A PYRRHIC VICTORY FOR UNJUST ENRICHMENT IN SINGAPORE?

Rachel Leow*

Timothy Liau†

In *Esben Finance Ltd v Wong Hou-Lianq Neil,* the Singapore Court of Appeal handed down a momentous judgment, holding that, unlike in England and Wales, unjust enrichment claims could not be time-barred under the Limitation Act, laches would not apply, and 'lack of consent' should be accepted as an unjust factor, subject to circumscribed limits. These are novel stances, unheard of anywhere else in the common law world. We suggest, moreover, that *Esben* is of potentially greater significance: it is important evidence that Singapore has adopted a distinctive approach towards unjust enrichment. Under this gradually crystallising vision, unjust enrichment is characterised as a new area of law, with independent status but only an interstitial role. This vision, which draws a sharp divide between common law and equity and places unjust enrichment under the common law umbrella, is likely to have far-reaching consequences for the subject's future development.

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Claims for restitution of an unjust enrichment are conventionally analysed through a series of inquiries, or 'signposts'[1]: Is the defendant enriched? Is his enrichment at the claimant's expense? Was it unjust? Were there any defences? Within this framework, further questions might be asked. Are ignorance, lack of consent, or want of authority recognised unjust factors?[2] What limitation period applies?[3] Does laches apply? What effect does illegality have, if any?[4]English courts have offered answers to some of these questions, but not all. All keen to know

* Assistant Professor, National University of Singapore. From Sept 2022, Assistant Professor, London School of Economics and Political Science.

† Assistant Professor, National University of Singapore. From Sept 2022, Assistant Professor, London School of Economics and Political Science.

[1] *Investment Trust Companies v RCC* [2017] UKSC 29, [2017] 2 WLR 1200 at [41]. NB In Singapore these 'signposts' have a stronger status than in England; they are 'well-settled' 'elements' of an 'unjust enrichment claim'. See eg *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] SGCA(I) 1 ('*Esben*') at [125]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36, [2013] 3 SLR 801 at [98]; *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] SGCA 28, [2016] 3 SLR 845 at [90]; *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] SGCA 2, [2018] 1 SLR 239 at [45].

[2] Compare *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846; *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168 (Ch) (affirmed without express discussion of the unjust factor in [2014] EWCA Civ 360, [2015] 1 BCLC 14); *Great Investments Ltd v Warner* [2016] FCAFC 85.

[3] Eg *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47, [2022] AC 1.

[4] Eg *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

how they might be resolved should find the 147-page judgment of the Singaporean Court of Appeal in *Esben Finance Ltd v Wong Hou-Lianq Neil* ('*Esben*') of importance.[5]

Developments in unjust enrichment law have long been influenced, sometimes significantly, by insights from comparative law.[6] In the past, cross-fertilization between common law and civilian jurisdictions was most common.[7] Increasingly, comparisons between common law scholarship are on the rise – a phenomenon observed not just within unjust enrichment, but across private law more generally.[8] Comparative legal analysis can provide much valuable material: unusual fact patterns, thought-provoking reasoning, and sometimes, bold new approaches.

In *Esben*, all three are on display. Unanimously handed down by a five-member panel, it will be of particular interest to an English audience to note that Lord Neuberger sat as an International Judge. As a former Justice of and President of the UK Supreme Court, Lord Neuberger was involved in key unjust enrichment decisions in the past decade, including *Benedetti v Sawiris*,[9] *Menelaou v Bank of Cyprus UK Ltd*,[10] *Patel v Mirza*,[11] and *Investment Trust Companies v RCC*.[12]

While *Esben* briefly discussed 'enrichment at the expense of' and illegality,[13] this note focusses on two aspects of the judgment which were the most detailed, firm, and significant: limitation and 'lack of consent'. In previous cases, there were already signs of divergence between

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[5] [2022] SGCA(I) 1 ('*Esben*').

[6] Most famously, the change of mind in Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Clarendon Press, 2005) from an 'unjust factors' approach to an 'absence of basis' approach was acknowledged to have been due to the impact of a German scholar, Sonja Meier: Birks, *Unjust Enrichment*, xiii.

[7] Eg see also Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (London: Cavendish Publishing, 2001); Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Oxford: Hart Publishing 2013).

[8] See especially Birke Häcker, 'Divergence and Convergence in the Common Law – Lessons from the Ius Commune' (2015) 131 LQR 424, and the contributions in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations* (Oxford: Hart Publishing, 2017); Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Oxford: Hart Publishing, 2017).

[9] [2013] UKSC 50, [2014] AC 938.

[10] [2015] UKSC 66, [2016] AC 176.

[11] [2016] UKSC 42, [2017] AC 467.

[12] [2017] UKSC 29, [2017] 2 WLR 1200.

[13] Their pronouncements on illegality were dicta, and the court emphasised their 'provisional' and 'tentative' status: *Esben* at [159], [172], [176] [178], [190]. On Singapore's approach and how it compares to the line of cases following on from *Patel v Mirza* [2016] UKSC 42, significant cases include *Ting Siew May v Boon Lay Choo* [2014] SGCA 28, [2014] 3 SLR 609 and *Ochroid Trading Ltd v Chua Siok Lui (t/a VIE Import & Export)* [2018] SGCA 5, [2018] 1 SLR 363. See further, Andrew BL Phang and Yihan Goh, *Contract Law in Singapore*, 2nd ed (The Netherlands: Wolters Kluwer, 2021) Ch 7.

Singaporean and English law on these points.[14] *Esben* follows in that vein, cementing that divergence. We conclude with some general remarks on *Esben*'s potential wider significance. *Esben*, we suggest, provides further evidence indicating that the Singaporean courts have indeed taken a novel and distinctive approach towards unjust enrichment. With the shape and future direction of the subject now in dispute in England and Wales, Singaporean developments should be put firmly on the radar of all interested in unjust enrichment and private law.

