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# ENFORCING UNJUST ENRICHMENT RIGHTS: THE RECOVERY OF MISTAKEN PAYMENTS IN PRACTICE

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This article examines the recoverability of mistaken payments made by bank transfer in practice in Singapore. It is now clearly established under Singapore law that a mistaken payor has a claim in unjust enrichment to recover his mistaken payment. However, it is not so easy for the mistaken payor to enforce his rights. In Singapore, this problem is particularly acute because of bank privacy laws in Singapore which make it difficult for a mistaken payor to discover the identity of the payee. Yet, without the ability to effectively enforce one's unjust enrichment rights, having those rights themselves is of little practical value. The article then proposes a simple way to make it significantly easier and cheaper for mistaken payors to enforce their unjust enrichment rights: by expanding the jurisdiction of the Small Claims Tribunal to encompass these claims. Doing so would enhance access to justice and should be warmly welcomed.

## I. INTRODUCTION

Several months ago, I put up an item for sale on Carousell,[1] an online platform in Singapore for the buying and selling of goods and services.[2] Carousell allows sellers to put up goods and services for sale to other users of the website or app. A buyer quickly made an offer for the item, which I accepted. Payment was to be made by bank transfer. After I received payment, I would then send the item to the buyer by post. In a haze after teaching an unjust enrichment class, I quickly sent the buyer a message with my bank account details for the buyer to make payment to. The buyer duly paid by transferring payment to the bank account number I provided. When checking to see if I had received the payment, I discovered that no payment had yet been received. On closer inspection, I realised that when I had given the buyer

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1 Available online: <http://carousell.com>.

2 Essentially, this platform allows sellers to put up various items or services for sale, ranging from furniture to books to cleaning services, and prospective buyers can browse the platform. When a buyer finds an item that he or she wants to purchase, he or she can make an offer through the Carousell 'app'. If the seller accepts the offer, the buyer and seller typically arrange for payment to be made. The most common way that this is done is that the seller provides his or her bank details to the buyer, the buyer makes payment of the offered amount by bank transfer, and when the seller receives the payment, the seller then posts the item to the recipient.

my bank account details, I had accidentally mistyped my bank account number by mistake. In a classic 'fat finger' mistake, I had typed a '4' instead of a '5'. The buyer had paid someone else, not me. What now? What then followed was a quest to get the buyer to recover her mistaken payment from the payee, so that she could pay me.

As an unjust enrichment lawyer, I know full well that the mistaken payor has valid claims in unjust enrichment to recover payments of money made by mistake. This is said to be a matter of right, not discretion.[3] This is so under Singapore law just as it is under English law.[4] But as I later found out, the ability to enforce that right is far from a simple matter in Singapore. In fact, it is relatively costly and difficult to enforce unjust enrichment rights to recover mistaken payments where the mistaken payment is made by bank transfer. Particularly where mistaken payment is not very large, the costs of trying to enforce one's unjust enrichment rights are likely not to be worth it compared to the amount that the mistaken payor stands to recover.

The main aim of this paper is to show that although it is now well-established in Singapore that mistaken payors have claims in unjust enrichment to recover mistaken payments that they have made, much less attention has been paid to the question of how easy it is to enforce those rights in practice. One particular reason for this difficulty in Singapore is bank privacy laws that make it difficult for a mistaken payor to discover the identity of the payee. I then propose a simple way to make it significantly easier and cheaper for mistaken payors to recover their money in unjust enrichment: by expanding the jurisdiction of the Small Claims Tribunal to encompass these claims. Without the ability to effectively enforce one's unjust enrichment rights, having those rights themselves is of little practical value.

The focus of this paper is on payments made by bank transfers. Payments by bank transfers are likely to be more common than payments of physical notes and coins today, tend to involve larger sums of money, and raise some particularly difficult issues. The rest of this paper is set out as follows. Part II looks briefly at unjust enrichment law in Singapore. Part III looks at the practicalities of trying to recover a mistaken payment in Singapore. Part IV then proposes a simple solution to make the recovery of mistaken payments easier and less costly by expanding the jurisdiction of the Small Claims Tribunal in Singapore and discusses some of the limitations of this solution. Part V concludes.

## II. Recovering Mistaken Payments in Principle

Unjust enrichment is now reasonably well-established in both English law, as well as in the law in Singapore. The last decade and a half have seen a consistent stream of cases through Singaporean courts, setting out various principles of unjust enrichment in Singapore.[5] But cases that would now be described as based on unjust enrichment existed for a long time before the formal recognition of unjust enrichment in either

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3 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at paras 105, 106, 136 (CA) [*Anna Wee*].

4 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 578 (HL) [*Lipkin Gorman*]: 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right'.

5 Some recent important cases include: *Anna Wee*, *supra* note 3 (relationship between unjust enrichment and unconscionability; 'at the expense of' requirement; unjust enrichment and knowing receipt); *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 (CA) [*Alwie Handoyo*] (unjust factor of 'want of authority'); *Eng Chiet Shoong v Cheong Soh Chin* [2016] 4 SLR 728 (CA) [*Eng Chiet Shoong*] (unjust

Singapore or England. Even before unjust enrichment was formally recognised, courts recognised that monies paid out by mistake could be recovered as monies had and received,[6] and that monies paid by a mistake of fact could be recovered but not monies paid under a mistake of law.[7] Today, courts in Singapore have repeatedly accepted that unjust enrichment is an independent source of obligations in its own right, that monies paid by mistake can be recovered in unjust enrichment claims, and that recovery of mistakenly paid monies is as a matter of right, not based on the court's discretion. Each of these three points are elaborated upon in more detail in this part.

### A. *Unjust Enrichment as an Independent Source of Obligations*

First, it is clear that courts do accept unjust enrichment as an independent source of obligations in its own right, distinct from contract and tort. This is clearly shown by the High Court and Court of Appeal decisions of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [*De Beers*].[8] Both the High Court and Court of Appeal recognised that the defendant's claim to recover a mistaken payment was based on unjust enrichment[9] and it was not 'founded on a contract', so it fell outside section 6 of the *Limitation Act* in Singapore which provides for a limitation period of 6 years from the date of accrual of the cause of action in 'actions founded on a contract or on tort'.[10] In fact, the High Court held that common law unjust enrichment claims fell outside the *Limitation Act* altogether.[11] This interpretation of the *Limitation Act* was affirmed by the Court of Appeal.[12] Both the High Court and Court of Appeal have therefore accepted that claims in unjust enrichment are not founded on a contract or on tort, and that unjust enrichment is an independent, distinct source of obligations.

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enrichment and *quantum meruit*); *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 (HC) (unjust factor of 'lack of consent'); *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 (CA) [*Benzline Auto*] (failure of consideration); *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 (CA) (illegality and unjust enrichment).

6 *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR (R) 836 (CA). That case did not formally base the recoverability of the mistaken payment on unjust enrichment, but did apply *Lipkin Gorman*, *supra* note 4 in holding that a defence of change of position existed.

7 *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 (Sing HC) [*Marian Chye*]. See also *Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd* [1992] 2 SLR (R) 419 (CA) [*Borneo Motors*].

8 [2001] 2 SLR (R) 669 (HC) [*De Beers* (HC)], aff'd [2002] 1 SLR (R) 418 (CA) [*De Beers* (CA)].

