Time Bars and Novel Factors in Unjust Enrichment:
***Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] SGCA(I) 1**

I. Executive summary

Unjust enrichment is a distinct branch of the law of obligations, alongside contract and tort. The elements of a successful unjust enrichment claim are: (1) the defendant had been enriched; (2) the enrichment was at the expense of the plaintiff; (3) the enrichment was unjust.

In *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] SGCA(I) 1, the Court of Appeal ("**CA**") considered claims in unjust enrichment (among other claims) to recover 50 allegedly unauthorised payments. First, the CA clarified that the Limitation Act (Cap 163, 1996 Rev Ed) ("**LA**") would not apply to claims in unjust enrichment. Second, the CA laid out principles that guide the incremental recognition of lack of consent as an unjust factor. Third, the CA gave their provisional views on illegality as a bar to defences, specifically defences to unjust enrichment.

II. Material facts

The appellants were four offshore companies ("**Companies**") related to the WTK Group of companies. The Companies and the WTK Group were managed by Malaysian businessman Mr Wong Kie Nai ("**WKN**") until his death, upon which control passed to WKN's brothers, Wong Kie Yik ("**WKY**") and Wong Kie Chie ("**WKC**"). The respondent was WKN's son ("**Wong**").

Upon taking control, WKY noticed the Companies' bank accounts had lower balances than expected. Investigations revealed that between January 2001 and November 2012, 50 payments had been made from the Companies' bank accounts to Wong's personal bank accounts. Of the 50 payments, 49 were made between January 2001 and October 2011. Wong claimed the payments were for the following purposes:

- 11 payments were "gifts" from WKN;
- three payments were for directors' fees and shareholder dividends to which he was entitled and/or gifts from WKN; and
- 36 payments were made in connection with an alleged "practice" entered into by the WTK Group companies with the object of evading Malaysian taxes (the "**36 Payments**".

On 20 November 2017, the Companies sued Wong in the Singapore International Commercial Court ("**SICC**") to recover all 50 payments on the basis of, among others, unjust enrichment.[1] Claims on the grounds of dishonest assistance, knowing receipt and unlawful means conspiracy ("**Other Grounds**") were also raised.

The international judge ("**IJ**") found that save for the claim made pursuant to the latest payment ("**Payment No 50**"), all claims were time-barred under the LA. Had the claims not been time-barred, the unjust enrichment claims for the 11 payments and the three payments (collectively, the "**14 Payments**") would have succeeded. However, the unjust enrichment claims for the 36 Payments would have failed. The claims on the Other Grounds would also have failed.

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[1] The action to recover the payments formed part of proceedings in different jurisdictions, including Malaysia and the British Virgin Islands.

III. Issues on Appeal

The Companies appealed against the IJ's decision. They argued that the IJ had erred in finding that first, their claims were time-barred, and second, that the claims in unjust enrichment for the 36 Payments and the Other Grounds for all 50 payments were not made out. On appeal, the CA thus considered the following issues.

A. Whether the IJ had erred in finding the claims were time-barred ("**Time Bar Issue**"), specifically:
   (i) whether section 6 of the LA applied to the claims;
   (ii) if the claims were time-barred under section 6 of the LA, whether section 29 of the LA applied to extend the limitation period; and
   (iii) if the claims were not statutorily time-barred, whether the equitable doctrine of laches would nonetheless bar them.

B. If the claims were not time-barred ("**Merits Issue**"):
   (i) whether the unjust enrichment claims in respect of the 36 Payments would have succeeded;
   (ii) whether the unjust enrichment claims in respect of the 14 Payments would have succeeded; and
   (iii) whether the claims made on the Other Grounds would have succeeded.

A. Time-bar Issue

(i) Whether section 6 of the LA applied to the claims in unjust enrichment

Section 6 of the LA sets out a limitation period of 6 years on specified causes of action. While it was previously inconclusive whether section 6 of the LA applied to restitutionary claims, here the CA held that claims for restitution for both unjust enrichment and wrongs are not covered under the LA, citing two reasons for their decision.

First, the statutory wording of the LA does not provide for restitutionary claims. The LA sets out limitation periods based on specified causes of action, such as "actions founded in contract or in tort" but makes no mention of restitutionary claims. In so deciding, the CA departed from the UK courts' position that a restitutionary claim is a cause of action founded on simple contract within their equivalent of the LA. The CA noted that even though claims in unjust enrichment were historically brought in quasi-contract, they should not be covered under the LA as the underlying basis for such claims has changed entirely. Further, even if one were to consider unjust enrichment's roots in quasi-contract, a claim in quasi-contract (which this was) is conceptually different from a contractual claim, as the former involves the use of a fiction where there was in fact no contract, and thus cannot fall within the LA.

