23. RESTITUTION

YIP Man
LLB (Hons) (National University of Singapore), BCL (Oxon);
Advocate and Solicitor (Singapore);
Associate Professor of Law, School of Law,
Singapore Management University.

Introduction

23.1 The 2017 decisions on the law of unjust enrichment and restitution raised a number of interesting issues that merit closer scrutiny. These issues include recovery of deposits in the law of unjust enrichment, the establishment of a shared basis in multiparty cases for the purpose of failure of consideration, the good faith requirement for the ministerial receipt defence, and the interplay between law and equity.

Pre-contractual deposit

23.2 In *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd*[1] ("*Jiacipto*"), the plaintiff sought to recover a pre-contractual deposit made to the defendant in respect of the purchase of luxury yachts in unjust enrichment. In *Jiacipto*, the plaintiff had signed two documents: (a) a contract to buy yacht A ("contract A"); and (b) an invoice for the sum of €1m as "holding deposit" for yacht B and yacht C ("the Deposit Invoice"). He then paid €500,000 as deposit for contract A and €1m as payment under the Deposit Invoice. The restitutionary claim related to the €1m deposit.

23.3 As events unfolded, yacht A was sold to a third party and was thus unavailable for sale to the plaintiff. The plaintiff and the defendant agreed to the sale and purchase of yacht B, which increased the purchase price. In accordance with the parties' agreement, half of the €1m paid under the Deposit Invoice was then applied for the payment of the purchase price of yacht B and the remainder purchase price was subsequently paid off by the plaintiff. However, when the plaintiff inspected yacht B, he was not satisfied that it matched the specifications. The defendant, with the plaintiff's agreement, sold yacht B to someone else and paid the balance sale proceeds, after deducting its claims against the plaintiff, to the plaintiff.

1 [2017] SGHC 288.

23.4 The court stressed that identifying the basis on which the payment was made is crucial in each case as this would enable one to further determine if the basis has failed and therefore entitling the payor to restitution.[2] The characterisation of the payment as "a pre-contractual deposit" without more is, on the other hand, not determinative of recoverability.[3] This is because the basis upon which a deposit is paid ahead of the conclusion of a contract varies from case to case. It may be: (a) a payment made on the basis that an anticipated contract would be concluded;[4] (b) a payment to indicate earnestness;[5] or (c) a payment to put an asset off the market while the potential buyer decides whether to buy it.

23.5 Having considered the evidence which included the contractual documents and contemporaneous communications, Loh J concluded that the €1m deposit was paid to the defendant "as a holding deposit" to secure [yacht B and yacht C] until 15 May 2013 and upon the plaintiff's election, the money would then become the initial down payment for the selected yacht. In other words, the case concerned a payment to put the yachts off the market while the plaintiff considered whether to purchase one of them. Accordingly, that no contract was ultimately concluded after 15 May 2013 would not entitle the plaintiff to restitution, as the conclusion of a contract was not the promised performance. However, on the facts, since the two yachts were sold on or around 30 April 2013, there was a *total* failure of consideration (or basis) and the plaintiff was thus entitled to recover the deposit after 30 April 2013.[6]

Unjust factors

Ignorance, lack of consent and lack of authority

23.6 Whether ignorance, lack of consent and lack of authority are recognised unjust factors under Singapore law remains unresolved. Two High Court decisions in 2017 seemingly assumed that these are recognised unjust factors under Singapore law: *Cristian Priwisata Yacob v Wibowo Boediono*[7] ("*Wibowo Boediono*") and *Tradewaves Ltd v*

2 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 at [49].
3 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 at [49].
4 Such a payment would be *prima facie* recoverable if the contractual did not ultimately come into existence.
5 See further Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", lecture delivered at the Yong Pung How Professorship of Law Lecture (16 May 2013).
6 *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 at [50].
7 [2017] SGHC 8 at [186].

