

# THE LAW OF RESTITUTION OF UNJUST ENRICHMENT IN MALAYSIA: A SEARCH FOR PRINCIPLE, POST '*DREAM PROPERTY*'

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## ABSTRACT

Part VI of the Malaysian Contracts Act 1950 ('of certain relations resembling those created by contract') embodies the old notion of quasi-contract or implied contract - what is now known under English Law and in other Common Law jurisdictions as restitution of unjust enrichment. The landmark decision of our Federal Court, in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* gave recognition to 'unjust enrichment' as a separate cause of action in Malaysia. However, the law of unjust enrichment in Malaysia is at its infancy and still developing. This paper focuses on two main questions that arise from that decision. Firstly, on the legal consequences of the court's apparent adoption of the civil law 'absence of basis' approach to determine whether an enrichment is 'unjust', rather than the traditional 'unjust factor' approach under English Common Law, and how this might affect the future development of unjust enrichment as a separate cause of action in Malaysia. Secondly, on the larger question of what the law of unjust enrichment in Malaysia now is or should be - whether the correct approach is to develop unjust enrichment within an apparent 'dual legal regime' ie. the statutory regime under the Contracts Act 1950 and the Common Law regime; or rather to use the Common Law by analogy to develop the contents (ie. detailed rules and principles) of the Contracts Act 1950 (Part VI) in a principled approach that may require modern restatement for practical use today. Using the doctrinal and comparative methodology, it is the paper's findings that the latter 'unified' approach is preferable as a way forward for Malaysian courts to develop our law of unjust enrichment and using the 'unjust factor' approach, for reasons outlined in this paper.

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## **UNDANG-UNDANG PENGEMBALIAN KEKAYAAN TANPA SEBAB DI MALAYSIA: SATU PENCARIAN PRINSIP, PASCA 'DREAM PROPERTY'**

### **ABSTRAK**

Bahagian VI Akta Kontrak 1950 ('tentang sesetengah hubungan menyerupai yang dicipta oleh kontrak') merangkumi gagasan lama quasi-kontrak atau kontrak tersirat - yang kini dikenali di bawah Undang-undang Inggeris dan di bidang kuasa Undang-undang Am sebagai pengembalian kekayaan tanpa sebab. Keputusan penting Mahkamah Persekutuan kita, dalam kes *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* memberi pengiktirafan kepada 'kekayaan tanpa sebab' sebagai suatu tindakan berasingan di Malaysia. Walau bagaimanapun, undang-undang kekayaan tanpa sebab di Malaysia masih dalam peringkat permulaan dan masih berkembang. Artikel ini memberi tumpuan kepada dua soalan utama yang timbul dari keputusan tersebut. Pertama, mengenai akibat-akibat undang-undang yang terlihat dari tindakan mahkamah mengambil pendekatan 'ketiadaan asas' sivil untuk menentukan sama ada suatu pemerikayaan adalah 'tidak adil', berbanding dengan pendekatan tradisional 'faktor tidak adil' di bawah Undang-undang Inggeris, dan bagaimana ini mungkin mempengaruhi perkembangan masa depan kekayaan tanpa sebab sebagai satu tindakan berasingan di Malaysia. Kedua, mengenai soalan yang lebih besar tentang apa undang-undang kekayaan tanpa sebab di Malaysia sekarang atau seharusnya - sama ada pendekatan yang betul adalah untuk membangunkan kekayaan tanpa sebab dalam seolah-olah 'dua regim undang-undang', iaitu. regim berstatut di bawah Akta Kontrak 1950 dan regim Undang-undang Am; atau adakah lebih baik menggunakan Undang-undang Am secara analogi untuk membangunkan kandungan (iaitu peraturan dan prinsip terperinci) Akta Kontrak 1950 (Bahagian VI) dalam pendekatan yang berprinsip yang mungkin memerlukan pembaharuan moden untuk penggunaan praktikal hari ini. Dengan menggunakan metodologi doktrin dan perbandingan, dapatan kertas ini adalah bahawa pendekatan kedua, iaitu satu pendekatan yang lebih bersifat seragam atau 'bersatu' adalah lebih baik sebagai jalan ke hadapan bagi mahkamah kita dalam membangunkan undang-undang kekayaan tanpa sebab di Malaysia, dengan menggunakan pendekatan 'faktor tidak adil', atas sebab-sebab yang dinyatakan dalam kertas ini.

**Kata Kunci:** Kekayaan Tanpa Sebab, Pengembalian, Kontrak, Undang-Undang Kewajipan.

## INTRODUCTION

It might be argued by some that as long as justice is done by awarding a remedy to the aggrieved party, then it does not matter that the basis for the intervention and remedy are far from clear. Conversely, in order to avoid palm-tree justice, it is actually important to the law that the basis for the judicial intervention and the remedy proceed together with a sense that justice is done in the individual case. This matters because the exposition of the rationale and justification will help in identifying and formulating the juridical basis for the intervention and remedy, which in turn would help the classification of the obligation. This analytical exercise can produce predictability and coherency in the development of the law in future cases that are alike (arising out of the same or similar fact situation),<sup>1</sup> assisted by the doctrine of judicial precedent and the principle of *stare decisis*.

A promising development occurred in the legal landscape of Malaysia in late 2015, when our Federal Court gave a groundbreaking decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*<sup>2</sup> (“Dream Property”). The Federal Court stated that unjust enrichment describes a cause of action and that a cause of action in unjust enrichment can give rise to a right to restitution. This is the first time that a Malaysian court has explicitly recognised that unjust enrichment can be a separate cause of action in Malaysia, and being the pronouncement of the apex court, it has given hope for the future of unjust enrichment in Malaysia, but several issues arise as to the best way forward for such development, which this paper seeks to address.

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<sup>1</sup>David Y.K Fung, *Pre-Contractual Rights and Remedies: Restitution and Promissory Estoppel* (Kuala Lumpur: Sweet & Maxwell Asia, 1999), 1.  
<sup>2</sup>[2015] 2 MLJ 441.

## Introduction to Unjust Enrichment

‘Unjust enrichment’ refers to categories of cases in which the law allows recovery by one person of a benefit unjustly gained by another at his expense. According to ‘Goff & Jones on the Law of Unjust Enrichment’ (9<sup>th</sup> Ed.):

Unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases. It is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the Defendant has been enriched by the receipt of a benefit that is gained at the Claimant’s expense in circumstances that the law deems to be unjust.<sup>3</sup>

Goff & Jones seminal work in this area of English Law culminated in authoritative judicial blessing being given by the House of Lords in the case of *Lipkin Gorman v Karpnale Ltd*<sup>4</sup> that restitution as a body of law is founded upon the principle of unjust enrichment. Unjust enrichment is now recognised as the third ground to base liability in the Common Law of Obligations, after contract and torts.

At least since 1998, with the House of Lords’ decision in *Banque Financière de la Cité SA v Parc (Battersea) Lt*<sup>5</sup>, it has been established that restitutionary analysis proceeds by addressing the four-stage inquiry i.e. the elements to be proven in an unjust enrichment claim, which are:

1. The ‘enrichment’ of the Defendant (a transfer of ‘benefit’).
2. “At the expense” of the Claimant.
3. The enrichment was ‘unjust’.
4. There are no defences that can deny Restitution.