Second, the LA's legislative history supports the conclusion that unjust enrichment claims are not within its ambit. The law of limitation in Singapore underwent its last major statutory overhaul in 1959 when the LA's predecessor, the Limitation Ordinance 1959 (No 57 of 1959), was enacted . At that time, the law of unjust enrichment was just developing and could not have been contemplated by Legislature at the point of drafting. The LA was "couched only in terms of obligations known to the drafters at the time of drafting", which did not include unjust enrichment and other restitutionary claims. Further, the LA does not contain catch-all provisions for all other claims, suggesting that limitation periods apply only to those expressly specified. Hence, the CA cautioned against acting as "mini-legislatures" by reading into the LA a statutory limitation period for a claim which the Legislature dd not intend to impose.

Accordingly, the CA held that the claims in unjust enrichment were not statutorily time-barred under section 6 of the LA.

(ii) Whether section 29 of the LA applied to extend the limitation period

As section 6 of the LA applied in respect of the claims on the Other Grounds (save for Payment No 50), the next issue was whether section 29 of the LA would apply to postpone their limitation periods. The CA found that section 29 of the LA did not apply.

Sections 29(1)(*a*) and (*b*) of the LA state that where an action is based on the fraud of the defendant or his agent, or if the right of action concealed by such person's fraud, the limitation period does not begin to run until the claimant has discovered the fraud or could with reasonable diligence have discovered it. A claimant's exercise of reasonable diligence is determined by an objective inquiry – whether a reasonable person in the claimant's position had knowledge of sufficient information, such that he ought to be put on inquiry to conduct further investigations. The claimant need not be specifically put on inquiry of a possible fraud. Only in circumstances that give rise to a claimant's desire to investigate would the limitation period begin to run.

Applying the above principles, the CA held that WKY failed to exercise reasonable diligence. First, WKY signed 25 of the forms authorising the 50 payments and did not question them. While WKY's evidence was that WKN would be unhappy if WKY had questioned WKN, WKY was unable to explain why that would be the case. Second, WKN told WKY not to interfere with the business and disallowed him from accessing the Companies' records. These facts should have been sufficient to put WKY, a director and shareholder of the Companies, on inquiry to investigate further. Had WKY exercised reasonable diligence and made inquiries, he would have found out about the payments by March 2011 at the latest. Hence, section 29 of the LA did not apply with respect to the claims on Other Grounds. The CA thus did not further consider the threshold issue of whether the action was based on the fraud of Wong or his agent, or whether the right of action was concealed by such person's fraud.

(iii) Whether the equitable doctrine of laches barred the claims

Next, the CA considered whether the equitable doctrine of laches (or an undue delay in asserting a legal right or privilege) barred the claims in unjust enrichment with respect to all 50 payments, and the claims on Other Grounds with respect to Payment No 50.

Generally, the doctrine of laches is invoked to bar a claim for equitable relief where a substantial lapse of time has occurred in circumstances that make it inequitable to enforce the claim. It applies only to equitable claims, not common law claims where there is an applicable statutory limitation period. However, there was uncertainty as to whether the doctrine of laches could apply to common law claims where no statutory limitation period applied.

While the CA noted the risk of unfairness in having no time limits imposed on common law claims with no applicable statutory limitation period, they were cautious not to extend equitable doctrines into the realm of the common law. Hence, as unjust enrichment claims originate in common law, the doctrine of laches did not bar such claims.

B. Merits Issue

(i) Whether the unjust enrichment claims in respect of the 36 Payments would have succeeded

The issue with respect to the 36 Payments was whether the elements of unjust enrichment were made out – specifically, whether Wong was enriched at the Companies' expense, and if such enrichment was unjust.

This case presented the specific situation where the Companies were neither the recipient nor the provider of the services for which the payments were made, but rather acted as intermediaries. As no Singapore case law had yet dealt with this particular situation, the CA turned to UK law. In UK law, a party may claim in unjust enrichment for the benefit transferred through intermediaries if the transaction is, in substance, a transfer of value from claimant to defendant. The intermediate transactions are seen as part of the wider scheme *but for which there would be no value to transfer*. Implicit in this reasoning is that intermediary payers have no right to mount an unjust enrichment claim, since the enrichment does not stem from their own money or resources.

The CA then noted that the 36 Payments, while part of a "practice", were made for services rendered by Wong's companies to the other WTK Group companies. These services comprised log supply, production and transportation, road construction, and management consultancy, which did not involve the Companies. Rather, the Companies served as a mere channel for funds. As the Companies' own assets were not depleted or put at risk, the CA found the Companies' net position did not appear to have deteriorated to Wong's advantage. Hence, the claim failed.

Nonetheless, the CA also considered, in *obiter*, whether illegality could bar Wong's defence to the unjust enrichment claims. The issue of illegality arose because the IJ had found the "practice" was entered into, and the 36 Payments were made, with Wong's deliberate intention of evading taxes in Malaysia; such actions would be unlawful under Malaysian law. Wong argued that the 36 Payments were made for a legitimate purpose pursuant to the "practice" and he was therefore not unjustly enriched. The Companies countered that the 36 Payments were made with the object of breaking the laws of a friendly country (*ie*, Malaysia) or to procure someone else to break them or to assist in the doing of it. As such, under the principle of international comity ("**Comity Unenforceability Principle**")[2] illegality ought also to bar Wong's defence. As such, the Companies argued the CA should not recognise the 36 Payments.