FACTS AND RESULT

The case concerned a family dispute on a grand scale, forming only part of various proceedings in different jurisdictions, including Malaysia and the British Virgin Islands.[15] The claimants were four companies related to the WTK Group,[16] named after the late Datuk Wong Tuong Kwang, a successful Malaysian businessman whose empire spanned many businesses including timber logging and harvesting.[17]

Following a stroke in 1993, Wong Tuong Kwang left management and control of the Group to his three sons.[18] One of them, Wong Kie Nai, took over effective management and control of the Group until his death in 2013.[19] After he passed away, his elder brother discovered that the balances of the claimant companies' bank accounts were substantially lower than expected.[20] Upon investigation he discovered that between 2001 and 2012, 50 payments totalling over US$20 million and SGD4 million had been made to Wong Kie Nai's son, the defendant Neil Wong.[21]

Amongst other claims,[22] the claimants brought actions seeking restitution of the payments for the defendant's unjust enrichment at their expense.[23] They pleaded a 'lack of

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[14] Documented in Rachel Leow and Timothy Liau, 'Birksian Themes and Their Impact in England and Singapore: Three Points of Divergence' [2021] LMCLQ 350, 359-365.

[15] *Esben Finance Ltd v Wong Hou-Lianq Neil* [2020] SGHC(I) 25, [2021] 3 SLR 82 ('*Esben HC*') at [2].

[16] Esben Finance Ltd and Incredible Power Ltd, incorporated in the BVI, and Rayley Co Ltd and Lismore Trading Co Ltd, incorporated in Liberia: *Esben HC* at [3].

[17] *Esben HC* at [4].

[18] *Esben HC* at [9].

[19] *Esben* at [4]. See also *Esben HC* at [10]-[12], [134].

[20] *Esben* at [5].

[21] *Esben* at [5]

[22] In knowing receipt, dishonest assistance, unlawful means conspiracy. This note will not discuss these claims in detail, all of which failed: *Esben HC* at [128], [195]-[205]; *Esben* at [86], [109], [124], [254]-[262].

[23] *Esben HC* at [20], *Esben* at [40].

consent to the transfer of its money',[24] an unjust factor which had been recognised in earlier Singaporean cases.[25]

In response, the defendant alleged that of the 50 payments, 14 payments were made as either gifts, directors' fees, or share dividends,[26] and 36 payments were made pursuant to a group 'practice', a revenue splitting arrangement deliberately designed to evade income tax payable in Malaysia.[27] The relevance of these allegations are key to understanding the court's reasoning in *Esben*: it was assumed at both levels of litigation that these allegations, if proven, could provide 'defences'[28] to the 'lack of consent' unjust enrichment claim. The Court of Appeal used the terminology of a 'valid basis'[29] or 'legitimate purpose'[30] justifying these payments (which would negate any 'injustice').[31]

Before the Singapore International Commercial Court

At first instance the case was heard by International Judge Sir Henry Bernard Eder, a former Judge of the High Court of England and Wales. Eder IJ held that the claims all failed.

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[24] *Esben HC* at [133](e).

[25] *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636; *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819; *Compania De Navigacion Palomar, SA v Koutsos, Isabel Brenda* [2020] SGHC 59, discussed in Leow and Liau n 14 above 359-62; cf *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205 (Vinodh Coomaraswamy J). Contrast also *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 which rejected 'want of authority' as an unjust factor, reversing the first instance decision which had accepted it: *Tjong Very Sumito v Chan Sing En* [2012] SGHC 125, [2012] 3 SLR 953.

[26] *Esben HC* at [144]-[145], [153], *Esben* at [21]-[22], [192].

[27] *Esben HC* at [210], [217]; *Esben* at [160]. By splitting revenue into 'onshore' (Malaysian) and 'offshore' (non-Malaysian) components, the latter of which would not be declared to the Malaysian tax authorities: *Esben HC* at [209], *Esben* at [9].

[28] Eg *Esben HC* at [25]: 'substantive positive defences', at [38(d)], [142], [147], [224], [226], [227(d)]; *Esben* at [128], [132], [145], [159]-[160], [162].

[29] *Esben* at [125], [253].

[30] *Esben* at [23], [160]. See also Esben at [132] ('legitimate reasons'), [192], [253] ('legitimate basis'). See also *Esben HC* at [38].

[31] The court's analogy and further generalisation to valid legal obligations can certainly be questioned, but reasons of space preclude further discussion here. For example, if these were indeed bases or juristic reasons negating 'unjust'(ified), they would be 'denials' rather than 'defences': see James Goudkamp & Charles Mitchell (eds), 'Denials and Defences in the Law of Unjust Enrichment' in Charles Mitchell and William Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (Oxford: Hart Publishing 2013) 133, 139 and see also 151-53. See further Birke Häcker, 'Unjust Factors vs Absence of Juristic Reason (causa)' in Elise Bant, Kit Barker, and Simone Degeling (eds) *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham: Edward Elgar, 2020) 304.

Except for the 50th payment, all were time-barred. A six-year limitation period under s 6 of the Singaporean Limitation Act applied,[32] and its commencement could not be postponed.[33]

However, even if he was wrong about limitation, Eder IJ held that the unjust enrichment claims for the 14 payments would have succeeded with 'lack of consent' as the unjust factor. The evidence, he found, did not support the defendant's allegations that they were gifts, directors' fees, or shareholder dividends.[34]

As to the unjust enrichment claims for the 36 payments (which included the 50th payment), Eder IJ held that they would have all failed, even if not time-barred. This is because they were indeed made under the alleged 'practice'.[35] Although illegal under Malaysian law, Eder IJ held that this did not prevent the defendant from relying on said 'practice' as a 'defence'[36] to the unjust enrichment claim.[37]

On appeal

A five-member Singapore Court of Appeal unanimously dismissed the appeal, but for different reasons from the trial judge.[38] On limitation, the Court of Appeal reached the opposite conclusion. The claimants' unjust enrichment claims were not time-barred because the Limitation Act does not cover unjust enrichment claims.[39] Nonetheless, all claims failed.

Claims for the 36 payments failed because they were held not to be 'at the expense of' the claimants. The Court of Appeal thought that, in order for D's enrichment to be at the expense of C, C must suffer a 'loss' as a result of the payments.[40] The court held that this requirement was not met as the claimant companies were 'intermediaries'[41] in the group 'practice', and the claimants' 'own assets were never depleted or put at risk by the making of the 36 payments pursuant to the

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[32] *Esben HC* at [93], [107], [128].

[33] Under s 29(1)(a)-(b) of the Singapore Limitation Act 1959, which is materially similar to s 32(1)(a)-(b) of the UK Limitation Act 1980. See *Esben HC* at [108], [128].

[34] *Esben HC* at [148], [151], [171].

[35] *Esben HC* at [209], [217].

