopt Edelman's argument.

30 It is regarded as exceptional for breaches of contract: see *A.G. v. Blake* [2001] 1 A.C. 268 at 285 (H.L.) (Lord Nicholls), and also for torts: see *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2009] 3 W.L.R. 198 [*Devenish Nutrition*].

31 In England and Wales, not all wrongs can trigger gain-based remedies. For commission of torts, it appears that only proprietary torts can do so: see *Devenish Nutrition*, *ibid.*

There remains considerable uncertainty over what else the claimant must prove in order to convince the court to award gain-based damages, particularly for claims in breach of contract.[32]

Most commentators in England now accept Birks' second view (*i.e.* the separation thesis) that there is a conceptual separation between restitution for unjust enrichment and restitution for wrongs. For example, this is clearly the view taken by Virgo[33] and *Goff & Jones*.[34] Burrows however still appears to adopt the quadration view.[35] In contrast to Burrows' hesitant stance, English law appears to support the separation thesis.[36]

B. *The Position in Singapore*

In Singapore, the Court of Appeal in *Anna Wee* appears to have accepted Birks' second view (*i.e.* the separation thesis), which is more widely accepted. The quadration thesis was clearly rejected. In rejecting the quadration thesis, Phang J.A. held that to accept it would adopt "a much broader understanding of the requirement that the enrichment be at the expense of the claimant than that which exists under the law of unjust enrichment".[37] This follows Virgo's reasoning for his rejection of the quadration thesis.[38] Discussing the claimant's pleading in that case, the court then made a distinction between two parts of her claim by commenting that "[t]he former is properly regarded as part of the law of restitution for wrongs, while the latter is *more limited* and focuses on enrichment in the *subtractive* sense".[39] Birks described unjust enrichment by subtraction as cases where the defendant's gain was subtracted from the claimant's wealth. This can be illustrated most simply by the claimant paying the defendant $100. The result of the payment is that the defendant has a gain of $100, which is subtracted from the claimant's wealth, resulting in the claimant's wealth decreasing by $100. This phenomenon of 'subtraction' from the claimant's wealth does not usually occur in a claim for restitution for wrongs, *e.g.*, where the defendant commits a tort against the claimant. The court's statements in *Anna Wee* thus clearly accepted that a distinction exists between restitution for wrongs and restitution for unjust enrichment in Singapore law, implying an adoption of the separation thesis. This was recently reiterated by the Court of Appeal in *Alwie Handoyo v. Tjong Very Sumito* where V.K. Rajah J.A. eloquently held that "[d]ifferent causes of action may

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[32] See most recently, Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Oxford: Hart Publishing, 2012) for an interpretive theory which tries to identify when courts will award gain-based damages for breaches of contract.

[33] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 9, 10.

[34] Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 1-02 to 1-04 [Mitchell, Mitchell & Watterson, *Goff & Jones*].

[35] Burrows, *The Law of Restitution*, *supra* note 12 at 9-12. However, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 5 excludes rights to restitution based on civil wrongs at s. 1(3)(b).

[36] See *e.g.*, *Sempra Metals Ltd v. Inland Revenue Commissioners* [2008] 1 A.C. 561 at para. 116 (Lord Nicholls), paras. 230, 231 (Lord Mance) (H.L.) [*Sempra Metals*]; *Macmillan Inc v. Bishopsgate Investment Trust plc (No 3)* [1995] 1 W.L.R. 978 at 988 (Ch.) (Millett J.).

[37] *Anna Wee*, *supra* note 2 at para. 152.

[38] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 425, 426.

[39] *Anna Wee*, *supra* note 2 at para. 152.

give rise to the same remedy of restitution. The law of restitution is more than just the law of unjust enrichment; the two are not synonymous."[40]

Post-*Anna Wee*, the separation thesis has been definitively approved of by another decision of the Court of Appeal. In *ACES System Development Pte Ltd v. Yenty Lily (trading as Access International Services)*, Andrew Phang J.A. held that "though both unjust enrichment and restitution for wrongs fall under the broad umbrella of restitution, it would be preferable, in our view, to treat unjust enrichment as being theoretically distinct from restitution for wrongs".[41]

This is consistent with previous case law in Singapore, which has also recognised this distinction between unjust enrichment and restitution for wrongs made under the separation thesis. In *Cavenagh Investment Pte Ltd v. Kaushik Rajiv*,[42] the High Court was faced with the issue of whether change of position could apply to a case of restitution for a wrong for the tort of trespass to land. Earlier cases in Singapore which had accepted the defence of change of position concerned claims in unjust enrichment and not claims for restitution for wrongs. Chan Seng Onn J. did not assume that change of position would automatically be available for restitution for wrongs, as he arguably should have done had he adopted the quadration thesis. Instead, he explicitly considered the issue of whether change of position could apply to claims for restitution for wrongs. This would be a non-issue to a proponent of the quadration thesis. Thus, by raising this issue at all, Chan J. implicitly recognised the distinction between unjust enrichment and restitution for wrongs.[43]

This approach is also consistent with the views expressed in the leading local text on contract law in Singapore. There, the authors draw a distinction between the law of unjust enrichment and the law of restitution. They recognise that "restitutionary responses may arise as a matter of the law of contract (as discussed above in relation to restitutionary damages awarded for breach of contract)" and "the law of the *remedy* of restitution… straddles more than one area of law."[44] By recognising that the remedy of restitution can be awarded for breaches of contract, the authors also recognise the distinction between unjust enrichment and restitution for wrongs.

In conclusion, the current position of the law in Singapore makes a distinction between restitution for wrongs and unjust enrichment. This has important practical consequences for the manner in which claims are pleaded, and whether the defence of change of position is available in respect of these claims.

IV. Proprietary Restitution: Unjust Enrichment or the Vindication of Property Rights?

The third structural issue considered by *Anna Wee* concerned proprietary restitution. At risk of oversimplification, proprietary restitution concerns the award of proprietary

[40] [2013] SGCA 44 at para. 126 [*Tjong Very Sumito (CA)*].

[41] [2013] SGCA 53 at para. 31.

[42] [2013] 2 S.L.R. 543 [*Cavenagh*], noted in Rachel Leow, "Change of Position in Restitution for Wrongs—A View from Singapore" (2014) 130 Law Q. Rev. 18.

[43] *Cavenagh*, *supra* note 42 at paras. 64, 65.

[44] Andrew Phang Boon Leong, ed., *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at n. 364, 365.

remedies, such that the defendant must give back to the claimant the property in which the claimant has a proprietary interest.[45] However, academic commentators disagree strongly as to the extent that proprietary restitution is based on unjust enrichment. There are two main camps. One camp, led by Burrows, argues that cases of proprietary restitution fall within the law of unjust enrichment and can be explained by unjust enrichment. The other camp, led by Virgo, argues that cases of proprietary restitution have nothing to do with unjust enrichment at all and are best explained as the 'vindication of property rights'. Given the practical and conceptual importance of this area, some of the consequences of accepting the unjust enrichment view will also be explored.

A. *The Current Debate*

Proprietary restitution is most relevant to three-party cases. In these three-party cases, the claimant C's property is misapplied by a third party T, who later transfers it on to the defendant D.[46] The attempt is then for C to claim that D must return C's property via a proprietary restitutionary remedy.[47] This section focuses on one specific aspect of the proprietary restitution debate: claims to substitute property.[48] In the paradigm of such situations, a trustee T holds money on trust for C's benefit, but acts in breach of trust by using the money from the trust fund to purchase a car from D. This can be represented diagrammatically as follows:

C ---- **T** ---- D

On Burrows' view, claims to substitute property are based on unjust enrichment. The main challenge in fitting these three-party situations under the law of unjust enrichment is to explain how (i) D is enriched, (ii) at the expense of C, and (iii) there is a relevant unjust factor. However, unjust enrichment deals best with cases involving two-party situations, and three-party cases pose difficulty.[49] Particularly difficult are requirements (ii) and (iii).

This is exemplified with the element of 'at the expense of'. The element of 'at the expense of' generally requires that transfers of value from the claimant to the

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45 This has been simplified to aid understanding. A proprietary claim is one where the claimant claims against the 'thing' rather than against the 'person', and this may include situations where the claimant elects not to have his property returned *in specie*, opting instead for the imposition of an equitable lien over the 'thing' to secure the payment of a sum: *Foskett v. McKeown* [2001] A.C. 102 (H.L.) [*Foskett*].

46 For brevity and clarity in dealing with complicated multi-party fact scenarios, Part IV of this paper uses the terminology 'C' to represent the claimant, 'T' to represent the third party, and 'D' to represent the defendant.