Standard Chartered Bank.[8] However, neither decision turned on the application of the said unjust factors. In a third High Court decision, *Ong Teck Soon v Ong Teck Seng*[9] ("*Ong Teck Soon*"), it was observed that the status of these unjust factors under Singapore law is presently uncertain. The court noted that "lack of authority" was rejected by the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito*[10] and the status of "ignorance" and "lack of consent" was left open in *Wee Chiak Sek Anna v Ng Li-Ann Genevieve*[11] ("*Anna Wee*"). Notwithstanding that, the court pointed out that lack of consent was very recently endorsed as an applicable unjust factor in *AAHG, LLC v Hong Hin Kay Albert*[12] ("*AAHG*"). In *AAHG*, the unjust enrichment claim was brought as an alternative claim to a claim for conversion, in the event that the court found that the plaintiff had no immediate right of possession to the assets to support the primary claim.[13] The High Court was satisfied that the action in conversion was established but nevertheless went on to comment that the claim in unjust enrichment, based on lack of consent, would have been made out.[14]

23.7 In *Ong Teck Soon*, the plaintiff, an executor of the Testator's will, alleged that the first defendant had issued two unauthorised cheques which led to unauthorised withdrawals from the Testator's bank account. The plaintiff, however, did not plead an unjust factor in support of his claim in unjust enrichment. Whilst acknowledging that lack of consent would have been the applicable unjust factor on the facts, the High Court refrained from deciding if the said unjust factor should be recognised under Singapore law.[15] This is because the court had found that the conversion claim would have succeeded if it could be proved that the Testator had not authorised the withdrawals, rendering the unjust enrichment claim unnecessary. Moreover, it did not wish to resolve a controversy without the benefit of full arguments from counsel.[16]

23.8 The implications arising from recognising ignorance/lack of consent/lack of authority as unjust factors have been considered in great

8 [2017] SGHC 93 at [274] and [275].
9 [2017] 4 SLR 819 at [24].
10 [2013] 4 SLR 308 at [111].
11 [2013] 3 SLR 801 at [139] and [166]–[168].
12 [2017] 3 SLR 636 at [74] and [75].
13 *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [69].
14 *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [77].
15 *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819 at [24].
16 *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819 at [24].

detail elsewhere.[17] In summary, there are two ensuing issues. First, embracing these unjust factors would bring us a step closer to recognising strict liability[18] for receipt of property transferred in breach of trust/fiduciary duty that are traditionally dealt with under the equitable doctrine of knowing receipt.[19] But recent Australian developments – most notably, the Full Federal Court of Australia's decision in *Great Investments Ltd v Warner*[20] ("*Great Investments*") – have shown us that this is no longer an unchartered territory and there are good reasons for recognising strict liability, at least in respect of receipt of corporate assets misapplied in breach of fiduciary duty. The Full Federal Court of Australia, broadly consistent with the preference as expressed by the Court of Appeal in *Anna Wee*,[21] did not recommend supplanting fault-based equitable liability with strict liability in unjust enrichment. It said that knowing receipt is "unnecessary" if the plaintiff is merely claiming the rights or the value of the rights transferred without authority.[22] It, however, noted that knowing receipt may be relevant and necessary for the plaintiff company to claim further and alternative relief: consequential losses or an account of profits.[23]

23.9 The second complication arising from recognising ignorance, lack of consent and lack of authority as unjust factors is the difficulty in establishing that the defendant has been enriched *at the expense of* the plaintiff in such cases because property would not have passed in such circumstances.[24] That property did not pass raises the further question

17 See, *eg*, Mohammud Jaamae Hafeez-Baig & Jordan English, "'Lack of Consent' as an Unjust Factor" [2017] LMCLQ 176 and Tham Lijing, "Unjust Enrichment and Lack of Consent" *Singapore Law Gazette* (January 2018).

18 *Cf* Lionel Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 LQR 412; Joachim Dietrich & Pauline Ridge, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment" (2007) 31 *Melbourne University Law Review* 47; Kelvin F K Low, "Recipient Liability in Equity: Resisting the Siren's Lure" [2008] *Restitution Law Review* 96; David Salmons, "Claims against Third-Party Recipients of Trust Property" (2017) 76(2) *Cambridge Law Journal* 399.

19 (2013) 14 SAL Ann Rev 465 at 480–482, paras 22.41–22.44; (2016) 17 SAL Ann Rev 614 at 622, paras 23.25–23.26.