[36] *Esben HC* at [25], [218].

[37] *Esben HC* at [233], [235], [238].

[38] Comprising Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Lord Neuberger IJ, and Arjan Kumar Sikri IJ.

[39] *Esben* at [48], [85]-[86], discussed below.

[40] *Esben* at [158], compare [149], [153], [261].

[41] *Esben* at [148].

"practice"'.[42] Thus, according to the court, because the '[claimants'] net position did not appear to have deteriorated to the advantage of the [defendant]',[43] any enrichment of the defendants could not be said to have been at the expense of the claimants.

Claims for the 14 payments failed because 'lack of consent':

> 'would generally not be available… where the claimant has any other available cause of action for recovery of the property or value in question under established areas of law (for example, the vindication of property rights)'.[44]

Agreeing with the trial judge, the court found that the 14 payments were made to the defendant's bank account 'without any valid basis'.[45] In reasoning that will be examined later, the court then found that the claimants had a 'proprietary claim'[46] based on the 'vindication of [their] proprietary rights'.[47] The court thought this sufficient to dismiss the unjust enrichment claim even though it was not pleaded as an 'alternative cause of action'.[48]

LIMITATION

Unlike the trial judge, the Court of Appeal concluded that the unjust enrichment claims were not time-barred under the Singapore Limitation Act 1959. The Court of Appeal's conclusion can be summed up in the following line from the judgment:

> 'in view of the statutory wording of the Limitation Act and its legislative history, we decline to (artificially) hold that restitutionary claims, including those in unjust enrichment, come within the ambit of the Limitation Act. Until the lacuna in the law has been addressed by Legislature, restitutionary claims are therefore *not* time-barred… this should be an urgent clarion call for legislative intervention.'[49]

The court gave two reasons for its conclusion. First, unjust enrichment claims did not fit squarely within the statutory wording of s 6(1) or s 6(7) of the 1959 Act.[50] Section 6(1) sets out a limitation period for 'actions founded in contract or in tort'. But, the Court of Appeal stressed, unjust

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[42] *Esben* at [155].
[43] *Esben* at [147].
[44] *Esben* at [251].
[45] *Esben* at [253].
[46] *Esben* at [253] (emphasis changed).
[47] *Esben* at [253].
[48] *Esben* at [253].
[49] *Esben* at [85] (emphasis changed).
[50] *Esben* at [52], [56], [75], [85] (emphasis changed).

enrichment claims are conceptually different from quasi-contract and tort claims; they therefore could not fall within that provision.[51] Not being 'founded upon any contract or tort or upon any trust or other ground in equity', the claim was also not time-barred under s 6(7).[52]

Second, the court reasoned from the 1959 Act's legislative history. The Act was enacted in 1959,[53] borrowing from the UK Limitation Act 1939. However, they thought that since unjust enrichment's independence was only authoritatively recognised in 1991 in England, in *Lipkin Gorman v Karpnale Ltd*[54],[55] 'most claims in [unjust enrichment] would not have been in the contemplation of the legislature at the point of drafting the [Singapore] Limitation Act as well as its predecessor legislation'.[56]

The Court of Appeal acknowledged this as an 'unhappy' position but refused to 'artificially' interpret the statute otherwise.[57] The court was also very firm that laches, an equitable doctrine, could not apply to common law claims.[58] And because they thought (all instances of?) restitution for an unjust enrichment to be a 'common law' claim 'based on strict liability', laches could have no bite.[59] The correct response to inadequate legislation should be statutory reform. It is 'not the function of the courts to act as "mini-legislatures" by reading into the Limitation Act a statutory limitation period for a claim which the Legislature did not intend to impose.'[60]

To the English reader, these conclusions might appear astonishing.[61] Faced with a similarly poorly-drafted limitations statute, English courts took a wholly different approach, deploying an ad hoc fix to the statute.[62] In *Re Diplock*, the English Court of Appeal assumed that s

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[51] *Esben* at [65]-[67], [75], [77]-[78].

[52] *Esben* at [76].

[53] *Esben* at [80].

[54] [1991] 2 AC 548 (HL).

[55] *Esben* at [83].

[56] *Esben* at [81], see also [82]-[84].

[57] *Esben* at [85].

[58] *Esben* at [122].

[59] *Esben* at [122], citing *Anna Wee* n 1 above at [109]. See also *Esben* at [116], [120]. Cf *MCST No 473 v De Beers Jewellery Pte Ltd* [2001] SGHC 206, [2001] 2 SLR(R) 669 at [85]-[93], appealed [2002] SGCA 13, [2002] 1 SLR(R) 418 at [33]-[34]; *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] SGCA 27, [2013] 2 SLR 1200 at [41]-[42].

[60] *Esben* at [84].

[61] For further detailed comparison, see Leow and Liau n 14 above 363-65. Compare *Esben* at [54].

[62] On the English law of limitation in unjust enrichment, see generally Andrew Burrows, *The Law of Restitution* 3rd ed (Oxford: Oxford University Press, 2011) 604-614; Charles Mitchell, Paul Mitchell, and

5 of the Limitation Act 1980, which prescribed a period of six years for an 'action founded on simple contract', must be taken to cover actions for money had and received, 'although the words used cannot be regarded as felicitous'.[63] Hobhouse J followed this approach in *Kleinwort Benson v Sandwell BC*,[64] relying on parliamentary debates leading to the enactment of the UK Limitation Act 1939 which made clear that the Act was to give effect to the recommendations of the Law Revision Committee[65] that the period for all actions founded in tort or simple contract, including quasi-contract, should be six years.[66] For "equitable relief" claims which do not have a limitation period explicitly stated in the Act,[67] the question is whether one can be applied "by analogy".[68] If not, the claim could nevertheless still be barred by laches.[69]

As we have recently explained, this is one area where Singaporean unjust enrichment law has diverged from its English roots.[70] *Esben* resoundingly confirms this. Although the Singapore Court of Appeal in *Esben* discussed the relevant English case-law, accepting that the English position was 'pragmatic',[71] they firmly refused to follow it. In their view, doing so entailed endorsing an implied contract theory of unjust enrichment, which they regarded as fictional,[72] artificial,[73] and conceptually inaccurate.[74] Even though historically based on quasi-contract, unjust enrichment claims today fall outside the Limitation Act as 'the underlying basis for such claims has changed entirely'.[75] For the Singapore Court of Appeal, recognising and defending the conceptual independence of unjust enrichment was believed so important that 'pragmatism' was

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Stephen Watterson (eds), *Goff and Jones on the Law of Unjust Enrichment* (London: Sweet & Maxwell, 2016) Ch 33; James Edelman and Elise Bant, *Unjust Enrichment*, 2nd ed (Oxford: Hart Publishing, 2016) 385-390.