The law of restitution is the law based on the principle of reversing a defendant’s unjust enrichment at the claimant’s expense. Restitution is a response to ‘causative events’ (i.e. the cause of action triggering restitution). The ‘causative event’ can be unjust enrichment,

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<sup>3</sup>Charles Mitchell et al. (eds.), *Goff & Jones The Law Of Unjust Enrichment* (9<sup>th</sup> Ed.) (London: Sweet & Maxwell, 2016), 7.

<sup>4</sup>[1991] 2 AC 548.

<sup>5</sup>[1999] 1 AC 221.

or it can be a 'wrong' (e.g. breach of contract, breach of fiduciary duty, torts). In short, unjust enrichment is a 'cause of action', and restitution is a 'remedy'. Restitution is a gain-based response/remedy i.e. it aims to strip the defendant of its gains (as opposed to compensation/damages which aims to compensate the claimant of its loss i.e. a loss-based response/remedy).

The judicial recognition of these four questions indicates that the basis of restitution is not merely an assertion of judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate.<sup>6</sup> On the contrary, the authorities indicate that the unjust enrichment principle operates at a high level of generality and that the approach of the courts is still very much an incremental one, heavily dependent on past cases.<sup>7</sup> Thus an enrichment is determined to be unjust not by reference to a subjective valuation of what is fair or unconscionable but on the existence of a recognised 'unjust factor' such as mistake or failure of consideration.

Once the unjust enrichment is established, restitution (as a legal principle) allows for a wide variety of remedies.<sup>8</sup> While the majority of the cases concern restitutionary remedies which are personal (substitutionary) in nature, some restitutionary remedies that are proprietary in nature may be considered. These are necessarily dependent on the defendant's retention of any particular property. An example of such a remedy is that of equitable tracing, as it was used in the context of restitution in *Westdeutsche's* case.<sup>9</sup>

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<sup>6</sup>Malik Intiaz Sarwar, "Equity and Commerce: An Alternative Perspective", *Malayan Law Journal Articles*, vol. 3 (1997): cliv.

<sup>7</sup>Andrew Burrows, "Understanding the Law of Restitution: A Map Through the Thicket", *University of Queensland Law Journal*, vol. 18, no. 2 (1995): 157.

<sup>8</sup>Examples include constructive trusts, accounts, disgorgement of profits or restitutionary damages. For an emphatic restatement of the principle in relation to breaches of fiduciary duties, see the decision of Gopal Sri Ram JCA in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265.

<sup>9</sup>*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938 (CA) (affirming the trial judge's findings).

The modern law of unjust enrichment can be seen in *United Australia Ltd v Barclays Bank Ltd*, where Lord Atkin in the House of Lords (HOL) rejected the fiction of the implied contract theory:

These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared, should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judges is to pass through them undeterred.<sup>10</sup>

*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*<sup>11</sup> was when the concept of unjust enrichment was referred to for the first time by the English Court and was finally given full recognition in *Lipkin Gorman v Karpnale Ltd* (above). The prevention of unjust enrichment as a legal principle, capable of founding a cause of action, gained currency as an independent branch of the common law in England only in the 1990s.

In the Malaysian context, it cannot be said that there is a well-developed law of unjust enrichment. This is because in Malaysia, despite recent judicial recognition of unjust enrichment as a separate cause of action, the law is still in its formative stage and there is generally a lack of proper understanding about the subject (as opposed to the law of restitution) and consequently a failure to adopt a principled approach in its treatment.

There are already several statutory provisions in Malaysia dealing with restitutionary reliefs which can be argued to be based on concepts that are now recognised as being within the body of law of unjust enrichment; most importantly under the Contracts Act 1950 which contained several important restitutionary provisions (sections 65 and 66<sup>12</sup>), and Part VI 'Of Certain Relations Resembling Those

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<sup>10</sup>[1941] AC 1, 29.

<sup>11</sup>[1943] AC 32.

<sup>12</sup>Section 66 should be read together with ss. 15 & 16 of the Malaysian Civil Law Act (CLA) 1956, which in turn is substantially based on the English Law Reform (Frustrated Contracts) Act 1943. However, Malaysian courts almost never do this (the notable exception being the Federal Court in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211).

Created By Contract' (sections 69 to 73) the most relevant of which being section 71 and section 73). There are also other restitutionary remedies provided for by statutes, namely sections 15 & 16 of the Civil Law Act 1956 on frustrated contracts; and section 37 of the Specific Relief Act 1950 for restitution upon rescission of a contract in equity.

The approach of the Malaysian courts in interpreting these restitutionary provisions in the past has always been one of faithfully applying the old English Common Law in relation to implied/quasi-contractual claims - despite the courts appearing to be cognisant of how the restitutionary provisions differ from English Law from 1920 to 1940,<sup>13</sup> however in the 1950s the courts began to display inconsistency in their application of the restitutionary provisions,<sup>14</sup> and cases then started being decided particularly under section 66 of the Contracts Act 1950 based on the then English Law's implied contract theory.<sup>15</sup>

Admittedly, the restitutionary provisions of the Contracts Act 1950 is based on Roman Law principle,<sup>16</sup> however it can be convincingly argued that this is not a ground to say that the law of unjust enrichment should be developed in Malaysia as a separate 'dual legal regime' i.e. under the Contracts Act and under the Common Law separately (see the proceeding discussion below), since it will be seen in this paper that the historical basis of the English Common Law of unjust enrichment is also based on the Roman Law principles, and since the English Common Law has passed beyond the implied contract theory into the recognition of unjust enrichment as a separate area of law, it makes more sense now for Malaysian courts with their normative tendency to refer to English Law to then now develop our law of unjust enrichment by using the common law by analogy in order to develop the contents of the restitutionary provisions of our Contracts Act; moving to a point of convergence that is now correct as a matter of principle, as well as amounting to a modern restatement of our old Contracts Act 1950, for practical commercial use today (see the proceeding discussion below).

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<sup>13</sup>Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia* (Petaling Jaya: Lexis Nexis, 2015), Ch 1.

<sup>14</sup>Tchung, *The Law of Restitution*.

<sup>15</sup>*Fook Lee Tin Mining Kongsi v Gurdev Singh* [1952] 1 MLJ 55, CA; *Mohamed Abdullah v Teoh Teng Swee* [1953] 1 MLJ 138.

<sup>16</sup>*Menaka v Lum Kum Chum* [1977] 1 MLJ 91 (Privy Council)

## THE HISTORICAL BASIS OF THE ENGLISH COMMON LAW OF UNJUST ENRICHMENT

Coming to an intersection to determine the direction to develop the law of unjust enrichment in Malaysia, it is essential to appreciate its legal origin. To fully establish and understand, particularly in the Malaysian context, that unjust enrichment is a claim that is truly independent of contract, we need to examine the historical basis for unjust enrichment for us to understand how the modern law of unjust enrichment came to be recognised under the English Law and other common law jurisdictions and thus enable us to shed the exigencies of the past that might still linger in our law and court judgments today.

