Birksian themes and their impact in England and Singapore: three points of divergence

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This article evaluates the impact of Birksian themes through a comparative lens. It is shown how, unlike the English courts, the Singaporean courts have accepted "lack of consent" as an unjust factor, held that actions for restitution of mistaken payments, being based on unjust enrichment, fall outside the scope of the Limitation Act, and accepted Birks' lack-of-intention analysis of the resulting trust. On these points, perhaps surprisingly, one could even say that Birks' thinking has found greater traction in Singaporean private law than in its English counterpart. To explain this observation, five possible reasons are ventured.

1. INTRODUCTION

These are exciting times for scholars of unjust enrichment and restitution.[1] Powerful objections and new accounts abound.[2] The subject's vibrancy belies its youth: the modern starting point for the subject, Peter Birks's seminal work *An Introduction to the Law of Restitution*,[3] was published only thirty-odd years ago.

This article, an early version of which was presented at a conference celebrating *Introduction*'s publication,[4] aims to evaluate its impact through a comparative lens. It proceeds first by setting out the necessary background, comparing the relative impact of Birks' writings in England and Singapore. In light of this, three points of divergence between Singaporean and English law are then explored. It is shown how, unlike the English courts, the Singaporean courts have (a) accepted "lack of consent" as an unjust factor, (b) held that actions for restitution of mistaken payments, being based on unjust

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1. For ease of reference, hereafter "unjust enrichment". This is not to take a position on the precise relationship between "restitution" and "unjust enrichment", a contentious matter.

2. See eg Robert Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574; Lionel Smith, "Restitution: A New Start?", in Rohan Havelock and Peter Devonshire (eds), *The Impact of Equity and Restitution in Commerce* (Oxford, 2019). In response, see Andrew Burrows, "In Defence of Unjust Enrichment" (2019) 78 CLJ 521; Andrew Burrows, "'At the Expense of the Claimant': A Fresh Look" [2017] RLR 167. Other recent contributions include Peter Watts, "'Unjust Enrichment'—the Potion that Induces Well-meaning Sloppiness of Thought" [2016] CLP 289; Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford, 2016); Frederick Wilmot-Smith, "Should the Payee Pay?" (2017) 37 OJLS 844; Tatiana Cutts, "Materially Identical to Mistaken Payment" (2020) Can J of Law & Jurisprudence 31; Tatiana Cutts, "Unjust Enrichment: What We Owe to Each Other" [2021] 41 OJLS 114.

3. Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1985; rev. edn, 1989) ("*Introduction*").

4. "The Place of Restitution in the Modern Law: 30 Years after *An Introduction to the Law of Restitution*" Conference, University of Leeds, June 2019.

enrichment, fall outside the scope of the Limitation Act, and (c) accepted Birks' lack-of-intention analysis of the resulting trust. These instances of divergence, it is argued, could be explained by the lasting sway of Birksian themes on the Singaporean judiciary. On these points, one could even say that, perhaps surprisingly, Birks has had a greater influence on Singaporean private law than its English counterpart. To explain his traction, we then put forward five possible reasons. We conclude on a further speculative note about prospects for convergence, in light of a recent wave of English scepticism.

Given Singapore's growing importance and its roots in English law, this article may be of interest to multiple audiences. For the comparative lawyer, this article provides another useful example of divergence amongst common law jurisdictions, and an account of possible factors leading to that result.[5] For unjust enrichment scholars, the Singaporean experience prompts further reflection about the status of "unjust enrichment", what kind of unity it has, and how that might matter.

As important questions about the scope and structure of our subject are interrogated and ironed out, Singaporean case law may prove a valuable resource. As counterpoints to English developments they might be paid greater heed. Signs of reverse pollination have emerged, though incipient. Recently, Foxton J relied on two Singaporean Court of Appeal cases to accept that transfers of benefit could be conditional on more than one basis,[6] and to consider whether change of position should be applied before counter-restitution in cross-payments between two parties to a void contract.[7]

2. BIRKS' IMPACT

Birks' impact is well known in England, but little has been said about his impact in Singapore.[8] Here we seek to bridge the gulf, connecting the dots between developments across jurisdictions.

(a) In England

Birks' writings had a considerable influence on the English law of unjust enrichment, and on English private law more generally. Despite Birks having been "riddled with self-doubt as to its worth", having "seriously contemplated throwing the manuscript off the

5. See Birke Häcker, "Divergence and Convergence in the Common Law—Lessons from the Ius Commune" (2015) 131 LQR 424 for an account of factors leading to convergence or divergence between legal systems.

6. *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [421], citing *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] SGCA 2; [2018] 1 SLR 239, [52]. *School Facility Management* is noted by Alexander Georgiou in "What's 'unjust' about Unjust Enrichment: an answer at last?" [2021] LMCLQ 63.

7. *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1477 (Comm), [9–27], esp. [19–20], citing *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries Singapore Pte Ltd* [2011] SGCA 22; [2011] 3 SLR 540, [129].

8. It is possible to list here the bulk of writing: eg, Rachel Leow and Timothy Liau, "Unjust Enrichment and Restitution in Singapore: Where Now and Where Next?" [2013] SJLS 331; TM Yeo, "Unjust Enrichment: Revolution and Evolution in the Asia-Pacific" [2017] RLR 152, 157–165; Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Singapore, 2019). Singaporean cases have also been covered in the *Restitution Law Review*'s Regional Digest for Asia-Pacific (now continued in the LMCLQ *Unjust Enrichment Review*) and the Singapore Academy of Law's *Annual Review of Singapore Cases*.

Forth Road Bridge",[9] *Introduction* was an enormous success in England.[10] A long history of restitution and unjust enrichment case law and other materials predated *Introduction*, though lacking in systematicity. What English law lacked was order. The well-known practitioner text *Goff & Jones*[11] collected together the ingredients, but it was *Introduction* which attempted to provide "the simplest structure on which the material in *Goff & Jones* can hang".[12] Its aim was to take the law of restitution and "cut away its detail so as to reveal the skeleton of principle which holds it together".[13] It sought to map the relationship between the subject and neighbouring areas, the relationship between restitution and unjust enrichment,[14] and then to map the internal structure of the subject, providing the analytical framework it lacked,[15] dividing it into the familiar four-, now refined to five-, question framework of "enrichment", "at the expense", "injustice", "proprietary or personal right to restitution", and "defences".[16]

Much of this effort translated into a direct influence on the reasoning of English cases, particularly in the 1990s. In 1991, *Lipkin Gorman v Karpnale Ltd*[17] provided the first authoritative recognition of unjust enrichment as an independent category of the law of obligations. After *Introduction* and Birks' later work, there were increasingly strong judicial statements that it was necessary to separate obligations generated by contract and those generated by unjust enrichment.[18] Thus, in *Banque Financière de la Cité v Parc (Battersea) Ltd*,[19] contractual subrogation, an example of the former, was distinguished from what is now called subrogation to extinguished rights[20]—an instance of the latter. The four-question analytical framework was adopted by Lord Steyn in *Banque Financière*[21] in 1999. Relying on *Introduction* and other writing by Birks,[22] cases in the 1990s accepted the recovery of *ultra vires* payments to public authorities,[23] and it was confirmed that the common law required proof of an "unjust factor", by contrast to civilian systems operating

9. Alan Rodger and Andrew Burrows, "Peter Birks" [2013] RLR 54, 66.

10. *Ibid*, 66–68.

11. Robert Goff and Gareth Jones, *The Law of Restitution*, 1st edn (London, 1966); now Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London, 2016) ("*Goff & Jones*").

12. *Introduction*, 3.

13. *Introduction*, 1.

14. *Introduction*, 16–18, 26. Birks later resiled from this view: Peter Birks, "Misnomer", in WR Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford, 1998); Birks, *Unjust Enrichment*, 1st edn (2003); 2nd edn (Oxford, 2005) ("*Unjust Enrichment*"), 25–28.

15. *Introduction*, 19–21; *Unjust Enrichment*, 38–40.

16. *Introduction*, 20–21; *Unjust Enrichment*, 39. The fifth question, "proprietary or personal right to restitution", is often omitted by courts in both England and Singapore. In this article we thus describe it as the "four-question framework".

17. [1991] 2 AC 548, 578 (Lord Goff of Chieveley).

18. Earlier explanations based on implied contracts had been rejected by the House of Lords in the 1940s: *United Australia Ltd v Barclays Bank Ltd* [1940] AC 1*; Fibrosa Spolka Akcyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1943] AC 32.

19. [1999] 1 AC 221, 231–233 (Lord Hoffmann).

20. *Goff & Jones*, 9th edn (2016), [39.01].

21. [1999] 1 AC 221, 227.

22. Eg, Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in Paul Finn (ed), *Essays in Restitution* (NSW Australia, 1990). See also Peter Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473.

23. *Woolwich Equitable Building Soc v IRC* [1993] AC 70, 166–167 (Lord Goff), 196 (Lord Jauncey of Tullichettle). See now *Waikato Regional Airport Ltd v AG* [2003] UKPC 50; *Hemming (t/a Simply Pleasure Ltd) v Westminster City Council* [2013] EWCA Civ 591; *Vodafone Ltd v Office of Communications* [2020] EWCA Civ 183, [2020] 2 WLR 1108.

on "absence of basis" (*sine causa*).[24] The notable swaps litigation considered Birks' views on the abolition of the mistake of law bar,[25] the applicable unjust factor in the swaps litigation,[26] the availability of restitution in fully performed swaps[27] and the development of the resulting trust as a proprietary response to unjust enrichment.[28]

A similar story was seen in the 2000s, continuing even after Birks' untimely death in 2004. Legal concepts he introduced, such as a distinction between mistakes and mispredictions, were accepted and affirmed by the courts.[29] Terminology he coined made its way into judicial reasoning: "subjective devaluation",[30] "incontrovertible benefit"[31] and "free acceptance",[32] to name a few. The use of the analytical framework proposed by Birks has continued,[33] though its limits have recently been emphasised.[34]

Introduction's impact went far beyond what could be seen in these cases. As Lord Rodger of Earlsferry and Professor Burrows (as he was then) explained, "[th]e devising of a new scheme for understanding this area of the law captured the imagination of many lawyers, for whom the necessary combination of traditional doctrinal skills and a pioneering spirit proved irresistible".[35] As Birks himself put it, "It is the last major area to be mapped and in some sense the most exciting subject in the modern canon. There is everything to play for".[36] Many were swept up in the excitement. Students flocked to study the subject. Numerous doctoral theses, many of them supervised by Birks, were produced, many of them highly influential.[37] Birks also played an enormous role

24. Eg, *Woolwich* [1993] AC 70, 196–197 (Lord Browne-Wilkinson); *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, 408–409 (Lord Hope of Craighead). See also the citations *infra*, fn.55.

25. *Kleinwort Benson v Lincoln CC* [1999] 2 AC 349, 371–372 (Lord Goff).

26. *Ibid*, 385–387 (Lord Goff).

27. *Ibid*, 385–387 (Lord Goff), 416 (Lord Hope), considering Birks' views in a footnote in Peter Birks, "No Consideration: Restitution after Void Contracts" (1993) 23 UWALR 195.

28. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 689–690 (Lord Goff), 702–709 (Lord Browne-Wilkinson).

29. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, [29]; *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108, [104].