9 In *De Beers* (CA), *ibid*, the court often referred to the claim as a 'restitutionary' one, but this should now be read in light of *Alwie Handoyo*, *supra* note 5 at para 126, where the Singapore Court of Appeal held that 'restitution' and 'unjust enrichment' are not synonymous. The Court of Appeal also said that 'restitution' refers to a response to an event, while 'unjust enrichment' is an event which triggers a legal response (*De Beers* (CA), *supra* note 8 at para 126). Since *De Beers* also cited *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 which described the claim as being based on the principle of unjust enrichment, the main point accepted by the court seems to be that unjust enrichment claims do not fall within the *Limitation Act* (Cap 163, 1996 Rev Ed Sing).

10 *De Beers* (HC), *supra* note 8 at para 77.

11 *Ibid*.

12 *De Beers* (CA), *supra* note 8 at para 32: 'A perusal of the Limitation Act showed that a claim for unjust enrichment which was neither grounded in contract nor tort, and in which equitable relief was not sought, did not fall within the scope of the Act.'

This position was put beyond a doubt by the recent Court of Appeal decision in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*, where Phang JA recognised that 'it has been generally accepted that "restitution for unjust enrichment" is a distinct and new branch of the law of obligations (the other two great branches being the law of contract and the law of tort, as part of the common law, and the law of equity constituting yet another distinct branch that developed separately from the common law).'[13]

### B. *Recovery of Mistaken Payments*

Second, it has always been clear that where a payor makes payments of money caused by a mistake of fact, he can recover them, even before the formal recognition of unjust enrichment in Singapore. A classic Singaporean decision is *Seagate Technology Pte Ltd v Goh Han Kim*.[14] Seagate was a company manufacturing and repairing computer and data processing equipment. It employed Heng, who was responsible for raising purchase requisitions and scheduling delivery of materials. Heng got to know the defendant, who was one of Seagate's suppliers. Heng then devised schemes under which Seagate would pay the defendant for goods that were never physically delivered to Seagate or for goods that it in fact already owned. When the frauds came to light, Seagate brought actions in money had and received against the defendant to recover the money. The claims succeeded. The principle that the court stated for this result was that:

> The action for money had and received will lie where the defendant has received money of the plaintiff under such circumstances that he is obliged by the ties of natural justice and equity to refund it: he is regarded in law as having received the money to the use of the plaintiff and the law imposes an obligation upon him to repay it to the plaintiff on the principle that he has unjustly benefited.[15]

As Seagate had made a mistake in paying out the money under mistakes of fact that they had received goods for which Seagate had to make payment,[16] they could recover the monies paid, subject to a defence of change of position.[17]

Another case which recognised that monies paid out by mistake could be recovered in a claim for restitution to correct the defendant's unjust enrichment was *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd*.[18] There, Lai Kew Chai J held that monies paid by mistake could be recovered in a claim based on unjust enrichment.[19] In doing so, Lai J cited *Kelly v Solari*[20] as an example of the recoverability of mistaken payments where the mistake was causative of, and operated at the time of the payment. However, in that case, Lai J held that the claimant was not mistaken about whether the compensation sum they

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13 [2018] SGCA 44 (CA) at para 181 (emphasis and italics omitted).
14 *Supra* note 6.
15 *Ibid* at para 23.
16 *Ibid* at para 24.
17 *Ibid* at paras 28-43.
18 [2002] 2 SLR (R) 136 (HC) [*IDA*].
19 *Ibid* at para 90, though paras 87 to 89 also describe the claim as a 'restitutionary' one.
20 (1841) 9 M & W 54; 152 ER 24.

had paid to the defendant for termination of the defendant's licence was taxable, and so the claim failed.[21]

Initially, recovery was only allowed where the mistake was one of fact, not law.[22] The mistake of law bar was judicially abolished by the Singapore Court of Appeal in *De Beers*.[23] Following that decision, where a payor makes payments of money by mistake, whether of fact or law, he can recover them in an unjust enrichment claim. This was confirmed by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [*Skandinaviska*],[24] where the court said that:

> [M]oney paid under a mistake, whether or fact or of law, is generally repayable as money had and received. . . The defendant must account for and repay the money if all of the following conditions are satisfied: (a) the defendant has received a benefit (*ie*, he has been enriched); (b) the enrichment is at the plaintiff's expense; (c) it is unjust to allow the defendant to retain the enrichment; and (d) there are no defences available to the defendant.[25]

This makes clear that money paid under a mistake is generally recoverable by the mistaken payor and that recovery is based on unjust enrichment, as the four-step unjust enrichment framework was adopted by the Court of Appeal.

Nor does it matter whether the money paid under a mistake was paid in the form of physical coins and notes that passed from the payor to the payee, or whether the money was paid through bank transfers.[26] As the Court of Appeal has said in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*, the benefit or enrichment requirement 'does not present any difficulties where the enrichment is monetary in nature'.[27] In *Skandinaviska*, the Court of Appeal clearly regarded the fact that monies had been received into a bank account as not being an obstacle to establishing that the defendant had been enriched, although the claim failed on other grounds.[28]

### C. *Recovery as a Matter of Right, Not a Discretion*

Singaporean courts have also been at pains to stress that whether a claimant is successful in his claim for unjust enrichment depends on the application of legal

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21 This was for two reasons. First, there was no mistake, only a misprediction: *IDA*, *supra* note 18 at paras 97-104. Second, it could not be shown that the claimant had made a mistake of law in the absence of a settled legal position falsified by a court of law: *Ibid* at para 113. In this case, there was neither a settled legal position (*ibid* at para 108) nor was there a definitive ruling by the courts on whether the sum was taxable: *Ibid* at para 112.

22 *Marian Chye*, *supra* note 7. See also *Borneo Motors*, *supra* note 7.

23 *Supra* note 8.

24 [2011] 3 SLR 540 (CA) [*Skandinaviska*].

25 *Ibid* at para 110. See also *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240 (HC) at para 211 [*Freddie Koh* (HC)].

26 In English law, see generally David Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008).

27 *Anna Wee*, *supra* note 3 at para 112. See also *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799.

28 *Skandinaviska*, *supra* note 24 at paras 116-130. For an analysis of the decision see generally Yip Man, "Restitution for Victims of Fraud" [2011] Sing JLS 570.

rules to the facts,[29] rather than the court's exercise of a discretion as to whether recovery would be 'fair' or 'just' in the circumstances.[30] Courts have repeatedly stressed that for a cause of action in unjust enrichment to be made out, the claimant must prove that the defendant has received a benefit or been enriched, that the defendant's enrichment is at the claimant's expense, and that the defendant's enrichment must be 'unjust',[31] in that there must be a recognised unjust factor.[32] It is not sufficient for the claimant simply to assert that the defendant's enrichment was unjust, in the sense of being unfair.[33] Where these requirements are proven, then the defendant is prima facie liable to make restitution unless he can establish one of the recognised defences to such a claim. In the *Anna Wee* decision, the Court of Appeal cited with approval the seminal statement in *Lipkin Gorman v Karpnale* that:

> [I]t does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.[34]

In short, Singapore law now recognises the independent existence of unjust enrichment as a source of rights and obligations; it accepts that payments made by mistake of fact or law can be recovered in unjust enrichment, and that recovery is made as a matter of right, not as an exercise of the court's discretion.