20 [2016] FCAFC 85; see further, Elise Bant & Michael Bryan, "Outflanking *Barnes v Addy*? The Persistence of Strict Recipient Liability" (2017) 11 *Journal of Equity* 271; Man Yip, "Third Parties' Liability for Receipt of Misapplied Corporate Assets: The Relevance of Knowing Receipt?" (2017) 11 *Journal of Equity* 293.

21 *Wee Chiak Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [141] and [143].

22 *Great Investments Ltd v Warner* [2016] FCAFC 85 at [53].

23 *Great Investments Ltd v Warner* [2016] FCAFC 85 at [53]. This part of the judgment requires fuller consideration: see Man Yip, "Third parties' Liability for Receipt of Misapplied Corporate Assets: The Relevance of Knowing Receipt?" (2017) 11 *Journal of Equity* 293 at 310–311.

24 *Wee Chiak Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [167], citing William Swadling, "A Claim in Restitution?" [1996] LMCLQ 63 at 64.

of whether the recipient has been *enriched*[25] – a separate element for the unjust enrichment claim – in the circumstances. This is ultimately a debate on what constitutes enrichment: value or rights.

Failure of consideration

23.10 In *Wibowo Boediono*, the High Court said that where "advances were made to further a particular purpose or goal, and the purpose or goal fails … the recipient in general must return the advance".[26] In that case, it was found that the plaintiffs had made advances pursuant to an oral contract for making joint investments in real properties but the said investments were never carried out. In the circumstances, the High Court ruled that the plaintiffs were entitled to recover the money transferred under the agreement by way of an unjust enrichment claim based on the unjust factor of total failure of consideration. The High Court explained that failure of consideration refers to the failure on the part of the promisor to provide the performance that has been promised.[27] The focus is on performance and not the bare promise itself. The High Court further affirmed that the unjust enrichment claim of such a nature could arise in both a contractual and non-contractual context.[28]

23.11 *Wibowo Boediono* was cited with approval in *Zhou Weidong v Liew Kai Lung*[29] ("*Zhou Weidong*"). In the latter case, the High Court commented that the failure of consideration (also known as failure of basis) operates on the basis of a "joint understanding that the recipient's right to retain" the benefit is "conditional" and the failure of the condition would entitle the plaintiff to restitution.[30] However, the High Court commented that it is unclear as to how a joint understanding is to be established in a multiparty case,[31]citing *Goff & Jones: The Law of Unjust Enrichment*[32] ("*Goff & Jones*").

23.12 In *Zhou Weidong*, the plaintiff claimed, *inter alia*, in unjust enrichment for the restitution of approximately $5.25m that had been

25 See, *eg*, Ross Grantham & Charles Rickett, "Trust Money as an Unjust Enrichment: A Misconception" [1998] LMCLQ 514 at 517–518.
26 *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8 at [189].
27 *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8 at [188].
28 *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8 at [188].
29 [2018] 3 SLR 1236.
30 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [72].
31 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [73].
32 (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 13-05.

received by the third to fifth defendants.[33] The funds were paid pursuant to four investment agreements entered into between the second defendant (a company incorporated by the first defendant to spearhead investments in China) and the plaintiff. However, the plaintiff later learnt that his moneys were not applied for the intended investments. In particular, in respect of two sums of moneys amounting to approximately $1.25m received by the third and fourth defendants, the High Court said that failure of consideration appeared "to be the most relevant" unjust factor for the claims.[34] On the facts, the court observed that there was no joint understanding between the plaintiff and the third and fourth defendants regarding how the moneys were to be used, though the said defendants knew that the sums were the plaintiff's moneys meant for investment.[35] The joint understanding on the purpose for which the moneys were paid was between the plaintiff and the first defendant. It was in this context that the court raised the interesting question on how the requirement of joint understanding (or a shared basis)[36] is to be established in multiparty cases.