30. See *Introduction*, 109; *Unjust Enrichment*, 52–55; applied in *Ministry of Defence v Ashman* (1993) 66 P & CR 195, 201 (Hoffmann LJ*); Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775, [28] (Mance LJ); *Sempra Metals Ltd v IRC* [2007] UKHL 34; [2008] 1 AC 561, [119] (Lord Nicholls of Birkenhead), [187] (Lord Walker of Gestingthorpe), [232] (Lord Mance); *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, [12], [18–25] (Lord Clarke), [110–117] (Lord Reed).

31. See *Introduction*, 116; *Unjust Enrichment*, 59–62; applied in *R (on the application of Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin); [2003] 1 Lloyd's Rep 418, [12] (Lightman J); *Cressman* [2004] EWCA Civ 47, [28] (Mance LJ); *Sempra Metals* [2007] UKHL 34, [232] (Lord Mance); *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, [43], [47] (Morritt C), [66] (Maurice Kay LJ); *Benedetti* [2013] UKSC 50, [25] (Lord Clarke).

32. See *Introduction*, 114; *Unjust Enrichment*, 56–58; applied in *Rowe* [2003] EWHC 388 (Admin); [2003] 1 Lloyd's Rep 418, [12] (Lightman J); *Cressman* [2004] EWCA Civ 47, [28] (Mance LJ); *Wigan Athletic* [2008] EWCA Civ 1449, [43–48] (Morritt C), [65–66] (Maurice Kay LJ); *Benedetti* [2013] UKSC 50, [25] (Lord Clarke), [117] (Lord Reed).

33. Eg, *Benedetti* [2013] UKSC 50.

34. See *post*, Part 5.

35. Rodger & Burrows [2013] RLR 54, 67.

36. *Ibid*, locating this quotation on the dust cover of the hardback original edition of *Introduction*.

37. Eg, Charles Mitchell, *The Law of Subrogation* (Oxford, 1994); Robert Chambers, *Resulting Trusts* (Oxford, 1997); Lionel Smith, *The Law of Tracing* (Oxford, 1997); Jonathon Moore, *Restitution from Banks* (DPhil thesis, University of Oxford, 2000); James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford, 2002); Steven Elliott, *Compensation Claims against Trustees* (DPhil thesis,

in organising important symposia and seminars from which an enormous amount of high-quality scholarship was generated, and partnering the establishment of a journal dedicated to the subject, the *Restitution Law Review*.[38]

Three caveats are due. First, *Introduction* was not written on a blank slate. Depending on how you count them, it is possible to identify instances of what we might today think of as unjust enrichment from writs in as early as the fourteenth century.[39] A long history of scholarly writing spanning centuries existed before *Introduction*.[40] American treatises existed[41] before equivalent English texts.[42] The "great textbook", as Birks himself called it,[43] Goff & Jones' *The Law of Restitution*, had its first edition some twenty years previously, in 1966,[44] with a following edition in 1978.[45] Birks recognised that *Introduction* could not have even been attempted without *Goff & Jones*.[46] *Introduction*'s impact was enormous, but also limited by the decided English cases. As an essentially interpretive project, trying to find the best explanation for the existing law,[47] it was constrained by the materials it sought to interpret.

Secondly, *Introduction*'s impact cannot be considered without accounting for the contributions of other important individuals in the subject's modern development. Lord Goff of Chieveley is one such example.[48] First as co-author as *Goff & Jones*, and later as a judge, Lord Goff advanced the subject greatly, giving it greater respectability amongst the profession.[49] His leading speech in *Lipkin Gorman v Karpnale*[50] was the first authoritative recognition of unjust enrichment. That decision also recognised the change of position defence, the "characteristic defence in unjust enrichment".[51] Influential judgments were also given in recognising a right to recover overpaid taxes paid to public authorities in *Woolwich Equitable Building Soc v IRC*,[52] contributing to the abolition of the mistake of law bar in *Kleinwort Benson v Lincoln City Council*,[53] and, as a trial judge,

University of Oxford, 2002); Simone Degeling, *Restitutionary Rights to Share in Damages: Carers' Claims* (Cambridge, 2003).

38. Francis Rose, "The Evolution of the Species", in Burrows & Rodgers, *Mapping the Law* (Oxford, 2006) 13, 25–26.

39. David Ibbetson, "Development at Common Law", in *Research Handbook* (Cheltenham, 2020) 28, 28–30.

40. *Ibid*, 28–40.

41. Eg, WA Keener, *A Treatise on the Law of Quasi-Contracts* (1893).

42. Eg, WS Holdsworth, *A History of English Law* (London, 1925), 8.88–8.98 and 12.542–12.549.

43. *Introduction*, 3.

44. R Goff and G Jones, *The Law of Restitution*, 1st edn (1966).

45. R Goff and G Jones, *The Law of Restitution*, 2nd edn (1978).

46. *Introduction*, 3.

47. See Stephen A Smith, *Contract Theory* (Oxford, 2004), 4–5; Allan Beever and Charles Rickett, "Interpretive Legal Theory and the Academic Lawyer" (2005) 68 MLR 320.

48. Gareth Jones, "Lord Goff's Contribution to the Law of Restitution", in Gareth Jones and William Swadling (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999).

49. Rose, "Evolution", *Mapping the Law* (2006) 13, 18.

50. [1991] 2 AC 548, 578.

51. Lionel Smith, "Defences and the Disunity of Unjust Enrichment", in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Oxford, 2016). *Cf Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] SGHC 45; [2013] 2 SLR 543.

52. [1993] AC 70, 163–178.

53. [1999] 2 AC 349, 365–389.

explaining recovery for frustrated contracts under the Law Reform (Frustrated Contracts) Act 1943 as embodying principles of unjust enrichment.[54]

Thirdly, it goes without saying that not all of Birks' ideas were universally accepted. Some were approached with what might be described as caution, or even resistance at times.[55] As an example, in *Unjust Enrichment* (affectionately known as "the orange book", the first edition of which was published just before Birks' death in 2004), he famously argued that the swaps cases entailed that English law had radically shifted overnight to abandon "unjust factors" in favour of "absence of basis",[56] calling his old work "back for burning".[57] This volte-face was less well received. So, while the impact of *Introduction* and Birks' earlier works was significant, not all aspects of Birks' thinking have been adopted by English courts. Furthermore, as will be discussed later, recent decisions of the UK Supreme Court and Privy Council may suggest a retreat from some aspects of his previously adopted thinking, namely, his "four-question" framework.[58]

(b) In Singapore

In Singapore, a former colony which until only recently received English law,[59] Birks' influence became clear only from 2000, accelerating posthumously. By the 2010s, explicit and direct references to Birks's writings became commonplace.

Before 2000 there seems little evidence of Birks' influence on Singaporean courts. The only real sign of unjust enrichment reasoning appeared in 1994, in *Seagate Technology Pte Ltd v Goh Han Kim*.[60] Even here there was little evidence of reliance on Birks' work. This was a straightforward mistaken payment case. The Singaporean Court of Appeal was content to analyse it as a claim for money had and received, justified by the defendant's receipt of the claimant's money under circumstances "that he is obliged by the ties of

54. *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783.

55. *Westdeutsche* [1996] AC 669, 689–690 (Lord Goff) and 708–709 (Lord Browne-Wilkinson) rejected the Birks-Chambers argument on resulting trusts; *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 (CA), 455–456 rejected the Birks-Nicholls argument on knowing receipt. See also *Woolwich* [1993] AC 70, 172 (Lord Goff); *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558, [21] (Lord Hoffmann); *Test Claimants in the FII Group Litigation v RCC* [2012] UKSC 19; [2012] 2 AC 337, [162] (Lord Sumption), doubting absence of basis.

56. See *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1; *Westdeutsche* [1996] AC 669; *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890; *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London BC* [1999] QB 215; *Kleinwort Benson Ltd v Lincoln CC* [1998] Lloyd's Rep Bank 387; [1999] 2 AC 349.

57. *Unjust Enrichment*, xii.

58. See *post*, Part 5.

59. English law as it stood in 1826 was generally received into Singapore through the Second Charter of Justice 1826, subject to local conditions: *R v Willans* [1808–1884] 3 Ky 16. After 1826, some areas of English law continued to apply in Singapore where specifically provided by statute, including commercial law, received under the Civil Law Act, s.5. This continued until 1993, when the Application of English Law Act (Cap 7A, 1994 Rev Ed) was passed. It abolished the Civil Law Act, s.5 and provided that "[t]he common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12 November 1993, shall continue to be part of the law of Singapore" (s.3(1)), that "[t]he common law shall continue to be in force in Singapore … so far as applicable to the circumstances of Singapore and its inhabitants and subject to such modification as those circumstances may require" (s.3(2)), and listed exhaustively applicable English statutes after 12 November 1993 (s.4). See generally Andrew Phang, *From Foundation to Legacy—The Second Charter of Justice* (Singapore, 2006).

60. [1994] SGCA 128; [1994] 3 SLR(R) 836.

natural justice and equity to refund it".[61] The language was a direct transposition of Lord Mansfield's judgment in *Moses v Macferlan*,[62] but there appeared little awareness of that fact.[63] The clearest sign of unjust enrichment reasoning was its recognition of the change of position defence, typically thought to apply only to unjust enrichment claims, but this development was more likely attributable simply to the Singaporean court's following a then-recent English decision, *Lipkin Gorman v Karpnale Ltd*,[64] rather than demonstrating direct reliance on Birks' work.

By the early 2000s, Birks' influence could be seen, but only indirectly. Singaporean courts still did not refer to Birks' work directly, but they regularly adopted the reasoning of English cases which did. The impact of Birks' thinking can be seen in a range of judgments during this period: the mistake of law bar was abolished in *MCST No 473 v De Beers Jewellery*[65] (relying on *Kleinwort Benson v Lincoln CC*[66]), mistakes were distinguished from mispredictions (relying on *Dextra Bank & Trust Co Ltd v Bank of Jamaica*[67])[68] and there was authority that subrogation was a remedy available to reverse unjust enrichment (relying on *Banque Financière de la Cité v Parc (Battersea) Ltd*[69]).[70] This might be attributable to the practice, still relatively prevalent during this period of Singapore's legal development, of treating English authorities as highly persuasive and thus to be presumptively followed unless there were good reasons for departure.

There were also traces of Birks' influence in the way Singaporean courts approached some problems. In *MCST No 473 v De Beers Jewellery*, another mistaken payment case, the Singaporean Court of Appeal explicitly referred to the claim as one for unjust enrichment, treating it as a source of obligations distinct from contract and tort.[71] The next year, the Court of Appeal accepted Birks' analytical framework of "enrichment", "at the expense" and "unjust factors" in *Info-Communications Development Authority v Singtel*,[72] just as English courts had accepted it some years prior in *Banque Financière*. But these were only nascent traces of what was to come.

After 2010, Birks' influence became strikingly clear. Direct reliance on Birks' writing became commonplace. In separate judgments, the Singaporean Court of Appeal accepted Birks' "events" and "responses" taxonomy, recognised unjust enrichment as an independent source of obligations, and strongly encouraged use of Birks' four-question analysis to structure legal reasoning.

61. *Ibid*, [23].
62. (1760) 2 Burr 1005; 97 ER 676.
63. Instead, what was cited for the proposition was *Atkin's Court Forms* (1991 Issue), Vol 27, 208: [23].
64. [1991] 2 AC 548.
65. [2001] SGHC 206; [2001] 2 SLR(R) 669; affd [2002] SGCA 13; [2002] 1 SLR(R) 418.
66. [1998] Lloyd's Rep Bank 387; [1999] 2 AC 349.
67. [2002] 1 All ER (Comm) 193.
68. *Info-Communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] SGHC 119; [2002] 2 SLR(R) 136, [97].
69. [1999] 1 AC 221.
70. *United Overseas Bank v Bank of China* [2005] SGCA 46; [2006] 1 SLR(R) 57, [27–29].
71. [2002] SGCA 13; [2002] 1 SLR(R) 418, [32].
72. *Info-Communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] SGHC 119; [2002] 2 SLR(R) 136, [70].