47 This is a deliberate simplification: see *ibid*.

48 Burrows also gives other examples of proprietary restitution which he argues are also based on unjust enrichment. These include equitable liens, the conferment of secured rights by (non-contractual) subrogation, some constructive and resulting trusts, and rescission insofar as concerned with revesting title to goods or land.

49 This is especially so when a corrective justice approach to unjust enrichment is taken: see Lionel Smith, "Philosophical Foundations of Proprietary Remedies" in Robert Chambers, Charles Mitchell & James Penner, eds., *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) c. 10.

defendant must be direct.[50] This is sometimes termed the 'privity' requirement. In other words, there should not be a third party interposed between the claimant and the defendant, and the enrichment should move directly from the claimant to the defendant. If proprietary restitution is best explained as being based on unjust enrichment, the requirement of 'at the expense of' proves problematic.

First, since most cases of proprietary restitution are ones where the defendant will not be a direct recipient of the benefit from the claimant, such cases must be an exception to the general rule of direct transfers. Burrows argues that such cases would fall under the 'title and tracing' exception.[51] It evolved from Birks' idea of a 'proprietary connection' where the defendant had received the claimant's property.[52] Under this exception, where the claimant retains either legal or equitable title to his property, which is then passed on by a third party to the defendant, the claimant is able to establish that the defendant's gain is at the claimant's expense by reason of his title to the property. In the more complicated situation where the defendant later exchanges the claimant's property for a substitute asset, this substitution of value is said to be at the claimant's expense under the phenomenon of 'tracing'. The claim is that because the claimant had legal or equitable title to the property in the defendant's hands immediately prior to the substitution, there is a transfer of value from the claimant to the defendant. The defendant is enriched by the substitute, and the substitute came from the claimant's property. This creation of the claimant's new proprietary rights in the substitute asset is thought by Burrows, following Birks, to be based on unjust enrichment. By contrast, under Virgo's 'vindication of property rights' theory, tracing is just a matter of property law, being simply a matter of evidence as to the location of value. Proprietary rights in substitute assets are generated by an automatic transmission of the claimant's subsisting equitable proprietary interest from his original misapplied asset into any substitute assets once the original asset cannot be identified. Where the original asset and the substitute can both be identified, the claimant can elect to claim either the original asset or its substitute.[53] Unjust enrichment is unnecessary to explain the creation of new proprietary rights in substitute assets.

A subtler problem that flows from inventing this 'title and tracing' exception to accommodate proprietary restitution under unjust enrichment is its conceptual unsoundness. By doing this, the conceptual status of the bona fide purchaser for value without notice defence becomes irreparably muddled—where does it fit, in (ii) 'at the expense of' or (iv) defences? Tracing, following, and claiming are conceptually and analytically distinct. Tracing and following are processes of identification, while claiming is an assertion of rights. The process of tracing in which substitute assets are identified is logically prior to claiming, where rights to those substitute assets traced

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50 *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84 (P.C.); *MacDonald, Dickens & Macklin (a firm) v. Costello* [2011] 3 W.L.R. 1341 (C.A.), but see now the slightly wider approach in *Investment Trust Companies (In liquidation) v. Revenue and Customs Commissioners* [2012] EWHC 458 (Ch) at paras. 67, 68.

51 Burrows, *The Law of Restitution*, *supra* note 12 at 75, 76.

52 Peter Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2005) at 86, 87 [Birks, *Unjust Enrichment*].

53 Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 622, 623.

are being asserted by the claimant.[54] It is only after having successfully identified the misapplied asset or its traceable proceeds that the claimant can assert rights against them by showing a cause of action against the defendant. If we say that bona fide purchase is a defence to a claim in unjust enrichment, then logically, we should be asking whether the defendant can plead bona fide purchase only *after* the claimant has established a prima facie claim in unjust enrichment *i.e.* that (i) the defendant was enriched; (ii) it was at the claimant's expense; and (iii) there was an unjust factor. Burrows' highly artificial stuffing of a 'title and tracing' exception into the second part of this line of inquiry establishing the cause of action creates much conceptual difficulty. The presence of a bona fide purchaser somewhere down the title chain ends the process of tracing by extinguishing the claimant's pre-existing equitable property rights, and the bona fide purchaser acquires full title in exception to *nemo dat*.[55] If the 'title and tracing' exception is part of the (ii) 'at the expense of' inquiry, what this means is that we never actually establish a prima facie claim in unjust enrichment against the defendant. That means we never get to the stage of claiming where the claimant is asserting rights against those successfully traced assets. That means that bona fide purchase cannot be a defence, since a defence comes into question to block liability only *after* a prima facie claim has been established. In summary, under Burrows' 'title and tracing' exception, we never get to the point of asking whether *in spite of* the prima facie unjust enrichment claim having been established because (i) the defendant was enriched; (ii) it was at the claimant's expense; and (iii) there was an unjust factor, the defendant can nevertheless (iv) plead an available defence by saying he was a bona fide purchaser for value without notice, and thus not liable to make restitution. Once there is a bona fide purchaser down the title chain, (ii) is never successfully established. We never get to (iv), which presupposes that (i), (ii) and (iii) are successfully established.

This conceptual confusion has practical implications. On whom does the legal burden of proof lie to show that the defendant purchased the misapplied assets or its traceable proceeds in good faith, for value, and without notice? Under Burrows' 'title and tracing' exception, the claimant must do this, since it forms part of the 'at the expense of' inquiry. It is for the claimant to show that there was an unjust enrichment, before he can ask for it to ground proprietary restitution. But if bona fide purchase for value is a true defence, it ought to be on the defendant to bear the legal burden of proof to then raise it against a claimant who has discharged his burden of establishing that there was unjust enrichment. If Burrows insists that there ought to be a shift in the burden of proof for an element of the cause of action to the defendant, he did not provide a good justification for it. Burrows cannot consistently insist on a 'title and tracing' exception to an 'at the expense of' inquiry, and yet at the same time insist that bona fide purchase be a defence to a claim in unjust enrichment, which he does.[56] On this issue, Virgo's position that the bona fide purchase defence is an exception to *nemo dat*, by which defects in the defendant's title are otherwise

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[54] *Foskett*, *supra* note 45. See generally Lionel D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997). Notably, Burrows, *The Law of Restitution*, *supra* note 12 at 117, 118 adopts Smith's distinctions between following, tracing, and claiming.

[55] Smith, *The Law of Tracing*, *ibid*. at 386-389; Graham Virgo, *The Principles of Equity & Trusts* (Oxford: Oxford University Press, 2012) at 668.

[56] Burrows, *The Law of Restitution*, *supra* note 12 at 574.

made good, is a much preferable proposition.[57] Besides being in greater concord with well-established rules of property law governing the transmission of property rights, it is also the law in England[58] and in Singapore.[59]

Hypothetically, Burrows might respond to this by relying on the Birksian approach towards resolving disputes in unjust enrichment. This approach divides the claimant-sided elements and the defendant-sided elements such that protection of the defendant's interests is generally accommodated at the stage of defences, the defence of change of position being a prime example. Under this approach, the principle of subjective devaluation could be regarded as a defence as well. It follows that the 'title and tracing' exception at the element of 'at the expense of' allows the claimant to build his prima facie case whilst the defendant is allowed a chance to state the justice of his case at the stage of defences through the bona fide purchase defence.[60] However, we think that this reply runs into further problems as it presupposes a strict line between the claimant-sided elements in the cause of action and the defendant-sided elements in the defences, a flawed supposition which we address further on in this paper.[61] But as this paper is intended to be only an introductory piece, to dwell further on this dispute at length would detract from its thrust, and should aptly be the subject of another paper. What this discussion serves to illustrate, though, is the fiercely contentious nature of the debate over proprietary restitution. This re-emphasises our point that courts in Singapore would be well advised to tread carefully before making any radical moves which imply commitment to a stance on the debate.

The second problem is in identifying a relevant unjust factor. Existing unjust factors which work well for two-party cases do not work well for three-party situations. Hence, advocates of proprietary restitutionary remedies being based on unjust enrichment have sought to invent various unjust factors to explain these situations, which Virgo describes as artificial.[62] There are three main unjust factors which have been proposed. The first is the claimant's 'ignorance' of a third party (T's) transfer of his property to the defendant D. The argument for the recognition of 'ignorance' usually follows from the recognition of claimant-sided unjust factors, such as mistake, which focus on the claimant's impaired consent to the transfer. Since impaired consent to the transfer justifies restitution, it is thought that the claimant's total absence of consent ought to do so too. In Birks' words, "total ignorance is *a fortiori* from the most fundamental mistake. Hence a system which believes in restitution for mistake cannot but believe in restitution for ignorance".[63] The second unjust factor which has been proposed is the claimant's 'powerlessness' to stop T's transfer of his property, to which he has not consented. Powerlessness captures situations where the claimant knows that his property is being transferred, but yet is powerless to stop it. The third unjust factor which has been proposed is the lack of authority of the third party T

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[57] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 656.