The CA thus considered: whether the Comity Unenforceability Principle ought to apply to bar claims in unjust enrichment; and whether the Comity Unenforceability Principle should be extended to defences to these claims. *First*, the CA noted the concept of common law illegality has been accepted as precluding claims in unjust enrichment, due to public policy concerns. Hence, provisionally, there was no reason why the Comity Unenforceability Principle should not apply equally to claims in unjust enrichment as it does in contract. Further, engaging the principle of stultification found in the doctrine of statutory illegality,[3] where permitting a claim in unjust enrichment stultifies the policy of international comity underlying the Comity Unenforceability Principle, the claim ought to be barred.

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[2] The Comity Unenforceability Principle provides that where parties enter into an agreement or arrangement with the object of breaking the laws of a friendly country or of assisting in doing so, courts ought not to recognise it and to treat it as void.

[3] Where a contract has contravened a statute, it may be void for statutory illegality. If void, no recovery will be permitted pursuant to the contract. Still, independent causes of action, such as a claim in unjust enrichment, may allow for recovery. These independent causes of action are subject to the principle of stultification, which prohibits a claim if permitting recovery would undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place.

Second, the CA adopted the tentative view that there are merits to extending the Comity Unenforceability Principle to defences in unjust enrichment. Claims and defences are both legal positions, advanced by claimants and defendants respectively. Regardless of the party, the courts should not recognise a legal position if it is illegal under foreign law and thus repugnant to domestic public policy. Ultimately, the courts should consider whether the outcome of a case would breach the policy of international comity. Where the success of a defence such as Wong's would require the courts to violate the policy of international comity, it should not be upheld.

(ii) Whether the unjust enrichment claims in respect of the 14 Payments would have succeeded

The issue with respect to the 14 Payments was whether they were unjust on the grounds of lack of consent. This being an uncertain area of law, the CA considered the matter and held that lack of consent, as an unjust factor in and of itself, should be recognised, albeit in an attenuated and limited form.

The CA recommended the recognition of lack of consent be done incrementally, having regard to the particular facts of the case and subject to two limits. First, lack of consent would not be available where an alternative and established cause of action is available, such as a proprietary claim – to do so would cause uncertainty or result in an encroachment on other areas of law. Second, there had to be no legal basis which justified not reversing the transfer of property or value, since an unjust factor had to describe an unjust state of affairs.

Turning to the facts, the CA agreed with the IJ's finding that the 14 Payments were made without legitimate basis. Such payments were not authorised as they were not made in the Companies' interests and nothing in the evidence indicated the Companies made any representations to the effect that the payments were authorised. Hence, the CA found the Companies had a proprietary claim for the sums transferred by the 14 Payments, precluding the recognition of an unjust enrichment claim. As a proprietary claim was not pleaded in the alternative, it did not have to be dealt with.

(iii) Whether the claims made on the Other Grounds would have succeeded

Lastly, the CA considered the claims made on the Other Grounds with respect to Payment No 50 only, as these were not statutorily time barred. All three grounds failed.

A claim in dishonest assistance is made out when: (1) that there has been a disposal of the claimant's assets in breach of trust or fiduciary duty; (2) in which the defendant has assisted or which he has procured; (3) the defendant has acted dishonestly; and (4) there was resulting loss to the claimant.

Next, to make a claim for unlawful means conspiracy, a claimant has to show that (1) there was a combination of two or more persons to do certain acts; (2) the alleged conspirators had the intention to cause damage or injury to the claimant by those acts; (3) the acts were unlawful; (4) the acts were performed in furtherance of the agreement; and (5) the claimant suffered loss as a result of the conspiracy.

The claims in dishonest assistance and unlawful means conspiracy failed because the Companies did not suffer loss in making Payment No 50. As earlier observed, the Companies would not have made the payments if not for the "practice". Moreover, they would not have been liable for penalties arising from criminal liability in connection with the "practice".

Finally, the claim in knowing receipt failed. The elements of a claim in knowing receipt are: (1) a disposal of the plaintiff's assets in breach of fiduciary duty; (2) the beneficial receipt by the defendant of assets traceable to the assets of the plaintiff; and (3) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty. Payment No 50 could not be traced to the Companies' assets. The Companies' own assets were also not depleted or put at risk by the "practice".

IV. Lessons learnt

The Time-bar Issue was a reminder of the courts' role in statutory interpretation. Where a statutory lacuna exists, as in the case of time-bars with respect to restitutionary claims, the courts ought not to act as "mini-legislatures". Rather, contending with such uncertainty provides an opportunity for the courts to "sound a clarion call for legislative intervention", as the CA did in this case.

With regard to the Merits Issue, a practical takeaway is that plaintiffs considering a claim in unjust enrichment should first evaluate whether a stronger cause of action might exist in other others of law, for example, agency or contract. This is especially so, given the courts' current tentativeness in recognising novel factors, such as lack of consent, in unjust enrichment claims.

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