In 2013, the Court of Appeal accepted the events-responses taxonomy, explicitly referring to Birks' work.[73] It also accepted, as Birks did after *Introduction*,[74] that restitution was "multi-causal": while unjust enrichment could generate the response of restitution, other events, such as wrongs, could as well.[75] VK Rajah JA delivered a unanimous joint judgment with Sundaresh Menon CJ and Chao Hick Tin JA in *Alwie Handoyo v Tjong Very Sumito*,[76] holding that:

"[B]uilding on the work of Prof[essor] Peter Birks, Prof[essor] Yeo also points out that in the context of *unjust enrichment*, the word *restitution* describes a response to an event. The event is the unjust enrichment of the defendant at the plaintiff's expense, and the response is to reverse the enrichment …

We agree. There are other restitutionary remedies which are not founded on a claim for unjust enrichment or property, but on a claim in tort or breach of contract or fiduciary duty. Restitution in this latter category of claims is more commonly known as "restitution for wrongs". Different causes of action may give rise to the same remedy of restitution. The law of restitution is more than just the law of unjust enrichment; the two are not synonymous."

The Court of Appeal also accepted that unjust enrichment is an independent source of obligations, distinct from contract and tort. In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*,[77] Andrew Phang JA, Sundaresh Menon CJ, Judith Prakash JA, Tay Yong Kwang JA, and Steven Chong JA held:

"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). This is because the law of unjust enrichment comprises a separate cause of action (with restitution as the remedial response), which is made out when there is no civil wrong but the defendant is unjustly enriched at the expense of the plaintiff. *Unjust enrichment is thus a distinct branch of the law of obligations.*"

Secondly, the impact of *Introduction* and Birks' subsequent work could also be clearly observed in the Singaporean courts' increasing practice of analysing unjust enrichment claims using the four-question framework. It became routine to recite the questions, using them to structure legal analysis.[78]

73. *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44; [2013] 4 SLR 308.

74. Birks, "Misnomer" (*supra* n 14); *Unjust Enrichment*, 25–28.

75. See also *Chip Hup Hup Kee Construction Pte Ltd v Yeow Chern Lean* [2010] SGHC 83; [2010] 3 SLR 213 [9]; *ACES System Development Pte Ltd v Yenty Lily* [2013] SGCA 53; [2013] 4 SLR 1317, [31]; *ARS v ART* [2015] SGHC 78, [277–279]; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44; [2018] 2 SLR 655, [180-182].

76. [2013] SGCA 44; [2013] 4 SLR 308, [126].

77. [2018] SGCA 44; [2018] 2 SLR 655, [181] (emphasis removed and added). *Turf Club* is noted by Jason Fee [2019] LMCLQ 500 and Lau Kwan Ho [2019] LMCLQ 508.

78. Eg, *Skandinaviska Enskilda Banken v Asia Pacific Breweries* [2011] SGCA 22, [110]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36; [2013] 3 SLR 801, [98] ("*Anna Wee*"); *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] SGCA 28; [2016] 3 SLR 845 [90]; *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] SGCA 2; [2018] 1 SLR 239, [45].

A third manifestation of Birks' influence could be seen in how the Singaporean judiciary eschewed reliance on the forms of action or reasoning based on "quasi-contract".[79] It was recognised that the forms of action occluded understanding, while quasi-contract was fictional. Justice VK Rajah accepted that "[t]he old language of 'money had and received' … conceals as much as it reveals about the nature of a claim".[80] Instead, his view was that "the underlying basis for the action for money had and received is now embraced under the rubric of unjust enrichment".[81] Similarly, in *Eng Chiet Shoong v Cheong Soh Chin,*[82] Andrew Phang J, Sundaresh Menon CJ, and Quentin Loh J accepted that a claim for a reasonable sum for work done based on *quantum meruit* was historically based on quasi-contract but was "more appropriately classified" as a claim for unjust enrichment, since quasi-contract "involved the use of a fiction".[83]

It is important to note that, while Birks' writings have had a striking impact on unjust enrichment's development in Singaporean law, not all of his ideas have been equally well received. For example, Singaporean courts, like their English counterparts, have been similarly firm in stating that an "absence of basis" is insufficient for an unjust enrichment claim to succeed.[84] An "unjust factor", such as the claimant's mistake, must also be pleaded and proven.

A second example concerns the jurisdictional divide between common law and equity. It was an especially noteworthy feature of Birks' thinking that it would be irrational for a legal system to give different answers to the same problem.[85] To the extent that equity and the common law did so, these were historical anomalies, and such differences ought to be eradicated in a rational legal system. Some members of the Singaporean courts seem, however, much less fusionist in their approach. In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[86] ("*Anna Wee*") the Court of Appeal described unjust enrichment as "a claim based on strict liability at common law". Unjust enrichment's purportedly "common law" origin was given as a reason not to assimilate knowing receipt, a traditionally equitable action, within unjust enrichment.[87] Similarly, *Turf Club*, extracted above, might be read as carving out to one side the "law of equity" as a "distinctive branch".[88] But some well-recognised "unjust factors", such as undue influence, are equitable in origin,[89] so these statements might be doubted.

79. See *Chiang Hong Pte Ltd v Lim Poh Neo* [1984] SGCA 5; [1983–84] SLR(R) 346, [20]; *Ooi Ching Ling v Just Gems Inc* [2002] SGCA 43; [2003] 1 SLR(R) 14, [43] for examples of quasi-contract reasoning.

80. *Tjong Very Sumito* [2013] SGCA 44, [125].

81. *Ibid* (emphasis removed). Foreshadowing this: *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] SGCA 36; [2012] 4 SLR 231, [39].

82. [2016] SGCA 45; [2016] 4 SLR 728.

83. *Ibid*, [32–33] (emphasis removed).

84. Anna Wee [2013] SGCA 36; [2013] 3 SLR 801, [129]. See also *Singapore Swimming Club* [2016] SGCA 28, [92–93].

85. Peter Birks, "Misdirected Funds: Restitution from the Recipient" [1989] LMCLQ 296; Peter Birks, "Equity in the Modern Law" (1996) 26 UWALR 1; *Unjust Enrichment*, 67.

86. *Anna Wee* [2013] SGCA 36, [138], [139–140].

87. *Ibid*, [110], [138], [146]. For the avoidance of doubt: there are good objections to Birks' arguments on "knowing receipt", but these are not good reasons.

88. *Turf Club* [2018] SGCA 44, [181].

89. As recognised recently in *BOM v BOK* [2018] SGCA 83; [2019] 1 SLR 349.

We might add that, in our view, history alone is insufficient to justify a continuing "distinctive" role for equity,[90] but here we enter admittedly contested terrain.[91]

3. THREE POINTS OF DIVERGENCE

The background context having been set, we turn now to three points on which Singaporean law has diverged from its English roots. Unlike the English courts, the Singaporean courts have (a) accepted "lack of consent" as an unjust factor, (b) held that actions for restitution of mistaken payments, being based on unjust enrichment, fall outside the scope of the Limitation Act, and (c) accepted Birks' lack-of-intention analysis of the resulting trust.

What could account for this divergence? We suggest here that each development is premised upon, or is an extension of, important aspects of Birks' thinking: impaired intention as the normative justification for the bulk of unjust enrichment claims; the independence of unjust enrichment as a distinct source of legal obligations; and the development of proprietary responses to unjust enrichment across the common law and equity divide.

(a) Lack of consent

The argument for "lack of consent" proceeds *a fortiori* from mistaken payments, which Birks regarded as the "core case" of unjust enrichment. The injustice there was the claimant's impaired intention; he had the wrong data in his head in paying,[92] but for which he would not have paid.[93] Extrapolating outwards, Birks reasoned that, if impaired intention sufficed, an absence of intention should all the more suffice.[94] Initially, the relevant unjust factor was identified as "ignorance".[95] Birks later added "powerlessness", to include cases where the victim is fully aware of her property being taken from her, but yet was physically powerless to prevent it.[96] Other commentators have suggested "lack of consent" or "want of authority" as either additional or alternative formulations to capture different cases.[97]

This is controversial territory. "Ignorance" and its variants have been invoked to ground a personal claim in unjust enrichment against a thief alongside the tort of conversion,[98]

90. See eg Ben McFarlane, "Equity", in AS Gold et al (eds), *The Oxford Handbook of New Private Law* (OUP, Oxford, 2020); Ben McFarlane and Robert Stevens, "What's Special about Equity? Rights about Rights", in Dennis Klimchuk, Irit Samet, Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford, 2020).

91. See eg Lusina Ho, "Unjust Enrichment and Equity", in *Research Handbook* (2020) 123.

92. See eg Birks, "Mistakes of Law" (2000) 53 CLP 205, 224: "the decision to transfer is impaired by being made on wrong data—that is, on beliefs which are false at the time when the decision is made."

93. *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

94. *Introduction*, 140–141.

95. *Ibid*, 141.

96. *Unjust Enrichment,* 154–156.

97. See eg Robert Chambers and James Penner, "Ignorance", in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (NSW Australia, 2008); *Goff & Jones*, 9th edn (2016), ch.8; James Edelman & Elise Bant, *Unjust Enrichment* (Oxford, 2016), ch.12. See also Michael Bryan, "No Intention to Benefit", in *Research Handbook* (2020) 363.

98. *Goff & Jones*, 9th edn (2016), [8.43]; Burrows, *Restitution*, 403–404; Edelman & Bant (2016), 280. *Cf* William Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 OJLS 627.

against recipients of misapplied company[99] or even trust assets,[100] as the best explanation for the proprietary claim to substitute assets after tracing,[101] and to explain the results in some difficult cases, including *Lipkin Gorman*.[102]

Although the *a fortiori* argument has since been accepted by many leading English commentators,[103] it has never received explicit judicial recognition in English law. As the High Court of Australia recognised in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[104] "[n]o case, even in England, has treated ignorance as a 'reason for restitution'." In two High Court decisions, however, Singapore recognised "lack of consent" as an unjust factor, explicitly adopting Birks' *a fortiori* argument. The first case, *AAHG LLC v Hong Hin Kay Albert*,[105] concerned alternative claims in the tort of conversion, causing damage to reversionary interest and unjust enrichment.[106] Judicial Commissioner Chua Lee Ming held that the conversion claim was successful[107] and that both alternatives would also have succeeded on the facts.[108] Analysing the unjust enrichment claim, Chua JC applied Birks' four-question framework, following the lead of the Court of Appeal in *Anna Wee*.[109] On the relevant "unjust factor" Chua JC said:[110]

> "There is much force in the argument (which the Court of Appeal noted in *Anna Wee*[111]) that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. In my view, lack of consent ought to be recognised as an unjust factor. In the present case, the unjust factor was the lack of DVI's consent when the defendant procured the transfer of the Shares to himself … In my view, the plaintiff would have succeeded in its claim in unjust enrichment and would have been entitled to recover the value of the Shares from the defendant."