23.13 In relation to multiparty cases, the editors of *Goff & Jones* referred to the recent UK Supreme Court decision of *Bank of Cyprus UK Ltd v Menelaou*[37] ("*Menelaou*"). In *Menelaou*, the parents decided to sell their family home and apply the sale proceeds for the purchase of another property in the name of their daughter, Melissa, as a gift and to be held on trust by her for herself and her siblings. Contracts for both the sale of the family home and the purchase of the second property were duly executed. However, the bank had a registered charge over the family home which secured liabilities that exceeded the property's value. The bank agreed to release the charge in exchange for a registered charge over the second property and a partial payment of £750,000. The charge of the second property turned out to be invalid as Melissa, who was unaware of the arrangement, never signed the mortgage documents. The issue was whether the bank was entitled to be subrogated to the vendor's lien over the second property in the circumstances. A number of issues were discussed in the case but we shall only focus on the narrow issue of establishing a joint understanding for the purpose of failure of consideration. The unjust factor inquiry, curiously, received scant analysis by the UK Supreme Court. Only Lord Clarke expressly discussed the applicable unjust factors. He identified two possible unjust

33 Of the $5.35m, $4m had been paid over to a third party, Chen Jie. See analysis at paras 23.17–23.21 below.

34 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [72].

35 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [73]–[74].

36 See *Burgess v Rawnsley* [1975] Ch 429 at 442.

37 [2016] AC 176, which noted Stephen Watterson, "Subrogation as a Remedy for Unjust Enrichment in the Supreme Court" (2016) 75(2) *Cambridge Law Journal* 209.

factors: [38] mistake[39] and failure of consideration. On the latter, it would appear that the basis that the bank would obtain a registered charge over the property had failed. However, the basis could not be said to be a shared one because Melissa was completely unaware of the bank's condition/mortgage arrangement. In respect of this case, the editors of *Goff & Jones* commented as follows:[40]

> It may be that failure of basis can justify restitution in three-party cases where the claimant transfers a benefit to a third party with whom he has a shared understanding, and who then transfers it to the defendant; and if that is correct, it might seem odd to hold that failure of basis cannot justify restitution where the claimant transfers a benefit directly to a defendant pursuant to a shared understanding with a third party. As the law currently stands, however, it is uncertain whether, and if so, why, a claim grounded on failure of basis is permitted in these situations, and whether any significance attaches to the question whether the defendant knows of the understanding shared by the claimant and the third party.

23.14 Graham Virgo, on the other hand, said that "this requirement of a shared basis is open to criticism, and perhaps should be assessed objectively rather than subjectively".[41] He cited the case of *Lissack v Manhattan Loft Corp Ltd* in which Roth J considered that a shared basis that a benefit was to be paid for was established if the defendant "ought reasonably to have known this".[42]

23.15 Returning to *Zhou Weidong*, the High Court clearly took an objective approach in assessing whether there was a shared basis between the plaintiff and the third and fourth defendants.[43] The High Court concluded that the said defendants ought to have known that the purpose/condition for the payments had not been fulfilled and must be returned to the plaintiff, based on what the defendants actually knew.[44]

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38 *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176 at 188.

39 According to Lord Clarke, the bank acted "pursuant to the mistaken assumption that it would obtain security which it failed to obtain": see *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176 at 188. However, as Graham Virgo correctly pointed out, this would be a misprediction and not a mistake: see Graham Virgo, *Restitution and Unjust Enrichment in the Supreme Court: Reflections on* Bank of Cyprus UK Ltd v Menelaou (University of Cambridge Faculty of Law Legal Studies Research Paper Series Paper No 10/2016, February 2016) at p 11.

40 *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 13-05.

41 Graham Virgo, *Restitution and Unjust Enrichment in the Supreme Court: Reflections on* Bank of Cyprus UK Ltd v Menelaou (University of Cambridge Faculty of Law Legal Studies Research Paper Series Paper No 10/2016, February 2016) at p 12.

42 [2013] EWHC 128 (Ch) at [88].

43 The fourth defendant was the third defendant's director and sole shareholder.

44 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [73] and [74].

23.16 More importantly, it appears that counsel for the defendants did not argue that claims in unjust enrichment should be barred on the facts of the case because the contracts pursuant to which the payments were made were on foot. It is well-established that the law of unjust enrichment cannot be invoked to subvert contractual allocation of risk.[45] Unless the contract has been set aside or is irrelevant to the unjust enrichment claim, the plaintiff will be confined to suing the counter-party to the contract,[46] as opposed to the third party who received the benefit.

Ministerial receipt

23.17 In *Zhou Weidong*, part of the sums received by the third to fifth defendants from the plaintiff were transferred onwards to a third party, Chen Jie. The High Court ruled that in respect of these sums that had been paid over to Chen Jie, the third to fifth defendants were not liable in unjust enrichment to make restitution to the plaintiff because they could rely on the defence of ministerial receipt. The court also said that in the alternative, they could successfully plead the defence of change of position.

