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The Law of Unjust Enrichment and Restitution in Malaysia: A Search for Principle, Post ‘Dream Property’

Siti Aliza Alias

Lecturer
International Islamic University Malaysia

alizaalias@iium.edu.my

ASLI Visiting Fellow
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Siti Aliza Alias*

Abstract

Part VI of the Malaysian Contracts Act 1950 ('of certain relations resembling those created by contract') embodies the old notion of quasi-contract or implied contract - what is now known under English law and in other Common Law jurisdictions as Restitution of Unjust Enrichment. The landmark decision of the Malaysian apex court, the Federal Court, in the case of ***Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 AMR 601*** *("Dream Property")* gave recognition to Unjust Enrichment as a separate cause of action in Malaysia. However, the law of Unjust Enrichment in Malaysia is still very much at its infancy and developing stage. This research focuses on two main questions that arise from the decision in the landmark case:

1. The legal consequences of the court's apparent adoption of the civilian 'absence of basis' approach to determine whether an enrichment is 'unjust', rather than the traditional 'unjust factor' approach under English law, and how this might affect the future development of Unjust Enrichment as a separate cause of action in Malaysia;

2. On the larger question of what the law of Unjust Enrichment in Malaysia now is or should be - whether the correct approach is to develop Unjust Enrichment within an apparent dual legal regime ie. the statutory regime under the Contracts Act 1950 and the Common Law regime; or rather to use the Common Law by analogy to develop the contents (ie. detailed rules and principles) of the Contracts Act 1950 (Part VI) in a principled approach that may require modern restatement for practical use today.

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* Lecturer, Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia

Introduction

'Unjust enrichment' refers to categories of cases in which the law allows recovery by one person of a benefit unjustly gained by another at his expense. According to 'Goff & Jones On The Law of Unjust Enrichment' (9th Ed.):

> "*Unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases. It is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the Defendant has been enriched by the receipt of a benefit that is gained at the Claimant's expense in circumstances that the law deems to be unjust"*[1]

Goff & Jones seminal work in this area in English law culminated in authoritative judicial blessing being given by the House of Lords in the case of ***Lipkin Gorman v Karpnale Ltd***[2] that restitution as a body of law is founded upon the principle of unjust enrichment. Unjust enrichment is now recognised as the 3rd ground to base liability in the Common Law of Obligations, after Torts and Contract. The 4-stage inquiry i.e. the elements to be proven in an unjust enrichment claim are:

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

The law of restitution is the law based on the principle of reversing a defendant's unjust enrichment at the claimant's expense. Restitution is a response to 'causative events' (i.e. the cause of action triggering restitution). The 'causative event' can be unjust enrichment, or it can be a 'wrong' (e.g. Breach of Contract, Breach of Fiduciary Duty, Torts). In short, unjust enrichment is a 'cause of action', and restitution is a 'remedy'. Restitution is a gain-based response/remedy i.e. it aims to strip the Defendant of its gains (as opposed to

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[1] C Mitchell et al. (eds.), *Goff & Jones The Law Of Unjust Enrichment* (8th Ed.) (London: Sweet & Maxwell, 2011), 7.

[2] [1991] 2 AC 548.

Compensation/Damages which aims to compensate the Claimant of its loss i.e. a loss-based response/remedy).

Brief Historical Basis of Unjust Enrichment

The law of unjust enrichment is sometimes thought to be a very modern and new category of law, but the truth from history is otherwise. Roman law, from which much of the development of the modern common law of obligations borrowed, recognised unjust enrichment alongside contract and delict (wrong/torts). It emerged generally during the classical period, described as an obligation *quasi ex contractu* i.e. 'obligations which cannot strictly be seen as arising from contract but which, because they do not owe their existence to wrongdoing, are said to arise as though from a contract'.[3] There was later recognition that 'quasi contract' was not the best name for this category of law.