This appears to be the first case in the Commonwealth explicitly accepting "lack of consent" as an unjust factor.[112] Given the controversy surrounding it, such strongly worded judicial support may no doubt raise eyebrows.[113] But whatever the merits, *AAHG* has made its mark on the positive law. *AAHG* cannot be so easily dismissed as a single aberration, a blip on the radar. Its recognition of "lack of consent" as an "unjust factor"

99. Eg, *Goff & Jones*, 9th edn (2016), [8.62–8.66], [8.110-8.112]; Edelman & Bant (2016), 281–282, 287.
100. Eg, *Goff & Jones*, 9th edn (2016), [8.119–8.137]; Burrows, *Restitution*, 424–431; Edelman & Bant (2016), 287–291.
101. Eg, *Goff & Jones*, 9th edn (2016), [8.152–8.165]; Burrows, *Restitution*, 169–171. *Cf Foskett v McKeown* [2001] 1 AC 102, 127 (Lord Millett) and 108, 110 (Lord Browne-Wilkinson).
102. Eg, *Goff & Jones*, 9th edn (2016), [8.82–8.86]; Burrows, *Restitution*, 413–415; Edelman & Bant (2016), 285–286.
103. Eg, *Goff & Jones*, 9th edn (2016), ch.8; Burrows, *Restitution*, ch.16; Edelman & Bant (2016), 281–291; Graham Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford, 2015), ch.8.
104. [2007] HCA 22; 230 CLR 89, [156].
105. [2017] SGHC 274; [2017] 3 SLR 636; noted by Mohammud Jaamae Hafeez-Baig and Jordan English, "'Lack of Consent' as an Unjust Factor' [2017] LMCLQ 176.
106. [2017] SGHC 274, [22].
107. *Ibid*, [64–65].
108. *Ibid*, [69], [77].
109. *Ibid*, [70].
110. *Ibid*, [74–77].
111. *Anna Wee* [2013] SGCA 36, [139].
112. *Cf Great Investments Ltd v Warner* [2016] FCAFC 85 (Jagot, Edelman and Moshinsky JJ).
113. Its most prominent objectors include Swadling (2008) 28 OJLS 627.

was subsequently noted by Steven Chong JA in *Ong Teck Soon v Ong Teck Seng*.[114] More importantly, *AAHG*'s reasoning was more fully expanded upon, and followed in *Compañia De Navegación Palomar SA v Koutsos, Isabel Brenda*.[115]

Koutsos was the latest instalment of a long-running series of disputes between members of the De La Sala family. Ernest, its *de facto* head, had given control of the claimant companies to his niece, his nephew and his niece's husband as part of continuity planning. But the three fell out with Ernest. Ernest, pursuant to his authority to act as sole signatory for the companies, then transferred large sums into his own bank account.[116] Earlier litigation had found him liable to return the sums transferred to the claimants.[117] *Koutsos* concerned claims for breach of fiduciary duty, knowing receipt and unjust enrichment brought against Ernest's sister, Isabel, who had received some of the misappropriated funds from him.

Holding that all three claims against Isabel succeeded,[118] Tan Siong Thye J reasoned in a pattern remarkably resembling the reasoning in *AAHG.* Again, Tan J commenced with the customary recitation of Birks' "four-questions", before proceeding to discuss the relevant "unjust factor". He emphasised, as *AAHG* did,[119] that "there is no freestanding claim on the abstract basis that it is 'unjust' for the defendant to retain the benefit—there must be a certain recognised unjust factor or event which gives rise to the claim".[120] Citing *AAHG* as a case "that appears to be in support of [lack of consent] being an unjust factor",[121] and noting its recognition in *Ong Teck Soon*,[122] Tan J concluded:[123]

> "I can accept that lack of consent should be recognised as an unjust factor. On the facts of this case, there is a clear lack of consent from the Plaintiff Companies in relation to the five transfers aggregating US$2.75m to Isabel … If the Plaintiff Companies had not even been aware of the transactions, they would surely have been unable to provide their consent. I, thus, find that the transfer of the US$2.75m amounts to an unjust enrichment for Isabel."

These are bold decisions, noteworthy across the Commonwealth. The trend is clear. But it may be noted, as Tan J did in passing,[124] that as a matter of Singaporean authority it is not that easy to square these line of cases with the outcome and reasoning of an earlier decision, *Tjong Very Sumito v Chan Sing En*.[125] There, the first instance judge, Steven Chong J (as he was then), had accepted "want of authority" as an unjust factor.[126] On appeal, however, the Court of Appeal overruled him on this point, giving as a reason the

114. [2017] SGHC 95; [2017] 4 SLR 819, [23–24].
115. [2020] SGHC 59.
116. *Ibid*, [10–11].
117. *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16; [2018] 1 SLR 894.
118. *Koutsos* [2020] SGHC 59, [131–135].
119. [2017] SGHC 274, [72].
120. *Anna Wee* [2013] SGCA 36, [134].
121. *Koutsos* [2020] SGHC 59, [126].
122. *Ibid*, [128].
123. *Ibid*, [129–130].
124. *Ibid*, [124].
125. [2013] SGCA 44. See also TM Yeo, "Unjust Enrichment: Revolution and Evolution in the Asia-Pacific" [2017] RLR 152, 161–162.
126. [2012] SGHC 125; [2012] 3 SLR 953, [120].

lack of judicial and academic support for its recognition.[127] So a kink remains, which needs sorting out. While there are certainly possible distinctions to be drawn between "lack of consent" and "want of authority", the former seems to be an unjust factor of wider ambit, encompassing all cases of "want of authority", and more. It does not seem a plausible position to accept "lack of consent" while rejecting "want of authority". In a rational legal system these two lines of cases must be reconciled.

On a brief aside, it may be questioned whether absence of consent indeed follows *a fortiori* from impaired intention to transfer. The analogy may not be as watertight as initially appears. Salient distinctions may be, and perhaps ought to be, drawn between the case of an attempted transfer (though impaired) as in a mistaken payment, and the case where there is no attempt at all to make a transfer or to do anything of the sort, say of someone sleeping, in a coma, having a shower or on holiday in Costa Rica. Intentions are obviously relevant to the (successful) exercise of one's legal powers. Less so where no power is being invoked. Where the claimant voluntarily intends to confer some benefit to another,[128] the quality of his intention is clearly relevant, as it determines the legal effect of his acts.[129] For example, the transfer of possession takes on a different complexion where accompanied by a donative intent, rather than an intention for another to hold on bailment,[130] as when borrowing books from a library. But, where the claimant does not intend to confer any benefit to another through his conduct (non-participatory enrichments), "it is quite hard to comprehend why the claimant's state of mind should be relevant".[131] If this line is pressed further, the *a fortiori* argument could eventually break down.

That said, the point is clear: Birks' thinking has made its mark on Singaporean law, in a way unobserved in England. His *a fortiori* argument followed from his commitment to impaired intention as the normative justification for the bulk of unjust enrichment claims, forming its core. While there is of course always a possibility of the reasoning in this line of cases being conclusively rejected by a future apex court, this series of developments constitute an undoubted and significant inroad. Birks' writings have breathed life into the issue, now well and alive here.

127. [2013] SGCA 44; [2013] 4 SLR 308, [111–115]. Another was that the cases cited in support of "want of authority", such as *Lipkin Gorman v Karpnale* and *Nelson v Larholt* [1948] 1 KB 339, had not been decided on that basis, but had been decided based on the idea that the defendant had received the claimant's property: [2013] SGCA 44, [113–114]. See also [123]: "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". This stance appears to be a misunderstanding of Birks' methodology (and that of other unjust enrichment scholars), which was an essentially interpretive project: see *ante*, text to fn.47. If the premise is that "unjust enrichment" was a concept concealed under the edges of, eg, "quasi-contract" and "constructive trusts", one would naturally expect the judicial reasoning in prior cases to be less than lucid. The true danger is in holding reasoning of older cases up to modern standards. An alternative view that could be adopted is of this being an interesting case of legal transplantation, in which the transplanted doctrine ("unjust enrichment") ends up modified when translated to a different context.

128. What Birks described as "participatory" enrichments: *Unjust Enrichment*, 129.

129. Chambers and Penner (*supra*, fn.97), 255–256.

130. *Ibid*, 255.

131. Birke Häcker, "Unjust factors versus absence of juristic reason (causa)" in *Research Handbook* (2020) 290, 297.

(b) Limitation

Singaporean law has diverged on yet another point, concerning the law of limitation. The Singaporean courts have taken a different approach, arguably more principled. By so doing, they have strongly affirmed Singapore's commitment to the independence of unjust enrichment as a source of legal obligations, distinct from contract and tort—a key element of Birks' thinking.

Faced with a poorly drafted limitation statute, the English courts have deployed ad hoc fixes. It is well known that the English position on limitation is convoluted, with "a patchwork of provisions" applying to different types of claims.[132] Defined limitation periods are specified under the Limitation Act 1980.[133] Time usually runs from the date that the cause of action accrued, but the 1980 Act also contains provisions postponing the start date in some cases, including where the claimant was mistaken.[134]

In *Re Diplock*,[135] the English Court of Appeal assumed that s.5, prescribing 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". In *Kleinwort Benson v Sandwell BC*[136] Hobhouse J followed this approach. The parliamentary debates leading to the enactment of the Limitation Act 1939 made clear that the Act was to give effect to the recommendations of the Law Revision Committee that the period for all actions founded in tort or simple contract, including quasi-contract, should be six years.[137] For "equitable relief" claims which do not have a limitation period explicitly stated in the Act,[138] the question is whether one can be applied "by analogy".[139] If not, the claim could nevertheless still be barred by laches.[140]

The Singaporean approach may be usefully contrasted here. The leading case remains *MCST No 473 v De Beers Jewellery Pte Ltd*.[141] De Beers owned flats in a condominium, the People's Park Complex, managed by the MCST. De Beers wanted to subdivide its four flats into eighteen units, but this required approval by the MCST. The MCST granted its approval, but only on condition that De Beers paid them sums to upgrade and maintain the complex. De Beers did so, thinking it a "cost of obtaining the approvals" and believing the MCST had the power to levy those payments.[142]

132. Edelman & Bant (2016), 388.

133. Eg, under the Limitation Act 1980, s.10, contribution claims under the Civil Liability (Contribution) Act 1978 have a limitation period of two years.

134. Limitation Act 1980, s.32(1)(c). *Kleinwort Benson v Lincoln CC* [1998] Lloyd's Rep Bank 387; [1999] 2 AC 349; *Deutsche Morgan Grenfell* [2006] UKHL 49; *Sempra Metals* [2007] UKHL 34; *Test Claimants in the FII Group Litigation v HMRC* [2016] EWCA Civ 1180; [2017] STC 696; *Prudential Assurance v HMRC* [2018] UKSC 39; [2019] AC 929. See further e.g. Samuel Beswick, "The Discoverability of Mistakes of Law" [2018] LMCLQ 112; Samuel Beswick, "Discoverability Principles and the Law's Mistakes" (2020) 136 LQR 20.

135. [1948] Ch 465, 514.

136. [1994] 4 All ER 890, 942–943.

137. *Ibid*.

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

139. Section 36(1): "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."

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

141. [2001] SGHC 206; [2001] 2 SLR(R) 669; affd [2002] SGCA 13; [2002] 1 SLR(R) 418.

142. *De Beers* [2001] SGHC 206, [58].

In a later dispute, De Beers sought recovery of these payments on various grounds, including mistake of law.