[63] [1948] Ch 465 (CA) 514.

[64] [1994] 4 All ER 890 (QB) 942-943.

[65] Law Revision Committee, Fifth Interim Report (Statutes of Limitation) (Cmd 5334, Dec 1936), para 37.

[66] *Sandwell* n 64 above 942-943.

[67] Limitation Act 1980, s 21; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

[68] Section 36(1) Limitation Act 1980: 'by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.'

[69] Limitation Act 1980, s 36(2). See further William Swadling, "Limitation", in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Oxford: Hart Publishing, 2002).

[70] Leow and Liau n 14 above 363-365.

[71] *Esben* at [56].

[72] *Esben* at [57], [67], [75].

[73] Esben at [67]-[68].

[74] *Esben* at [67].

[75] *Esben* at [66] (emphasis changed).

a price worth paying, even if it meant leaving all such claims unregulated by any statutory limitation period.

Put at its highest, the Singaporean position on limitation demonstrates its unyielding commitment to recognising unjust enrichment as an independent source of legal obligations, distinct from contract and tort. Although this may surprise an English audience, *Esben*'s views on limitation ought not be overly surprising to a Singaporean audience. The same conclusions and very similar reasoning were reached nearly twenty years ago in *MCST No 473 v De Beers Jewellery Pte Ltd*, a mistaken payment case.[76] *Esben*'s position on limitation is not new; it has long been in the making.

LACK OF CONSENT

Should 'lack of consent' be recognised as an unjust factor?[77] Several Singapore High Court cases had previously recognised it,[78] though one had also rejected it.[79] In 2013, the related unjust factor of 'want of authority' had also been rejected by the Singapore Court of Appeal.[80]

In *Esben*, the Court of Appeal preferred 'lack of consent' over alternative formulations of 'ignorance', 'want of authority' and 'powerlessness'. Ignorance was rejected as it did not readily encompass cases where corporate assets were misapplied by a company director. The company cannot be said to be 'ignorant' if the misbehaving director's knowledge could be attributed to the company.[81] Ignorance was also thought to be 'far too wide', since 'in many cases, a proprietary

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[76] *De Beers HC* (n 59) [68]-[79]; *De Beers CA* n 59 above at [32].

[77] There is no shortage of material on 'lack of consent' and its sister formulations of 'ignorance', 'want of authority', and 'powerlessness'. For a sampling of the literature, see eg Peter Birks, *Introduction to the Law of Restitution*, rev ed (Oxford: Clarendon Press, 1989) 140-46; Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Clarendon Press, 2005) 154-158; Robert Chambers and James Penner, 'Ignorance', in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008); *Goff and Jones* n 62 above Ch 8, Edelman and Bant n 62 above Ch 12; Michael Bryan, 'No Intention to Benefit' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham: Edward Elgar, 2020) Ch 18.

[78] *AAHG LLC v Hong Hin Kay Albert* [2017] 3 SLR 636; *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819; *Compania De Navigacion Palomar, SA v Koutsos, Isabel Brenda* [2020] SGHC 59, discussed in Leow and Liau n 14 above 359-362.

[79] *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2021] SGHC 205.

[80] *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44, [2013] 4 SLR 308, reversing the first instance decision which had accepted it: *Tjong Very Sumito v Chan Sing En* [2012] SGHC 125, [2012] 3 SLR 953.

[81] A problem first recognised by Robert Stevens, 'The Proper Scope of Knowing Receipt' [2004] LMCLQ 421, 425, noting *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846. See now *Goff & Jones* n 62 above paras 8-09–8.11. The latter was cited in *Esben* at [204].

claim would exist on the same facts.'[82] 'Want of authority' was thought unsatisfactory as it 'artificially (and confusingly) implies an agency relationship between the owner of the property transferred, and the transferor of the property.'[83] Powerlessness was rejected as a 'proliferation of grounds' was thought undesirable.[84]

The court in *Esben* ultimately decided that

> 'there is in principle no reason why lack of consent ought not to be recognised as an unjust factor because to hold otherwise would result in defendants who have received stolen property or value benefitting from a windfall'.[85]

However,

> 'the recognition of lack of consent as an unjust factor cannot be blanket and uncircumscribed because to do so would result in unacceptable encroachments on other areas of law, denuding them of their legal significance'.[86]

Thus, as has been mentioned above, the court held that 'an unjust enrichment action on the basis of the unjust factor of lack of consent would generally not be available'[87] where

> 'the claimant has any other available cause of action for recovery of the property or value in question under established areas of law (for example, the vindication of property rights).'[88]

Further examples of other established 'areas of law' the court had in mind include 'company law', 'the law of agency, the law of property, or the principles of equity'.[89]

This is a novel position, foreshadowed in an earlier Singaporean case,[90] but never before adopted anywhere else in the common law world.[91] The court relied heavily on academic writing

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[82] *Esben* at [206].

[83] *Esben* at [207]

[84] *Esben* at [206].

[85] *Esben* at [251], see also [240].

[86] *Esben* at [251] and see also [240]-[244], and especially at [247].

[87] *Esben* at [251(c)] (emphasis changed).

[88] *Esben* at [251(c)(iii)].

[89] *Esben* at [242].

[90] *Tjong Very Sumito* (CA) n 80 above at [111]-[121] (when discussing want of authority).

[91] *Esben* at [241] itself recognises that 'this position represents a departure from that taken in the Commonwealth cases cited above' (emphasis changed).

by Graham Virgo on the 'vindication of property rights',[92] effectively endorsing it.[93] Some support can be found for Virgo's position in the English case law, most notably in *Foskett v McKeown*,[94] but the level of explicit endorsement found in *Esben* clearly cannot claim to be matched by the English courts. *Esben* also relied on writing by Ross Grantham and Charles Rickett that unjust enrichment was subsidiary to other areas of law, including property law.[95] Grantham and Rickett argued that 'where a claimant retains title to property, that title provides a ground to recover that asset, and thereby the value that asset represents' – a ground which takes precedence over the law of unjust enrichment as 'the first port of call for any plaintiff.'[96] Again, such explicit judicial endorsement of these propositions has never been forthcoming; *Esben* is noteworthy for being the first to do so.