The English history of UE followed a similar pattern of development to that of Roman law. During the period of the 'forms of action', common law claims for unjust enrichment were brought as writs of debt or account – the true nature of the action concealed behind a bare plea that the Defendant owed the money as a debt or must account for it. When the nature of these actions was discussed, they were often referred to by the use of the Roman quasi-contract.[4]

In mid-17th century, the Common Law courts began to allow Plaintiffs to plead unjust enrichment cases in forms of action known as '*indebitatus assumpsit*', which is a species of assumpsit/promise, rather than in debt i.e. that the Defendant, being indebted (*indebitatus*), had promised to pay the debt (*assumpsit*), but failed to do so. One of the common counts of *indebitatus assumpsit* was the common count of 'money had and received'.

The count for money had and received moved 'very slowly outwards from a genuinely contractual core' to fictional promises.[5] In the 19th century counts of *quantum meruit / quantum valebat* (value of services / goods) were also pleaded as *indebitatus assumpsit*. In the mid-19th

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[3] P Birks and G McLeod (trs.), *Justinian's Institutes* (London: Duckworth, 1987), 111 [3.27].
[4] J Edelman and E Bant, *Unjust Enrichment (2nd Ed.)* (Oxford; Portland, Oregon: Hart Publishing, 2016), 9.
[5] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), 148.

century, the forms of action were abolished, however unjust enrichment actions remained known as quasi-contract – however the Latin 'as though from a contract' began to morphed into the erroneous expression 'implied contract'.[6] As per Viscount Haldance LC in ***Sinclair v Brougham,*** "when the Common Law speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the Defendant by a fiction of law"[7].

The Modern Law of Unjust Enrichment

In ***United Australia Ltd v Barclays Bank Ltd*** Lord Atkin in the House of Lords (HOL) rejected the fiction of the implied contract theory:

> *"These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared, should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judges is to pass through them undeterred."*[8]

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[9] was when the concept of unjust enrichment was referred to for the first time by the English Court and was finally given full recognition in ***Lipkin Gorman***.

Malaysian Restitutionary Provisions

There are already several statutory provisions in Malaysia dealing with restitutionary reliefs which can be argued to be based on concepts that are now recognized as being within the body of law of unjust enrichment; most importantly under the Contracts Act 1950 ("CA

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[6] Edelman and Bant, 11.
[7] [1914] AC 398, 415.
[8] [1941] AC 1, 29.
[9] [1943] AC 32.

1950") which contained several important restitutionary provisions (sections 65 and 66[10], and Part VI 'Of Certain Relations Resembling Those Created By Contract' (sections 69 to 73)). Excerpts of the relevant provisions of the Contracts Act 1950 are as follows:

- ***65 Consequences of rescission of voidable contract***

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

- ***66 Obligation of person who has received advantage under void agreement, or contract that becomes void***

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

…

PART VI OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

…

- ***71 Obligation of person enjoying benefit of non-gratuitous act***

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

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

- ***73 Liability of person to whom money is paid, or thing delivered, by mistake or under coercion***

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Unjust Enrichment before the Malaysian Courts prior to *Dream Property*

On a number of occasions where the Malaysian courts have taken cognizance of the concept of unjust enrichment, it is usually discussed by the courts in two (2) separate contexts:

(1) Describing the provisions of Part VI CA 1950 as being restitutionary in nature and as being the statutory embodiment of the principle of unjust enrichment

Case law on s. 71 is clear that the restitutionary right in this section is independent of contract. While some cases premised their decision on quasi-contract or implied contract doctrines, others had referred to unjust enrichment in their decisions. The High Court decision (upheld on appeal to the then Supreme Court) in the case of ***New Kok Ann Realty Sdn Bhd v Development and Commercial Bank Ltd***[11] signified one of the first attempts to discover a juridical basis for the cause of action in money had and received, and action under s 71. In relation to a claim for 'money had and received', Gunn Chit Tuan J stated that:

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

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

> "*According to Pollock and Mulla on the Indian Contract and Specific Relief Acts (9th edition) at page 497 there is good authority for saying that section 70 of [the Indian]*

[11] [1987] 2 MLJ 57

Contract Act was framed in the present form with a view to avoid the niceties of English law on the subject of quasi-contract. ***According to the learned authors of that book, the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment. According to them the principle of unjust enrichment falls under sections 69 and 70 (sections 70 and 71 of our Contracts Act). But these sections are wider in scope than the doctrine as applied in England and go far beyond it.*** *And according to them "the terms of [s 71 of our Contracts Act] are unquestionably wide but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract.*" (emphasis mine)

Sediperak Sdn Bhd v Baboo Chowdhury[12] is another significant case where the High Court analysed the case by referring to the three elements of unjust enrichment and concluded by stating that the underlying principle governing s. 71 is "the equitable principle of restitution and the prevention of unjust enrichment" and that "*[t]he future augers well for restitutionary action under this section.*"

(2) In addition to the provisions of Part VI of CA 1950, Malaysian courts continued to refer to the old 'forms of action' under English Common Law when determining restitutionary claims

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

In ***Affin Bank Bhd v MMJ Exchange Sdn Bhd***[13] the Plaintiff's restitutionary claim for mistaken payment of money was founded both upon s. 73 AND on the basis of 'money had and received'. These were treated as separate claims and were discussed under separate headings by the High Court (similarly also the cases of ***Bank Bumiputra (M) Bhd v Hashbudin bin***

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[12] [1999] 5 MLJ 229
[13] [2007] 9 MLJ 787

Hashim [1998] HC[14] and ***Green Continental Furniture (M) Sdn Bhd v Tenaga Nasional Bhd [2011] COA***[15]).

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

The continued reference to the old forms of action, in parallel with the provisions of Part VI of CA 1950 has led to significant confusion as to the appropriate legal basis for making a restitutionary claim within the Malaysian legal framework.[16] Such reference should be discontinued, since it can be convincingly argued that the statutory provisions (Part VI, Sections 65 and 66) are broad enough to accommodate the modern principles of unjust enrichment and most of the unjust factors recognised under the common law.

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

A promising development occurred in the legal landscape of Malaysia in late 2015, when the apex court of Malaysia, the Federal Court ("FC"), gave a groundbreaking decision in ***Dream Property Sdn Bhd v Atlas Housing Sdn Bhd***[17], where the court stated that unjust enrichment describes a cause of action and that a cause of action in unjust enrichment can give rise to a right to restitution. This is the first time that a Malaysian court has explicitly recognized that unjust enrichment can be a separate cause of action in Malaysia, and being the

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[14] [1998] 3 MLJ 262
[15] [2011] 8 MLJ 394
[16] See part of the discussion in the case of ***Dream Property*** itself (below).
[17] [2015] 2 MLJ 441

pronouncement of the apex court, it has given hope for the future of unjust enrichment in Malaysia.

The Landmark Case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] FC

The defendant/purchaser (Dream Property) had entered into a Sale and Purchase Agreement (SPA) with the plaintiff/seller (Atlas Housing) in Nov 2004. The defendant agreed to purchase a piece of land from plaintiff at RM33.5 million. The defendant's plan was to build a shopping mall on the land (the Batu Pahat Mall). Defendant paid a 10% deposit to plaintiff. The defendant was given a Power of Attorney (POA) by the plaintiff over the land and allowed to begin construction of the mall as defendant wanted to get the mall ready and operative before Chinese New Year in January 2007. A dispute arose when the plaintiff/seller claimed that the contract was automatically terminated due to the defendant's failure to pay the balance purchase price within the completion period (the completion and extended dates of payment of the balance purchase price were disputed between the parties). The plaintiff/seller refused to complete the contract and commenced legal proceedings in August 2006 for recovery of Vacant Possesion (VP) of the land on the ground that the defendant breached the contract. Defendant counter claimed for Specific Performance. The mall was at that time 50% constructed.