[58] *Foskett*, *supra* note 45.

[59] *Caltong (Australia) Pty Ltd (fka Tong Tien See Holding (Australia) Pty Ltd) v. Tong Tien See Construction Pte Ltd (in liquidation)* [2002] 2 S.L.R.(R.) 94 (C.A.) [*Caltong*].

[60] We are grateful to the anonymous reviewer for raising this point.

[61] See Part VI.A below.

[62] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 12.

[63] Birks, *An Introduction to the Law of Restitution*, *supra* note 24 at 141.

who is transferring C's property.[64] Direct authority for the proposed unjust factor of 'want of authority' is sparse. Many of the cases used by its proponents to support it are merely consistent with the unjust factor rather than being decided explicitly based on it.[65] It has also been conceded that it can only apply to three-party cases and not two-party cases of proprietary restitution.[66] However, 'lack of authority' can be viewed as consistent with the 'vindication of property rights' thesis in respect of equitable proprietary interests. This is because where T is a trustee who transfers property to D without authority, the lack of authority means that the beneficiaries' equitable proprietary interests in the property have not been overreached[67] and still persist in the substitutes.

As Burrows himself accepts, the courts have not expressly recognised ignorance[68] as a ground for restitution. Ignorance has also been strongly criticised by academic commentators such as Swadling.[69] It is also difficult to determine whether ignorance is truly in issue in some cases, such as where directors of a company act in breach of fiduciary duty, because of the difficulty involved in distinguishing between a company's knowledge and that of its directors.[70] As Burrows says, "[i]gnorance is the most difficult of the unjust factors. Not only have the courts not explicitly recognised it but also most of the relevant case law involves benefits conferred by third parties."[71] Courts have also not recognised powerlessness.[72] The difficulty in finding an unjust factor that can apply to a multitude of situations involving proprietary restitution has led some commentators to advocate accepting several of these proposed unjust factors.[73] Given the lack of any judicial acceptance of unjust factors such as ignorance, courts would be well advised to be extremely cautious about accepting the unjust enrichment explanation for the creation of new proprietary rights in substitute assets, which the camp led by Burrows prefers.

In comparison, under Virgo's 'vindication of property rights' thesis, the action to vindicate proprietary rights belongs in the law of property and has nothing to do with unjust enrichment. To succeed in a proprietary restitutionary claim, the claimant only has to show that he has a proprietary interest in property received by the defendant, whether legal or equitable.[74] Whether he has a legal or equitable proprietary interest in the property is determined in accordance with well-established property rules on the passing of title and the creation of equitable proprietary interests (*e.g.*, under

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64 Robert Chambers & James Penner, "Ignorance" in Simone Degeling & James Edelman, eds., *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Company, 2008) c. 13.

65 Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 34 at 8-37.

66 Burrows, *The Law of Restitution*, *supra* note 12 at 406.

67 On overreaching, see generally David Fox, "Overreaching" in Peter Birks & Arianna Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002) c. 4.

68 Burrows, *The Law of Restitution*, *supra* note 12 at 403.

69 *Cf.* William Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 Oxford J. Legal Stud. 627.

70 Burrows, *The Law of Restitution*, *supra* note 12 at 407; Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 34 at 8-03.

71 Burrows, *The Law of Restitution*, *ibid.* at 434.

72 *Ibid.* at 406.

73 See *e.g.*, *Goff & Jones*, which advocates a combination of 'lack of consent' to deal with two-party cases and 'want of authority' for three-party cases: Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 34 at c. 8.

74 Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 570.

a constructive trust). In the specific instance of proprietary interests in substitute property, the claimant must first have a proprietary interest in an asset, and then be able to follow or trace this interest into the property held by the defendant.[75] Proprietary interests in substitute assets arise by automatic transmission from the original asset. Thus, on Virgo's 'vindication of property rights' thesis, proprietary restitution is explained by reference to well-established property rules, without the need to invent artificial unjust factors. By contrast with Burrows' thesis, accepting Virgo's thesis will conflict far less with well-established property rules.

B. *The Position in Singapore*

The position of proprietary restitution in Singapore is unclear, with local cases which arguably support both camps of the debate.

In 2002, the Singapore Court of Appeal accepted the House of Lords decision of *Foskett v. McKeown*.[76] As recognised by Virgo,[77] Burrows[78] and Birks,[79] *Foskett* provides the strongest support of Virgo's thesis that proprietary restitution is based on the vindication of property rights and has nothing to do with unjust enrichment. In Singapore, the Court of Appeal followed *Foskett* in the 2002 decision of *Caltong*,[80] quoting Lord Millett's statement that "[a] beneficiary of a trust is entitled to a *continuing* beneficial interest not merely in the trust property but in its traceable proceeds also".[81] The reference to the interest in the traceable proceeds as a continuing beneficial interest rejects the argument that the interests in the traceable proceeds were newly created interests which were generated in response to unjust enrichment. Hence, *Caltong* appears to support Virgo's thesis that proprietary restitution is not based on unjust enrichment.

In the 2013 decision by the Court of Appeal in *Anna Wee*, the court acknowledged the existence of the "robust academic debate"[82] but appeared not to have decided explicitly whether proprietary restitution falls within the unjust enrichment principle or is based on the vindication of property rights.[83] However, a closer analysis of the Court of Appeal judgment suggests that there is some bias towards the unjust enrichment view. First, under the requirement of 'at the expense of', the Court of Appeal made statements appearing to recognise a 'title and tracing' exception, while unaware that it seemed to have done so. For example, the court held that claimants could establish the element of 'at the expense of' by showing that "the defendant received a benefit traceable from the claimant's assets".[84] The court also suggested tentatively that "the claimant must show some sort of *legal (and not merely factual) entitlement* to the property which is received by the recipient".[85]

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[75] *Ibid*. at 579.
[76] *Supra* note 45.
[77] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 12.
[78] Burrows, *The Law of Restitution*, *supra* note 12 at 185.
[79] Peter Birks, "Property, Unjust Enrichment, and Tracing" (2001) 54 Curr. Legal Probs. 231.
[80] *Caltong*, *supra* note 59.
[81] *Ibid*. at para. 55 [emphasis added].
[82] *Anna Wee*, *supra* note 2 at para. 114.
[83] *Ibid*. at para. 167.
[84] *Ibid*. at para. 115.
[85] *Ibid*. at para. 123 [emphasis in original].

The Court of Appeal also considered whether the requirement of directness should be a general rule. The current editors of the 8th edition of *Goff & Jones* (Charles Mitchell, Paul Mitchell, and Stephen Watterson) have argued that there should not be a blanket rule requiring direct transfers.[86] Instead, they argued that the law should only adopt a 'but for' causal test under the 'at the expense of' requirement.[87] Part of their argument was built on the acceptance of the 'title and tracing' exception argued for by commentators who believe that the event of unjust enrichment triggers proprietary restitution. Recognising a general causal test would thus fully integrate the 'title and tracing' exception cases into the general test for 'at the expense of'. In rejecting *Goff & Jones*' argument that only a 'but for' test should be required, the court appeared to have thought that three-party cases (where the claimant confers a benefit to a third party which is then given to the defendant) already fit within the traditional 'at the expense of' inquiry.[88] This also appears to support the unjust enrichment explanation of proprietary restitution.

Second, the Court of Appeal also mentioned the possible unjust factors of ignorance and lack of consent in the judgment.[89] However, as the court explicitly stated: "[w]e should note, however, that there is no authority that has expressly acknowledged the unjust factor of ignorance or lack of consent… and we do not express any conclusive opinion as to whether both fall within the present catalogue of unjust factors."[90] Thus, *Anna Wee* appears at first blush to provide some support in favour of the unjust enrichment view of proprietary restitution, as supported by Burrows and *Goff & Jones*. However, the Court of Appeal repeatedly emphasised in *Anna Wee* that its pronouncements on the unjust enrichment issues were not definitive[91] and were anyway *obiter*. Furthermore, given that the Court of Appeal in *Anna Wee* appeared to be striving to take a neutral stance on the debate, *Anna Wee* should not be taken as definitively deciding whether proprietary restitution is based on unjust enrichment.