## III. Recovering Mistaken Payments in Practice

What we have looked at so far was the legal position in Singapore as to the recoverability of mistaken payments. In principle, a payor who makes a payment by mistake to the payee should have a valid claim to recover the payment in unjust enrichment under Singapore law, in the absence of any applicable defences such as change of position. But how easy is it actually to recover a mistaken payment in practice? As this Part shows, it is not so easy to recover a mistaken payment made by bank transfer in practice.

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29 *Anna Wee*, *supra* note 3 at para 130: 'We have already observed that unjust enrichment is not based on a general notion of unconscionability or unjustness. It follows that the crucial question of whether the enrichment is unjust is circumscribed by the traditional common law rules.'

30 *Freddie Koh* (HC), *supra* note 25 at para 209.

31 *Skandinaviska*, *supra* note 24 at para 110; *Anna Wee*, *supra* note 3 at para 98; *Freddie Koh* (HC), *supra* note 25 at para 208; *Benzline Auto*, *supra* note 5 at para 45.

32 *Anna Wee*, *supra* note 3 at paras 130-134; *Freddie Koh* (HC), *supra* note 24 at para 209; *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 (CA) at paras 92-94 [*Freddie Koh* (CA)].

33 *Anna Wee*, *supra* note 3 at para 134; *Lo Man Heng v UBS AG* [2014] SGHC 134 at para 82; *Khor Liang Ing Grace v Nie Jianmin* [2014] 4 SLR 1197 (HC) at para 29; *Freddie Koh* (HC), *supra* note 25 at para 208; *Freddie Koh* (CA), *supra* note 32 at para 90.

34 *Anna Wee*, *supra* note 3 at para 105.

### A. *Payments Made by Bank Transfer*

Where the payor makes a mistaken payment by local bank transfer (*ie* to another bank account held in Singapore), the position of the leading local banks in Singapore appears to be that the bank is unable to reverse any allegedly mistakenly paid transfer of money without the consent of the payee.[35] One of the leading local banks in Singapore, the Development Bank of Singapore Ltd ("DBS Bank Ltd"), has a page on their website titled 'Wrong Local Funds Transfer'.[36] The bank suggests two different routes for how to recover the mistaken payment, depending on whether or not it is possible for the mistaken payor to contact the account holder.[37]

Where the mistaken payor is able to contact the account holder, then the mistaken payor is advised to inform the account holder directly and request for the return of the funds.[38] This is most likely to be the case where the mistaken payor has accidentally transferred money to the bank account of someone they know, such as one of the mistaken payor's family members, whose account details are already added to the payor's payee list on the bank's internet banking facility.

However, in some cases, the mistaken payor will not know the identity of the account holder. An example is where the payor has simply mistyped the bank account number, mistakenly replacing a single digit with another digit. In that case, all the mistaken payor knows is the bank account number to which he or she has accidentally transferred money to, but not the identity of the holder of that bank account. In this second case, then the bank suggests that the mistaken payor visits any branch of the bank with his or her passport or national identification card to fill up an indemnity form and the bank will then try to recover the funds on the mistaken payor's behalf.[39] Anecdotally, it appears that the bank does this first by calling the payee's telephone number to inform the payee about the payment and to ask for the payee's consent to reverse the payment. If the bank is unable to contact the payee after repeated calls, the bank may then send emails to the payee, and then finally send a letter to the payee's registered address to inform them about the payment and to ask for the payee's consent to reverse it.[40] If the account holder refuses to consent to the funds

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[35] A recent consultation paper issued by the Monetary Authority of Singapore ("MAS") proposes specific duties to be imposed on financial institutions to make reasonable efforts to recover sums sent in error. For example, where the responsible financial institution is the financial institution of the account holder who has made a mistaken payment, then the financial institution should inform the recipient financial institution of the erroneous transaction within two business days of receiving the necessary information from the account holder. The financial institution should also ask the recipient financial institution for the recipient's response and provide the account holder with any new relevant information within seven business days of informing the recipient financial institution. These proposals would appear to similar to the approach currently taken by local banks, apart from the introduction of specific time limits. See MAS, *Consultation Paper: Proposed E-payments User Protection Guidelines*, P004-2018 (13 February 2018) at 26-28, online: MAS <http://www.mas.gov.sg/~/media/resource/publications/consult_papers/2018/P0042018%20User%20Protection%20Guidelines%20Consultation%20Paper.pdf>.

[36] DBS Bank Ltd, "Wrong Local Funds Transfer", online: <https://www.dbs.com.sg/personal/support/bank-local-wrong-funds-transfer.html>.

[37] *Ibid*.

[38] *Ibid*.

[39] *Ibid*.

[40] See "Man Makes Fund Transfer to Wrong DBS Acc, DBS Unable to Help" *All Singapore Stuff* (2 May 2016), online: <https://www.allsingaporestuff.com/article/man-makes-fund-transfer-wrong-dbs-acc-dbs-unable-help>.

being returned, or refuses to answer the phone calls or reply the bank's letter, then it appears that the bank will not reverse the payment and recredit the money into the payor's bank account.[41]

Two reasons can be given for this. First, contractually, the terms and conditions of the operation of any bank account between the bank and the account holder typically do not give the bank the unilateral power to debit the account holder's account without his consent. Thus, the payee's bank has no power to debit the payee's account even if the payor complains. Second, from the bank's point of view, it has little ability to be able to determine whether the payor had truly made a mistake in transferring money to the payee's account. It could well be that the payor had made the payment in full awareness of all the true facts and had subsequently changed his mind about making the payment, or that payor had paid the money to the payee for a good reason, such as to discharge his obligation to pay the payee for goods, and then tried to recover the money after having received his goods. This is likely to be the reason why banks do not want to get involved with the substantive merits of the dispute between the payor and the payee where the payee refuses to consent to a reversal of the transfer. In those cases, then it appears that the payor has to bring an action against the payee in the courts to recover the mistaken payment.

The payor may also make a police report in respect of the mistaken payment to the payee if the payee does not consent to reverse the transfer.[42] Sometimes, the investigation of the police may be enough to pressure the payee to consent to reverse the transfer. The payee may also be guilty of some criminal offence,[43] but even if convicted, this would not help the payor recover his or her mistaken payment.

It is possible that there may be other dispute resolution mechanisms available to a mistaken payor. One possibility is FIDReC, the Financial Industry Disputes Resolution Centre,[44] which has jurisdiction to adjudicate disputes between consumers and financial institutions for claims worth up to S$100,000.[45] The dispute resolution process comprises two stages: mediation; and if mediation is unsuccessful, adjudication.[46] However, it is unclear whether mistaken payors can have their disputes adjudicated before FIDReC as the breakdown of types of complaints heard by FIDReC in their annual reports does not list mistaken payments as a recognised

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41 *Ibid*. Connie Cheong, "Legal to keep Mistakenly Wired Funds?", Letter to the Editor, *The Straits Times Forum* (13 July 2015), online: <http://www.straitstimes.com/forum/letters-in-print/legal-to-keep-mistakenly-wired-funds>.

42 *Ibid*.

43 It is not clear what offence might be committed. It cannot be theft under section 378 of the *Penal Code* (Cap 224, 2008 Rev Ed Sing), because that requires the defendant to move movable property from the victim's possession, nor criminal misappropriation of movable property under section 403 of the *Penal Code*. The property in question is a contractual right owed by the bank to the customer and cannot be moved from the customer's possession, nor did the payee move or misappropriate the debt. Similarly, there is no extortion involved in refusing to return a mistaken payment (section 383), it is unlikely that the payee was 'entrusted' with property or dominion over property for the commission of criminal breach of trust (section 405), the property in question was probably not stolen (section 410 and 411), and the payee did not cheat by fraudulently or dishonestly inducing the payor to pay him in spontaneous mistake cases (section 415).