In October 2006, the plaintiff issued a letter demanding that the defendant ceased construction of the mall, but did not appply for any injunction to restraint the defendant from continuing the construction works on the land, and so despite on-going litigation, the defendant pressed on with construction of the mall. The mall was completed and fully operative by early 2007 with ongoing businesses and tenants. As of November 2007, its market value was estimated to be around RM387 million. The cost of construction of the mall was about RM124 million.

After full trial, the High Court dismissed the defendant's claim, held that the defendant committed repudiatory breach and ordered VP of the land together with the mall to be returned to the plaintiff. However, the High Court also ordered the plaintiff to pay the defendant the costs of construction for the shopping mall pursuant to section 71 of the CA 1950. The decision

of the High Court was upheld by a majority of the Court of Appeal. In addition, the defendant was ordered to pay profits derived from its use and occupation of the land to the plaintiff. Defendant appealed to the Federal Court.

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

The Federal Court explained that the defendant/purchaser's right of recovery was based on the law of unjust enrichment and went on to address the issue by applying the traditional four-stage inquiry. The orders from the courts below for the defendant to give an account of profit was set aside and substituted with order to pay rent at market value for its occupation of the plaintiff's unimproved land (without the mall) until the date of the Federal Court judgment.

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

(1) The apex court granted full recognition on the availability of a separate cause of action of unjust enrichment in Malaysian law. As per Azahar Mohamed FCJ's judgment:

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

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

(2) The Federal Court accepts the orthodox English approach for establishing a claim of restitution in unjust enrichment (relying on leading English cases of *Banque Financiere* and *Sempra Metals*) i.e. the traditional 4-stage inquiry.

(3) However, on the 3rd inquiry/element i.e. in determining whether the enrichment was "unjust", the Federal Court chose to apply **the civilian 'absence of basis' approach** rather than the traditional English 'unjust factors' approach.

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

The Federal Court basically disagreed with the plaintiff's counsel's argument that the case of ***New Kok Ann Realty*** (above) dealt with the doctrine of unjust enrichment within the context of s.71 when it stated that *"We note that the Supreme Court made no reference to the law of unjust enrichment. A closer reading of the judgment will show the Supreme Court in that case decided the appeal entirely on the basis of the provisions of s.71 of the CA 1950 and not based on the law of unjust enrichment as we understand it today."*

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

This also lends support to the view that these restitutionary provisions do not embody the principle of unjust enrichment as recognised and developed under English law, and thus the approach is to treat the law of restitution as embodied in the restitutionary provisions of the Contracts Act 1950 as distinct from "the common law of unjust enrichment" that is now recognized in Malaysia by virtue of the case of ***Dream Property***. As such, the restitutionary provisions should not be interpreted by reference to principles of English law and "that the appeal of the common law should, where appropriate, be firmly resisted or even rejected, in other words, arguing for a mutually exclusive dual regime for Restitution in Malaysia[18] i.e. the

[18] LW Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia*, (Petaling Jaya, Selangor: Lexis Nexis, 2015), 37.

statutory regime under Contracts Act 1950, and a Common Law regime based on the principle of unjust enrichment.

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

Criticism of *Dream Property*

1. How the Court understood the "enrichment" question i.e. whether the enrichment is the value of defendant's labour in constructing the mall, or the mall itself?

This distinction was not recognised as an issue of the enrichment question itself, but rather in deciding what award to make. The court stated that this measure i.e. the current market value of the mall (excluding the market value of the land) is correct simply because it would be "manifestly unfair & unjust" to award only the value of the labour. However this is wrong, as gains realised by plaintiff beyond the value of the defendant's labour is actually the function of its own property rights, not the defendant's labour.[19] As a point of reference, we can compare the position under English law in relation to an improver of land (such as the defendant).