At first instance, Prakash J (as she was then) ruled in De Beers' favour. She held that the MCST did not have the statutory powers to levy those payments.[143] Thus, De Beers had paid over the sums under a mistake of law, and so could compel their repayment.[144]

However, an obstacle stood in the way. These payments by De Beers had been made eight to nine years before its claim was brought. Was the recovery of these payments time-barred? If the English approach was adopted, a six-year limitation period would apply. De Beers' claim would fail. Prakash J did not follow the English position. Instead, she held that:[145]

"De Beers's claim for restitution of payments made under a mistake of law is not time-barred. Until the Legislature intervenes, it would appear that there is no applicable limitation period for restitutionary claims which have no grounding in contract."

Prakash J rejected counsel's contention that s.6(1)(a) of the Singapore Limitation Act,[146] which provides for a limitation period of six years for "actions founded on a contract or on tort", could apply.[147] This was clearly not a tort claim. Nor was it "founded on a contract".[148] An earlier case raised by counsel, *Ching Mun Fong v Liu Cho Chit*,[149] was distinguished on the basis that it involved an anticipated contract which failed to materialise, while *De Beers* did not. She emphasised that "De Beers founded its claim in restitution … [and] that no contract arose or was capable of arising in the circumstances",[150] eschewing as "fictitious" the idea of implying a contractual obligation to repay.[151]

Prakash J also rejected the contention that the claim fell within the Singapore Limitation Act, s.6(7) as a "claim for equitable relief founded upon a ground in equity", where a six-year limitation period would also be available.[152] This was rejected because the claim to recover money paid by mistake was said to be a "common law claim", "not founded in equity".[153]

143. *Ibid*, [34–45].
144. *Ibid*, [54–58].
145. *Ibid*, [79].
146. Singapore Limitation Act (Cap 163, 1996 Rev Ed). NB the relevant provisions here are *in pari materia* to the English Limitation Act 1939, s.2(1): "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:— (a) actions founded on simple contract or on tort."
147. *De Beers* [2001] SGHC 206, [77]. Prakash J did not discuss *Kleinwort Benson v Sandwell*, instead discussing *Kleinwort Benson Ltd v Glasgow City Council* [1998] Lloyd's Rep Bank 10; [1999] 1 AC 153, concerning the jurisdiction of an English court to hear the action as "an action relating to a contract": [74–77].
148. *De Beers* [2001] SGHC 206, [69].
149. [2000] SGHC 199; [2000] 3 SLR(R) 304; affd [2001] SGCA 36; [2001] 1 SLR(R) 856. Here a payment was made under a purported oral contract for the sale of land, but it later transpired that the seller had no rights to the land. Seventeen years after the payment had been made, the buyers sought to recover the payment. It was held to be time-barred, the courts holding that the words of s.6(1)(a) were "wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise": [2000] SGHC 199, [73]; affd [2001] SGCA 36, [27].
150. *De Beers* [2001] SGHC 206, [77].
151. *Ibid*, [76]. In support, she cited with approval *Westdeutsche* [1996] AC 669, 710 (Lord Browne-Wilkinson).
152. *De Beers* [2001] SGHC 206, [78].
153. *Ibid*.

On appeal, the Court of Appeal upheld De Beers' claim,[154] affirming the trial judge's ruling that it was not time-barred. Yong Pung How CJ delivered the unanimous joint judgment with Chao Hick Tin JA and Tan Lee Meng J:[155]

"A perusal of the Limitation Act showed that a claim for unjust enrichment which was neither grounded in contract nor tort, and in which equitable relief was not sought, did not fall within the scope of the Act."

De Beers is the high water mark of taking unjust enrichment seriously, as a distinct source of obligation from contract or tort. This distinctiveness, it might be recalled, was a key element to Birks' thinking; to carve out unjust enrichment's role as an independent subject in its own right, he thought it necessary to define it as a not-wrong, and distinguish it from what he saw as fictional implied contracts or quasi-contracts. This was a reason Birks latched onto *Kelly v Solari*[156] as a "core case";[157] Mrs Solari had received a sum mistakenly paid out under a lapsed insurance contract, but her behaviour at time of receipt could be not be impugned. It was a neat, clean example of an impaired consent transfer due to a purely unilateral mistake on the payor's part, not induced by the payee. Restitution in that case could thus not be easily re-explained as responding to the payee's wrongdoing or to a contract.[158]

Rather than apply a strained interpretation to a poorly drafted statute, *De Beers* affirmed unjust enrichment's independence as a source of legal obligations, even if this left unjust enrichment claims unregulated by any statutory limitation period. Again, *De Beers* cannot be dismissed as an isolated instance, divorced from the background of larger trends. As seen above, similar statements have been made in more recent cases to the same effect, stressing the independence of unjust enrichment from tort and contract.[159]

Subsequent cases have noted that *De Beers* represents the legal position today,[160] with statutory reform mooted but not enacted.[161] A live question remains whether the equitable doctrine of laches could apply to bar claims for restitution of mistaken payments, classically thought to be exemplified by the old form of action, monies had and received.[162] Yong CJ in *De Beers*[163] seemed to suggest it could, but this stands now in contrast to *Anna Wee*, a more recent decision, which characterised the right to restitution generated by a mistaken payment as "a claim based on strict liability at common law", opposing it to equity.[164] This, we think, is simply another indication of the fraught relationship between equity and unjust enrichment in Singapore, to an aspect of which we now turn.

154. *De Beers* [2002] SGCA 13.
155. *Ibid*, [32].
156. (1841) 9 M&W 54; 152 ER 24.
157. *Unjust Enrichment*, 3–9.
158. *Ibid*.
159. *Turf Club* [2018] SGCA 44, [181]; and see *ante*, text to fn.77.
160. *OMG* [2012] SGCA 36, [39–46]; *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] SGCA 27; [2013] 2 SLR 120, [42].
161. Law Reform Committee, *Report of the Law Reform Committee on the Review of the Limitation Act* (Cap 163) (February 2007).
162. *OMG* [2012] SGCA 36, [39–46]; *eSys* [2013] SGCA 27, [42].
163. *De Beers* [2002] SGCA 13, [33–34].
164. *Anna Wee* [2013] SGCA 36, [109], [137], [138].

(c) Resulting trusts

A third point of divergence concerns the availability of proprietary responses to unjust enrichment,[165] particularly through resulting trusts. Singaporean courts appear more open to this prospect than the English courts.

English law generally accepts as its starting point that "the standard response to unjust enrichment is a 'monetary restitutionary award'".[166] When and why proprietary responses are available remains difficult,[167] with trusts not currently a favoured response. Today, outside mistakes,[168] authorities in support of an immediate trust to prevent unjust enrichment are few or controversial. But this was not always so.

Along with Robert Chambers, Birks once argued that resulting trusts might be "equity's principal contribution to the independent law of unjust enrichment".[169] On their view, the traditional categories of resulting trusts—failed gifts, and "presumed" resulting trust cases—were instances of a wider principle identifying when resulting trusts arose: where there is a "lack of intention to benefit the recipient".[170] Generalising, Birks and Chambers argued that this wider principle could encompass other instances beyond the traditional categories, including a mistaken payment, the example par excellence of impaired intention. In all these cases, unjust enrichment was the "causative event"; and a resulting trust was the response. Acceptance of the Birks-Chambers thesis entailed that resulting trusts should arise in more instances than previously thought. This view of the resulting trust was firmly rejected by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[171] Twenty years later, scepticism remains. In *Angove's Pty Ltd v Bailey*[172] the UK Supreme Court held that "failure of consideration does not give rise to a proprietary restitutionary right",[173] in the process casting doubt on a line of cases suggesting that trusts might arise for a failure of basis,[174] as "the prospect of a total failure of consideration, however inevitable, is not a circumstance which … vitiate[s] the intention … to part with [an] entire interest in the money".[175]

Some of these routes, since closed off in England, remain wide open in Singapore. Indeed, there is clear evidence of receptiveness by the Singaporean judiciary. Singapore has gone quite far down the path towards adopting the Birks-Chambers thesis on resulting

165. See generally Timothy Liau and Rachel Leow, "Proprietary Restitution", in *Research Handbook* (2020) 476.

166. *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66; [2016] AC 176, [81].

167. *Angove's Pty Ltd v Bailey* [2016] UKSC 47; [2016] 1 WLR 3179, [30].

168. *Westdeutsche* [1996] AC 669, 714–715, reinterpreting *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

169. Peter Birks, "Restitution and Resulting Trusts", in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1990) 335, 372.

170. Robert Chambers, *Resulting Trusts* (OUP, 1997), 1–4; Robert Chambers, "Resulting Trusts", in *Mapping the Law* (2006) 247, 254; Birks, "Restitution and Resulting Trusts" (*supra*, fn.169), 346.

171. [1996] AC 669, 708–709. Similarly, *ibid*, 689, *per* Lord Goff. Cf *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412 (Lord Millett). See further William Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 72; John Mee, "Presumed Resulting Trusts, Intention and Declaration" (2014) 73 CLJ 86.

172. [2016] UKSC 47; [2016] 1 WLR 3179.

173. *Ibid*, [30] (Lords Sumption, Neuberger, Clarke, Carnwath and Hodge).

174. *In re Japan Leasing (Europe) Plc* [1999] BPIR 911 overruled*; Neste Oy v Lloyd's Bank Plc* [1983] 2 Lloyd's Rep 658 doubted on the basis it was decided: "mistake would have been a better basis for the decision", as suggested in *In re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch); [2008] BCC 22, [39–40] (Mann J).

175. *Angove's* [2016] UKSC 47, [30] (Lords Sumption, Neuberger, Clarke, Carnwath and Hodge).

trusts. The lack-of-intention analysis was first mooted in *Chan Yuen Lan v See Fong Mun*,[176] involving a dispute over the equitable ownership of a house between a married couple. The decision focused on whether such disputes were to be resolved primarily through a resulting trust, or a common intention constructive trust. In a joint judgment by VK Rajah JA, Sundaresh Menon CJ and Andrew Phang JA, the Singaporean Court of Appeal chose the former.[177] Referring to Chambers' book, *Resulting Trusts*,[178] and later to Birks' "wider thesis",[179] the court said[180] "[t]his view has the judicial support of Lord Millett … in the Privy Council case of *Air Jamaica*.[181]" Considering the "competing view" of Lord Browne-Wilkinson in *Westdeutsche*, they concluded:[182]

"We are of the view that going forward, the lack-of-intention analysis may potentially provide a more sensible basis for the principled yet pragmatic development of this equitable doctrine."

Several years later, in *Chia Kok Weng v Chia Kwok Yeo*, a dispute between siblings concerning equitable ownership of the family home, the "lack of intention" analysis was firmly adopted by the Court of Appeal.[183] Judith Prakash JA, Chao Hick Tin JA and Steven Chong JA accepted that:[184]

"When the presumption of resulting trust applies, the fact that is being inferred is the lack of intention of the transferor to benefit the transferee, and not the presence of an intention of the transferor to retain a beneficial interest."[185]

Thus:[186]

"the correct position in law is that in rebutting the presumption of resulting trust, what the transferee needs to prove is not that the transferor did not have an intention to retain a beneficial interest, but that the transferor had the donative intent to benefit him or to make a gift to him."