The law of unjust enrichment is sometimes thought to be a very modern and new category of law, but the truth from history is otherwise. Much of the development of the modern common law of obligations borrowed from the Roman Law, which recognised unjust enrichment alongside contract and delict (wrong/torts). The conceptual categories of contract and tort cover much of the range of personal obligations but do not exhaust it. Beyond them lies the residuary group characterised by the Roman jurist Gaius as ‘obligations arising from various other causes’.<sup>17</sup>

Slowly and tardily, a third category emerged from this group, to be known as ‘quasi-contract’, ‘restitution’, or ‘unjust enrichment’. It emerged generally during the classical period, described as an obligation *quasi ex contractu* i.e. “obligations which cannot strictly be seen as arising from contract but which, because they do not owe their existence to wrongdoing, are said to arise as though from a contract.”<sup>18</sup>The common features of the cases falling into this third category is that the defendant has received money or property that ought in justice to be made over to the plaintiff, or has benefitted from the performance of some service that ought in justice to be paid for. Liability arises independently of wrongdoing on the defendant’s part, as such it is distinct from liability in tort. It is independent of any promise or agreement, as such it is distinct from contract.

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<sup>17</sup>DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), Ch 14 ‘Unjust Enrichment’, 264.

<sup>18</sup>Peter Birks and George McLeod (trs.), *Justinian’s Institutes* (London: Duckworth, 1987), 111 [3.27].

The English history of unjust enrichment followed a similar pattern of development to that of Roman Law. During the period of the ‘forms of action’, common law claims for unjust enrichment were brought as writs of debt or account – the true nature of the action concealed behind a bare plea that the defendant owed the money as a debt or must account for it. When the nature of these actions was discussed, they were often referred to by the use of the Roman quasi-contract.<sup>19</sup>

In the mid-17<sup>th</sup> century, the Common Law courts began to allow plaintiffs to plead unjust enrichment cases in forms of action known as ‘*indebitatus assumpsit*’, which is a species of *assumpsit*/promise, rather than in debt i.e. that the defendant, being indebted (*indebitatus*), had promised to pay the debt (*assumpsit*), but failed to do so. One of the common counts of *indebitatus assumpsit* was the common count of ‘money had and received’. The count for money had and received moved ‘very slowly outwards from a genuinely contractual core’ to fictional promises.<sup>20</sup>

In the 19<sup>th</sup> century counts of *quantum meruit* / *quantum valebat* (value of services / goods) were also pleaded as *indebitatus assumpsit*. Even at the close of the 20<sup>th</sup> century, the expression *quantum meruit* is still used to formulate a remedy to claim for a reasonable remuneration for work done by a plaintiff for the defendant. The basis for some of these *quantum meruit* remedies is reasoned to have arisen out of neither contract nor tort but *quasi ex contractu*.<sup>21</sup>

As such, claims for a *quantum meruit* as well as those for ‘money had and received’, and for ‘money paid’ which are founded neither in contract nor in tort, are described as arising *quasi ex contractu* (as though from a contract), being a term borrowed from Roman Law. English Law borrowed the term, but not the Roman jurisprudence for the category. By anglicising the Roman term, the description ‘quasi-contract’ was coined<sup>22</sup> and it was generally used in the common law to mean all those common law obligations which do not fall within the categories of either contract or tort.

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<sup>19</sup>James Edelman and Elise Bant, *Unjust Enrichment (2<sup>nd</sup> Ed.)* (Oxford and Portland, Oregon: Hart Publishing, 2016), 9.

<sup>20</sup>DJ Ibbetson, *A Historical Introduction*, 148.

<sup>21</sup>Fung, *Pre-Contractual Rights*, 13.

<sup>22</sup>Fung, *Pre-Contractual Rights*, 17.

Although in the mid-19<sup>th</sup> century, the forms of action were abolished, unjust enrichment actions remained known as quasi-contract – however the Latin ‘as though from a contract’ began to morphed into the erroneous expression ‘implied contract’.<sup>23</sup> As per Viscount Haldane LC in *Sinclair v Brougham*:

When the Common Law speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.<sup>24</sup>

The common law of quasi-contract, and later implied contract, developed in a piecemeal fashion with no apparent *a priori* conception or general principle as its guide or rationale.<sup>25</sup> When a judge declares that a claim is a quasi-contractual one, all that one can understand is that the basis for the remedy awarded is neither contract nor tort. Thus, the third category came to be based on a model superimposing implied contracts and implied trusts, which can be seen to merely provide common features linking together the specific instances of liability, without really providing any explanation as to why liability was imposed in these cases and not in others.<sup>26</sup>

The decision in *Sinclair v Brougham* (on implied contract as the theoretical basis for the restitutionary liability) was never explicitly overruled until 1996.<sup>27</sup> This error has been described as ‘erroneous and very unfortunate’,<sup>28</sup> as it hides the true nature of the claims, which is not contractual but rather restitutionary in nature due to a benefit obtained (an enrichment) that is unjust or without proper legal basis. It is due to the works of the pioneers in the field<sup>29</sup> that have identified those claims gathered under the banner of quasi-contract and implied contract and analysing their true rationale, that we now know them as being one founded upon the principle of restitution of unjust enrichment.

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<sup>23</sup>Edelman and Bant, *Unjust Enrichment*, 11.

<sup>24</sup>[1914] AC 398, 415.

<sup>25</sup>Fung, *Pre-Contractual Rights*, 17.

<sup>26</sup>DJ Ibbetson, *A Historical Introduction*, 264.

<sup>27</sup>*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

<sup>28</sup>Re Rhodes (1890) 44 Ch D 94, 105 (per Cotton LJ).

<sup>29</sup>Peter Birks, *An Introduction to the Law of Restitution* (1<sup>st</sup> Ed.) (Oxford: Clarendon Press, 1985); Robert Goff and Gareth Jones, *Goff & Jones on The Law Of Restitution* (1<sup>st</sup> Ed.) (London: Sweet & Maxwell, 1966).

## UNJUST ENRICHMENT BEFORE THE MALAYSIAN COURTS PRIOR TO *DREAM PROPERTY*

On a number of occasions where the Malaysian courts have taken cognisance of the concept of unjust enrichment prior to the Federal Court case of *Dream Property*, it is usually discussed by the courts in two (2) separate contexts, which are discussed below in turn.

### (1) Describing the Provisions of Part VI Contracts Act 1950 as being Restitutionary in Nature and as being the Statutory Embodiment of the Principle of Unjust Enrichment

Case law on section 71 is clear that the restitutionary right in this section is independent of contract. While some cases premised their decision on quasi-contract or implied contract doctrines, others had referred to unjust enrichment in their decisions.<sup>30</sup> The High Court decision (upheld on appeal to the then Supreme Court) in the case of *New Kok Ann Realty Sdn Bhd v Development and Commercial Bank Ltd*<sup>31</sup> signified one of the first attempts to discover a juridical basis for the cause of action in money had and received, and action under section 71. In relation to a claim for 'money had and received', Gunn Chit Tuan J. stated that:

the theoretical basis for an action for money had and received is based on quasi-contractual liability and is still doubtful and has been controversial. There are two main theories namely, (1) that liability is based on an implied contract ... and (2) that liability is derived from the principle of unjust enrichment. And yet another suggestion is that although the basis of the action is an implied promise to repay, such a promise will be implied only where an element of unjust enrichment exists.

In relation to a claim for section 71, Gunn Chit Tuan J. stated that:

According to Pollock and Mulla on the Indian Contract and Specific Relief Acts (9th edition) at page 497 there is good authority for saying that section 70 of [the Indian] Contract Act was framed in the present form with a view to avoid the niceties of English law on the subject of quasi-contract. According to the learned authors of

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<sup>30</sup>*Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229.