This is reinforced by the recent 2013 Court of Appeal's decision in *Tjong Very Sumito (CA)*.[92] There, the claimants contracted to sell shares in a company to a purchaser. As payment for the sale, monies and shares in another company were paid over to two of the defendants, who were to receive them on behalf of the claimants. The defendants later sold the shares, and the claimants sought both personal and proprietary restitution in respect of the monies and shares. The High Court decision[93] appeared to have accepted the unjust enrichment explanation of proprietary restitution. In analysing the requirement of 'at the expense of' for the proprietary claim, the High Court held that claimants seeking a proprietary restitutionary remedy must establish a proprietary link to the money claimed via rules of following and tracing.[94] In doing so, the court appeared to accept the 'title and tracing' exception

86 Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 34 at 6-18 to 6-24; Stephen Watterson, "'Direct Transfers' in the Law of Unjust Enrichment" (2011) 64 Curr. Legal Probs. 435.

87 Mitchell, Mitchell & Watterson, *Goff & Jones*, *ibid*. at 6-25.

88 *Anna Wee*, *supra* note 2 at paras. 126-128, 167.

89 *Ibid*. at paras. 139, 166.

90 *Ibid*. at para. 139.

91 *Ibid*. at paras. 97, 110, 123, 146.

92 *Tjong Very Sumito (CA)*, *supra* note 40.

93 *Tjong Very Sumito v. Chan Sing En* [2012] 3 S.L.R. 953 (H.C.) [*Tjong Very Sumito (HC)*].

94 *Ibid*. at para. 86.

argued for by Burrows. However, on the facts, it was held that it was not possible to trace from the shares into payments made by the purchaser under the contract for the sale of shares, as there was no connection between the shares and the payments. In analysing the appropriate unjust factor for the *personal* claim, the court recognised the unjust factor of 'want of authority', citing *Goff & Jones* with approval.[95] This thus appears to support the unjust enrichment explanation of proprietary restitution.

However, the Court of Appeal reversed the High Court's decision, rejecting the unjust enrichment claim. As the defendants had received the monies and shares pursuant to a valid contract, allowing a claim for unjust enrichment would undermine the risk allocation under the contract.[96] More importantly, the Court of Appeal rejected the argument that 'want of authority' was an unjust factor.[97] Rajah J.A. emphasised that there was a lack of judicial and academic support for the unjust factor.[98] The Court of Appeal recognised that they were leaving open the issue of whether proprietary restitution was based on unjust enrichment or the vindication of property rights.[99] Ultimately, the Court of Appeal's decision in *Tjong Very Sumito* removed the strongest authority in Singapore in favour of the unjust enrichment view (*i.e.* the High Court decision in *Tjong Very Sumito*), but did not accept Virgo's 'vindication of property rights' theory either.[100]

In conclusion, the position in Singapore on proprietary restitution is unclear. While *Caltong* appears to support Virgo's position and *Anna Wee* could be read to provide some support for Burrows' position, Singapore law has not yet taken a firm position on the debate, as indicated by *Tjong Very Sumito (CA)*. As Rajah J.A. insightfully held in *Tjong Very Sumito (CA)*, "[l]eaving the law unsettled in these circumstances may not be particularly satisfactory. That said, given that there will be potential cascading ramifications on other fields of law, most notably property, equity, trusts and insolvency, it would be prudent to refrain from making a conclusive determination of this issue without the benefit of fuller arguments."[101] While greater clarity is needed in this area, a decision on the debate should only be made after the benefit of hearing full arguments from the parties and much careful deliberation about its potential drastic consequences.

V. Unjust Factors and the Absence of Basis

The fourth issue that the Court of Appeal dealt with was within the law of unjust enrichment itself. This is the debate between the 'unjust factors' approach, which was widely accepted as the law prior to 2003, and the 'absence of basis' approach which Birks proposed in 2003.

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95 *Ibid*. at para. 120.
96 *Tjong Very Sumito (CA)*, *supra* note 40 at paras. 103-110.
97 *Ibid*. at paras. 111, 114.
98 *Ibid.* But see Chambers & Penner, "Ignorance", *supra* note 64.
99 *Tjong Very Sumito (CA)*, *ibid.* at paras. 115-122.
100 *Ibid*. at para. 119.
101 *Ibid*. at para. 122.

A. *The Current Debate*

Up till 2003, Birks' second view accepted that in order to make out a claim in unjust enrichment, it was necessary to show a positive ground for unjust enrichment, *i.e.* a relevant unjust factor. However, in 2003, Birks argued that recent cases in England had demonstrated a move towards the negative approach of absence of basis. In doing so, Birks was famously influenced by one of his German students.[102] The absence of basis approach is used in several civil law jurisdictions, including Germany.[103] Birks said of the civilian approach:[104]

> Enrichments are received with the purpose of discharging an obligation or, if without an obligation, to achieve some other objective as for instance the making of a gift, the satisfaction of a condition, or the coming into being of a contract. These outcomes succeeding, the enrichment is sufficiently explained. *An enrichment which turns out to have no such explanation is inexplicable and cannot be retained. The recipient is not entitled to it.*

Under the absence of basis approach, the question is whether there was any valid legal basis for the enrichment to be conferred on the defendant. If there was no valid legal basis for the enrichment, then this absence should justify compelling the defendant to make restitution. Examples of valid legal bases would include where the enrichment was conferred on the defendant under a valid contract, gift, or statutory obligation. Birks adopted a pyramidal structure to explain the absence of basis approach.

At the base of the pyramid are the existing unjust factors, as well as other circumstances showing that the transfer of the enrichment was invalid, such as the invalidity of a contract. Establishing any of these grounds comprising the base of the pyramid will mean that the second level of the pyramid is made out, which is whether there is an absence of basis for the transfer. This in turn will show that the transfer was unjust, at the top level of the pyramid.[105]

The shift in focus from the unjust factors approach to the absence of basis approach changes the default position which the law takes towards when restitution should be made. Under the unjust factors approach, the legal burden is on the claimant to show positive grounds via the unjust factors that the enrichment was unjust, thus triggering restitution. However, under the absence of basis approach, the legal burden rests on the claimant to prove a negative, *i.e.* there is an absence of basis for his enrichment of the defendant.[106] If the claimant is able to produce sufficient evidence to meet the required standard of proof for this, the evidential burden will then shift to the

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[102] Birks, *Unjust Enrichment*, *supra* note 52 at xiii and 113 at n. 21.

[103] Birks was not alone in supporting an absence of basis approach: see *e.g.*, Tariq A. Baloch, *Unjust Enrichment and Contract* (Oxford: Hart Publishing, 2009).

[104] Birks, *Unjust Enrichment*, *supra* note 52 at 102, 103 [emphasis added].

[105] Graham Virgo, "Demolishing the Pyramid—the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment" in Andrew Robertson & Tang Hang Wu, eds., *The Goals of Private Law* (Oxford: Hart Publishing, 2009) at 482, 483 [Virgo, "Demolishing the Pyramid"].

[106] Stevens argues that this would be "notoriously difficult" for the claimant: Robert Stevens, "The New Birksian Approach to Unjust Enrichment" [2004] R.L.R. 260 at 272 [Stevens, "New Birksian Approach"].

defendant to refute this by showing that there was some valid legal basis for his enrichment,[107] *i.e.* the transfer was made pursuant to a contract, gift, trust or some other purpose.[108] In effect, the defendant is compelled to return the enrichment unless he is able to explain why he ought to be allowed to retain it. Notably, Birks deliberately omitted to detail a comprehensive list of possible legal bases on which there may be transfers of enrichments, leading Virgo to remark that the claimant is being set up for an "impossible" task.[109] Further, this shift in the burden of proof to recipients of enrichments would increase the transaction costs of commercial transactions, since every recipient could potentially be asked to satisfactorily explain on what valid legal basis he received the enrichment, on pain of being legally compelled to make restitution. As a response to this possible risk of having to be legally coerced into making restitution in court, in every proposed commercial transaction where there is the passing of an enrichment, the rational utility maximising actor would have to try, *ex ante,* to characterise the transaction under one of the legally recognised bases for receipt in order to avoid this risk, if he believes that the risk of restitution multiplied by the magnitude of the cost of restitution outweighs the transaction costs he would have to incur to do so. Such transaction costs might involve, *inter alia*, information gathering costs as to what sort of legal bases qualify under the scheme, the cost of hiring of legal expertise to advise as to possible valid legal bases, advise on the quantification of *ex post* recharacterisation risks in the event of litigation, documentation costs to record the transaction's legal basis, further negotiation costs of whether the risk will be assumed by the transferor in return for a lower price, and costs of strategic bargaining. These transaction costs might inhibit Pareto improving commercial transactions where the value of the exchanged enrichment is small, leading to inefficient outcomes. There is thus especial bite in discrete, one-off, non-relational transfers of small values.