44 FIDReC, online: <https://www.fidrec.com.sg/website/index.html>.

45 FIDReC, "The Jurisdiction of FIDReC", online: <https://www.fidrec.com.sg/website/jurisdiction.html>.

46 FIDReC, "Dispute Resolution Process", online: <https://www.fidrec.com.sg/website/disputerp.html>.

complaint.[47] It is therefore doubtful whether these other mechanisms are likely to be helpful for the mistaken payor.

### B. *Identifying the Payee*

What can a mistaken payor then do if the payee refuses to consent to the mistaken payment being returned? One possibility is that the mistaken payor can then consider bringing court proceedings to recover the money from the mistaken payee.

The first problem is that the payor may have no information about the payee's identity and will not know who to name as the defendant. Where the mistaken payor simply mistypes the recipient's account number, the payor will not know the identity of the payee. Furthermore, strict bank privacy laws in Singapore mean that the bank is legally prohibited from disclosing customer information except in strictly specified circumstances provided for under the Singapore *Banking Act*.[48] Customer information includes information relating to an account of a customer of the bank,[49] which would clearly include the customer's name and contact information. Exceptions to the general prohibition on disclosing customer information are found in the Third Schedule to the Singapore *Banking Act*. For example, the Third Schedule indicates that disclosure of customer information is permitted, among other circumstances, in connection with the conduct of proceedings between the bank and two or more parties making adverse claims to money in an account of the customer where the bank seeks relief by way of interpleader,[50] or where disclosure is permitted in writing by the customer.[51] Under English law, a banker's duty of confidentiality and the exceptions to that duty are governed by common law.[52] But in *Susilawati v American Express Bank Ltd*,[53] the Singapore Court of Appeal held that the duty of confidentiality between banker and customer is exclusively governed by the *Banking Act*, that the exceptions to that duty listed in the Third Schedule were comprehensive,[54] and that there is no further room for the common law exceptions to operate.[55] If this is correct, then a mistaken payor can only obtain information

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47 See *eg* the Annual Report 2016/17, available on FIDReC, "Annual Reports", online: <https://www.fidrec.com.sg/website/annualreports.html>.

48 *Banking Act* (Cap 19, 2008 Rev Ed Sing), ss 47(1), 47(2).

49 *Ibid*, s 40A.

50 *Ibid*, Third Schedule, Part I.

51 Another potentially relevant exception is found in paragraph 4(b), which allows disclosure where disclosure is solely with a view to the institution of proceedings between the bank and 2 or more parties making adverse claims to money in an account of the customer where the bank seeks relief by way of interpleader: *Ibid*, Third Schedule, Part I, para 4(b). Interpleader proceedings essentially involve the bank applying to court for relief where the bank has been or expects to be sued by two or more parties making adverse claims to the money: *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), O 17 r 1. This too is a possible route for the payor to eventually discover the identity of the payee, but is rather circuitous as it requires the payor to bring an action against the bank, wait for the bank to bring interpleader proceedings, and then obtain disclosure from the bank as to the payee's identity.

52 The landmark decision is *Tournier v National Provincial and Union Bank of England, Ltd* [1924] 1 KB 461.

53 [2009] 2 SLR (R) 737 (CA) [*Susilawati*].

54 *Ibid* at paras 64-70.

55 *Ibid* at para 67.

about the payee from the payee's bank under one of the exceptions listed in the Third Schedule.[56]

The exception that is most likely to be available to a mistaken payor seeking information about the payee's identity is found in paragraph 7 of Part I of the Third Schedule, which provides that disclosure is possible where '"[d]isclosure" is necessary for compliance with an order of the Supreme Court or a Judge thereof pursuant to the powers conferred under Part IV of the *Evidence Act*'.[57]

Part IV of the *Evidence Act*[58] contains the equivalent of the 'bankers' books' provisions under English law.[59] They essentially allow copies of entries in bankers' books to be produced in court as evidence. The rationale for these provisions is that it would cause great inconvenience for a bank's day to day operations if bank representatives had to produce physical bank documents in court rather than simply copies of such documents.[60] Section 175 of the *Evidence Act* provides that 'On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.' A court or judge would therefore be able to order that the bank produces copies of entries in its books relating to identifying information of the payee for the inspection of the mistaken payor.

However, in *Wee Soon Kim Anthony v UBS AG*, the Court of Appeal held that the bankers' books provisions only deal with the mechanism of how evidence is to be produced by banks, not whether the bank is required to provide that evidence in the first place. The Court of Appeal thus held that Part IV of the *Evidence Act* does not expand a party's right of discovery.[61] Whether a party may inspect the bank account of another person depends on his right of discovery in the first place.[62] This position was recently reaffirmed by the High Court in *Success Elegant*, where Andrew Ang SJ confirmed that 's 175 was not meant to confer an independent right of discovery'.[63] Even more clearly, Andrew Ang SJ agreed that 'Pt IV "relates only to how evidence is to be provided by the banks"'.[64] In other words, Part IV only deals with the mechanism of the production of evidence, allowing it to be done by production of copies of the bank's documents, rather than by requiring the production

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56 For criticism of *Susilawati*, *supra* note 53, on this point, see Poh Chu Chai, *Law of Banker and Customer*, 6th ed (Singapore: LexisNexis, 2016) at 543-548; Sandra Booysen, "Singapore" in Sandra Booysen & Dora Neo, eds, *Can Banks Still Keep a Secret?* (Cambridge: Cambridge University Press, 2017) 278 at 287-288.

57 *Banking Act*, *supra* note 48, Third Schedule, Part I, para 7.

58 *Evidence Act* (Cap 97, 1997 Rev Ed Sing).

59 From the English *Bankers' Books Evidence Act, 1879* (UK), 42 & 43 Vict, c 11.

60 *Pollock v Garle* [1897] 1 Ch 1 at 4. It also facilitates the production of bankers' books as evidence, see *Wheatley v Commissioner of Police of the British Virgin Islands* [2006] 1 WLR 1683 (PC) at 1692.

61 [2003] 2 SLR (R) 91 (CA) at para 19 [*Wee Soon Kim*]. See also *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392 (HC) at para 92 [*Success Elegant*].

62 *Wee Soon Kim, supra* note 61 at para 19. See also *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669; *R v Bono* (1913) 29 TLR 635.

63 *Success Elegant, supra* note 61 at para 92.