It will be recalled how, as mentioned above, the Court of Appeal held that the unjust enrichment claims for the 14 payments failed. They reached this conclusion by applying the statements above, reasoning in the following steps:

1. The payments were not 'actually authorised' because payments made 'without any legitimate basis cannot be said to have been in the claimants' interests'.[97] Nor was there apparent authority.[98]
2. Thus, citing their previous decision in *Anna Wee* and an article by William Swadling, the court concluded that the claimants 'retained property to the monies transferred by the 14 payments' which could be 'traced' into the defendant's bank account.[99]

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[92] Graham Virgo, *The Principles of the Law of Restitution*, 3rd ed (Oxford: Oxford University Press 2015) 7-17, Ch 21-23.

[93] NB however that, unlike *Esben*, Virgo accepts that a claimant can elect to rely on 'ignorance' as an unjust factor even if she would have a claim to vindicate her proprietary rights on the same facts: Virgo, ibid 155-156. 'It is no bar to a restitutionary claim founded on unjust enrichment that the claimant could have brought a claim founded on the commission of a wrong, and neither should it matter that the claim could alternatively have been founded on the vindication of proprietary rights': Virgo, ibid 156.

[94] [2001] 1 AC 102 (HL). See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch).

[95] *Esben* at [223]-[225], citing Ross Grantham and Charles Rickett, 'Restitution, Property and Mistaken Payments' [1997] RLR 83; Ross Grantham and Charles Rickett, 'Restitution, Property and Ignorance – A Reply to Mr Swadling' [1996] LMCLQ 463; Ross Grantham and Charles Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] NZLR 668. Also relevant, but not cited, is Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2000) 117 LQR 273, and see also Ross Grantham and Charles Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 CLJ 717.

[96] *Esben* at [223], citing Grantham and Rickett, 'Restitution, Property and Ignorance – A Reply', ibid, at 465.

[97] *Esben* at [253].

[98] *Esben* at [253].

[99] *Esben* at [253].

3. According to the Court of Appeal, this meant that the claimants had a 'proprietary claim'[100] based on the 'vindication of [their] proprietary rights' as 'an alternative cause of action', even though this was not pleaded. Citing *Foskett v McKeown,* the court concluded that this was a case of 'hard-nosed property rights' which unjust enrichment should not interfere with.[101]

With respect, some of these steps in the court's reasoning are rather surprising.

Bank transfers from companies operate in several distinct steps.[102] The company's directors or agents give instructions on behalf of the company to the company's bank to debit its account and to credit the receiving bank with an equivalent sum. The directors who instructed the bank to pay would have at least had apparent authority to do so from their position as directors,[103] even if they did not have actual authority because they were not acting in the company's interests.[104] The bank would be entitled to rely on the directors' appearances of authority if it did not know or have reason to suspect that the directors lacked actual authority.[105] There was no indication that the bank did. It was therefore entitled to rely on the directors' apparent authority, and thus acted within the scope of its mandate to the company – its customer – when it executed the transfer.[106] The effect of the bank transfer is that the company's account is debited and the transferee's account with the collecting bank is credited with a corresponding amount.[107]

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[100] *Esben* at [253] (emphasis changed).

[101] *Esben* at [253].

[102] Depending on the precise type of bank transfer, see generally Michael Brindle and Raymond Cox (eds), *The Law of Bank Payments*, 5th ed (London: Sweet & Maxwell, 2017) Ch 3.

[103] Eg *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (CA) 583; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) 509-510.

[104] See eg *Lysaght & Co Ltd v Falk* [1905] HCA 7, (1905) 2 CLR 421, 439; *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 (Ch) at [88]; *Akai Holdings Ltd v Kasikornbank Public Co Ltd* [2010] HKCFA 64, [2011] 1 HKC 357 at [77].

[105] Eg *Morris v Kanssen* [1946] AC 459 (HL) 475 (Lord Simonds); *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (CA) 284-85 (Slade LJ), 304 (Browne-Wilkinson LJ); *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 at [75]-[92]; cf *Akai Holdings Ltd,* ibid at [49]-[51].

[106] Eg *Agip (Africa) Ltd v Jackson* [1991] 1 Ch 547 (CA) 561-63 (Fox LJ): the bank acted within its mandate when it relied on the apparent authority of individuals giving instructions to it and was thus entitled to debit the customer's account. See similarly *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC 1425 at [41]-[43], appealed [2003] EWCA Civ 1446, [2006] QB 986 on different points.

[107] Brindle and Cox, *The Law of Bank Payments* n 102 above para 3-002. See also Tatiana Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 20-21.

In such circumstances there can be no argument that the claimants 'retained' any property to the money. Although the court relied heavily on the work of William Swadling for its conclusions on retention of title,[108] Swadling's arguments were made in the context of chattels; they said nothing about bank accounts.[109]

Even if the claimants somehow 'retained' title to the money, it remains quite difficult to see how these monies could be traced into the recipient's bank account. Until a trust is created, the title to the money is an undivided legal title, rather than a separate legal and equitable title.[110] So any tracing must have been common law tracing. This raises even more difficulties since there is clear authority that common law tracing is unavailable where there is mixing,[111] and the correctness of the existence of common law tracing has long been doubted.[112]

There are also some wider problems. The court's main concern was that unjust enrichment would unduly encroach on other well-established areas of law. The problem, however, is that prior to relatively recent unjust enrichment scholarship, it was not clear at all whether some of these 'well-established' areas would provide a claim at all (much less any comparable claim).

Consider the example given in *Esben* itself:

> *Naughty Agent:* Without his principal's knowledge, an agent transfers (rights to) his principal's property to the agent himself or to a third party.[113]

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[108] *Esben* at [253], citing William Swadling, 'A Claim in Restitution?' [1996] LMCLQ 63. See also *Esben* at [202], citing William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627 on 'retention', and further discussion at [222], [228]-[229].

[109] See especially Swadling, 'Ignorance and Unjust Enrichment', ibid 643 explicitly recognising that most cases of mistaken payments are concerned with the debiting and crediting of bank accounts, not transfers of rights to exclusive possession of specific bank notes and coins.