<sup>31</sup>[1987] 2 MLJ 57.

that book, the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment. According to them the principle of unjust enrichment falls under sections 69 and 70 (sections 70 and 71 of our Contracts Act). But these sections are wider in scope than the doctrine as applied in England and go far beyond it. And according to them “the terms of [s 71 of our Contracts Act] are unquestionably wide but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract.

## **(2) In Addition to the Provisions of Part VI of Contracts Act 1950, Malaysian Courts Continued to Refer to the Old ‘Forms of Action’ under the English Common Law When Determining Restitutionary Claims**

This can be seen for example in cases of action for ‘money had and received’ for parties seeking restitution of money paid under a mistake or some other unjust factors, for the claim in *quantum valebat* and for the claim in *quantum meruit*. Claims made and decided on the basis of these old forms of action often appear to be conceptualised as claims based on a “general law” relating to restitution and unjust enrichment – co-existing with, but separate from, the statutory provisions of Part VI of the Contracts Act 1950.

In *Affin Bank Bhd v MMJ Exchange Sdn Bhd*<sup>32</sup> the plaintiff’s restitutionary claim for mistaken payment of money was founded both upon section 73 AND on the basis of ‘money had and received’. These were treated as separate claims and were discussed under separate headings by the High Court (similarly also the cases of *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim [1998] HC*<sup>33</sup> and *Green Continental Furniture (M) Sdn Bhd v Tenaga Nasional Bhd [2011] COA*<sup>34</sup>).

Similarly in *New Kok Ann Realty* (above), money had and received and section 71 were treated and discussed by the court as separate claims (but it was mentioned that both is based on the principle of unjust enrichment).

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<sup>32</sup>[2007] 9 MLJ 787

<sup>33</sup>[1998] 3 MLJ 262

<sup>34</sup>[2011] 8 MLJ 394

The continued reference to the old forms of action, *in parallel with the provisions of Part VI of CA 1950* has led to significant confusion as to the appropriate legal basis for making a restitutionary claim within the Malaysian legal framework.<sup>35</sup> Such reference should be discontinued, since it can be convincingly argued that the statutory provisions (Part VI, Sections 65 and 66) are broad enough to accommodate the modern principles of unjust enrichment and most of the unjust factors recognised under the common law.

Taken as a whole, although the Malaysian courts have become fairly accustomed to the language of restitution and unjust enrichment and have applied in numerous decisions the principle of law stated in leading English cases such as *Lipkin Gorman*, the dicta of Lord Wright in *Fibrosa Spolka* and the classic definition of unjust enrichment (enriched, at the expense, unjust, no defence), however, this is mostly done in a precursory and broad-brush manner, and not highly conceptualised. The courts practically never discuss and/or analysed why and under what circumstances the receipt of benefit should be considered unjust (i.e. to identify the unjust factor(s) within the true framework of unjust enrichment.). This has not heed proper understanding of this area of law among practitioners.

This brings us to the Federal Court's decision in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*<sup>36</sup>, where the apex court for the first time has expressly recognised that unjust enrichment can be a separate cause of action in Malaysia, independent of contract and other cause of action previously associated with a claim for restitutionary remedy.

### **THE LANDMARK FEDERAL COURT CASE OF *DREAM PROPERTY SDN BHD v ATLAS HOUSING SDN BHD***

The facts of the case concerned Dream Property as the defendant/purchaser who had entered into a Sale and Purchase Agreement with the plaintiff/seller (Atlas Housing). The defendant agreed to purchase a piece of land from the plaintiff at RM33.5 million in order to build a shopping mall, and duly paid a 10% deposit. The defendant was allowed to begin construction of the mall as defendant

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<sup>35</sup>See part of the discussion in the case of *Dream Property* itself (below).

<sup>36</sup>[2015] 2 MLJ 441.

wanted to get the mall ready and operative before the Chinese New Year in January 2007. A dispute arose when the plaintiff claimed that the contract was automatically terminated due to the defendant's failure to pay the balance purchase price within the completion period, therefore refusing to complete the contract and commencing legal proceedings for recovery of Vacant Possession (VP) of the land on the ground that the defendant breached the contract.

The mall was at that time 50% constructed. The plaintiff issued a letter demanding that the defendant ceased construction of the mall, but did not apply for any injunction to restrain the defendant from continuing the construction works on the land, and so despite on-going litigation, the defendant pressed on with the construction of the mall. The mall was completed and fully operative with ongoing businesses and tenants, so as of November 2007 its market value was estimated to be around RM387 million. The cost of construction of the mall was about RM124 million.

After a full trial, the High Court dismissed the defendant's claim, held that the defendant committed a repudiatory breach and ordered the VP of the land together with the mall to be returned to the plaintiff. However, the High Court also ordered the plaintiff to pay the defendant the costs of construction for the shopping mall pursuant to section 71 of the Contracts Act 1950. The decision of the High Court was upheld by a majority of the Court of Appeal. In addition, the defendant was ordered to pay profits derived from its use and occupation of the land to the plaintiff. The defendant appealed to the Federal Court.

The Federal Court upheld that the defendant breached the contract and must deliver the VP. The only point of contention lay in the amount if any that the defendant would be entitled to recover from the seller for the improvement to the land. The Federal Court decided that the defendant was entitled to recover from the plaintiff a sum amounting to *the market value of the Mall at the date of the judgment (instead of the cost of construction)*.

The Federal Court explained that the defendant's/purchaser's right of recovery was based on the law of unjust enrichment and went on to address the issue by applying the traditional four-stage inquiry. The orders from the courts below for the defendant to give an account of profit were set aside and substituted with an order to pay rent at

market value for its occupation of the plaintiff's unimproved land (without the mall) until the date of the Federal Court judgment.

### **Significance of *Dream Property* for the Law of Unjust Enrichment in Malaysia**

The apex court granted full recognition on the availability of a separate cause of action of unjust enrichment in Malaysian law. As per Azahar Mohamed FCJ's judgment:<sup>37</sup>

...there is now no longer any question that unjust enrichment law is a new developing area of law which is recognized by our courts. . . . the time has come for this court to recognize the law of unjust enrichment by which justice is done in a range of factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice...

...Unjust Enrichment describes a cause of action. On the other hand restitution describes a remedy.

Although the Federal Court accepted the orthodox English approach for establishing a claim of restitution in unjust enrichment (relying on leading English cases of *Banque Financiere* and *Sempra Metals*) by recognising the traditional 4-stage inquiry (enriched, at the expense, unjust, no defence), on the third inquiry/element i.e. in determining whether the enrichment was "unjust", the Federal Court chose to apply the *civilian 'absence of basis' approach* (the approach under civil law jurisdictions) rather than the traditional English 'unjust factors' approach.

Furthermore, while section 71 of the Contracts Act 1950 was brought to the attention of the Court, the Court ultimately relied only on a more general law of restitution of unjust enrichment, which it appears to regard as necessarily existing outside the scope of the statutory regime of Part VI of the Contracts Act 1950. In its judgment the Federal Court drew a distinction between "the provisions of section 71 of the Contracts Act 1950" and "the law of unjust enrichment as we understand today".

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<sup>37</sup>[2015] 2 MLJ 441.