64 *Ibid* at para 92, citing *La Dolce Vita Fine Dining Co Ltd v Deutsche Bank AG* [2016] SGHCR 3 at para 91 [*La Dolce*]. See also *Chan Swee Leng v Hong Kong and Shanghai Banking Corp Ltd* [1996] 5 MLJ 133 (Brunei HC).

of original documents or other means. They do not deal with the question of whether the bank is required to provide that evidence to the mistaken payor in the first place.[65]

Whether the bank is required to provide that evidence to the mistaken payor in the first place depends on whether the mistaken payor can establish a 'substantive right' to the information or documents.[66] In Singapore, this is likely to depend on the rules on pre-action discovery. In England and Wales, some orders that the mistaken payor might seek to establish such a substantive right are the *Norwich Pharmacal* order[67] or a *Bankers' Trust* order.[68] A *Norwich Pharmacal* order, which essentially requires a non-party who is involved in a wrongful act of another to disclose information and potentially even documents so that the potential claimant can bring its action against the party who committed the wrongful acts. Another possibility is the *Bankers' Trust* order, which enables the court to make an order against a bank to disclose information and documents from the bank so that a victim of fraud who has an equitable proprietary claim in respect of misappropriated assets can follow the flow of money. Neither route is straightforward in a simple claim by a mistaken payor for the recovery of his mistaken payment. The difficulty with *Norwich Pharmacal* orders for simple mistaken payment claims in unjust enrichment is that there is no wrongdoing on the part of a payee who receives a payment made by mistake by a payor,[69] nor has the bank facilitated any wrongdoing,[70] and so *Norwich Pharmacal* orders should not be available for the recovery of mistaken payments in unjust enrichment.[71] Similarly, in a simple mistaken payment case, ordinarily all the claimant is interested in is a personal, not a proprietary claim, and there is also no fraud involved in the misapplication of the assets, so there seems to be no basis to grant a *Bankers' Trust* order either.[72]

In Singapore, the rules on pre-action discovery are found in Order 24 rule 6 of the Rules of Court. Order 24 rule 6(5) provides specifically for the court's power to make an order for pre-action discovery for the purpose of or with a view to identifying possible parties to any proceedings where the court thinks it just to make such an order. Order 24 rule 6(5) now incorporates one of the most common orders for pre-action discovery, *Norwich Pharmacal* orders,[73] which can be made to require a non-party who is involved in a wrongful act of another to disclose information so

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65 *Success Elegant, supra* note 61 at para 92.

66 *Ibid.*

67 Named after the case which first made such an order: *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL) at 168.

68 First made in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (CA).

69 *Santander UK plc v The Royal Bank of Scotland plc* [2015] EWHC 2560 (Ch) at para 13 [*Santander (2015)*].

70 *Ibid* at para 14.

71 *Cf Santander UK plc v National Westminster Bank plc* [2014] EWHC 2626 (Ch); *Santander (2015)*, *supra* note 69, where the claimant bank had made mistaken payments to customers of other banks and successfully sought *Norwich Pharmacal* orders for the other banks to disclose personal information relating to the customers. For further discussion, see Mat Campbell, "Unjust Enrichment Meets *Norwich Pharmacal*" [2016] LMCLQ 42.

72 *Santander (2015)*, *supra* note 67 at paras 12-14.

73 *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133 (HL) at 175 (Lord Reid).

that the potential claimant can bring its action against the wrongdoer.[74] But Order 24 rule 6(5) goes beyond *Norwich Pharmacal* orders as it does not require the person the order is to be made against to have facilitated wrongdoing.[75]

The general rule under Order 24 rule 7 is that discovery is to be ordered only if necessary.[76] Some factors that can be taken into account in determining whether pre-action interrogatories are necessary include whether the information required is proportionate, whether there are alternative avenues to obtain the information, and how intrusive those interrogatories would be.[77] In a case involving a mistaken payment by bank transfer, it appears fairly clear that discovery is necessary for the mistaken payor to be able to effectively enforce his unjust enrichment rights. Due to the banking privacy regime, there is likely to be no other practical avenue for the mistaken payor to obtain the information, and concerns about proportionality and intrusiveness can be addressed by giving the mistaken payor only enough information for him to bring an action against the payee. For example, the payee's full name and postal address would be sufficient for the payor to bring an action against the payee, without needing information such as the payee's date of birth.[78] If no order was made in favour of the mistaken payor, he would not know who to bring the claim to recover the mistaken payment against, and could not even start the process of bringing a claim.

One last hurdle with Part IV of the *Evidence Act* is that the key section giving the judge the power to grant an order for inspection of the bankers' books provides that such evidence can only be ordered 'on the application of any party to a legal proceeding'.[79] On the face of it, this suggests that there must be some existing legal proceeding already in progress,[80] most likely that between the mistaken payor and the bank. If this plain reading of the section is adopted, then section 175 is not helpful for the mistaken payor in discovering who the payee is without starting an action against the bank itself for the return of the money. However, in *Success Elegant*, Andrew Ang SJ interpreted the words 'legal proceedings' in section 175 to the very application for disclosure itself.[81] This approach was justified on the basis that requiring a separate set of independent legal proceedings before pre-action discovery was possible would make banks generally exempt from pre-action discovery.[82] However, it has been argued that this interpretation of 'legal proceedings' goes too far, and a better interpretation of 'legal proceedings' for section 175 should include

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74 *Ibid* (Lord Reid).

75 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 17.038. However, facilitation is likely to play a key role in determining whether it would be just to grant the order to disclose the person's identity: *Ibid* at para 17.035.

76 This mirrors the general approach for pre-action interrogatories: *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 231 (CA) at para 47.

77 *Ibid*.

78 As in *Santander (2015)*, *supra* note 69 at paras 17-20, where a *Norwich Pharmacal* order was granted in respect of the payee's name and postal address, but not the payee's telephone number, email address, or date of birth, on the basis that disclosure of those details could not be justified by necessity.

79 *Supra* note 58.

80 As was suggested in *La Dolce*, *supra* note 64 at paras 90-96, overturned on appeal in *Success Elegant*, *supra* note 61 at paras 87-93.

81 *Success Elegant, supra* note 61 at paras 91-93.

82 *Ibid* at paras 92-93.

anticipated legal proceedings where the applicant has an underlying legal right.[83] If either *Success Elegant* is followed so that 'legal proceeding' can refer to the legal proceeding seeking discovery itself, or 'legal proceedings' is interpreted as including anticipated legal proceedings, then section 175 can be used by a mistaken payor to obtain information about the payee's identity without bringing an independent action against the bank.

### C. *Bringing Court Proceedings*

Once the payor does have the necessary information about the identity and address of the payor, then which court or tribunal should the mistaken payor look at in bringing his claim? The Singapore court system is relatively straightforward. The Supreme Court of Singapore comprises the High Court and the Court of Appeal, with the latter being the ultimate appellate court.[84] Generally, except in probate matters, a civil case must be commenced in the High Court if the value of the claim exceeds $250,000.[85] The State Courts of Singapore comprise the District Courts, the Magistrates' Courts, the Coroners' Courts, the Small Claims Tribunals, and the Employment Claims Tribunals.[86] A very large proportion of the case-load in Singapore is dealt with by the State Courts. In the State Courts, the District Courts and Magistrates Courts both hear civil cases.[87] Magistrates' Courts have jurisdiction to hear actions for the recovery of sums not exceeding S$60,000,[88] and District Courts generally have jurisdiction over civil actions for the recovery of sums not exceeding $250,000.[89] In practice, that suggests that most mistaken payments will likely fall within the jurisdiction of the Magistrates' Courts.

The main difficulty with bringing court proceedings is the cost involved. The smaller the sum of money that the payor paid by mistake, the less likely it is to make financial sense for the payor to attempt to recover the payment by commencing a court proceeding, even in the Magistrates' Courts. Even if the payor is successful in recovering the mistaken payment, his costs in bringing the action are likely to outstrip the amount he can recover. For example, even if the payor is self-represented in an action in the Magistrates' Courts, he will still need to pay to file a writ of summons, to serve the writ on the bank, to obtain information from the bank about the identity of the payee, to serve the writ on the payee, to enter appearance, to file subsequent defences, replies or other pleadings, all before any trial happens. In the very best case scenario where the payor is self-represented, brings his action in the Magistrates' Courts, knows the identity and personal information of the payee, and obtains default judgment, the payor's costs are likely to be a minimum of $245 purely for court filings, comprising $150 to file the writ of summons, $15 for service of the writ on the bank,

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83 Nelson Goh, "Banking Secrecy in Singapore and its Impact on Pre-action Asset Tracing" (2017) 36 Civil Justice Quarterly 484 at 499.