[110] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706 (Lord Browne-Wilkinson).

[111] *Sinclair v Brougham* [1914] AC 398 (HL) 418-19; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 (CA) 327-38 (Bankes LJ), 336 (Atkin LJ); *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA) 563, 566.

[112] The leading authority for common law tracing, *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721, was in fact a case of equitable tracing, as explained by Lionel Smith, 'Tracing in Taylor v Plumer: Equity in the Court of King's Bench' [1995] LMCLQ 240. Subsequent cases on common law tracing were thus based on a misreading of *Taylor v Plumer*, eg *Banque Belge*, ibid; *Lipkin Gorman* n 54 above; *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA) 169. For criticism of the continued existence of common law tracing, see Lionel Smith, *The Law of Tracing* (Oxford: Oxford University Press, 1997) 62; Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Sydney: Federation Press, 2021) 89-93, but compare *FC Jones & Sons v Jones*, 169 and *Foskett v McKeown* n 94 above 128 (Lord Millett).

[113] *Esben* at [242].

The court thought that whether recovery is permitted was a question that might be dealt with by 'the law of agency, the law of property or the principles of equity'.[114] But these do not clearly provide an answer, and when they do, the modern answer is typically 'unjust enrichment'.[115] The 21st edition of *Bowstead and Reynolds*, the leading text on agency, illustrates the point. The authors state that 'the subject matter of [the Article dealing with these claims] is very wide and connects to areas of law that have historically been very complex, and which are undergoing much development',[116] and in the 22nd edition, the claim is described as 'restitutionary',[117] at least one of its editors disliking 'unjust enrichment'.[118] Property law provides no answer where title passes to the recipient at common law. Equitable principles again do not seem to apply unless a trust arose upon the misapplication[119] or where the dissipated funds had originally been held on trust.[120] Unjust enrichment was attractive precisely because of these perceived deficiencies in existing law. An unjust enrichment explanation, relying on 'lack of consent' or one of its sister concepts, could explain and justify rights to restitution of the value of or rights to company assets dissipated by directors without authority.[121]

Esben declared that lack of consent would not be available where the claimant has a 'proprietary claim' for the 'vindication of [her] property rights'[122], but it did not explain any further exactly what these were or might include. Perhaps what the court had in mind were claims of the form 'this is mine!'. Such claims are indeed available in trusts law, most famously where beneficiaries under a trust assert rights to substitute assets after equitable tracing.[123] Even then,

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[114] *Esben* at [242].

[115] See eg *Goff & Jones* n 62 above Ch 9.

[116] Peter Watts and Francis Reynolds (eds), *Bowstead & Reynolds on Agency*, 21st ed (London: Sweet & Maxwell, 2016) para 8-160.

[117] Peter Watts and Francis Reynolds (eds), *Bowstead & Reynolds on Agency*, 22nd ed (London: Sweet & Maxwell, 2020) para 8-160. They accept that this phrase is not free from controversy: *Bowstead & Reynolds*, 21st ed, ibid para 8-160; *Bowstead & Reynolds*, 22nd ed, para 8-160.

[118] One of Bowstead & Reynolds' editors has previously argued against a wide concept of unjust enrichment: Peter Watts, 'A Property Principle and a Services Principle' [1995] RLR 49; Peter Watts, '"Unjust Enrichment" – the Potion that Induces Well-Meaning Sloppiness of Thought' [2016] CLP 1.

[119] Plausibly for various reasons, eg breach of fiduciary duty: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250; theft: *Black v S Freedman* [1910] HCA 58, (1910) 12 CLR 105.

[120] *Bowstead & Reynolds*, 22nd ed n 117 above para 8-162, though see also discussion of fiduciary duties.

[121] *Criterion Properties* n 2 above at [4] (Lord Nicholls); *Relfo Ltd (in liquidation) v Varsani* n 2 above; *Re Hampton Capital* [2015] EWHC 1905 (Ch); *Great Investments* n 2 above.

[122] *Esben* at [253].

[123] *Foskett* n 94 above.

this form of 'vindication' may be very limited. It is limited by the conditions for terminating a trust – the beneficiary can only order a conveyance of those rights directly to herself if the trust can be simultaneously terminated under her *Saunders v Vautier*[124] power. If, however, these were the only 'proprietary' claims, they would be relatively limited. Unlike equity, the common law did not recognise a *vindicatio* of similar form, instead protecting property rights primarily through the property torts: conversion, detinue, trespass, and so on, now partially reformed in the UK by the Torts (Interference with Goods) Act 1977. Do they also count as instances of 'proprietary claims' or claims to 'vindicate property rights'? Neither specific restitution (delivery up) nor restitution of value is always available for these torts.

Even if these problems can be ironed out, a deeper underlying concern remains. Taxonomically, it is not ideal to have a patchwork of claims labelled 'agency law claims', 'property law claims', and 'equitable claims'. It might be objected that these categories tell us precious little about the normative foundations of the claim. On Maitland's view, equitable claims are simply claims originating from one branch of courts prior to the Judicature reforms in 1873-75.[125] Likewise, an 'agency law' claim merely indicates that the claim occurs in the context of an agency relationship. This again was why unjust enrichment was attractive: it could potentially provide a rational explanation for a large variety of claims across the broad expanse of the law, indicating where and how the law should develop further.

A DIFFERENT VISION OF UNJUST ENRICHMENT?

We conclude by commenting on *Esben's* potential wider significance. *Esben*, we suggest, provides further evidence indicating that the Singaporean courts have indeed taken a distinctive approach towards unjust enrichment. In this vision, unjust enrichment is seen as a new area of law, with an independent but only interstitial role. This vision is premised upon a sharp divide between common law and equity, placing unjust enrichment under the common law umbrella. This characterisation of unjust enrichment is likely to have far-reaching consequences for its future development.

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[124] [1841] 5 WLUK 52, 49 ER 282 (Ct of Chancery).

[125] FW Maitland, *Equity: A Course of Lectures* (first published 1936, John Brunyate, AH Chaytor and WJ Whittaker eds, Cambridge: Cambridge University Press 2011) 1.