The Federal Court basically disagreed with the plaintiff's counsel's argument that the case of *New Kok Ann Realty* (above) dealt with the doctrine of unjust enrichment within the context of section 71, when it stated that:<sup>38</sup>

We note that the Supreme Court made no reference to the law of unjust enrichment. A closer reading of the judgment will show the Supreme Court in that case decided the appeal entirely on the basis of the provisions of s.71 of the CA 1950 and not based on the law of unjust enrichment as we understand it today.

This represents a missed opportunity for the Federal Court to clarify the scope and limitations of the restitutionary provisions of the Contracts Act 1950 – the court did not give any specific reasons for rejecting section 71 nor any justification why section 71 cannot be interpreted so as to reflect principles of unjust enrichment.

This has led to some taking the view that these restitutionary provisions do not embody the principle of unjust enrichment as recognised and developed under the English law, and thus the approach is to treat the law of restitution as embodied in the restitutionary provisions of the Contracts Act 1950 as distinct from, arguably, “the common law of unjust enrichment” that is recognised in Malaysia by virtue of the case of *Dream Property*. As such, the argument goes, the restitutionary provisions should not be interpreted by reference to principles of the English Law and “that the appeal of the common law should, where appropriate, be firmly resisted or even rejected”,<sup>39</sup> in other words, *arguing for a mutually exclusive dual regime for Restitution in Malaysia* i.e., the statutory regime under the Contracts Act 1950, and a Common Law regime based on the principle of unjust enrichment.

However, it is highly questionable whether this is the best way forward for Malaysia in developing this area of law. The court cannot continue interpreting and applying the restitutionary provisions of the Contracts Act based on outdated principles of quasi-contract (as seen in the preceding discussions) that has been abandoned by other jurisdictions, while at the same time developing the common law

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<sup>38</sup>[1987] 2 MLJ 57.

<sup>39</sup>Tchung, *The Law of Restitution*, 37.

regime of unjust enrichment. The arguments for this will be extrapolated further below in this paper.

### **Criticism of *Dream Property***

Firstly, as a matter of principle of the law of unjust enrichment, essentially the court's treatment of the first element of the action is liable to criticism - how the court understood the "enrichment" question i.e. whether the enrichment is the value of the defendant's labour in constructing the mall, or the mall itself?

This distinction was not recognised by the court as an issue of the enrichment question itself, but rather in deciding what award to make. The court stated that this measure i.e. the current market value of the mall (excluding the market value of the land) is correct simply because it would be "manifestly unfair & unjust" to award only the value of the labour. However, this is wrong as a matter of principle, as gains realised by the plaintiff beyond the value of the defendant's labour is actually the function of its own property rights, not the defendant's labour.<sup>40</sup> To understand this issue further, as a point of reference, we can compare the position under the English Law in relation to an improver of land (such as the defendant in *Dream Property*).

When discussing the issue of unjust enrichment in the case of 'improver of land', the prevailing position under the English Law is significantly less generous to the improver of land. In *Cobbe v Yeoman's Row Management Ltd*,<sup>41</sup> the plaintiff obtained planning permission for the defendant's land in anticipation of a joint venture, which did not materialise. The House of Lords held that the plaintiff was entitled to a *quantum meruit* payment for his services, which will take into account relevant costs in procuring the planning permission as well as his fee.

Lord Scott reasoned that the defendant's enrichment shall not be assessed by the difference in market value between the land without the planning permission and the land with it, "for the planning permission did not create the development potential of the land but

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<sup>40</sup> Frederick Wilmot-Smith, "A Dream Case?", *LQR*, 132(Apr), 196-201 (2016): 199.

<sup>41</sup>[2008] 1 WLR 1752.

merely unlocked it”.<sup>42</sup> The English approach places a premium on the landowner’s freedom to exploit his land, which is an important aspect of land ownership.<sup>43</sup>

The second criticism of *Dream Property* can be seen in its treatment/analysis of the “at the expense of the Claimant” requirement (the second element of an unjust enrichment claim).

Many scholars have argued that to justify an award stripping the enricher’s gain, there must be a corresponding “loss” on the claimant’s part to make it ‘at his expense’. It is not just a matter of ordinary language or a rule of attribution, as requiring a corresponding “loss” of the claimant would serve to identify the appropriate beneficiary of the claim, and serve *to place a limit on the measure of the claim*.

Therefore, in *Dream Property*, the enrichment was only to the defendant’s expense to the extent of its costs in constructing the Mall, as the value of the mall is more closely link to the claimant’s property rights pursuant to their ‘title’ to the land. Otherwise, the application of the law of unjust enrichment becomes *too wide* – which is the subject of a new wave of academic detractors/skepticism even from former ‘proponents’ of unjust enrichment.<sup>44</sup> In this regard, there is a compelling argument for “double ceiling’ on unjust enrichment in that unjust enrichment is not calculated to strip defendants of gain at all costs, but rather to restore to the claimant the value of rights he has unjustly lost. It can therefore only justify restitution to the extent of the claimant’s ultimate expense, or the defendant’s ultimate enrichment, whichever is lesser.<sup>45</sup> As such, the case of improvements to property under the English Law supports the double-ceiling approach as the approach justifies the law’s general restriction of the measure of restitution to the market price of the services where that is lower than the increase in value of the defendant’s property.

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<sup>42</sup>[2008] 1 WLR 1752, [41].

<sup>43</sup> Alvin W-L See, “Restitution for the Mistaken Improver of Land”, *The Conveyancer and Property Lawyer*, 80 (2016): 60.

<sup>44</sup>see Andrew Burrows, “At the Expense of the Claimant: A Fresh Look”, *RLR* (2017): 167; and Andrew Burrows, “In Defence of Unjust Enrichment”, *Cambridge Law Journal*, 78(3) (2019): 521.

<sup>45</sup>Andrew Trotter, “The Double Ceiling on Unjust Enrichment: Old Solution for Old Problems”, *Cambridge Law Journal*, 76(1) (2017): 168.

The main criticism of the court's decision comes from the court's adoption of the civilian 'absence of basis' approach rather than the traditional English 'unjust factors' approach that is more familiar to a common law jurisdiction like Malaysia, in establishing the third element of the unjust enrichment claim. The court stated that "in our view it would produce a fairer outcome", but did not elaborate much further; and not providing any further or detailed guidance on how the "absence of basis" test was to be applied in future cases. It is quite unfortunate that such a fundamental philosophical shift was executed in three short paragraphs, the first of which substantially comprised quotations from *Goff & Jones*.<sup>46</sup> As a result, it is not clear what the Federal Court meant by "absence of basis", and its adoption potentially casts the liability net very wide, which in turn would mean that other methods of circumscribing liability will need to be found.<sup>47</sup>

### ***'Absence of Basis' vs. 'Unjust Factors'***

The starting point of the English 'unjust factors' approach is that there is "*no restitution unless*" the plaintiff can demonstrate a positive reason for allowing restitution i.e. plaintiff must establish an unjust factor/'ground of restitution' based on the existing case law – which includes well-known categories such as mistake, failure of consideration, duress/coercion, etc.

On the other hand, the starting point of the 'absence of basis' approach (based on civil law jurisdiction but has been recognised in some common law jurisdictions such as Canada) is that "*there is restitution unless*" the defendant can demonstrate 'juristic basis' or 'legal ground' to justify retention of the benefit that has been transferred to the defendant.