84 *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing), s 3.

85 Because the claim cannot be brought in the District Courts of the Magistrates Courts, see below.

86 *State Courts Act* (Cap 321, 2007 Rev Ed Sing), s 3.

87 Section 19 of the *State Courts Act*, *ibid*, provides for the general civil jurisdiction of the District Courts, and section 52 provides for the general civil jurisdiction of the Magistrates Courts.

88 Section 52 of the *State Courts Act*, *ibid*, read with section 2.

89 Section 19 of the *State Courts Act*, *ibid*, read with section 2.

$15 for service of the writ on the payee, $40 to enter a request for default judgment, $25 to enter a judgment or order of Court, and costs involved in levying execution on the payee which vary depending on the mode of execution.[90]

This relatively modest sum does not include the other costs associated with the time and effort needed for a payor to understand the court process and documentation needed, and what to do to recover the payment. It is likely in practice that most claimants will need some legal advice and representation due to a lack of familiarity with the legal process and the state of the law, and if so, the monetary out-of-pocket costs will certainly be far higher. Furthermore, there are other variables that will affect the payor's recovery negatively. The sums involved could be far greater if the payee disputes the claim and the matter goes to trial. Or the payee may be impecunious, so that he is not worth suing so that even if the payor manages to obtain judgment against the payee, his victory is worthless. A mistaken payor is thus faced with a dilemma: he can bring proceedings to recover the mistaken payment, but has to take risks as to how much opposition he may meet from the payee, whether the payee is able to meet a judgment, and how much his legal costs will be. Given that many mistaken payments are relatively small, legal costs can be substantial, and there is stress and hassle involved in bringing court proceedings, it is likely that many mistaken payors simply decide to against trying to enforce their rights to recover the mistaken payment.

The problem with this is that it impedes access to justice and creates additional inequality. Claimants who are well-to-do may be more readily able to bear the out-of-pocket costs, and the risks that result in the legal process. But if the law is clear that mistaken payors do have valid unjust enrichment claims to recover their payments, then it should not make the effectiveness of those claims dependent on other factors that do not relate to the merits of the claim. It is often of little value to have legal rights without the ability to effectively enforce those rights in courts of law.

### D. *Low-cost Tribunals?*

One way to ameliorate this problem is to have lower cost mechanisms for enforcing one's rights, thereby increasing access to justice. A common method is to set up specialist tribunals to adjudicate low-value disputes. These are often specially designed to have streamlined procedures which are more cost-effective and accessible to the average layperson, without the need for specialist legal advice or representation. An example of such a tribunal in Singapore is the Small Claims Tribunal.[91] Before the recent amendments to the *Small Claims Tribunal Act* in August 2018, the Tribunal could hear claims not exceeding a value of $10,000, which could be raised to $20,000 if both parties agreed to it and filed a memorandum of consent.[92] After the recent legislative changes introduced by the *Small Claims Tribunals (Amendment)*

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90 See *Rules of Court*, *supra* note 51, Appendix B.

91 Set up under the *Small Claims Tribunal Act* (Cap 308, 1998 Rev Ed Sing). References to sections under the *Small Claims Tribunal Act* throughout this article incorporate changes made under the *Small Claims Tribunals (Amendment) Act 2018*, No 33 of 2018, unless otherwise stated. The *Small Claims Tribunals (Amendment) Act 2018* was gazetted on 10 August 2018.

92 See previously *Ibid*, ss 2, 5(4) prior to the *Small Claims Tribunals (Amendment) Act 2018*.

*Act 2018*, the jurisdictional limit of all claims before the Small Claims Tribunal has been increased to $20,000, which can be raised to $30,000 if all parties agree to it and file a memorandum of consent.[93] There is a relatively short time period in which claimants can bring their claims before the Tribunal: all claims must be filed within 2 years from the date on which the cause of action accrued.[94] The advantage of the Tribunal is that it provides for relatively informal, low-cost methods of resolving certain types of disputes. The proceedings before the Tribunal are informal and adopt a 'judge-led' approach,[95] parties to the action must present its own case[96] and cannot be represented by a lawyer,[97] all proceedings are held in private,[98] the Tribunal is not bound strictly by the rules of evidence,[99] costs are not awarded,[100] and the fees to file a claim are extremely minimal, starting at $10 for claims up to $5000.[101] These features would make proceedings in the Small Claims Tribunal much more financially feasible for most mistaken payment claims, compared to proceedings in even the Magistrates' Courts.

The difficulty with bringing claims before the Small Claims Tribunal to recover mistaken payments is that the Tribunal has limited jurisdiction. Prior to the amendments in August 2018, the Small Claims Tribunal only had jurisdiction in three areas: first, in any claim relating to a dispute arising from any contract for the sale of goods or the provision of services;[102] second, any claim in tort in respect of damage caused to any property other than certain excluded claims;[103] and third, any claims relating to a dispute arising from any contract for the lease of residential premises that does not exceed 2 years.[104] A small range of other claims could be brought within the jurisdiction of the court by a variety of means, such as deeming the claim to be one of the three types of eligible claims.[105] Furthermore, the Tribunal was expressly stated not to have jurisdiction to deal with claims concerning damage caused to property by an accident arising out of or in connection with the use of a motor vehicle, nor in respect of claims which the State Courts have no jurisdiction to hear and determine.[106] Notably, the Tribunal did not have jurisdiction in respect of claims to

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93 *Ibid*, ss 2, 5(4) after the *Small Claims Tribunals (Amendment) Act 2018*.

94 *Ibid*, s 5(3)(b). Previously, the limit was 1 year: *Ibid*, s 5 prior to the *Small Claims Tribunals (Amendment) Act 2018*.

95 *Ibid*, s 22.

96 *Ibid*, s 23(2).

97 *Ibid*, s 23(3).

98 *Ibid*, s 24.

99 *Ibid*, s 28.

100 *Ibid*, s 31.

101 Claims between $5000 and $10,000 cost $20 for filing the claim or counter-claim, and the fees for claims of more than $10,000 and up to $20,000 (which requires the consent of both parties) is 1% of the claim amount.

102 *Small Claims Tribunal Act*, *supra* note 91, s 5(1)(a).

103 Claims under section 4 of the *Community Dispute Resolution Act 2015* (No 7 of 2015, Sing) are excluded: *Small Claims Tribunal Act*, *supra* note 91, s 5(1)(b).

104 *Small Claims Tribunal Act*, *supra* note 91, s 5(1)(c) prior to the *Small Claims Tribunals (Amendment) Act 2018*.

105 See *eg Building Management and Strata Management Act* (Cap 30C, 2008 Rev Ed Sing), s 40(8), prior to the *Small Claims Tribunals (Amendment) Act 2018* which repeals the section.