New

Seeds of the idea that unjust enrichment is a 'relatively new creature' date back to at least 2013 in *Alwie Handoyo v Tjong Very Sumito*, where its youth was raised as a reason against recognising 'want of authority' as an unjust factor.[126] In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*, the Singapore Court of Appeal unanimously said:

> '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).'[127]

Esben continues to stress that unjust enrichment is 'new', going as far as to accept that 'obligations such as unjust enrichment and other restitutionary claims… were not known in 1959'.[128] Unjust enrichment claims being 'new' was given as a reason for why the Singapore Limitation Act does not apply to unjust enrichment claims.[129] Likewise, unjust enrichment's newcomer status was given as a reason for accepting 'lack of consent' only a circumscribed manner.[130] Throughout the judgment, unjust enrichment was said to be 'only recognised… [in] *Lipkin Gorman',*[131] 'of relatively recent origin',[132] 'relatively fledgling',[133] and 'only several decades old'.[134]

These views are not new. In 2013, the Court of Appeal likewise said in *Tjong Very Sumito* that:

> 'caution should be exercised when interpreting older cases, especially those predating Lipkin Gorman… for the simple but important reason that the principle of unjust enrichment is a relatively new principle… Earlier cases were evidently not decided on the basis of unjust enrichment, and it would be dangerous to read those cases as laying down a principle that only came to be established and recognised much later.'[135]

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[126] n 80 above at [123]. See also *Anna Wee* n 1 above at [144].

[127] [2018] SGCA 44, [2018] 2 SLR 655 at [181].

[128] *Esben* at [81], discussing the views of the Law Reform Committee of the Singapore Academy of Law, Report of the Law Reform Committee on the Review of the Limitation Act (Feb 2007) para 64.

[129] *Esben* at [81]-[84].

[130] *Esben* at [234]. See also *Esben* at [243]-[244], stressing that courts would be slow to recognised 'novel' doctrines if it would encroach on other areas of law, cause uncertainty, or be redundant because the ground covered by the 'novel' doctrine is already covered by a more established legal principle.

[131] *Esben* at [83].

[132] *Esben* at [193].

[133] *Esben* at [193], citing *Eng Chiet Shoong v Cheong Soh Chin* [2016] SGCA 45, [2016] 4 SLR 728 at [2].

[134] *Esben* at [193].

[135] n 80 above at [123].

These statements display a markedly different understanding of modern unjust enrichment scholarship. Unjust enrichment scholars like Peter Birks devoted enormous effort to demonstrating that 'unjust enrichment', as a source of legal obligations to make restitution, could better explain and justify the results in apparently disparate cases.[136] The aim was to show that, despite being variously described, the cases were united by a common normative and analytical structure.[137] The success or otherwise of that project is a separate matter.[138]

On this account, unjust enrichment is not a 'new' subject; at least not in the sense used by the Singaporean Courts. The cases were long-standing; what was new was the *explanation or justification* given to them. It was unproblematic that the older cases pre-dating *Lipkin Gorman* did not explicitly use fully-fledged unjust enrichment reasoning. If they had, there would hardly have been a need for scholars to argue that unjust enrichment could better explain them.

Although it is commonplace to date unjust enrichment's authoritative recognition as a distinct source of obligations to *Lipkin Gorman*, instances of unjust enrichment date back to as early as the fourteenth century.[139] These suits may have been variously described in terms of the forms of action, quasi-contract, or equitable doctrines, but, like *Kelly v Solari,*[140] they could still be explained or justified in unjust enrichment terms.[141] Without this older material, Goff and Jones could hardly have produced their pioneering work on the law of restitution in 1966, collecting them into a single book.

Independent, but only interstitial

Characterising unjust enrichment as a 'new' area of law has further implications. As a newcomer, unjust enrichment is seen as interstitial, operating only within the empty spaces left between

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[136] For some examples of this thinking, see eg Birks, *Introduction* n 77 above 1-6; 29-39 (quasi-contract); Birks, *Unjust Enrichment* n 77 above Ch 1; Burrows, *Law of Restitution* n 62 above, 4 (especially in discussing Goff & Jones); Edelman and Bant n 62 above 5, 13-14.

[137] Birks, *Introduction* n 77 above 1-4; Birks, *Unjust Enrichment* n 77 above 38-40; Burrows, *Law of Restitution* n 62 above, 26-27; Edelman and Bant n 62 above 5-6.

[138] Eg Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Oxford: Hart Publishing, 2019). In response: Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521.

[139] David Ibbetson, 'Development at Common Law' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham: Edward Elgar, 2020) Ch 2.

[140] (1841) 9 M & W 54, 152 ER 24.

[141] See eg Edelman and Bant n 62 above Ch 2, especially 9-15.

older and better-established areas of law. Unjust enrichment is seen as subsidiary to other areas of law; it is merely a 'mop-up' area.[142] Perhaps most telling is *Esben's* citation of Gummow J's statements in *Roxborough v Rothmans of Pall Mall Australia*[143] that restitutionary remedies have a 'gap filling and auxiliary role… to avoid unjust results in specific cases – as a series of innovations to fill gaps in the rest of the law.'[144]

A claimant who confers benefits on his counter-party under a contract, which is then terminated for the counter-party's serious breach, has a claim in unjust enrichment to restitution of the benefits for a failure of consideration/basis/condition,[145] even though he also has a concurrent right to damages for the breach of contract. A claimant who is induced to pay a defendant by his fraudulent misrepresentation has at least two possible claims, one in unjust enrichment for mistake[146] and another in the tort of deceit.[147] If subsidiarity entails rejecting concurrence of different causes of action, the law of unjust enrichment in Singapore is set to shrink.

Writers who endorse subsidiarity typically focus on the normative justifications for different areas of law, explaining how some have primacy over others. Grantham and Rickett prioritise contract, property, and torts, over unjust enrichment as they think the former three promote respect for individual autonomy.[148]

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[142] Subsidiarity is not new: Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 LQR 273; Lionel Smith, 'Property, Subsidiarity and Unjust Enrichment' in David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press 2002). Compare Stephen Smith, 'Concurrent Liability in Contract and Unjust Enrichment' (1999) 115 LQR 245; Jack Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Inquiries in Law* 1.

[143] [2001] HCA 68, (2001) 208 CLR 516 at [75], citing eg Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment' ibid.

[144] *Esben* at [247].

[145] Eg *Wilkinson v Lloyd* (1845) 7 QB 27 (money); *Lodder v Slowey* [1904] AC 442 (work done), discussed at Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press 2012) 89; Burrows, *The Law of Restitution*, n 62 above 344-345, 347.