However, there have been several powerful arguments against the adoption of the absence of basis approach. First, by a subtle change in the default position, the absence of basis approach could potentially result in a significantly wider scope of liability than the unjust factors approach. There would have to be a wide variety of valid legal bases to accommodate the frequent transfers of enrichments that occur daily between persons in both commercial and social settings, which we would not want to upset. In order to constrain the scope of liability, Birks had to use problematically wide notions of 'risk-taking'[110] and 'gifts'.[111] A famous example Birks gave was a hypothetical set of facts involving neighbours. In this scenario, A lives in a flat and turns on his heating during winter, thereby indirectly heating B's flat, which is above A's. B would be enriched by the savings in expenditure on heating which he would otherwise have incurred, and this enrichment comes from A. There would appear to be no basis for B's enrichment, but Birks, wary of the wide-ranging practical implications of holding that there is a right to restitution, had to argue that this was an example of a gift from A to B. This is an unusually wide notion of gifts.

[107] Virgo, "Demolishing the Pyramid", *supra* note 105 at 483.

[108] Birks, *Unjust Enrichment*, *supra* note 52 at c. 6.

[109] Virgo, "Demolishing the Pyramid", *supra* note 105 at 488.

[110] 'Risk-taking' is used to deny allowing the claimant restitution on the basis that he took the risk when making the payment that he would not be able to recover it.

[111] Burrows, *The Law of Restitution*, *supra* note 12 at 111.

Second, it has been argued that the existing unjust factors would still be relevant to showing that there is an absence of basis, and are not completely discarded. However, they are relevant but in a way which is less clear and transparent than under the unjust factors approach.[112] Third, the adoption of an absence of basis approach or unjust factors approach affects secondary classifications in the law, most notably, the law on limitation of actions.[113] Fourth, the unjust factors affect the shape and scope of the restitutionary response, such that the existence of some unjust factors may automatically mean that the defendant is not in good faith for the purposes of the change of position defence.[114] These far-reaching consequences suggest that caution is necessary. Any move towards an absence of basis approach must be considered very carefully before it is made.

At present, English law still firmly accepts the unjust factors approach. Although some judges have expressed sympathy towards an absence of basis approach, they nevertheless acknowledge that the unjust factors approach is still the current law.[115] More recent cases in England have decisively applied the unjust factors approach in looking for specific positive grounds of restitution.[116] Australia also adopts the unjust factors approach.[117]

The 'absence of basis' approach should not be confused with the 'absence of juristic reason' approach which is used in Canada. The Canadian absence of juristic reason approach is similar to the absence of basis approach in that the legal burden is also on the claimant to prove a negative, *i.e.* that there is no juristic reason for the defendant to be enriched. However, it differs from the absence of basis approach in two ways. First, there is Supreme Court of Canada authority that the list of juristic reasons was closed,[118] though a more recent decision thought that the list was open.[119] Second, even if the claimant can show that there was an absence of juristic reasons, the court can take into account "legitimate expectations of the parties" and "moral and policy arguments about whether particular enrichments are

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[112] Virgo, "Demolishing the Pyramid", *supra* note 105 at 486, 487.

[113] Stevens, "New Birksian Approach", *supra* note 106 at 270, 271.

[114] See Mindy Chen-Wishart, "Unjust Factors and the Restitutionary Response" (2000) 20 Oxford J. Legal Stud. 557. In England, now see *Test Claimants in the FII Group Litigation v. Revenue & Customs Commissioners* [2008] EWHC 2893 (Ch), which held that change of position cannot apply to claims where the unjust factor is that the payments were made *ultra vires* to a public authority (*i.e.* the *Woolwich* unjust factor, as recognised in *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] A.C. 70 (H.L.) [*Woolwich*]), as the defendant public authority would be a 'wrongdoer', which bars the defence of change of position.

[115] *Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners* [2007] 1 A.C. 558 at para. 158 (H.L.) [*Deutsche Morgan Grenfell*] (Lord Walker).

[116] See *e.g.*, *Test Claimants in the FII Group Litigation v. Revenue & Customs Commissioners*, *supra* note 114; *Littlewoods Retail Limited v. Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch); *Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners* [2010] EWCA Civ 103; *Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners* [2012] 2 A.C. 337 (S.C.).

[117] See *e.g.*, *David Securities Pty Limited v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353 at 379 (H.C.A.); *Farah Construction*, *supra* note 6 at 158, 159.

[118] *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 at para. 44 [*Garland*].

[119] *Kerr v. Baranow* [2011] 1 S.C.R. 269 at para. 41 [*Kerr*], which cited *Garland*, *ibid.*, in the same paragraph but did not explain why it moved away from the closed list of juristic reasons. See also para. 43, which quoted *Garland*, *ibid.* at para. 44 but omitted only the sentence which stated that the list of juristic reasons was closed.

unjust".[120] This approach is plainly inconsistent with the approach of Singapore and English courts which emphasise that unjust enrichment is not an exercise in palm tree justice.[121] Hence, practitioners and courts are advised to treat Canadian cases on unjust enrichment with great caution, since they diverge significantly from Singapore and English law, especially following the rejection of absence of basis reasoning.

B. *The Position in Singapore*

The Court of Appeal in *Anna Wee* noted the existence of the ongoing debate as to whether an absence of basis approach or an unjust factors approach should be adopted:[122]

> We should note—but only briefly as well as parenthetically—that there is an ongoing debate as to whether one should adopt the "unjust factors" approach or the "absence of basis" approach after Prof Birks advocated a structural change in the English common law approach from the former to the latter (see generally *Birks*… especially at pp 102-108). However, the "absence of basis" approach has (understandably, given its relatively recent arrival on the legal landscape and notwithstanding Prof Birks's justifiable pre-eminence within the discipline itself) yet to take root within the common law of restitution and unjust enrichment, and has generally appeared not, as yet, to have found favour amongst scholars in this particular field of law (see, for example, *Goff & Jones*… at paras 1-18–1-22 and *Burrows* at ch 5).

They concluded that based on "what we perceive to be the present state of the law of restitution and unjust enrichment, we will proceed on the assumption that the 'unjust factors' approach applies, as recently endorsed by this court in *Skandinaviska Enskilda*".[123] *Anna Wee* thus provides clear confirmation that the unjust factors approach applies in Singapore.

This is consistent with previous case law in Singapore, which has repeatedly affirmed the need to prove an unjust factor as one of the elements of a cause of action in unjust enrichment.[124] The court in *Tjong Very Sumito (HC)* specifically recognised that "[t]he approach taken by our courts, as well as the courts in England, requires the identification of a specific unjust factor to justify disgorging a defendant of his benefit".[125] It is also consistent with previous case law in Singapore which has

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[120] *Kerr*, *ibid*. at para. 44.

[121] See Part II, Section A above.

[122] *Anna Wee*, *supra* note 2 at para. 129.

[123] *Ibid*.

[124] *Info-communications Development Authority of Singapore v. Singapore Telecommunications Ltd* [2002] 2 S.L.R.(R.) 136 at para. 70 (H.C.) [*IDA Singapore*]; *United Artists Singapore Theatres Pte Ltd v. Parkway Properties Pte Ltd* [2003] 1 S.L.R.(R.) 791 at para. 216 (H.C.); *Tjong Very Sumito (HC)*, *supra* note 93 at para. 94; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 S.L.R. 540 at paras. 116, 135-137 (C.A.) [*Skandinaviska Enskilda*].

[125] *Tjong Very Sumito (HC)*, *ibid*.

recognised the existence of specific unjust factors such as mistake (of both fact and law)[126] and total failure of consideration[127] as grounding claims in unjust enrichment.

The current state of the law of unjust enrichment in Singapore is thus based on unjust factors and not absence of basis. The practical implications of this are that when claims in unjust enrichment are pleaded, it is necessary to plead the existence of a specific unjust factor, as well as any sub-rules making out the unjust factor. It is not sufficient to simply plead that there is no basis for the defendant to have received the enrichment.