23.18 In respect of ministerial receipt, which is the focus of this part of the discussion, the Court rightly noted that the defence requires that "the agent must not have notice of the plaintiff's claim at the time he transfers the received assets to his principal".[47] The "no notice" requirement for the purpose of the ministerial receipt defence requires only that the agent knows of the plaintiff's claim for restitution.[48] If the

45 See *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161, *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635, *MacDonald Dickens & Macklin v Costello* [2012] QB 244 and *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd* [2016] SGHC 55 at [84]–[86]. See further James Goodwin, "Contract, Unjust Enrichment and Risk" (2012) 128 LQR 503, Alvin See, "Contract, Unjust Enrichment and Leapfrogging" [2012] *Restitution Law Review* 125 and Man Yip, "Suing the Third Party for Improvements to Land: *Costello v MacDonald* [2011] EWCA Civ 930, [2011] 3 WLR 1341" [2011] *Oxford University Commonwealth Law Journal* 217.

46 This applies if, *eg*, the payments did not discharge the plaintiff's obligation under the investment agreements. But this was not the case in *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236. The High Court had found on the evidence that the plaintiff had transferred the money to the third parties relying on the instructions from the first defendant or Brian (acting under the first plaintiff's instructions). The first defendant was the director of the second defendant, the counter-party to the investment agreements.

47 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [57].

48 Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 75.

agent is unsure as to whether the claim is good, the traditional view is that he should interplead the payment.[49]

23.19 In *Zhou Weidong*, the court said that the "no notice" element under the ministerial receipt defence requires that the agent has acted in good faith and the test is the same as that for the requirement of good faith under the change of position defence.[50]

23.20 Although the High Court treats the two defences as conceptually distinct, aligning the test for notice under ministerial receipt and the test for lack of good faith under change of position, in essence, would make it easier to subsume the defence ministerial receipt under the defence of change of position, a view that is favoured by some commentators.[51] As James Edelman and Elise Bant observed:[52]

> [The] requirement of an irreversible payment over made without notice of the plaintiff's claim is the same as the requirements for the change of position defence. The only point of distinction between the two lies in the putative requirement for the payment over defence that the principal must be disclosed. But where an agent knows that the principal has not been disclosed, the agent must be aware that the payment is proceeding under a mistake and will generally be unable to satisfy the change of position defence in any event.

23.21 To show a lack of good faith under the change of position defence, the Court in *Zhou Weidong*, citing *Cavenagh Investment Pte Ltd v Kaushik Rajiv*,[53] said that the test for dishonesty for establishing dishonest assistance would apply:[54]

> A defendant lacks good faith if he acts in a commercially unacceptable way, and such behaviour is made out if he fails to query the irregular shortcomings of the transaction that ordinary people would so query.

49 *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 207.
50 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [57].
51 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2010) at p 565; James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 381; *cf Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 28-02.
52 James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 382.
53 [2013] 2 SLR 543 at [71].
54 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [57]–[58]; see also *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 at [42].

Mistake in equity: Setting aside voluntary dispositions

23.22 In *BMM v BMN*,[55] the parties (Y and X) had entered into marriage which was invalid. Before the discovery of the invalidity of the marriage, Y had transferred a property in his sole name to the joint names of X and himself to hold as joint tenants. Y had also mistakenly believed that he had fathered the twins given birth to by X. Amongst other claims, Y sought to set aside the voluntary transfer of the property to the parties' joint names on the basis of mistake. Although it was unnecessary to decide this issue given the court's conclusion that X held her share of the property on trust for Y pursuant to their common intention, the court went on to address the matter.[56]

23.23 Although there were two potentially operative mistakes in the dispute, the court noted that Y was only relying on the mistake as to the validity of the marriage.[57] The court said[58] that the applicable principles would be those laid down by the UK Supreme Court in *Pitt v Holt*:[59]

> [T]he equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable when there was a causative mistake, as to either the legal character of the transaction or a matter of fact or law that was basic to the transaction, and that was of such gravity that it would be unconscionable to refuse relief … The gravity of the mistake would be assessed objectively but by an intense focus on the facts including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences (including tax consequences) for the disponor …