Unjust enrichment in the case of improver of land – the position under English law

The prevailing position under English law is significantly less generous to the improver. In ***Cobbe v Yeoman's Row Management Ltd***[20], the plaintiff obtained a planning permission for the defendant's land in anticipation of a joint venture, which did not materialise. The HOL held that the plaintiff was entitled to **a quantum meruit payment for his services**, which will take into account relevant costs in procuring the planning permission as well as his fee.

[19] F Wilmot-Smith, "A Dream Case?", *LQR,* 132(Apr), 196-201 (2016): 199.
[20] [2008] 1 WLR 1752

Lord Scott reasoned that the defendant's enrichment **shall not be assessed by the difference in market value** between the land without the planning permission and the land with it, "for the planning permission did not create the development potential of the land but merely unlocked it"[21]. The English approach places a premium on the landowner's freedom to exploit his land, which is an important aspect of land ownership.[22]

However, ***Dream Property*** can be distinquished from Cobbe, where in ***Dream Property*** the Seller by entering into an agreement to sell the land, had already willingly bargained away the land together with its development potential.[23]

2. The treatment/analysis of "at the expense of the Claimant" requirement.

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

Therefore in ***Dream Property***, the enrichment was only to the defendant's expense to the extent of its costs in constructing the Mall, as the value of the mall is more closely link to the Claimant's property rights pursuant to their 'title' to the land. Otherwise, the application of the law of unjust enrichment becomes **too wide** – which is the subject of a new wave of academic detractors/skepticism even from former 'proponents' of unjust enrichment.[24] In this regard, the best approach is for a "double ceiling" measure on unjust enrichment claims.

A compelling argument for "double ceiling" on unjust enrichment

Unjust enrichment is not calculated to strip defendants of gain at all costs, but rather to restore to the claimant the value of rights he has unjustly lost. It can therefore only justify

[21] [2008] 1 WLR 1752, [41]
[22] A W-L See, "Restitution for the Mistaken Improver of Land", *The Conveyancer and Property Lawyer*, 80 (2016): 60.
[23] *Ibid.*
[24] see A Burrows, "At the Expense of the Claimant: A Fresh Look", *RLR* (2017): 167; and A Burrows, "In Defence of Unjust Enrichment", *Cambridge Law Journal,* 78(3) (2019): 521.

restitution to the extent of the claimant's ultimate expense, or the defendant's ultimate enrichment, whichever is lesser.[25] As such, the case of improvements to property under English law supports the double-ceiling approach as the approach justifies the law's general restriction of the measure of restitution to the market price of the services where that is lower than the increase in value of the defendant's property.

3. The court's reference to 'Unconscionability' is in effect a 'Good Faith' Defence.[26]

4. The court ordered counter-restitution as a pre-condition to redelivery of Vacant Possession.[27]

5. The court's adoption of the civilian 'absence of basis' approach rather than the traditional English 'unjust factors' approach that is more familiar to a Common Law jurisdiction like Malaysia.

The Court stated that "in our view it would produce a fairer outcome", but did not elaborate much further; and not providing any further or detailed guidance on how the "absence of basis" test was to be applied in future cases.

'Absence of Basis' vs. 'Unjust Factors'

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

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[25] A Trotter, "The Double Ceiling on Unjust Enrichment: Old Solution for Old Problems", *Cambridge Law Journal,* 76(1) (2017): 168.
[26] A W-L See, "Restitution for the Mistaken Improver of Land", *The Conveyancer and Property Lawyer*, 80 (2016): 60.
[27] *Ibid.*

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

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

The adoption of the civilian 'absence of basis' approach by the Federal Court without providing further guidance have given rise to several pertinent questions/issues[28]:

1. **What constitutes a "legal ground" or "juristic basis" to retain an enrichment?**

   The words "legal ground" and "juristic basis" are very general in nature and somewhat vague. It is not clear what the scope, width and limits of these words may be. The Federal Court only mentioned "by legislation or by contract", which are equally general and vague words.