VI. Unjust Enrichment: Common Law, Strict Liability, Claimant-Sided, and Loss Focused?

The first part of this paper has focused on discussing the main conceptual debates in the law of restitution and the position that Singapore law takes on the debates. The remaining part of this paper will examine some recent statements made by the Court of Appeal on the nature of unjust enrichment. The Court of Appeal in *Anna Wee* also reiterated the view that the claim in unjust enrichment is a common law, strict liability, claimant-focused cause of action,[128] which focuses on "the claimant's loss or deprivation".[129] This description of unjust enrichment is, however, inaccurate. The Court of Appeal's broad generalisations of the law of unjust enrichment should not be interpreted as drawing any definitive conceptual boundaries that might unduly hamstring its future development on a case-by-case basis.

A. *Unjust Enrichment is Not Only Claimant-Focused*

The Court of Appeal described unjust enrichment as being fundamentally "claimant-focused",[130] but it will be argued that this view should not be accepted.

In *Anna Wee*, the Court of Appeal appeared to think that all unjust factors were claimant-sided, apart from possibly 'free acceptance'. The concept of free acceptance must first be explained. Free acceptance is an area of great controversy, and Birks and Goff and Jones were its initial pioneers. Birks gave a memorable example of a situation of free acceptance. The claimant, a window washer, washes the windows of the defendant's house. The defendant sees the claimant doing so but does not stop the claimant from washing the windows. The claimant then asks the defendant to pay for his services in cleaning the windows. Birks initially thought that the claimant would be able to succeed in this claim, because the defendant had 'freely accepted' the benefit. Free acceptance was thus unusual in that it was seen as establishing that

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[126] *Management Corporation Strata Title Plan No 473 v. De Beers Jewellery Pte Ltd* [2002] 1 S.L.R.(R.) 418 (C.A.) [*De Beers*] abolished the bar against recovery of money for mistake of law in Singapore. See also *IDA Singapore*, *supra* note 124.

[127] *Skandinaviska Enskilda*, *supra* note 124, despite comments in the High Court decision at *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 S.L.R.(R.) 788 that could possibly suggest an absence of basis approach: see Yip Man, "Restitution for Victims of Fraud" [2011] Sing. J.L.S. 570 at 577, 578.

[128] *Anna Wee*, *supra* note 2 at paras. 108-110, 137-139.

[129] *Ibid*. at para. 109.

[130] *Ibid*. at para. 108.

the defendant was enriched and could also act as an unjust factor. Free acceptance was heavily criticised, with academic commentators arguing that it would unduly interfere with the defendant's autonomy as it would require him to positively refuse benefits, and this is contrary to the common law's position in not imposing liability for omissions.[131] Under the law in England now, free acceptance does not appear to be an unjust factor, though it may be relevant to show that the defendant was enriched by overcoming subjective devaluation. In Singapore, there appears to have been no judicial acceptance of free acceptance either to establish enrichment or as an unjust factor.

However, even apart from the controversial case of free acceptance, there are other well-established defendant-sided unjust factors.[132] Unjust factors are broadly divisible into three reasons for holding the defendant liable to return the benefit which he obtained from the claimant. These are (i) the claimant's defective consent to the transfer (claimant-sided unjust factors); (ii) the defendant's unconscientiousness in receiving it (defendant-sided unjust factors); and (iii) overriding policy reasons calling for restitution (policy-motivated unjust factors).[133]

Claimant-sided unjust factors do indeed focus on the claimant's defective consent to the transfer of the benefit to the defendant. An example of such a claimant-sided unjust factor is mistake, where the claimant's consent to the transfer of the benefit is impaired because he is mistaken as to some relevant state of affairs.[134] However, defendant-sided unjust factors do not focus primarily on the claimant's defective consent. Instead, they focus on the poor conduct of the defendant in either procuring the claimant to transfer the benefit to the claimant, or in receiving the benefit. Examples of defendant-sided unjust factors would arguably include undue influence[135] and unconscionability.[136] Policy-motivated unjust factors include the payment of money to a public authority which is made *ultra vires*, more commonly

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[131] Andrew P. Simester, "Unjust Free Acceptance" [1997] L.M.C.L.Q. 103.

[132] Birks and Burrows take the view that the unjust factors are concerned either with the claimant's lack of autonomy or are policy-motivated: Birks, *Unjust Enrichment*, *supra* note 52 at 105; Burrows, *The Law of Restitution*, *supra* note 12 at 199.

[133] Chen-Wishart, "Unjust Factors and the Restitutionary Response", *supra* note 114 at 560.

[134] What the mistake must relate to has varied over time. Initially, only mistakes of fact as to the claimant's legal liability to pay were recoverable, but the scope of mistakes which can justify recovery is now considerably wider. See generally Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 147-158.

[135] Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 Oxford J. Legal Stud. 503; Rick Bigwood, "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect" (2005) 25 Oxford J. Legal Stud. 65. *Cf.* Peter Birks & Chin Nyuk Yin, "On the Nature of Undue Influence" in Jack Beatson & Daniel Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) c. 3, who argue that it is a claimant-sided unjust factor; Chen-Wishart, "Unjust Factors and the Restitutionary Response", *supra* note 114 at 563, who argues that presumed undue influence is a policy-motivated unjust factor where the policy is the protection of vulnerable groups from improvidence. However, see also Mindy Chen-Wishart, "Undue Influence: *Beyond* Impaired Consent and Wrongdoing towards a Relational Analysis" in Andrew Burrows & Lord Rodger of Earlsferry, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) c. 11; Mindy Chen-Wishart, "Undue Influence: Vindicating Relationships of Influence" (2006) 59 Curr. Legal Probs. 231, which can be interpreted as supporting a defendant-sided view of undue influence.

[136] This is a contentious area. For relevant background, see *e.g.*, Michael Bryan, "Unconscionable Conduct as an Unjust Factor" in Degeling & Edelman, *Unjust Enrichment in Commercial Law*, *supra* note 64 at c. 15.

known as the *Woolwich* principle.[137] The existence of strong arguments for the existence of defendant-sided unjust factors suggests that it is inaccurate to say that unjust enrichment is fundamentally claimant-focused.

Furthermore, the claimant-sided view is not normatively desirable. Chen-Wishart has recently argued that a wholly claimant-sided view of vitiating factors which focuses overwhelmingly on the claimant's absence or vitiation of consent provides a picture of the law which does not fit well with the law, lacks transparency and takes a disrespectful view of the claimant's autonomy.[138] This is equally true of the unjust factors, many of which are also vitiating factors in contract law.[139] For example, Birks' and Chin's defence of undue influence as being based on the claimant's defective consent led them to characterise undue influence claimants as "lacking the capacity for self-management" because of their "excessive" and "morbid dependency on the enforcer" and having "markedly sub-standard" judgment.[140] Hence, since it is inaccurate and not normatively desirable, *Anna Wee*'s comments about unjust enrichment being fundamentally claimant-focused should not be accepted.

B. *Unjust Enrichment is Not Loss Focused*

The Court of Appeal also described unjust enrichment as focusing on "the claimant's loss or deprivation".[141]

This statement is inaccurate. Unjust enrichment provides the remedy of restitution. The law of restitution is the law of gain-based remedies, or remedies measured by the defendant's gain. A successful claim in unjust enrichment thus requires the defendant to give up the gains which it has received from the claimant where there is a relevant unjust factor. The response of restitution is in direct contrast to compensation, which is focused on the claimant's loss. The better view is that unjust enrichment does not focus primarily on the claimant's loss or deprivation, but instead on the defendant's gain.

An area where a focus on the claimant's loss may be relevant is in the defence of passing on. The defence of passing on is made out where the claimant passes on his loss to a third party. The defence of passing on is best illustrated with reference to the facts of *Roxborough*.[142] There, A was a supplier of goods which were subject to tax by the tax authorities. The tax authorities levied higher tax on the goods, but this is later held to be *ultra vires* the tax authorities' powers. In the meantime, A has arguably passed on the higher cost of the goods to his customers by raising the

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[137] *Woolwich*, *supra* note 114, which is the clearest example of a policy-motivated unjust factor. Other examples of policy-motivated unjust factors are heavily contested. For example, if subrogation is based on unjust enrichment as suggested in *Banque Financiere*, *supra* note 15, it could be based on the suggested unjust factors of 'legal compulsion', 'powerlessness' or the 'avoidance of undeserved escape from liability': see Burrows, *The Law of Restitution*, *supra* note 12 at 437. Necessity may also be another policy-motivated unjust factor: see generally Burrows, *The Law of Restitution*, *ibid*. at c. 18 for discussion and examples of situations which may be explained by necessity as an unjust factor.

[138] Mindy Chen-Wishart, "The Nature of Vitiating Factors in Contract Law" in Prince Saprai *et al*., eds., *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014) [forthcoming].