[146] Although the 'core' case of unjust enrichment involves the claimant's spontaneous mistake, the case for a claim should be even stronger where there was fraud by the defendant. Most, if not all, commentators assume that there is such a claim, typically advocating a looser causal requirement where the defendant has acted fraudulently, eg Burrows, *Restatement* n 145 above 63 and 65; *Goff & Jones* n 62 above para 9-100. An example which seems to have been analysed in these terms is *Thompson v Bell* (1854) 10 Exch 10, 156 ER 334 (Ex Ct).

[147] On similar facts as *Thompson v Bell*, ibid, contrast *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL), analysed in terms of deceit.

[148] Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', n 142 above, 293-296.

By contrast, *Esben* appears to adopt a straightforwardly historical approach under which 'first in time prevails'. This position is neither easy to justify nor to operate. In a common law system, dating areas of law, or even individual doctrines, is a tricky task. *Esben* assumes that unjust enrichment was first born in *Lipkin Gorman*. But why not *Kelly v Solari*?[149] Or *Moses v Macferlan*?[150] Or even earlier?[151] On this approach, Singaporean lawyers would be well-advised to start acquiring the skills of a legal historian.

This characterisation is most pronounced in *Esben*'s discussion about 'lack of consent' and the recognition of new unjust factors. In discussing whether 'lack of consent' ought to be recognised,[152] their chief concern was to 'prevent unjust enrichment from encroaching on or making otiose *established* areas of the law or denuding them of much of their legal significance'[153]

A sharp common law/equity distinction

In Singapore, unjust enrichment has another unusual feature: since 2013, the Court of Appeal has repeatedly described it as a 'common law' cause of action.[154] This perspective departs from leading accounts of unjust enrichment, which are more-or-less fusionist in approach.[155]

Esben follows in that vein. 'Principles of equity' were thought a well-established area of law that unjust enrichment should not encroach upon.[156] Deciding that laches could not apply,[157]

[149] (1841) 9 M & W 54, 152 ER 24.

[150] (1760) 2 Burr 1005, 97 ER 676.

[151] David Ibbetson, 'Development at Common Law', n 139 above, Ch 2.

[152] The court's reasons against it did not centre at all on whether a claimant's one-sided absence of consent to a transaction ought to generate restitution. Compare Stevens, 'The Unjust Enrichment Disaster', n 138 above.

[153] *Esben* at [251(c)(iii)].

[154] *Anna Wee* n 1 above at [109], [137]-[139]. Contrasting it with knowing receipt, an action of equitable origin, unjust enrichment was characterised as a claim based on 'strict liability at common law': *Anna Wee* at [110], [137]-[146].

[155] Eg Edelman & Bant n 62 above 21-24. Influenced by Birks, they are motivated by the governing ideas that like should be treated alike. For Birks, history alone is not a good reason for continued differentiation, or for giving multiple different answers to the same question. As far as possible, common law and equitable doctrines should be incorporated into a coherent, rational body of law: Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia LR 1, 1-25. See also Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1.

[156] *Esben* at [242].

[157] *Esben* at [110]-[122].

the court thought this 'unhappy position'[158] insufficient to 'displace the weightier considerations in favour of not lightly extending equitable doctrines into the realm of the common law'.[159]

This sharply drawn distinction between common law and equity reinforces and is reinforced by the characterisation of unjust enrichment as new, but only interstitial – unjust enrichment can operate only in the gaps left behind by centuries-old equitable doctrine.

But there may also be something more behind this distinction. An earlier case, *Anna Wee*, suggested that unjust enrichment focuses on the claimant's conduct and is a form of strict liability, while equitable doctrines focus on the defendant's conduct and is based on unconscionability.[160] Thus, remedial constructive trusts may be imposed over mistaken payments where the recipient knows of the mistake, but the explanation for these trusts is not unjust enrichment but unconscionability.[161]

If this vision of unjust enrichment is truly what the Singapore Court of Appeal has in mind, then it is virtually certain that Singaporean law will diverge even more from dominant English accounts. Restitution of benefits conferred under another's undue influence, or an unconscionable bargain, will need new explanations. So too will resulting trusts: Singaporean courts have long accepted Robert Chambers's account[162] that resulting trusts arise when the transferor lacks intention to benefit the transferee,[163] but have never explicitly accepted the other part of Chambers's account – that these trusts respond to unjust enrichment.[164] If unjust enrichment is truly conceived of as a new 'common law' area which operates only interstitially, the latter explanation becomes unavailable.

CONCLUSION

[158] *Esben* at [85].

[159] *Esben* at [122].

[160] *Anna Wee* n 1 above at [108]-[110], [137], [182]. See also *Esben* at [113] 'the notion of unconscionability… underpins the equitable jurisdiction of the court' (emphasis changed), see also at [122].

[161] *Anna Wee* at [172], [182].

[162] Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997); Robert Chambers, 'Resulting Trusts' in *Mapping the Law* (Oxford: Oxford University Press, 2006) 247, 254; Peter Birks, 'Restitution and Resulting Trusts' in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem: Hebrew University of Jerusalem, 1990) 335, 372.

[163] *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36, [2014] 3 SLR 1048 at [38]-[44]; *Chia Kok Weng v Chia Kwok Yeo* [2017] SGCA 54, [2017] 2 SLR 964 at [47], [49].

[164] Rachel Leow and Timothy Liau, 'Resulting Trusts: A Victory for Unjust Enrichment' (2014) 73 CLJ 500.

Unsurprisingly for a considered judgment running to 264 paragraphs, *Esben* provides much to think about. Perhaps most intriguing and momentous are the indications given about Singapore's gradually crystallizing vision of unjust enrichment.

At first sight, *Esben* may look like a resounding victory for unjust enrichment – its conceptual independence is fervently defended, even at the expense of undesirable practical outcomes. There is vigorous engagement with topical and difficult questions. Surely the future is bright?

Viewed more closely however, *Esben* confirms earlier, burgeoning indications of a markedly different approach towards unjust enrichment. While its conceptual independence is prized, it may be no more than a 'gap-filler', the new kid on the block forced to bow down to its elder siblings.

It remains to be seen if *Esben* will be no more than a pyrrhic victory. Singaporean developments should be put firmly on the radar of all who are interested in unjust enrichment law, and private law more generally.