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<sup>46</sup>at para. 128 – 130 of the case.

<sup>47</sup>See, "Restitution for the Mistaken Improver of Land".

### ***Challenges to Dream Property's Adoption of the 'Absence of Basis' Approach***

The adoption of the civilian 'absence of basis' approach by the Federal Court without providing further guidance has given rise to several pertinent questions/issues.<sup>48</sup> First, what constitutes a "legal ground" or "juristic basis" to retain an enrichment? The words "legal ground" and "juristic basis" are very general in nature and somewhat vague. It is not clear what the scope, width and limits of these words may be. The Federal Court only mentioned "by legislation or by contract", which are equally general and vague words.

Second, how should the courts develop the "absence of basis" approach in the future? In developing and clarifying the "absence of basis" test, what are the sources of law or persuasive authority that the Malaysian courts should take into consideration? English Law does not recognise the "absence of basis" approach. Although the "absence of basis" approach informs the law of unjustified enrichment in Civil Law and mixed-law systems, the laws of each jurisdiction are very different, as well as unfamiliar to Malaysian practitioners and judges.

Third, who bears the burden of proof under the "absence of basis" approach? Fourth, what is the status of earlier Malaysian case law (i.e. the precedent and authorities at all levels of the judicial hierarchy which dealt with common law restitutionary claims or unjust enrichment)? The entire corpus of earlier Malaysian case law on restitution of unjust enrichment, dealing with well-known grounds of restitution such as failure of consideration, mistake, legal compulsion, duress, undue influence, frustration, etc were all decided based on principles of English Law, and which can readily be explained and categorised based on the "unjust factors" approach under the English Law. Does this mean that the earlier Malaysian case law are now to be regarded as obsolete, irrelevant or even overruled? Would it mean that the Malaysian Law of unjust enrichment would effectively be starting from scratch?

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<sup>48</sup>See Low Weng Tchung, "Absence of basis: Challenges for the Malaysian Law of Unjust Enrichment", <https://weng.com.my/absence-of-basis-challenges-for-the-malaysian-law-of-unjust-enrichment/> (accessed 15 April, 2024).

Lessons to be learned on the potential difficulties that our jurisdiction might grapple with, should the civil law ‘absence of basis’ approach be the preferred approach to establish the third element of unjust enrichment, can be seen from the issues arising in other common law jurisdictions such as England and Canada.

In England, an invitation for a shift to the ‘absence of basis’ or ‘Birksian’ approach (propounded by Peter Birks) was met with caution by the courts. In *Deutsche Morgan Grenfell Group plc v IRC*,<sup>49</sup> the House of Lords preferred to maintain the ‘unjust factor’ approach. Lord Hope stressed the virtue of incremental development and warned against “attempts at dramatic simplification” of the law without fuller study.

This is because the ‘absence of basis’ approach operates at a high level of abstraction and therefore may oversimplify the unjust inquiry to such an extent that some of the subtleties and nuances of the existing law are lost. Thus, it has been argued that the ‘absence of basis’ test is too broad and would have led to recovery of enrichment in undeserving situations.<sup>50</sup>

In fact, this approach was appealing to the Federal Court in *Dream Property* precisely because it readily supplied the answer sought by the court (based on its own perceived justice) which might be unavailable under the ‘unjust factor’ approach. To avoid such idiosyncrasies in the law, the option is to either expand the categories of legal justifications/basis or to shift the burden of filtering unnecessary claims to the requirement of ‘defences’ (fourth element of an unjust enrichment claim).

In Canada, it has been observed<sup>51</sup> that the ‘absence of basis’ approach has been wrought with difficulties mainly because the role of ‘unjust factors’ is problematic. The interaction between ‘unjust factors’ and ‘absence of basis’ often confuses the analysis as in some cases courts award restitution on the ground that there is no basis, while in other cases the analysis suggests the reason for restitution is actually

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<sup>49</sup>[2007] 1 AC 558.

<sup>50</sup> Lionel Smith, “Demystifying Juristic Reasons”, *Canadian Business Law Journal*, Vol. 45 (2007): 281.

<sup>51</sup>Chris Hunt, “Unjust Enrichment Understood as Absence of Basis: A Critical Evaluation with Lessons from Canada”, *Oxford U Comparative L Forum* (2009): 6.

the presence of an unjust factor, but employ the phrase ‘absence of juristic reason’ (the phrase used by Peter Birks) simply as an expression of the conclusion reached under the traditional approach. Therefore, it appears that both approaches are operating simultaneously, leading to confusion and uncertainty. As can be seen from the following discussion, this also seems to be the direction of Malaysian courts post *Dream Property*, which would need to be rectified quickly.

### ***Way Forward – ‘Absence of Basis’ or ‘Unjust Factor’?***

The ‘absence of basis’ approach was merely mentioned without further elaboration in cases after *Dream Property*. For instance, the case of *Lim Kim Huat v Datuk Johari bin Abdul Ghani & Anor (Pauline Soo Wei Ling, third party)*<sup>52</sup> concerns misapplication of the ‘absence of basis’ approach, which was merely mentioned without further elaboration. In delivering the judgment of the court, Faizah Jamaludin JC merely stated that:

It is settled law that, if a fiduciary, in breach of his/her fiduciary duty, obtains a benefit for himself/herself at the expense of the beneficiary it is *a case of unjust enrichment...* Applying the “*absence of basis*” in *Dream Property*, I find that there was an absence of basis for D1 to gain the benefits of the proceeds of the assignment and novation of the Properties<sup>53</sup>(*emphasis added*).

Similarly, in *Monument Mining Limited & Anor v Emas Kehidupan Sdn Bhd & Ors*,<sup>54</sup> the court simply asserted that the plaintiff had established the four ingredients of unjust enrichment enunciated in *Dream Property* to sustain the restitutionary claim without further elaboration. As Lim Chong Fong JC stated in the judgment:<sup>55</sup>

I am satisfied on the facts before me that the plaintiffs herein have met the four ingredients of unjust enrichment enunciated by the Federal Court to sustain their restitutionary claim... Consequently, there is in my view *the absence of basis* for the defendants to retain

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<sup>52</sup>[2018] MLJU 1292.

<sup>53</sup>Ibid at [176], [178].

<sup>54</sup>[2016] MLJU 75.

<sup>55</sup>[2016] MLJU 75, at [55].

the benefit derived from the EIA. There was substantial nearing total failure of consideration (*emphasis added*).

As seen in the above judgements, these open-ended notions are rather dissatisfying and nonintuitive in order to comprehend what constitutes a basis in the ‘absence of basis’ approach. Without detailed analysis, the law of unjust enrichment may be perceived as a “vague principle of justice of no practical value”<sup>56</sup> which is essentially susceptible to judge’s subjective discretion. Most importantly, this misperception will certainly be detrimental to the development of the law. Malaysian courts would need to further clarify and develop the ‘absence of basis’ test concretely. In fact, in espousing absence of basis as the founding principle of the law of unjust enrichment in Malaysia, the *Dream Property* case signifies a potential expansion in the Malaysian common law (and possibly equity) that could well render the unjust enrichment content in the statutory provisions practically nugatory.<sup>57</sup>

The Federal Court in *Dream Property* did not appear to provide that the principle of unjust enrichment is a single overarching principle covering all situations of restitutionary relief, thus in situations relating to existing principles of restitutionary relief under contract law such as failure of consideration and mistake, the courts would still rely on the ‘unjust factor’ test. This would lead to confusion as two different approaches are applicable in Malaysia now.<sup>58</sup>

In most cases the two approaches often yield the same outcome. However practically speaking, since unjust enrichment is still at its formative stage in Malaysia, to systematically develop the law, it is best done by requiring the courts to articulate the precise reason for regarding an enrichment as unjust, especially since the Malaysian courts are already familiar with most of the unjust factors.