2. **How should the courts develop the "absence of basis" approach in the future?**

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

3. **Who bears the burden of proof under the "absence of basis" approach?**

4. **What is the status of earlier Malaysian case law?** (i.e. the precedent and authorities at all levels of the judicial hierarchy which dealt with common law restitutionary claims or unjust enrichment)

[28] See LW Tchung, "Absence of basis: Challenges for the Malaysian Law of Unjust Enrichment", http://weng.com.my/2015/03/09/absence-of-basis-challenges-for-the-malaysian-law-of-unjust-enrichment/ (accessed 12 November, 2019).

The entire corpus of earlier Malaysian case law on restitution of unjust enrichment, dealing with well-known grounds of restitution such as failure of consideration, mistake, legal compulsion, duress, undue influence, frustration, etc were all decided based on principles of English law, and which can readily be explained and categorised based on the "unjust factors" approach under English law.Does this mean that the earlier Malaysian case law are now to be regarded as obsolete, irrelevant or even overruled? Would it mean that Malaysian law of unjust enrichment would effectively be starting from scratch?

Criticism of the 'Absence of Basis' Approach – English Law

In England, an invitation for a shift to the 'absence of basis' or 'Birksian' approach was met with caution by the courts. In ***Deutsche Morgan Grenfell Group plc v IRC***[29], the HOL preferred to maintain the 'unjust factor' approach. Lord Hope stressed the virtue of incremental development and warned against "attempts at dramatic simplification" of the law without fuller study.

This is because the 'absence of basis' approach operates at a high level of abstraction and therefore may oversimplifies the unjust inquiry to such extent that some of the subtleties and nuances of the existing law are lost. Thus it has been argued that the 'absence of basis' test is too broad and would have led to recovery of enrichment in undeserving situations.[30]

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

[29] [2007] 1 AC 558
[30] L Smith, "Demystifying Juristic Reasons", *Canadian Busines Law Journal,* Vol. 45 (2007): 281.

Criticism of the 'Absence of Basis' Approach – the Canadian Experience

Three structural problems with the 'Absence of Basis' approach in Canada[31]:

1. The role of 'unjust factors' is problematic.

The interaction between 'unjust factors' and 'absence of basis' often confuses the analysis as in some cases courts award restitution on the ground that there is no basis, while in other cases the analysis suggests the reason for restitution is actually the presence of an unjust factor, but employ the phrase 'absence of juristic reason' simply as an expression of the conclusion reached under the traditional approach. Therefore it appears that both approaches are operating simultaneously - leading to confusion and uncertainty.

2. The nature of what would amount to an acceptable legal 'basis' is unclear.

3. The expansionary tendencies of 'absence of basis' would then be shifting work to the 'Defences'.

Way Forward – 'Absence of Basis' or 'Unjust Factor'?

The Federal Court did not appear to provide that the principle of unjust enrichment is a single overarching principle covering all situations of restitutionary relief, thus in situations relating to existing principles of restitutionary relief under contract law such as failure of consideration and mistakes, the courts would still rely on the 'unjust factor' test. This would lead to confusion as two different approaches are applicable in Malaysia now.[32]

In most cases the two (2) approaches often yield the same outcome. However practically speaking, since unjust enrichment is still at its formative stage in Malaysia, to systematically develop the law it is best done by requiring the courts to articulate the precise reason for regarding an enrichment as unjust, especially since the Malaysian courts are already familiar with most of the unjust factors.

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[31] C Hunt, "Unjust Enrichment Understood as Absence of Basis: A Critical Evaluation with Lessons from Canada", *Oxford U Comparative L Forum* (2009): 6.
[32] TP Meng and OS Fook, "The Law of Unjust Enrichment in Malaysia: Where Are We Now?" *Advanced Science Letters*, Volume 23, Number 9 (2017): 8594.