23.24 The High Court, however, considered the mistake as to the validity of the marriage was not "material".[60] In other words, the court did not think that the mistake *caused* the transfer. On the evidence, the court was clearly of the view that the parties' dealings with each other reflected "a considerably close and loving relationship, which was borne out by the fact that [Y] had fought for the custody of the twins despite the fact that they were not his biological children".[61] Interestingly, the court said that the result "*may* be different if [Y] had been made aware of both the invalidity of his marriage and the fact that the twins were not

55 [2017] 4 SLR 1315.
56 *BMM v BMN* [2017] 4 SLR 1315 at [90].
57 *BMM v BMN* [2017] 4 SLR 1315 at [91]–[92].
58 *BMM v BMN* [2017] 4 SLR 1315 at [95].
59 [2013] 2 AC 108 at [122]–[123] [126] and [128].
60 *BMM v BMN* [2017] 4 SLR 1315 at [96].
61 *BMM v BMN* [2017] 4 SLR 1315 at [96]. The court went on to comment that had Y known that the marriage was invalid at the relevant time, he would not have annulled the marriage but would have re-registered his marriage.

his biological children" [emphasis in original].[62] But the court need not consider this scenario, given that Y was not pursuing the twins' paternity as a ground to justify setting aside the transfer.

23.25 Two points arising from the decision in *BMM v BMN* merit attention. First, it appears that Singapore law accepts the applicability of the *Pitt v Holt* principles to the setting aside of voluntary dispositions in equity on the ground of mistake.[63] It should follow that Singapore law accepts that the equitable jurisdiction to set aside voluntary dispositions is subject to a different set of rules from the common law claim in unjust enrichment for restitution on the ground of mistake. The common law claim only requires a *simple causative mistake*.[64] As has been argued by Hang Wu Tang, a differentiated approach may be justified. He explained:[65]

> Although a gift is not a legally recognised method of binding parties' future conduct, most gift-giving is calculated to influence the donee to behave in a benevolent way towards the donor in the future by fostering and engendering social bonds such as love, affection, intimacy, friendship, trust and gratitude. Thus 'gift-exchange can be characterised as a non-commodity market which functions in the affective realm in much the same way as commodity markets function in the conventional economic realm.' … [It] is equally essential to protect the moral economy by defending the completed gift from an overzealous application of the law of restitution. The gift is an important social practice meant to generate trust so as to form the basis of future action.

The inquiry on consistency between law and equity in this respect is ultimately a policy-based one.[66]

23.26 Secondly, the court's willingness to consider that the position might be different had the plaintiff relied on the operation of two mistakes implicitly acknowledges that in cases involving human decisions, the cause of a decision may not be a single factor. This raises the query as to whether a straightforward "but-for" approach – which underlines the causative mistake approach – is appropriate in decision-

62 *BMM v BMN* [2017] 4 SLR 1315 at [96].
63 See also *BOK v BOL* [2017] SGHC 316.
64 *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [94].
65 Hang Wu Tang, "Restitution for Mistaken Gifts" (2004) 20 JCL 1 at 23–24; *cf* Sir Terence Etherton MR, "Reflections on the Restitution Revolution – A Judicial Perspective" in *Revolution and Evolution in Private Law* (Sarah Worthington, Andrew Robertson & Graham Virgo eds) (Hart Publishing, 2018) at p 220.
66 See generally Terence Etherton, "The Role of Equity in Mistaken Transactions" (2013) 27 *Trust Law International* 159; Man Yip, "Further Reflections on the *Hastings-Bass* Rule, Rescission for Mistake and Rectification" (2014) 8 *Journal of Equity* 46 at 59–60.

making cases.[67] After all, the process of human decision-making is a complex one and in some cases, it may be difficult to point out a single factor that has led to the decision. Edelman and Bant, relying on Australian cases, have forcefully argued that "a factor" test – which is focused on contributing to (as opposed to causing) the decision – be applied in such cases instead.[68]

67 See especially Elise Bant, "Causation and Scope of Liability in Unjust Enrichment" [2009] *Restitution Law Review* 17.

68 James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at pp 190–194.