The absence of basis has the appearance of simplicity and convenience and this may make it liable to be invoked indiscriminately,

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<sup>56</sup>Charles Mitchell et al. (eds.), *Goff & Jones*, at para. 1-07.

<sup>57</sup>Tchung, *The Law of Restitution*.

<sup>58</sup>Tan Pei Meng and Ong Seng Fook, “The Law of Unjust Enrichment in Malaysia: Where Are We Now?” *Advanced Science Letters*, Volume 23, Number 9 (2017): 8594.

particularly by those who are not well versed in the subject. Furthermore, in trying to discover what belongs IN the law of unjust enrichment (i.e. what constitutes an ‘unjust factor’), the courts will instead struggle to keep irrelevant things OUT (i.e. what would not amount to a valid legal ‘basis’). Keeping in line with the other major common law jurisdictions will also allow the Malaysian courts to continue tapping from a familiar pool of resources seeing that the common law has long influenced the development of Malaysian law. The reality is that the unjust factors approach is so well entrenched that it is likely to retain its place in Malaysian Law since if the facts of a case reveal an established unjust factor, the court will most likely still refer to it. For example, it is highly unlikely that a court will ignore section 73 of the Contracts Act 1950 when addressing a clear case of mistake.<sup>59</sup>

In the past, the Malaysian courts have not explicitly expressed preference for the unjust factor approach, but they always look for specific grounds to justify restitution, particularly since some of the established unjust factor is provided in the Contracts Act 1950 (e.g. section 73 Mistake/Coercion, section 65/66 ‘failure of consideration’). This can be seen from the fact that since *Dream Property*, there has been a threefold increase in the number of cases that mention ‘unjust enrichment’, but only ten cases resorted to mentioning the phrase ‘absence of basis’.<sup>60</sup>

On the other hand, the traditional ‘unjust factor’ approach not only is more familiar for Malaysia as a common law country, but as most of the unjust factors can be found in our Contracts Act 1950, it would be easier for us to reconcile the law of unjust enrichment with our Contracts Act 1950, which would work towards a more principled approach in dealing with restitutionary claims in Malaysia (see the discussion below).

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<sup>59</sup>See, “Restitution for the Mistaken Improver of Land”.

<sup>60</sup>The survey method is by typing “unjust enrichment” and “absence of basis” into the Lexis Nexis database, since the month after the judgment date of *Dream Property* i.e. beginning March 2015.

## WAY FORWARD FOR UNJUST ENRICHMENT IN MALAYSIA – 1<sup>ST</sup> VIEW: MUTUALLY EXCLUSIVE DUAL REGIME

Low Weng Tchung in his book<sup>61</sup> argued for a mutually exclusive dual regime for Restitution in Malaysia, stating that the two regimes are and should be treated as being different in principle, and therefore “the restitutionary provisions of the Contracts Act 1950 should not be interpreted, restricted or limited by reference to English Law” and “that the appeal of the common law should, where appropriate, be firmly revisited or even rejected”. Among the primary reasons given can be summarised as follows:

1. Restitutionary provisions of Contracts Act 1950 which is a direct legal enactment stand on a different juridical foundation i.e. they are of Roman Law origin.
2. By looking at the state of English Law of restitution and unjust enrichment prior to 1867 (the year the Indian Contract Bill was introduced), in particular that in 1872 (when the Indian Contract Act<sup>62</sup> was enacted), “English Law did not recognise and would not for another 120 years recognise a law of restitution based on the principle of unjust enrichment”.
3. “The separate and distinct principle of ‘restitution’ underpinning the relevant provisions of the Contracts Act 1950 is too well established to be assimilated or equated with the principle of unjust enrichment at Common Law”.
4. The Indian Law Commission in its 13th Report recommended amendments to the Indian Contract Act to accept the doctrine of unjust enrichment, therefore it implicitly acknowledges that the principle of unjust enrichment formed no part of the Indian Contract Act.
5. The case of *Dream Property* itself.<sup>63</sup>

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<sup>61</sup> Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia*, (Petaling Jaya: Lexis Nexis, 2015).

<sup>62</sup> The Malaysian Contracts Act 1950 was drafted based on its Indian counterpart, and hence the provisions in the Malaysian statute are in *parimateria* with the Indian’s Contract Act 1872.

<sup>63</sup>see the discussion above.

Responding to the points above, several counter arguments can be put forward as to why such a position is untenable. Firstly, such an understanding/approach seems to freeze the provisions of the Contracts Act 1950 to the point of time when they were enacted. Is this how Malaysian courts have or should approach the law (even in other provisions outside the restitutionary provisions)? Are courts supposed to apply the provisions without regard to subsequent development in English/Common Law and only look at what the provisions were supposed to cater to at the point of time when they were enacted? This cannot be the case as statute should not be seen as freezing or stifling or turning back a development of the common law; and judges should not be unnecessarily rigid in their interpretation of statutory provisions.

Secondly, even if the restitutionary provisions are of Roman Law origin, this shows that we share the same historical roots with English Law. Hence the way we develop our law on unjust enrichment should move towards a point of *convergence*, which comes with a lot of benefit in terms of pooling jurisprudential resources, providing familiarity and therefore consistency and certainty, etc., unless absolutely prevented by the clear wordings of the statutory provisions. However, the statutory provisions are fairly broad that it could encapsulate the common law principles of unjust enrichment in its analysis.<sup>64</sup> Even Indian judges have shown a tendency to be more liberal in the way they approach restitutionary provisions (as with other provisions) of the Contracts Act – sometimes even going against express wordings of the statutory provisions. Malaysian judges tend to be more reticent, as they should, but not to the extent that the law remains stunted.

Finally, a mutually exclusive dual regime is liable to confuse. The court would naturally look to somewhere to import principles in order to inform their interpretation of the scope of a provision, which should be fluid and move with new exigencies of the time; as such the line between pure statute law and common law will always remain blurry. Therefore, it is better to have a principled approach towards developing the statutory provisions with the freedom to import common law principles.

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<sup>64</sup>see the 2<sup>nd</sup> view below.

## Dual Regime or Unified Approach?

According to Prof. Andrew Burrows:<sup>65</sup>

The interpretation of a statute is for the judges to determine and their decisions effectively create a new body of common law. This can be called “statute based common law”. Statute-based common law classically exemplifies the merger of statute and common law in one system. (one might regard this) as the closest equivalent to case law in a civilian system...*common law analogies can be used to interpret a statute*, or put another way, statute-based common law can draw on pure common law...there seems no reason why this technique should not be used *provided the analogy is consistent with the statutory words*. On the contrary, one can strongly argue that using the common law to interpret a statute should be positively encouraged not merely because this enhances consistency between common law and statute, *but also because the common law has been carefully crafted and is likely to be both principled and practically workable* (emphasis added).