[139] *Ibid*.

[140] *Ibid*.

[141] *Anna Wee*, *supra* note 2 at para. 109.

[142] *Roxborough*, *supra* note 6.

price of the goods. If unjust enrichment focuses primarily on the claimant's loss, this would support the law recognising the passing on defence. This conception of unjust enrichment suggests that the claimant's measure of recovery should be limited only to the amount of loss which he has actually suffered.[143] However, the defence of passing on has been rejected in Singapore by the Court of Appeal in *De Beers*.[144] This suggests that in Singapore, it is likely that unjust enrichment does not focus primarily on the claimant's loss.

The Court of Appeal's description of unjust enrichment as focusing on the claimant's loss would have consequences for the requirement of 'at the expense of'. There is a lively debate as to whether unjust enrichment should have a requirement of 'correspondence' between the claimant's loss and the defendant's gain.[145] Under the requirement of correspondence, the claimant's recovery will be capped by his loss, even where the defendant's gain is greater than the loss. In a simple case of unjust enrichment where the claimant pays the defendant $50 by mistake, the amount of recovery does not matter depending on whether one focuses on the claimant's loss or the defendant's gain. This is because the claimant's loss is equal to the defendant's gain, *i.e.* the defendant's gain corresponds to the claimant's loss. However, there are cases where the claimant's loss may be less than the defendant's gain. In such cases, accepting the correspondence principle may have important consequences. An example of such a situation is where the claimant performs services on the defendant's land, improving the value of the land. If the correspondence principle were to be accepted, the claimant would only be able to recover up to the amount of his loss, which will ordinarily be the market value of the services he has provided, and not the increase in value of the land.[146] Current English and Singapore law does not appear to adopt the principle of correspondence, and Singapore courts should consider the issue more carefully before adopting it. This is because the adoption of the correspondence principle would have far-reaching consequences for the amount of recovery for claimants.

The better view is that unjust enrichment does not focus primarily on the claimant's loss. Instead, it focuses primarily on the defendant's gain. The event of unjust enrichment triggers the response of restitution, *i.e.* to make the defendant give up the gains. This focus on the defendant's gain is also consistent with the Singapore court's rejection of the defence of passing on.[147] Finally, the focus in *Anna Wee* on the claimant's

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[143] Although it would still be possible to reject a defence of passing on for other reasons even if a requirement of correspondence was accepted, as is the case in Canada: see *Kingstreet Investment Ltd v. New Brunswick (Department of Finance)* [2007] S.C.C. 1 [*Kingstreet*], noted in Mitchell McInnes, "Restitution for *Ultra Vires* Tax" (2007) 123 Law Q. Rev. 365.

[144] *Supra* note 126 at para. 53. It is also not accepted in England (*Kleinwort Benson Ltd. v. Birmingham City Council* [1996] Q.B. 380 (C.A.)), Australia (*Roxborough*, *supra* note 6), and Canada (*Kingstreet*, *supra* note 143).

[145] As recognised by the House of Lords in *Sempra Metals*, *supra* note 36 at para. 30. See also Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 112-115.

[146] There is a question as to whether the enrichment itself in such cases should be the value of the services provided, or the 'end-product' of the increase in the value of the land. *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 W.L.R. 783 (Q.B.) suggests that the enrichment should be the end product based on an interpretation of the relevant statute, while Lord Scott in *Cobbe v. Yeoman's Row Management Ltd* [2008] 1 W.L.R. 1752 at para. 41 (H.L.) suggests that it should only be the value of the services.

[147] *De Beers*, *supra* note 126.

loss should not be taken as support for the correspondence principle without careful consideration, because of the far-reaching consequences of its adoption.

C. *The Relevance of Fault in Unjust Enrichment*

Unjust enrichment is sometimes described as a strict liability cause of action. However, this is only true as a broad, sweeping statement, and particularly only when juxtaposed against equitable doctrines. A more nuanced view of unjust enrichment demonstrates that fault *is* relevant to various aspects of the claim.

First, fault may also be relevant in establishing the relevant unjust factor. As discussed earlier, unjust factors fall into three categories: claimant-sided, defendant-sided, and policy-motivated. Claimant-sided unjust factors focus on the vitiation of the claimant's consent, while defendant-sided unjust factors focus on the shabbiness of the defendant's conduct, while policy-motivated unjust factors identify some other reason why the enrichment should be given back to the claimant. Defendant-sided unjust factors clearly do require some form of fault on the part of the defendant. Fault is thus built into at least some of the unjust factors, and thus into the structure of unjust enrichment.

Second, the claimant's fault may also be relevant in barring a claim in unjust enrichment. It is well-established that the claimant's negligence does not bar a claim in unjust enrichment.[148] However, the claim may be barred where the claimant's conduct in enriching the defendant indicates that he has taken the risk that he will not be able to obtain restitution in respect of the enrichment. The precise role of risk-taking in unjust enrichment remains unclear. Some commentators incorporate risk-taking analysis into the operation of individual unjust factors. For example, if the claimant assumes the risk of an event happening, this can be viewed as a mere misprediction and not a mistake for purposes of establishing the unjust factor of mistake.[149] However, Virgo treats the presence of risk-taking as a distinct principle which bars any claim in unjust enrichment.[150] Risk-taking comes close to demonstrating some form of fault on the part of the claimant if a more objective view of risk-taking is accepted, as was suggested by Lord Hoffmann in *Deutsche Morgan Grenfell*.[151] Under Lord Hoffmann's objective view of risk-taking, whether the party should be treated as having taken the risk depends on the objective circumstances surrounding the payment, as reasonably known to both parties.[152] This sits uneasily with the principle that the claimant's negligence does not preclude recovery, as a negligent claimant could be treated as a risk-taker under Lord Hoffmann's analysis. Risk-taking has received some judicial support in the English cases[153] and there is Singapore Court of Appeal authority supporting risk-taking.[154] However, risk-taking has come under academic

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[148] *Kelly v. Solari* (1841) 9 M. & W. 54.

[149] *Dextra Bank & Trust Company Limited v. Bank of Jamaica* [2001] UKPC 50 at para. 29.

[150] Virgo, "Demolishing the Pyramid", *supra* note 105 at 504-506.

[151] *Deutsche Morgan Grenfell*, *supra* note 115 at para. 28. Lord Hoffmann's remarks in *Deutsche Morgan Grenfell* were recently described by Lord Walker in *Futter v. Revenue and Customs Commissioners* [2013] UKSC 26 at para. 114 as "illuminating".

[152] *Deutsche Morgan Grenfell*, *ibid*.

[153] *Ibid*. at paras. 27, 64-66; *Pitt v. Holt* [2012] Ch. 132 at para. 114 (C.A.).

[154] *IDA Singapore*, *supra* note 124 at paras. 100, 101; *Skandinaviska Enskilda*, *supra* note 124 at para. 137.

criticism for being ambiguous, circular and inconclusive,[155] and courts should take caution in relying on risk-taking to deny recovery since there is considerable uncertainty over the scope and operation of risk-taking. The point made here is simply that at least one form of risk-taking can be interpreted as relevant to the claimant's fault.

Third, fault is clearly relevant to some defences, as recognised by the Court of Appeal in *Anna Wee*.[156] To make out the defence of change of position, the defendant must be acting in good faith and must not be a wrongdoer, as recognised in the leading case of *Lipkin Gorman v. Karpnale Ltd*.[157] *Lipkin Gorman* has been accepted and applied by the courts in Singapore.[158] Fault is also relevant for the defence of bona fide purchase, which, if it applies to a claim in unjust enrichment,[159] will require the defendant to prove that he was acting bona fide.

Finally, recipient liability is one area in which it has been commonplace for commentators to loosely describe unjust enrichment as based on 'strict liability'.[160] The court in *Anna Wee* seems to have adopted the same language.[161] In the interest of precision, it would be better instead to talk about the 'stricter approach' that unjust enrichment adopts towards recipients, as opposed to a more lenient approach which equity traditionally uses.[162]

These recipient liability cases involve at least three parties. The basic structure of such tripartite situations has already been described above in the section on proprietary restitution. We are here talking about the possibility of a personal claim against a recipient either under the equitable doctrine of knowing receipt, or under a personal restitutionary claim for unjust enrichment.

As will be apparent from our discussion above, it makes sense to say that unjust enrichment is based on 'strict liability' and that the equitable doctrine of knowing

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155 Frederick Wilmot-Smith, "Replacing Risk-Taking Reasoning" (2011) 127 Law Q. Rev. 610 at 613-616. *Cf.* Paul S. Davies, "Risk in Unjust Enrichment" [2012] R.L.R. 57.