As it could not be shown that the transferor did intend to benefit his brother, the transferee, the transferred share in the property was held by the transferee on resulting trust. Apart from cases concerning presumed resulting trust over family homes, Singaporean courts have also affirmed the "lack-of-intention" analysis in cases of "Quistclose trusts".[187] Put together, a trend is discernible. These developments suggest a wider scope in Singapore for an explicit recognition of resulting trusts as responses to unjust enrichment. The point is ripe—in fact overdue—for argument, unlike in England, where the temperature remains "decidedly cold".[188]

176. [2014] SGCA 36; [2014] 3 SLR 1048.
177. *Cf Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432; *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776.
178. *Chan Yuen Lan* [2014] SGCA 36, [38], referring to Robert Chambers, *Resulting Trusts* (1997).
179. *Chan Yuen Lan* [2014] SGCA 36, [39], referring to *Unjust Enrichment*, 305.
180. *Chan Yuen Lan* [2014] SGCA 36, [38].
181. *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412.
182. *Chan Yuen Lan* [2014] SGCA 36, [44].
183. [2017] SGCA 54; [2017] 2 SLR 964.
184. *Ibid*, [47].
185. *Ibid*, [47].
186. *Ibid*, [49]
187. *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] SGHC 137; [2015] 4 SLR 474, [112], [114].
188. *Westdeutsche* [1996] AC 669, 689 (Lord Goff).

Some clarifications are in order. First, despite accepting "lack-of-intention", Singaporean courts have not gone a step further to accepting outright that the resulting trust responds to the transferee's unjust enrichment.[189] "Lack-of-intention" was accepted because it "fits" better with the case law than the "positive intention" analysis.[190]

More importantly, it might be stressed that, even if the Birks-Chambers' lack-of-intention view is accepted, the resulting trust may arise in fewer instances than they had initially thought. Impaired intention does not follow *a fortiori* from lack-of-intention, even if one might argue the reverse. Not every situation where the transferor's intention was impaired will generate a resulting trust. Even in the classic case of a mistaken payment, if the payor pays mistakenly believing that he owes a debt (which he does not), his very intention must be to benefit the payee, in order to obtain a good discharge.[191] Similarly, in *Allcard v Skinner*,[192] a novice nun, under the Lady Superior's undue influence, transferred her property to the latter to advance the Order's aims. But this shared purpose could be achieved only if the nun positively intended to benefit the Lady Superior.

So, while the Singaporean courts have diverged from their English counterparts, and have indeed gone a considerable distance down the path, it is thus still an open question how far Singaporean courts will take their analysis of the resulting trust, and consequently, how far this will expand the general availability of trust-based proprietary responses to unjust enrichment.

4. EXPLAINING BIRKS' TRACTION IN SINGAPORE

Birksian themes have gained observable traction. One could even say that they have had a relatively greater uptake in Singaporean private law than in its English counterpart. How could this be explained? We venture here five interrelated reasons: (i) the underdeveloped state of Singaporean law in the 1990s and the potential of Birks' work to create a rational and orderly private law; (ii) poor prospects for developing a home-grown Singaporean jurisprudence; (iii) the receptiveness of Singaporean lawyers to English developments due to a common legal heritage and education; (iv) the judiciary's role; and (v) the Birksian framework's attractiveness as a user-friendly and easily accessible tool for structuring legal reasoning.

(a) A desire to construct a rational private law

Unlike England's, Singapore's legal system was at an early stage of development when *Introduction* was published. As a former British colony, important aspects of its legal system were underdeveloped. Upon independence, Singapore inherited legislation from

189. Rachel Leow and Timothy Liau, "Resulting Trusts: A Victory for Unjust Enrichment?" (2014) 73 CLJ 500, 502.

190. *Chan Yuen Lan* [2014] SGCA 36, [41], as it could explain cases such as *Vandervell v IRC* [1967] 2 AC 291.

191. *Cf* PJ Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399, 402.

192. (1887) 36 Ch D 145.

numerous sources: some home-grown, some made in India,[193] and English legislation received into Singapore law.[194] Which statutes had been received into Singapore law was unclear until as late as 1993, when legislation was finally passed to clarify the position.[195] Case law development was slow. Courts in the 1970s and 1980s had a large backlog of cases, which slowed down judicial development of the law. Greater efficiency was only achieved in the 1990s after the appointment of Yong Pung How CJ.[196] There were also difficulties with law reporting; Singaporean cases were only consistently reported in its own set of dedicated law reports from 1991.[197] Initially lawyers were English or trained in England, with legal education in Singapore beginning only in 1957 with the establishment of a department of law at the University of Malaya.[198]

Against this background, Birks' vision of unjust enrichment,[199] and of private law more generally, provided the tools to *construct* a rational private law.[200] Birks' taxonomy of private law provided an accessible map. Understanding how the different pieces fit within a larger whole made it possible to "move confidently" from one part of private law to another.[201] Individual doctrines could be made intelligible without relying on fictions or apparently illogical categorisations. Quasi-contract was a legal fiction which occluded, rather than aided, understanding. The forms of action were no better, and often in Latin, thus needing translation for nearly every Singaporean lawyer. Birks' work pointed the way to construct a rational private law from the ground up in a system which did not have a long history. The mistakes of history could be avoided; a new path could be confidently forged.

By contrast, in England, there was less need for the advantages presented by Birks' work. English law was a well-developed legal system with centuries' worth of case law and scholarship. What *Introduction* and Birks' other work provided first and foremost was a way to *understand* and reinterpret existing English law.[202] This made the impetus for immediate take-up of Birks' work in England less critical. English courts could, in most cases, largely get by through a slow process of analogous reasoning from existing cases. But the Singaporean courts could not.

Furthermore, there were also important instrumental reasons for Singapore's desire to construct a rational private law. First and foremost of these was to develop Singapore's economy. The rule of law was seen as crucial to attract foreign investment

193. Kevin YL Tan, "A Short Legal and Constitutional History of Singapore", in Kevin YL Tan (ed), *The Singapore Legal System*, 2nd edn (Singapore, 1999), 34–35.

194. See *supra*, fn.59.

195. Application of English Law Act (Cap 7A, 1994 Rev Ed).

196. Kevin YL Tan, "As Efficient as the Best Businesses: Singapore's Judicial System", in Jiunn Rong Yeh and Wen Chen Chang (eds), *Asian Courts in Context* (Cambridge, 2015), 237.

197. Kevin YL Tan, "Singapore: A Statist Legal Laboratory", in Ann Black and Gary Bell (eds), *Law and Legal Systems of Asia* (Cambridge, 2010), 340.

198. Cheng Han Tan et al, "Legal Education in Asia" (2006) 1 Asian J of Comparative Law 1, 2.

199. Eg, *Introduction*, Ch.2; *Unjust Enrichment*, Ch.2.

200. See further Peter Birks, "Definition and Division: A Meditation on Institutes 3.13", in Peter Birks (ed), *The Classification of Obligations* (Oxford, 1997) (classification); Birks (1996) 26 UWALR 1 (equity); Peter Birks, "The Concept of a Civil Wrong", in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP, Oxford,1996) (wrongs); Peter Birks, "Rights, Wrongs and Remedies" (2000) 20 OJLS 1 (remedies).

201. Birks (1996) 26 UWALR 1, 7.

202. See *ante*, text to fn.47.

and multinational businesses.[203] Lacking natural resources and land and possessing a small population, Singapore viewed foreign investment and technology as the "engine" driving economic growth, with a legal and business environment protecting contractual and property rights as its "fuel".[204] A rational private law would inspire investor confidence, leaving businesses with faith that their disputes could be resolved adequately by Singaporean courts.

These instrumental benefits are equally powerful today. In the last decade, Singapore has specifically targeted the legal services market as an area for potential economic growth.[205] A three-pronged approach was taken to promote Singapore as a hub for arbitration,[206] non-adversarial dispute resolution such as mediation[207] and, most recently, the court resolution of international commercial disputes. To achieve the last aim, the Singapore International Commercial Court was created in 2015.[208] Its distinguished members include the former members of the House of Lords and UK Supreme Court, Lord Neuberger and Lord Mance, the former Chief Justice French of Australia, and the former Chief Justice MacLauchlin of Canada. Singaporean courts have also been keen on developing Singapore's substantive law (primarily private and commercial law)[209] for it to be more attractive to commercial parties than other options such as English law. As then Chief Justice Chan Sek Keong explained in 2008, "we are also taking more time to examine legal issues in greater depth, and this has resulted in longer and more comprehensive judgments. We also wish to raise the stature of our decisions in the common law world, and hope that this will be a positive factor in promoting Singapore as a legal services hub".[210]

(b) Difficulty in developing home-grown jurisprudence

The difficulties in developing a home-grown jurisprudence also made Birks' vision more attractive. There were few cases, no especial expertise in the legal profession, nor specialist judicial expertise in Singapore. These factors applied with much less force in England.

In Singapore's early years, there was little opportunity for courts to develop a home-grown unjust enrichment jurisprudence incrementally. Before the 2000s, there was a relatively low case load, of which unjust enrichment cases formed only a small proportion. Few opportunities presented themselves for incremental development of

203. Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 Sing Acad LJ 413, 419; Prime Minister Lee Hsien Loong, "Address at the 150th Anniversary of the Attorney-General's Chambers" (31 March 2017).

204. Menon (2016) 28 Sing Acad LJ 413, [21].

205. *Report of the Committee to Develop the Singapore Legal Sector: Final Report* (September 2007); *Final Report of the Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (January, 2014).

206. Eg, through the Singapore International Arbitration Centre.

207. Eg, through the Singapore International Mediation Centre.

208. See Man Yip, "The Resolution of Disputes Before the Singapore International Commercial Court" (2016) 65 ICLQ 439.

209. See eg Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", in Stephen Moriarty (ed), *The Commercial Bar Association (COMBAR) 1989–2014: Celebrating the First 25 Years* (Oxford, 2016).

210. Chan Sek Keong, "Opening of the Legal Year 2008 Speech" (5 January 2008).

the law. The general state of unjust enrichment expertise in the legal profession left quite a bit to be desired, and rather much room for improvement. Until 2007, there was only one law school in Singapore—the National University of Singapore—and a course on the subject was taught only sporadically over the last two decades. The lack of expertise has meant that good unjust enrichment arguments that could be raised may have been missed; even if spotted, a lack of expertise would likely have affected the quality of argument. This provided a rather shaky basis on which courts could develop the law. Nor was there special judicial expertise on unjust enrichment when it first began developing seriously in Singapore in the late 1990s to the first decade of the new millennium. Most of the judges on the bench then had studied law at a time pre-dating *Introduction*. The courts themselves were not particularly equipped to strike out on their own at a time when there was a great deal of excitement and impetus for the unjust enrichment project.

By contrast, the difficulties with developing a home-grown jurisprudence did not exist in England. English law boasted a long history of case law. What Birks did was attempt to find the internal order within this existing material. The impetus for adopting new rationalisations was less strong in England, where existing cases could be fallen back on to decide cases. To a cautious English judge, used to deciding cases "bottom-up" in an incremental way, proceeding simply along established lines of thought was the path of least resistance.

What of the situation now? Singaporean courts now have a sizable case-load and reasonable numbers of unjust enrichment cases. The expertise of the legal profession is improving but only slowly. In some instances courts have had to construe the sparse pleadings creatively to avoid perpetuating further injustice.[211] Important issues, such as the availability of change of position to restitution for wrongs cases in *Cavenagh Investment v Kaushik Rajiv*[212] were raised by the presiding judge, not counsel.[213] Judicial suggestions may not always be perfect. For example, in a case where tax authorities awarded excess credits to a taxpayer who had utilised an elaborate tax avoidance scheme, the Court of Appeal suggested that perhaps the Comptroller had a common law unjust enrichment claim to recover the tax refunds as monies paid under a mistake.[214] Pointed in that direction, the Comptroller is presently pursuing such a claim. A serious, probably fatal, objection has so far been overlooked: that the statute impliedly excludes such a claim by providing detailed machinery for the recovery of mistaken payments.[215] While the current Singaporean Court of Appeal is quite academically orientated, to date there has not been an unjust enrichment specialist on the Supreme Court, unlike some other subjects where former academics have been appointed to the High Court or

211. See eg *Anna Wee* [2013] SGCA 36, [100]; *Khor Liang Ing Grace v Nie Jianmin* [2014] SGHC 202; [2014] 4 SLR 1197, [27–29]; *Lo Man Heng v UBS AG* [2014] SGHC 134, [83]; *Ong Lu Ling v Tan Ho Seng* [2018] SGHC 65, [3], [10].