106 *Small Claims Tribunal Act*, *supra* note 91, s 5(2) prior to the *Small Claims Tribunals (Amendment) Act 2018*.

recover mistaken payments based on unjust enrichment. As we have seen, these are not claims based on a contract or on tort.[107]

The *Small Claims Tribunals (Amendment) Act 2018* now consolidates the different claims falling within the Small Claims Tribunal's jurisdiction by listing them within a Schedule in the *Small Claims Tribunal Act* itself.[108] It now largely avoids the previous strategy of bringing other claims within the Tribunal's jurisdiction by deeming it to be one of the three types of claims permitted. However, the Tribunal's jurisdiction still does not include claims to recover mistaken payments based on unjust enrichment.

Arguably, it may be possible for some mistaken payment claims to come within a 'claim relating to a dispute arising from any contract for the sale of goods or the provision of services'.[109] Consider the problem we started this article with: what if the seller of goods provides the wrong payment details to the buyer by mistake, so that the buyer then makes payment, mistakenly thinking that he or she is paying the seller, when in fact he or she is actually making payment to some other third party? Could this be a claim relating to a dispute arising from any contract for the sale of goods or the provision of services? Arguably, it might be, in that the dispute between the buyer (*ie* the mistaken payor) and the payee arose in relation with a contract for the sale of goods. So maybe in my situation, the buyer/mistaken payor could bring a claim before the Small Claims Tribunal to recover the mistaken payment. But this conclusion would be rather odd. Even in that case, the mistaken payor's claim only has a tangential connection with the contract for the sale of goods—the mistake was induced by my misrepresentation to the buyer as to my bank account number. Beyond that, the mistaken payor's claim does not rest on the existence of any contract of sale between the payor and the payee, but on the payee's unjust enrichment in receiving the monies paid by the payor by mistake. It would be anomalous to allow some claims to recover mistaken payments in the Small Claims Tribunal, but not other claims to recover mistaken payments, just because there happened to be a contract for the sale of goods or provision of services operating in the background, even though the dispute between the payor and payee did not involve the contract of sale. It also runs contrary to the entire point of recognising unjust enrichment as an independent source of obligations and rights. If what is generating the rights to recover mistaken payments is unjust enrichment, then this ought to be the basis of recovery, not by slipping some of these cases through the backdoor via another provision providing for the Tribunal's jurisdiction.

## IV. Expanding Access to Justice: A Proposed Solution

What we have seen so far is that even in a jurisdiction where it is clearly accepted that a mistaken payor of money has a claim in unjust enrichment to recover his mistaken payments, it is likely to be neither easy nor cost-effective in practice for a mistaken payor to do so in many cases. In this part, I argue that the simplest way to make it easier for a mistaken payor to recover his mistaken payment in

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[107] See above Part II(A).

[108] See now *Small Claims Tribunal Act*, *supra* note 91, Schedule. The Schedule now refers to 'specified claims' for the purpose of section 5(1)(a).

[109] *Ibid*, s 5(1)(a) prior to the *Small Claims Tribunals (Amendment) Act 2018*.

unjust enrichment is by expanding the Small Claims Tribunal's jurisdiction to cover such claims. This proposal will capture the vast majority of cases where the costs involved in bringing court proceedings to recover the payment are likely to exceed or substantially diminish the potential benefits from bringing the action to recover the payment. Some potential problems with the solution are also discussed.

### A. *Expanding the Tribunal's Jurisdiction*

The most straightforward route to make it easier for a mistaken payor to recover his mistaken payment to improve access to justice would be to expand the jurisdiction of the Small Claims Tribunal to cover unjust enrichment claims to recover mistaken payments. This could be done by listing a new type of 'specified claim' for purposes of section 5(1)(a) of the Act in the Schedule of the *Small Claims Tribunal Act*. The Schedule of the Act currently recognises 9 types of claims falling within the jurisdiction of the Tribunal and a further type of claim which is deemed to be a contract for the provision of services. To this, the following provision could be added:

> (j) any claim in unjust enrichment to recover monies paid by mistake from the recipient of the money (or the recipient's bank).

The proposed addition would enlarge the jurisdiction of the Small Claims Tribunal to encompass claims in unjust enrichment to recover mistaken payments of money from the recipient of the money, or more controversially, from the recipient's bank. It covers more than just mistaken payments by bank transfer, though mistaken payments by bank transfer are the main focus of this paper. The proposed addition is limited only to simple cases of the recovery of monies paid by mistake, not the conferral of other types of benefits by mistake such as the mistaken provision of services to the defendant. This is again because those scenarios raise more complicated questions about whether the recipient can be said to have benefitted from the provision of the service and questions about valuation of the service, amongst others.[110] The words in the proposed addition allowing for the recoverability of the money from banks are in parenthesis because they are more controversial, as will be seen later. Since the monetary limit of the Tribunal's jurisdiction is not changed, only relatively modest mistaken payments will be recoverable through this route. After the changes introduced by the *Small Claims Tribunals (Amendment) Act 2018*, this will be either $20,000 or $30,000 with consent of both parties.[111] Larger sums will still have to be recovered through the Magistrates' Court, the District Court, or the High Court, depending on the value of the mistaken payment.

The main justification for expanding the jurisdiction of a tribunal like the Small Claims Tribunal in Singapore is to increase access to justice. Underpinning this is the idea that having legal rights is of little practical value without being able to effectively enforce them. In at least a significant number of cases, the costs involved

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[110] In Singapore, see the difficulties with enrichment and valuation problems in *eg*, *Eng Chiet Shoong*, *supra* note 5 at paras 87-92; *Higgins, Danial Patrick v Mulacek, Philippe Emanuel* [2016] 5 SLR 848 (HC) at paras 56-71.

[111] *Supra* note 91, ss 2, 5(4) after the *Small Claims Tribunals (Amendment) Act 2018*.

in bringing an action in unjust enrichment to recover a mistaken payment before the courts are likely to exceed the size of the mistaken payment itself. In Singapore, it has been recognised for some time that mistaken payors can recover their mistaken payments in unjust enrichment. The best justification for making unjust enrichment claims more easily enforceable is that it better increases access to justice, so that mistaken payors are not limited by their own lack of financial means or capacity to take the risk in bringing claims to recover their mistaken payments when the law recognises that they would otherwise have a valid claim to recover the payments.

This proposal does not resolve all the problems with recovering mistaken payments in practice, since it only applies to mistaken payments of money falling within the Tribunal's monetary limit. However, it is these in recovering these small mistaken payments that the costs of bringing the action are most likely to either exceed or substantially erode the potential benefits from bringing the action and recovering the payment. It is in these cases that mistaken payors are most likely to be deterred from attempting to enforce their unjust enrichment rights because of the cost. In mistaken payments of sums of money above the $20,000 or even $30,000 limit, the costs involved in bringing an action before the courts are likely to comprise a relatively small proportion of the potential amount recoverable by the payor. In those cases, there is less of a pressing need to provide a low-cost mechanism for the recovery of mistaken payments in order to improve access to justice, since it is less likely that justice is being impeded primarily because of cost issues. In addition, mistaken payments involving larger sums of money may also involve more complex issues of fact or law which are better dealt with by formal court proceedings.