156 *Anna Wee*, *supra* note 2 at para. 109.

157 [1991] 2 A.C. 548 (H.L.) [*Lipkin Gorman*].

158 *Seagate Technology Pte Ltd v. Goh Han Kin* [1994] 3 S.L.R.(R.) 836 (C.A.); *De Beers*, *supra* note 126; *IDA Singapore*, *supra* note 124; *Parkway Properties Pte Ltd v. United Artists Singapore Theatres Pte Ltd* [2003] 2 S.L.R.(R.) 103 (C.A.); *Skandinaviska Enskilda*, *supra* note 124. It must be noted that Singapore cases on change of position appear to require that it be inequitable for restitution to be made in full as an element of the defence, which does not seem to be the case in England at present.

159 This is a matter of some debate, largely following from the debate on whether proprietary restitutionary claims are within the law of unjust enrichment or outside it: see Part IV above. The most recent case on this point held that bona fide purchase was not applicable to unjust enrichment claims: see *Armstrong DLW GmbH v. Winnington Networks Ltd* [2012] 3 W.L.R. 835 at para. 105 (Ch.), following the approach in *Foskett*, *supra* note 45, which is consistent with Virgo's view, but *cf.* Burrows, *The Law of Restitution*, *supra* note 12 at 575, 576.

160 Peter Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; Peter Birks, "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q. 473; Peter Birks, "Trusts in the Recovery of Misapplied Assets: Tracing, Trusts and Restitution" in Ewan McKendrick, ed., *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon Press, 1992) c. 8; Burrows, *The Law of Restitution*, *supra* note 12 at 416-431; Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in Cornish, *Restitution: Past, Present and Future: Essays*, *supra* note 26 at c. 15.

161 *Anna Wee*, *supra* note 2 at paras. 139-144.

162 See Graham Virgo, "Restitution Through the Looking Glass: Restitution Within Equity and Equity Within Restitution" in Joshua Getzler, ed., *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Oxford: Oxford University Press, 2003) c. 5.

receipt is 'fault-based' only when we ignore the general law of unjust enrichment, and focus our minds solely on a comparative analysis of the two different solutions towards recipient liability which the doctrines of unjust enrichment and equity provide. In conducting this comparative analysis, we are only looking at unjust enrichment in one specific context, *i.e.* recipient liability. In this context, the 'at the expense' requirement of unjust enrichment must be satisfied by a 'title and tracing' exception, and the relevant unjust factor could be either ignorance, powerlessness, or lack of authority (which we have discussed in the context of proprietary restitution above). When we restrict our inquiry to this particular alleged instance of unjust enrichment, it can then be said to be 'strict liability' in the sense that the knowledge of the recipient is not a relevant factor. In contrast, in knowing receipt, we look at the fault of the claimant, which is roughly equated to his degree of knowledge of the surrounding circumstances in which the breach of trust or breach of fiduciary duty occurred.[163] In the context of recipient liability, the use of the terms 'strict liability and 'fault-based' are meant only to mark out whether the recipient's knowledge is a relevant factor towards establishing his liability under either doctrine. We do not, and should not be taken to, mean anything more than that. Thus, the term 'strict liability' is only a rough and ready device used to contrast the two possible approaches to recipient liability. It is not, and should not be taken as, definitional of the law of unjust enrichment and its future development.

D. *Unjust Enrichment is Not a Purely Common Law Phenomenon*

Anna Wee also described unjust enrichment as a common law cause of action,[164] but the better view is that unjust enrichment is not a purely common law phenomenon. As Virgo points out, determining to what extent the different approaches of common law and equity to the award of restitutionary remedies can be assimilated is "[o]ne of the most important challenges facing the modern law of restitution".[165] There are a variety of views, with Burrows on one end advocating complete assimilation.[166] In Burrows' own words:[167]

> [I]t is illuminating to see aspects of common law and equity alongside each other as underpinned by the principle of reversing unjust enrichment. While one must be sensitive to there being differences between common law and equity that can be rationally defended, what one must not do is to separate common law and equity as if the historical divide between them is in itself a good reason for regarding them as separate areas of the law.

Goff & Jones, too, advocates a fused approach.[168]

There are clear practical implications to this debate.

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[163] For the relevant test in Singapore, see *George Raymond Zage III v. Ho Chi Kwong* [2010] 2 S.L.R. 589 at paras. 23-41 (C.A.).

[164] *Anna Wee*, *supra* note 2 at paras. 109, 137, 138, 140, 146.

[165] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 45.

[166] Andrew Burrows, "We Do This at Common Law But That In Equity" (2002) 22 Oxford J. Legal Stud. 1.

[167] Burrows, *The Law of Restitution*, *supra* note 12 at 25, 26.

[168] Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 34 at 1-06, citing *Nelson v. Larholt* [1948] 1 K.B. 339 approvingly.

First, any attempt to confine the law of unjust enrichment to the sphere of common law alone would make it impossible to explain well-established unjust factors that are clearly equitable in origin, *e.g.* undue influence and unconscionability, and which serve as grounds for restitution of an unjust enrichment.[169]

Second, the difference between legal and equitable claims is probably most important in the context of restitutionary proprietary claims.[170] If one believes, as Burrows advocates, that proprietary restitution belongs within the law of unjust enrichment, it should make no difference whether the claimant had legal or equitable title immediately prior to a third party's misdirecting it to the defendant. A unitary law of tracing (in common law and equity),[171] coupled with the recognition of the unjust factor of ignorance or powerlessness, would demand that the defendant disgorge his enrichment to the claimant—the response of proprietary restitution is triggered. However, under Virgo's view, proprietary restitution is based on the principle of vindication of property rights, under which the rules of property govern the creation of proprietary rights. It matters whether the claimant has a legal or equitable proprietary interest which he is seeking to vindicate.[172]

Contrary to what *Anna Wee* may suggest, unjust enrichment cannot be satisfactorily understood as a purely common law phenomenon.

VII. Conclusion

In this paper, we have aimed to set out some of the more controversial debates in the law of restitution in their proper context and provide some guidance on the position that Singapore law has taken. The willingness of the local courts to grapple with these debates is encouraging. We have also analysed recent judicial pronouncements on the nature of claims in unjust enrichment, which may prove problematic if taken as setting out general definitions. Given the conflicting conceptual frameworks on offer and the intensity of the debates on particularly contested issues, the court's dictum in *Anna Wee* should not be taken as signalling a definitive adoption of one particular conceptual framework to undergird the future of the law of unjust enrichment. To do so would not only have extremely far-reaching consequences, it would be to ignore the Court of Appeal's repeated emphases that they were not making definitive pronouncements on the law.

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[169] Burrows, *The Law of Restitution*, *supra* note 12 at 25.

[170] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 45.

[171] This idea that the rules of tracing at common law and equity ought to be fused so that equity's more generous tracing rules can be applied to a common law claim (without first having to show a fiduciary relationship/equitable interest) is advocated by Birks, "The Necessity of a Unitary Law of Tracing" in Ross Cranston, ed., *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Clarendon Press, 1997) c. 9. It is still not the law in England (although dicta by Lord Steyn and Lord Millett in *Foskett*, *supra* note 45 support it) and see also Burrows, *The Law of Restitution*, *supra* note 12 at 120, 121. Singapore law at present still recognises two sets of tracing rules, one at common law and one in equity: *O'Connor Rosamund Monica v. Potter Derek John* [2011] 3 S.L.R. 294 at para. 47 (H.C.).

[172] Virgo, *Principles of the Law of Restitution*, *supra* note 12 at 45.

Rather than attempt to engage in overly-general line-drawing exercises, we would do well to heed Fox's warning:[173]

> It has become something of a commonplace to say that the boundary between property and obligations is fraught with complexity. The lines between these two fields have been drawn and re-drawn by scholars, all keen to fit the same primary features of the legal landscape into different maps of their own devising.

The complexity of the various conceptual frameworks on offer may have posed difficulty to lawyers unfamiliar with this controversial area of law. As a practical matter, this may have meant that potential restitutionary claims may have been overlooked by lawyers advising their clients due to their reluctance to engage with it. As a conceptual matter, this may have meant that the implications of choosing a particular conceptual framework have not been fully appreciated. It is our hope that this paper will help practitioners in venturing into the 'restitution thicket', and that it will pave the way for fuller and more comprehensive discussion on the conceptual debates.

[173] David Fox, Book Review of *Consequences of Impaired Consent Transfers* by Birke Häcker, (2011) 127 Law Q. Rev. 477 at 477.