212. [2013] SGHC 45; [2013] 2 SLR 543.

213. Anecdotal evidence from counsel in the case.

214. *Comptroller of Income Tax v AQQ* [2014] SGCA 15; [2014] 2 SLR 847, [162].

215. Eg, *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; [2011] 2 AC 15, [31–34]; *Investment Trust Companies v RCC* ("*ITC*") [2017] UKSC 29; [2018] AC 275, [86–87].

Court of Appeal.[216] Contrast Lord Goff's contributions in England,[217] and Justice James Edelman, making an observable impact in Australia today,[218] while Professor Andrew Burrows, a leading unjust enrichment scholar, has recently been appointed to the UK Supreme Court.

The lack of cases, specialist judicial expertise, and expertise of the profession made development of a Singaporean jurisprudence daunting, if not impossible, in Singapore's formative years. Some of these problems continue today. By contrast, these reasons largely did not exist in England.

(c) The impact of the judiciary

Singapore's judiciary also played a keen role in the reception of *Introduction* and Birks' other writings.

In the 1990s, there were close personal connections between Peter Birks and some members of the judiciary, such as the late Lai Kew Chai J. As opposed to other, more sceptical scholars, Birks was invited to give seminars to the judiciary and the legal profession. As early as in 1994, Birks's work appeared in Singaporean law journals.[219]

To some extent, these developments largely paralleled those in England during the same time period. Lord Goff, obviously, was sympathetic to the reception of restitution and unjust enrichment scholarship, as were Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Millett. Lord Nicholls' speech in *Attorney General v Blake*,[220] his views on knowing receipt[221] and his important decision in *Criterion Properties v Stratford UK Properties*[222] all bore unmistakable marks of being engaged with current thinking. Lord Hoffmann, too, was similarly engaged,[223] while Lord Millett wrote many influential judgments[224] and articles[225] on aspects of the subject. Lord Rodger, too, was a great friend of Birks. Birks held a chair at the University of Edinburgh, and his work greatly influenced Lord Rodger, who sought to implement Birks' ideas in the Scots law of unjustified enrichment.[226]

However, there was a divergence from the middle of the first decade of this millennium. A bench of new, academically inclined judges had been appointed to the Singaporean

216. Eg, contract law (Andrew Phang), intellectual property law (George Wei) and family law (Debbie Ong).

217. See *ante*, text to fnn 48–54.

218. Eg, *Great Investments Ltd v Warner* [2016] FCAFC 85; *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32.

219. Peter Birks, "Major Developments in the Law of Restitution" (1994) 6 Sing Acad LJ 253.

220. [2001] 1 AC 268.

221. Lord Nicholls, "Knowing Receipt: The Need for a New Landmark", in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Oxford, 1999).

222. [2004] UKHL 28; [2004] 1 WLR 1846.

223. *Ministry of Defence v Ashman* (1993) 66 P&CR 195.

224. Eg, *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *Boscawen v Bajwa* [1996] 1 WLR 328; *Foskett v McKeown* [2001] 1 AC 102.

225. Millett (1998) 114 LQR 399; Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (NSW Australia, 2005); Peter Millett, "*Jones v Jones*: Property or Unjust Enrichment?", in *Mapping the Law* (2006) 265.

226. See eg Robin Evans-Jones, "Thinking About Some Scots Law: Lord Rodger and Unjustified Enrichment", in Andrew Burrows, David Johnston and Reinhard Zimmerman (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013).

Court of Appeal from the start of this period, including a former leading litigator, VK Rajah, and a former contract law academic, Andrew Phang. A new Chief Justice, Chan Sek Keong, had been appointed after former Chief Justice Yong Pung How retired. These new judges were bolder in developing Singaporean law and made much more use of academic writing, making particularly noteworthy changes in the law of contract[227] and some aspects of trusts[228] even in the initial years upon their joining the court. Singaporean judgments continued to engage vigorously with academic writing and ideas, regularly citing large volumes of books and journal articles in their decisions. These developments tied into a strong desire to develop Singapore's own autochthonous law.

These new judges are also engaged with the local and international community. Andrew Phang J, a former contract law academic, continues to attend academic conferences and produce scholarly writing on contract law.[229] The current Chief Justice, Sundaresh Menon, also speaks at international conferences.[230] The Singapore Academy of Law Journal's publications committee comprises members of the judiciary. For many years, it has been chaired by Judith Prakash JA (as she is now), who actively curates the journal, develops strong relationships with the guest editors—who are typically international leaders in their areas—and commissions special issues. It is noteworthy that these judges are responsible for many of the developments in unjust enrichment we have examined earlier.

It is fair to say that, while English courts during this period did consider and engage with academic writing, they did so to a lesser extent than Singaporean courts. Furthermore, during this period, English courts were faced with a flood of cases concerning taxes overpaid contrary to EU law[231]—a topic on which Birks' work seemed to have less direct relevance. In Singapore, seizing on Birks' ideas appeared to cohere with aims to develop Singaporean law.

227. Eg, unilateral mistake in equity (*Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] SGCA 2; [2005] 1 SLR(R) 502), termination (*RDC Concrete Pte Ltd v Sato Kogyo* [2007] SGCA 39; [2007] 3 SLR(R) 413; *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] SGCA 34; [2009] 4 SLR(R) 602), remoteness (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] SGCA 8; [2008] 2 SLR(R) 623, followed later in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36; [2011] 1 SLR 150; *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] SGCA 15; [2013] 2 SLR 363), interpretation and terms (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43; [2013] 4 SLR 193), illegality (*Ting Siew May v Boon Lay Choo* [2014] SGCA 28; [2014] 3 SLR 609; *Ochroid Trading Ltd v Chua Siok Lui (t/a as VIE Import & Export)* [2018] SGCA 5; [2018] 1 SLR 363) and *Wrotham* Park damages and "restitution" for breach of contract (*Turf Club* [2018] SGCA 44).

228. *Lau Siew Kim v Yeo Guan Chye Terence* [2007] SGCA 54; [2008] 2 SLR(R) 108; *Chan Yuen Lan* [2014] SGCA 36.

229. Eg, Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract—A Comparative Perspective", in Rob Merkin and James Devenney (eds), *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (London, 2018); Yihan Goh and Andrew Phang, "A Statistical Analysis of the Influence of the Journal of Contract Law in Commonwealth Court Decisions" (2018) 35 JCL 14; Andrew Phang and Yihan Goh, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 Sing Acad LJ 170; Andrew Phang, Yihan Goh, Jerrold Soh, "The Development of Singapore Law: A Bicentennial Retrospective" (2020) 32 Sing Acad LJ 804.

230. Eg, Menon (*supra*, fn.209).

231. Eg, *Deutsche Morgan Grenfell* [2006] UKHL 49; *Sempra Metals* [2007] UKHL 34; [2008] 1 AC 561; *Test Claimants in the FII Group Litigation v RCC* [2012] UKSC 19; *ITC* [2017] UKSC 29; *Prudential Assurance* [2018] UKSC 39. See generally Steven Elliott, Birke Häcker, and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Oxford, 2013).

(d) Legal education

It is likely that the legal education of Singaporean lawyers contributed to the observed receptiveness to Birks' work. Singapore and England share a common legal heritage; English law before 1826 was received into Singapore, with continuing reception of English law in areas such as commercial law.[232] In the early decades of Singapore's independence, a significant number of Singaporean lawyers had received their undergraduate legal education in England. It was unsurprising that they would have been receptive to English authorities and developments.

As legal education became more widely available in Singapore, this receptiveness to English authorities and developments did not change. The National University of Singapore (NUS), Singapore's sole law school for many years, had many members of teaching faculty who had been trained in England. They were thus steeped in the same "common concepts, values, and methods" as English lawyers.[233] To all intents and purposes, they *were* English lawyers.[234]

Postgraduate education in England also played an important role, in more ways than one. First, in the 1990s, it became more common for Singaporean faculty members to pursue postgraduate education overseas, commonly at Oxford, Cambridge or Harvard. At Oxford, some of these faculty read for the Bachelor of Civil Law, taking the Restitution course, described as "one of the most exciting and demanding law courses in the world".[235] Restitution seminars, taught by Birks and other leading scholars, were at the very cutting edge of restitution thinking. On their return, some, such as Yeo Tiong Min, started teaching restitution courses to NUS undergraduates. Even more directly, Birks was even invited to visit the National University of Singapore law faculty in 1998, where he gave a lecture on unjust enrichment, which was published in the faculty's flagship journal.[236]

Second, young Singaporean lawyers who were not academics also increasingly started pursuing postgraduate education at Oxford. On their return, some of them participated in the Justices' Law Clerks ("JLC") programme, where they worked directly with judges.[237] The JLC programme was launched in 1991, employing a select group of highly qualified recent law school graduates to provide assistance to judges of the Supreme Court.[238] The aim of introducing this scheme was to enhance the productivity and output of the judges. JLCs work directly with judges, conducting research, preparing memoranda, reviewing materials and presenting reasoned analysis of the merits of each case to their assigned judges before oral argument.[239] It is difficult to measure the precise impact they had on the final decisions, but it is likely

232. See *supra*, fn.59.
233. Häcker "Divergence" (2015) 131 LQR 424, 433 .
234. Phang, Goh, and Soh (2020) 32 Sing Acad LJ 1, [39].
235. Rose "Evolution", *Mapping the Law* (2006) 13, 25.
236. Peter Birks, "The Law of Unjust Enrichment: A Millenial Resolution" [1999] SJLS 318. See also, just five years previously, Birks, "Major Developments" (1994) 6 Sing Acad LJ 253.
237. Eg, Aedit Abdullah (BCL Oxford) and See Kee Oon (LLM Cambridge), both now Judges of the Supreme Court.
238. Bernard Tan, "Justices' Law Clerks in the Supreme Court of Singapore" (1991) 12 Sing L Rev 340, 340.
239. *Ibid*, 344–345.

to have been substantial, given how closely they worked on individual cases and the substantive nature of their involvement on points of law.

(e) A user-friendly framework for legal reasoning

Moreover, Birks' rationalisation of unjust enrichment came with a general framework presenting a useful and easy tool for legal reasoning. Difficult issues could be broken down into bite-sized, digestible chunks, consumed in a step-by-step fashion. Accepting "unjust enrichment" as a united body of law, accessible through a four- or five-stage test, provides important advantages. It provides a simple structure for judges and counsel to approach complicated sets of facts. It helps weed out obvious problems, such as cases where counsel pleaded unjust enrichment as a cause of action, yet sought an award of *Wrotham Park* damages for breach of contract.[240] It helps counsel locate relevant case law and academic commentary. These advantages have especial appeal to a jurisdiction in which legal expertise in unjust enrichment is not particularly developed, providing a "user-friendly", systematic approach to analyse legal problems.[241]

It seems likely that Birks' four-question framework resonated with a notable recent feature of Singaporean legal reasoning: an obvious preference for multi-stage "range-of-factors" tests. This development seems to have commenced after the appointment of Chan Sek Keong CJ. Examples can be seen all over different areas of private law. In determining whether a duty of care is owed, a two-stage test is applied after a threshold requirement of factual foreseeability of the harm, with the two stages representing "proximity" and "policy considerations".[242] A different three-stage test is used to determine when a doctor has breached a duty of care in failing to warn a patient of risks.[243] For illegality, a different multi-stage approach is adopted.[244] It does not seem to be regarded as a problem that individual stages of inquiry may be open-ended, such as the assessment of whether there were policy reasons in favour of or against recognising a duty of care.