### B. *Claims Against the Recipient's Bank?*

The proposed amendment leaves in parenthesis the possibility that mistaken payments could be recovered directly before the Tribunal from the recipient's bank. The reason why the amendment remains in parenthesis is because the justification for making the payment recoverable against the recipient's bank is weaker than the justification for making the payment recoverable from the recipient directly. In particular, there is some doubt as to whether payments made to a recipient's bank account are recoverable in unjust enrichment from the recipient.[112] This was often said to be a matter of whether the bank has a defence of ministerial receipt,[113] but some analyses frame it as a question of whether the bank had been enriched.[114]

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[112] In Singapore, see *eg*, *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 (HC) at paras 53, 54 [*Zhou Weidong*] (where the court held that the 'ministerial receipt' defence succeeded, but in that case, the ministerial receipt defence was used to refer to a case where the agents had received their monies and paid them over to their principal).

[113] See *eg*, Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (London: Sweet & Maxwell, 2016) ch 28. The most detailed treatment of the topic is in Jonathon P Moore, "Restitution from Banks" (DPhil thesis, University of Oxford, 2000) [unpublished].

[114] See *eg*, Robert Stevens, "Why do agents 'drop out'?" [2005] LMCLQ 101 at 109-116; James Edelman & Elise Bant, *Unjust Enrichment*, 2d ed (Oxford: Hart Publishing, 2016) at 78; Mitchell, Mitchell & Watterson, *supra* note 113 at paras 28-02 to 28-04.

Some older authorities did take the view that where a mistaken payment was made to an agent on behalf of the principal, the payment could be recovered from either the agent (provided that he had not yet paid over to the principal)[115] or the principal himself.[116] Some commentators argued that the agent should have a defence of ministerial receipt because the bank would otherwise be put in a difficult position of not knowing whether to pay the money over to the principal or to the claimant mistaken payor.[117] The more recent cases favour an analysis that the question is whether the bank, as the recipient's agent, received the money for its own use and benefit.[118]

Constraints of space mean that the issue of the bank's liability in unjust enrichment cannot be dealt with here. But since the justification for expanding the Tribunal's jurisdiction is that it would more easily allow claimants to enforce legal rights which courts have recognised, then this justification is correspondingly weaker as regards claims by the mistaken payor against the bank, where it is not clear whether the mistaken payor has a valid unjust enrichment claim against the recipient's bank in the first place. Thus, the proposed amendment leaves words allowing for claims against banks in the proposed amendment, but recognises that the justification for these claims is less strong. However, even if it is thought that claims against the recipient's bank should not be allowed within the jurisdiction of the Tribunal, this is not a reason why the claims against the recipient himself should not come under the Tribunal's jurisdiction.

### C. *Bank Privacy*

The last problem involves banks again. As we have already seen, bank privacy laws put an additional hurdle in front of a mistaken payor who is seeking to recover his mistaken payment, since he first has to discover the identity of the recipient in order to recover his money from the recipient. It must be noted that expanding the jurisdiction of the Tribunal may not solve this problem.

It is possible that the practice of the Tribunal could be such that the mistaken payor is allowed to name the recipient's bank as defendant, and use proceedings before the Tribunal to get the bank to disclose the recipient's identity before either bringing a separate claim against the recipient or joining the recipient to the claim. After the amendments to the *Small Claims Tribunal Act*, section 22(4) now explicitly provides

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[115] Once there was payment over by the agent to the principal, it is clear that the agent would then have a defence. See generally Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) ch 3. Today there is a question as to whether the payment over defence is subsumed within the defence of change of position, see Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2011) at 564-566; *cf Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 207 (Millett LJ) [*Portman Building Society*]. See also the recent decision of *Zhou Weidong*, *supra* note 112 at paras 53-57.

[116] See *eg Buller v Harrison* (1777) 2 Cowp 565 at 568; *Cox v Prentice* (1815) 3 M & S 344; *cf Sadler v Evans* (1766) 4 Burr 1984; *Duke of Norfolk v Worthy* (1808) 1 Camp 337.

[117] See generally Moore, *supra* note 113; Mitchell, Mitchell & Watterson, *supra* note 113 at para 28-04. *Cf* Stevens, *supra* note 114 at 109-116.

[118] See *eg Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 292 (Millett J), aff'd [1991] Ch 547. See also *Portman Building Society*, *supra* note 115 at 207 (Millett LJ). Most recently see *Re Hampton Capital v Elite Performance Cars Ltd* [2015] EWHC 1905 (Ch) at paras 61, 62.

that a tribunal may summon any person to do either or both of the following: give evidence in any proceedings before a tribunal, and produce any document, record or thing which is relevant in any proceedings before a tribunal. On the face of this section, it seems plausible that the tribunal may indeed summon an officer of the bank to give evidence or produce documents as to the personal information of the recipient. If this approach is taken, the provisions of the *Small Claims Tribunal Act* effectively supersede and trump the provisions of the *Banking Act*.

The alternative view that might be taken is that the tribunal magistrate (previously known as a Referee) of a particular tribunal is not a judge of the Supreme Court, nor does he make an order of the Supreme Court.[119] As such, he cannot make an order under the bankers' books provisions of the *Evidence Act* to require the bank to disclose the recipient's identity, even if the mistaken payor could establish a substantive right to discovery. If none of the other exceptions under the Third Schedule will ordinarily be present, and the exceptions in the Third Schedule are exhaustive, then in cases where the mistaken payor does not know the identity of the recipient, he will need to take out at least pre-interlocutory proceedings to identify the recipient, before continuing to bring his action against the recipient in the Small Claims Tribunal. This will be costlier than if the recipient's identity could be ascertained in proceedings before the Tribunal, but will still likely be less costly than if all the proceedings, including those for the recovery of the mistaken payment, had to be carried out in the main court system.

The simplest way to resolve this problem without requiring the *Small Claims Tribunal Act* to supersede the exhaustive list of exceptions in the Third Schedule is to amend the Third Schedule of the *Banking Act* to allow for disclosure of customer information from banks if required to do so for the purposes of proceedings before the Small Claims Tribunal, limiting this information to the identity and contact information of the payee. This step is relatively non-intrusive, since the information obtainable is limited. If this additional step is taken, then even with recipients of unknown identity, a single proceeding before the Tribunal is all that is necessary for the mistaken payor to recover his payment. If not, then it appears that an additional proceeding to obtain disclosure of the recipient's identity may be necessary.

## V. Conclusion

My mistaken payment story had a good ending. The buyer managed to recover her money from the payee. She then paid me, this time using the correct bank details. I received payment and the rest of the transaction was carried out as planned. All was well, at least this time round. But the story would have been very different if the payee had refused to give his or her consent to reverse the payment or simply could not be bothered to do so.[120] In that case, the mistaken payee would have a windfall, the buyer would have paid out to the wrong person, and could only have recovered the mistaken payment at considerable cost and effort.

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[119] Tribunal magistrates, who preside over the tribunal, are appointed under section 4 of the *Small Claims Tribunal Act*, *supra* note 91.

[120] Presumably, the payee did consent to the payment being reversed, or possibly, the mistyped account number did not exist and so the money went into a holding account with the bank, before it was returned.

Although courts have clearly recognised that a mistaken payor can recover monies paid by mistake, it is often costly and difficult for mistaken payors to effectively enforce these rights and recover their mistaken payments. This is a question of access to justice: the substantive rights that we have are of little practical value if they are not also accompanied by the ability to effectively enforce those rights. The aim of the paper has been to propose a relatively simple way of increasing access to justice by enabling mistaken payors to more easily enforce their rights to recover mistaken payments of money: by expanding the jurisdiction of the Small Claims Tribunal and allowing mistaken payments to be recovered there. This may not solve all the problems, but goes a significant way to resolving some of them.