Absence of basis has the appearance of simplicity and convenience and this may make it liable to be invoked indiscriminately, particularly by those who are not well versed in the subject. Furthermore, in trying to discover what belongs IN the law of unjust enrichment (i.e. what constitutes an 'unjust factor'), the courts will instead struggle to keep irrelevant things OUT (i.e. what would not amount to a valid legal 'basis'). Keeping in line with the other major common law jurisdictions will also allow the Malaysian courts to continue tapping from a familiar pool of resources seeing that the common law has long influenced the development of Malaysian law. The reality is that the unjust factors approach is so well entrenched that it is likely to retain its place in Malaysian law since if the facts of a case reveal an established unjust factor, the court will most likely still refer to it. For example, it is highly unlikely that a court will ignore section 73 of CA 1950 when addressing a clear case of mistake.[33]

In the past, the Malaysian courts have not expressed preference for the unjust factor approach, but they always look for specific grounds to justify restitution, particularly since some of the established unjust factor is provided in the CA 1950 (e.g. s.73 Mistake/Coercion, s.65/66 Failure of Consideration). This can be seen from the fact that of all the cases on restitution/unjust enrichment that have referred to ***Dream Property*** since, only four (4) cases resorted to absence of basis.

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

Way Forward for Unjust Enrichment – 1st View: Mutually Exclusive Dual Regime

Low Weng Tchung in his book[34] argued for a mutually exclusive dual regime for Restitution in Malaysia, stating that the two regimes is and should be treated as being different

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[33] A W-L See, "Restitution for the Mistaken Improver of Land", *The Conveyancer and Property Lawyer*, 80 (2016): 60.

[34] LW Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia*, (Petaling Jaya, Selangor: Lexis Nexis, 2015).

in principle, and therefore "the restitutionary provisions of the Contracts Act 1950 should not be interpreted, restricted or limited by reference to English law…that the appeal of the common law should, where appropriate, be firmly reisited or even rejected". Among the primary reasons given are as follows:

1. Restitutionary Provisions of CA 1950 which is a direct legal enactment stands on a different juridical foundation i.e. they are of Roman Law origin.
2. By looking at the state of English law of Restitution and Unjust Enrichment prior to 1867 (the year the Indian Contract Bill was introduced), in particular that in 1872 (when the Indian Contract Act[35] was enacted), "English law did not recognise and would not for another 120 years recognise a law of restitution based on the principle of unjust enrichment".
3. "The separate and distinct principle of 'restitution' underpinning the relevant provisions of the Contracts Act 1950 is too well established to be assimilated or equated with the principle of unjust enrichment at Common Law".
4. The Indian Law Commission in its 13th Report recommended amendments to the Indian Contracts Act to accept the doctrine of unjust enrcichment, therefore it implicitly acknowledges that the principle of unjust enrichment formed no part of the Indian Contracts Act.
5. The case of ***Dream Property*** itself[36].

My Response

1. Such an understanding/approach seems to freeze the provisions of the Contracts Act 1950 to the point of time when they were enacted.

Is this how Malaysian courts have or should approach the law (even in other provisions outside the restitutionary provisions)? Are courts supposed to apply the provisions without

[35] The Malaysian Contracts Act 1950 was drafted based on its Indian counterpart, and hence the provisions in the Malaysian statute are in *pari materia* with the Indian's Contract Act 1872.
[36] see the discussion above.

regards to subsequent development in English/common law and only look at what the provisions were supposed to cater to at the point of time when they were enacted? This cannot be the case as statute should not be seen as freezing or stifling or turning back a development of the common law; and judges should not be unnecessarily rigid in their interpretation of statutory provisions.

2. Even if the restitutionary provisions are of Roman Law origin, this shows that we share the same historical roots with English law.