As such, by using the English Common Law by analogy to interpret the statutory provisions of Contracts Act 1950, Malaysian judges could, and should, develop their own Malaysian statute-based common law of unjust enrichment.

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<sup>65</sup>Andrew Burrows, “The Relationship Between Common Law and Statute in the Law of Obligations”, *LQR*, 128 (Apr) (2012): 232.

## WAY FORWARD FOR UNJUST ENRICHMENT IN MALAYSIA – 2<sup>ND</sup> VIEW: TO USE THE COMMON LAW TO DEVELOP THE CONTENTS OF THE RESTITUTIONARY PROVISIONS

This view has been taken by a number of authors<sup>66</sup> in order to promote a principled approach in the application of the provisions - but outside Part VI and section 65/66, of the Contracts Act 1950, the courts can still continue to develop unjust enrichment for other unjust factors not contained in these provisions. Importing the common law principles into the framework of statutory provisions can be done in Malaysia within the ambit of ss. 3 and 5 of the Civil Law Act 1956, with the following proviso in mind:

1. Any common law rules that is inconsistent (goes against) with express wordings of the statutory provision cannot be applied.
2. Where the express wordings of the statutory provision is wider than a common law rule (e.g. does not have a limitation recognised under the common law), the wider interpretation is preferred.

This approach would enhance consistency between common law and statute law, particularly since the common law is likely to be both principled and practically workable. The aim is to promote a principled approach in the application of the statutory provisions and to ensure consistency and coherence in the development of the law of unjust enrichment in Malaysia, as well as bringing the old provisions of the Contracts Act 1950 up to date for wider utility in contemporary commercial disputes. A detailed exposition of how to develop the detailed contents of the restitutionary provisions of the Contracts Act

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<sup>66</sup>Cheong May Fong and Yee Harn Lee, *Civil Remedies in Malaysia* (Subang Jaya, Selangor: Sweet & Maxwell / Thomson Reuters, 2016); David Fung, "Restitution and Section 71 of the Contracts Act 1950", [1994] 2 MLJ lxxix; Alvin W-L See, "Recovery of Non-Gratuitously Conferred Benefit Under Section 70 of India's Contract Act 1872" in A Robertson and M Tilbury (eds), *Divergences in Private Law* (Oxford; Portland, Oregon: Hart Publishing, 2015), Chapter 11; Alvin W-L See, "Restitution of Mistaken Enrichment under Section 73 of Malaysia's Contracts Act 1950: Pouring New Wine into an Old Bottle?", 31 *Journal of Contract Law*, 31 (2014): 206; Alvin W-L See, "An Introduction to the Law of Unjust Enrichment", [2013] 5 *Malayan Law Journal* i.

1950 by using the common law of unjust enrichment by analogy is outside the scope of this paper, however a brief overview is given below as a matter for further research.

### **Developing the Contents of Section 73 of the Contracts Act 1950**

The case of mistaken enrichment is generally regarded as the paradigm example of unjust enrichment.<sup>67</sup> Alvin See<sup>68</sup> argues that the courts must avoid drawing an analogy between the statutory claim and a contractual claim and applying incorrect distinction between the statutory claim and a claim for money had and received. The relevant ‘unjust factors’ under this section would be Mistake and Coercion (which should include economic coercion/duress). The words ‘repay or return’ indicates that both award of personal restitution and proprietary restitution can be recognised. It should also encompass recognition of common law defences to unjust enrichment claims that can serve to balance competing interests. The courts should formulate the detailed rules and principles of the section by drawing on the experience of other major common law jurisdictions and incorporating them into the section’s framework. The content of section 73 needs to be developed so as to enable it to better address complex issues, e.g. those that involves competing interests.

### **Developing the Contents of Section 71 of the Contracts Act 1950**

Four conditions under the section were laid down in *Siow Wong Fatt v Susur Mining Ltd (Privy Council)*<sup>69</sup> i.e. (1) doing of the act/delivery of the thing must be lawful, (2) it must be done for another person, (3) not intended to be gratuitous, and (4) the other person enjoys the benefit of the act or delivery. The relevant ‘unjust factor’ here would be ‘Free Acceptance’ i.e. where the defendant is aware that a benefit is being conferred non-gratuitously and having opportunity to reject, freely

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<sup>67</sup>Professor Birks regarded the mistaken payment of a non-existent debt as the core case of unjust enrichment. See Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> Ed.) (Oxford: Oxford University Press, 2005), 3.

<sup>68</sup>Alvin W-L See, “Restitution of Mistaken Enrichment under Section 73 of Malaysia’s Contracts Act 1950: Pouring New Wine into an Old Bottle?”, *Journal of Contract Law*, 31 (2014): 206.

<sup>69</sup>[1967] 2 MLJ 118 (PC).

accepts the benefit. The scope for each of the conditions can be analysed by looking at the 4-elements of unjust enrichment.

Alvin See <sup>70</sup> argues that by drawing on the common law to rationalise and develop the right to recovery of non-gratuitous benefit, it can inject principle and clarity into the antique section and revive it for practical and modern use. It would also put a stop to the tendency (as seen from Malaysian case law) to refer or apply section 71 in situations where ready solutions could be found in other established areas of the law (e.g. when parties obligations are governed by contract; or when restitution is a claim pursuant to failure of basis/consideration i.e. an action under section 66); loading the section with unnecessary materials is confusing, conceptually wrong and cloud the section's true utility, as well as liable to adversely affect the development of other area of law if it amounts to sidestepping established legal requirements.

### **Developing the Contents of Sections 65 and 66 of the Contracts Act 1950**

Fong and Lee <sup>71</sup> in their book dealing with restitutionary remedies, explained how previous decisions of the Malaysian courts under these sections in relevant aspects can be analysed through the lens of unjust enrichment. As these sections cover contracts that become void and contracts rescinded for want of free consent, they are of wide utility. For the former i.e. contracts discharged for 'frustration' or by 'breach', the relevant 'unjust factor' would be 'failure of consideration'; while for the latter the relevant 'unjust factor' can be coercion/duress, undue influence, mistake or fraud/misrepresentation.

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<sup>70</sup> Alvin W-L See, "Restitution of Non-Gratuitously Conferred Benefit in Malaysia: A Case for Sowing the Unjust Enrichment Seed", *Asian Journal of Comparative Law*, 11 (2016): 141.

<sup>71</sup> Cheong May Fong and Yee Harn Lee, *Civil Remedies in Malaysia* (Subang Jaya, Selangor: Sweet & Maxwell / Thomson Reuters, 2016), Ch 7.

## **CONCLUSION**

A dual-regime approach to restitution of unjust enrichment (separately under the common law and under the restitutionary provisions of the Contracts Act 1950) that is mutually exclusive, would give rise to possible competing and/or conflicting claims and inconsistencies in the doctrinal development of unjust enrichment in Malaysia, which would lead to legal uncertainty and unpredictability on the application of principles of unjust enrichment by the Malaysian courts in restitutionary claims. As such, the best way forward is to come up with one unified legal framework for unjust enrichment in Malaysia, which could be achieved primarily by developing the contents of the restitutionary provisions of the Contracts Act 1950 using the common law of unjust enrichment by analogy and applying the traditional ‘unjust factor’ approach under the English law of unjust enrichment rather than the civil law ‘absence of basis’ approach. This would chart the future direction of unjust enrichment in Malaysia as a modern, uniform and unified area of law.

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