5. THE FUTURE

Although Birks' vision has always had sceptics, recent years have seen a new wave of English scepticism. If English law continues down a sceptical vein, English and Singaporean law may further diverge in the years ahead. Much depends on whether these concerns gain ground in Singapore.

240. *ARS v ART* [2015] SGHC 78, [281].

241. See also Rory Gregson, "Is subrogation a remedy for unjust enrichment?" (2020) 136 LQR 481, 503–504.

242. *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37; [2007] 4 SLR(R) 100, [73–115]. *Cf Anns v Merton LBC* [1978] AC 728*; Caparo Industries Plc v Dickman* [1990] 2 AC 605*; Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736.

243. *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] SGCA 38; [2017] 2 SLR 492. *Cf Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] AC 1430.

244. *Ting Siew May* [2014] SGCA 28; *Ochroid Trading* [2018] SGCA 5. *Cf Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2017] AC 467.

(a) Recent English scepticism

Notably, Robert Stevens and Lionel Smith have recently criticised Birks' schema for being overly unilateral, and thus failing to take seriously the defendant's non-involvement.[245] As Stevens argues, "[t]he problem with a 'claimant sided' account is that it provides no explanation as to why the defendant should be obliged to do anything at all … Such an approach would be immoral. We would be using the defendant as a means to an end, requiring them to correct an injustice that was not of their doing".[246] Smith has similarly argued that "liability cannot arise unless the defendant's autonomy is also considered. We should always be worried about the defendant's involvement in the story. People are generally responsible for things that they have done, not for things that have happened to them".[247] Both draw on Ernest Weinrib,[248] for whom corrective justice demands that only bilateral reasons can justify private law rights, tying a particular duty-bearer to a particular correlative right-holder.[249]

Smith also argues that Birks' four-question framework is over-inclusive,[250] giving us erroneous results to cases where restitution should be unavailable. Take the example of "rising heat",[251] where one person turns his heating on, benefiting his upstairs neighbour, who thereby saves the expense of paying for his own heating. Another is the case of "two stamps", where the claimant and defendant each own one rare stamp.[252] By mistake, the claimant destroys her own stamp, thereby causing the value of the defendant's stamp to rise sharply. For Smith, this is a sign that something has "gone wrong" with Birks' conceptualisation of the subject as a single cause of action,[253] as we are "trying to cover the field with a single formula".[254]

These criticisms must be taken seriously. The UK Supreme Court has taken them on board. In *Investment Trust Companies v RCC*[255] ("*ITC*") Lords Reed, Neuberger, Mance, Carnwath and Hodge unanimously recognised that the reversal of unjust enrichments at another's expense generally requires a "direct transfer of value"[256] and is based on a "principle of corrective justice".[257] It was emphasised that the four questions are "no more than broad headings for ease of exposition", "intended to ensure a structured approach to the analysis

245. Stevens, "Disaster" (2018) 134 LQR 574; Smith "A New Start?" (*supra*, fn.2). In response: Burrows, "In Defence" (2019) 78 CLJ 521.

246. Stevens, "Disaster" (2018) 134 LQR 574, 577, 581–582.

247. Smith "A New Start?" (*supra*, fn.2), 111–112.

248. Stevens, "Disaster" (2018) 134 LQR 574, 581–582; Smith "A New Start?" (*supra*, fn.2), 102, 111.

249. Ernest Weinrib, *Corrective Justice* (OUP, Oxford, 2012) 3, 19, Ch.6; Ernest Weinrib, *The Idea of Private Law*, rev ed (Oxford, 2012) 125, 142–144; Ernest Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, 2009).

250. Smith "A New Start?" (*supra*, fn.2), 96–100.

251. An example given in *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99 (IH) 105–106, discussed in *ITC* [2017] UKSC 29.

252. Daniel Friedmann, "Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Col L Rev 504, 532 fn.144; Stevens, "Disaster" (2018) 134 LQR 574, 578.

253. Smith "A New Start?" (*supra*, fn.2), 91.

254. *Ibid*, 100.

255. [2017] UKSC 29; [2018] AC 275.

256. *Ibid*, [43], [46–50]. Most exceptions were said to be "apparent", though the possibility of genuine exceptions was acknowledged.

257. *Ibid*, [43].

of unjust enrichment".[258] However, "the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements".[259] In particular, "the words 'at the expense of' do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute".[260] This appears to downplay reliance on the four questions. Similarly, in *Skandinaviska Enskilda Banken AB (Publ) v Conway*,[261] the Privy Council held that the "academic model of unjust enrichment which was adopted by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd*[262] … may not, however, readily accommodate all the situations where personal claims lie for restitution, and should not become a Procrustean bed". Instead, as Lord Reed stressed in *ITC*,[263] "careful legal analysis of individual cases" was necessary, having in mind the purpose of the law of unjust enrichment: "to correct normatively defective transfers of value".

ITC is a definite landmark.[264] Relying on Stevens' objections and its pronouncements in *ITC*, the UK Supreme Court has in *Prudential Assurance Co Ltd v HMRC*[265] overruled *Sempra Metals Ltd v IRC*,[266] an earlier case on similar facts awarding compound interest on money paid as advance corporation tax contrary to EC law. *Prudential* confirms that in a mistaken payment there is only a single direct transfer of value on the date of payment, of the principal sum itself.[267] The payee's opportunity to use the sums paid can arise as a consequence, but it is not due to an additional transfer of value from payor to payee.[268]

(b) Singaporean adherence?

Would the Singaporean courts, too, sound a retreat on these concerns? This is a matter up for speculation, but in our view there are reasons to doubt that a withdrawal of support for Birks' framework will be witnessed any time soon. For now, Singaporean courts seem committed to a Birksian view of unjust enrichment: as a distinctive source of legal obligations normatively united by a claimant's impaired intention, the justifying reason for the bulk of unjust enrichment claims. Perhaps significantly, no policy-motivated unjust factors have been recognised in Singapore.[269]

258. *Ibid*, [41].
259. *Ibid*.
260. *Ibid*.
261. [2019] UKPC 36, [80] (Lords Reed, Wilson, Lloyd-Jones, Briggs, and Sir Donnell Deeny).
262. [1999] 1 AC 221, 227.
263. [2017] UKSC 29, [42].
264. One view is that, rather than heralding a radical shift in paradigm, *ITC* is simply a pragmatic "tightening up" of the "at the expense of" requirement: see Andrew Burrows, "'At the Expense of the Claimant': A Fresh Look" [2017] RLR 167.
265. [2018] UKSC 39; [2019] AC 929.
266. [2007] UKHL 34; [2008] 1 AC 561. According to *Prudential* [2018] UKSC 39, [70–72], mistaken payment of the primary sum generates an immediate debt to repay, for which only simple interest can be awarded under s.35A of the Senior Courts Act 1981.
267. *Prudential* [2018] UKSC 39, [71–72].
268. *Ibid*, [71]. See Stevens, "Disaster" (2018) 134 LQR 574, 596–597.
269. Which arguably are not part of "unjust enrichment", since they concern "policy" factors extrinsic to the parties before the court: *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120; Edelman & Bant (2016), ch 13.

For better or worse, Singaporean courts seem unlikely to share Stevens' concern that it would be immoral to use the defendant as a means to an end, to require them to correct an injustice not of their doing. Elsewhere in private law, Singaporean courts appear perfectly willing to impose duties or liabilities on a defendant, even if those duties are imposed *pour décourager les autres*. In the law of negligence, whether a duty of care is owed turns on whether there was factual foreseeability, followed by the application of a two-stage test, with the first stage considering questions of legal "proximity" and the second considering policy considerations explicitly.[270] Under the "policy" stage, courts can make "value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals",[271] allowing courts to extend liability where it is "just and fair" to do so. Vicarious liability can be imposed on defendants who have not committed a wrong, because of a special relationship between the defendant and the tortfeasor which would make it fair, just and reasonable to impose liability on the defendant.[272]

As for concerns of over-inclusiveness or over-generalisation, recall how the Singaporean courts have created and wholeheartedly endorsed multifactorial tests. Again, for better or worse, it seems likely that the Singaporean courts would think they could be resolved simply by further sub-rules or principles within each stage of the framework.[273] This would require some tinkering around the edges, but not root and branch reform. To do so might be seen as throwing the baby out with the bathwater—the simple, user-friendly framework might be thought too precious to give up on entirely.

Some move towards this may already have occurred. Singaporean courts have been willing to accept that different rules are used for different stages of the four-stage inquiry: there may be different types of sufficient connection between claimant and defendant for "at the expense".[274] It accepts different unjust factors, rejecting absence of basis.[275] There is evidence that the defence of change of position may not apply in the same manner to all unjust enrichment claims[276] and may even apply to some claims outside the law of unjust enrichment.[277] At present, Singapore does not seem to mind that different claims within "unjust enrichment" may have different features, different necessary conditions, and attract different defences.

270. *Spandeck Engineering* [2007] SGCA 37, [73–115].

271. *Ibid*, [85].

272. *Skandinaviska Enskilda Banken v Asia Pacific Breweries* [2011] SGCA 22, [81–85]; *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58; [2017] 2 SLR 1074, [41].

273. Eg, Burrows, "In Defence" (2019) 78 CLJ 521, 526–527; see also the approach to "at the expense" in Burrows [2017] RLR 167.

274. *Anna Wee* [2013] SGCA 36, [115].

275. *Ibid*, [129]; *Singapore Swimming Club* [2016] SGCA 28, [92–93].

276. Failure of basis: *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* [2003] SGCA 7, [2003] 2 SLR(R) 103; *Supercars Lorinser Pte Ltd v Benzline Auto Pte Ltd* [2016] SGHC 281, [77-80], explained on the basis that where the basis has failed, the defendant would know that repayment must follow. *Cf Goss v Chilcott* [1996] AC 788*; Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549.

277. *Cavenagh Investment* [2013] SGHC 45; [2013] 2 SLR 543 (trespass to land), noted Rachel Leow, "Change of Position in Restitution for Wrongs: A View from Singapore" (2014) 130 LQR 18.

6. CONCLUSION

In a book of essays in memory of Birks, Francis Rose remarked that "we shall never know whether theory might have been turned into practice by the force of Birks' intellect and personality".[278] In Singapore the answer seems clear—it largely has. In England, sceptical notes have recently made their mark on the landscape, but there may yet be more shifts ahead.[279]

278. Rose, "Evolution", *Mapping the Law* (2006) 13, 29. His remarks were of Birks' final work *Unjust Enrichment*, but they apply *mutatis mutandis* to *Introduction* and Birks' later works.

279. Andrew Burrows, a leading unjust enrichment scholar and proponent of the subject's unity largely along Birksian lines, has recently been appointed to the UK Supreme Court. For example, see recently *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33.