Hence the way we develop our law on unjust enrichment should move towards a point of **convergence**, which comes with a lot of benefit in terms of pooling jurisprudential resources, providing familiarity and therefore consistency and certainty, etc., unless absolutely prevented by the clear wordings of the statutory provisions. However the statutory provisions are fairly broad that it could encapsulate the common law principles of unjust enrichment in its analysis.[37] Even Indian judges have shown a tendency to be more liberal in the way they approach restitutionary provisions (as with other provisions) of the Contracts Act – sometimes even going against express wordings of the statutory provisions. Malaysian judges tend to be more reticent, as they should, but not to the extent that the law remains stunted.

3. Mutually exclusive dual regime is liable to confuse.

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

Dual Regime or Unified Approach?

According to Prof. Andrew Burrows[38]:

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[37] see the 2nd view below.

[38] A Burrows, "The Relationship Between Common Law and Statute in the Law of Obligations", *LQR,* 128 (Apr) (2012): 232.

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

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

Way Forward for Unjust Enrichment – 2nd View: To Use the Common Law to Develop the Contents of the Restitutionary Provisions

This view has been taken by a number of authors[39] in order to promote a principled approach in the application of the provisions - but outside Part VI and section 65/66, of the CA 1950, the courts can still continue to develop unjust enrichment for other unjust factors not contained in these provisions. Importing the common law principles into the framework of

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

statutory provisions can be done in Malaysia within the ambit of ss. 3 and 5 of the Civil Law Act 1956, with the following Proviso in mind:

1. Any Common Law rules that is inconsistent (goes against) express wordings of the statutory provision cannot be applied.

2. Where the express wordings of the statutory provision is wider than a Common Law rule (e.g. does not have a limitation recognised under the Common Law), the wider interpretation is preferred.

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

Developing the Contents of Section 73 CA 1950

The courts should formulate the detailed rules and principles of the section by drawing on the experience of other major common law jurisdictions and incorporating them into the section's framework. The content of s. 73 needs to be developed so as to enable it to better address complex issues, e.g. those that involves competing interests.

The courts must avoid drawing an analogy between the statutory claim and a contractual claim and applying incorrect distinction between the statutory claim and a claim for money had and received. The unjust factors here are Mistake and Coercion (which should include economic coercion/duress). The words 'repay or return' indicates that both award of personal restitution and proprietary restitution can be recognized. It should also encompasses recognition of common law defences to unjust enrichment claims that can serve to balance competing interests.

Developing the Contents of Section 71 CA 1950

Four (4) conditions under the section were laid down in ***Siow Wong Fatt v Susur Mining Ltd (Privy Council)***[40] i.e. (1) doing of the act/delivery of the thing must be lawful, (2) it must be done for another person, (3) not intended to be gratuitous, and (4) the other person enjoys the benefit of the act or delivery. The unjust factor here is 'Free Acceptance' i.e. where the defendant is aware that a benefit is being conferred non-gratuitously and having opportunity to reject, freely accepts the benefit. The scope for each of the condition can be analysed by looking at the 4-elements of unjust enrichment.

By drawing on the Common Law to rationalise and develop the right to recovery of non-gratuitious benefit, it can inject principle and clarity into the antique section and revive it for practical and modern use. It would also put a stop to the tendency (as seen from Malaysian case law) to refer or apply s.71 in situations where ready solutions could be found in other established areas of the law (e.g. when parties obligations are governed by contract; when restitution is a claim pursuant to failure of basis/consideration ie. an action under s.66); loading the section with unnecessary materials is confusing, conceptually wrong and cloud the section's true utility.

Developing the Contents of Sections 65 and 66 CA 1950

The sections cover contract that becomes void and contracts rescinded for want of free consent. For the former i.e. contracts discharged for 'frustration' or by 'breach', the unjust factor would be 'failure of consideration'; while for the latter the unjust factor can be coercion/duress, undue influence, mistake or fraud/misrepresentation.

Other Challenges for Unjust Enrichment in Malaysia Moving Forward

One main challenge would be to demarcate the line between restitution for unjust enrichment claims with purely contractual claims, hence it is very important to understand the various intersection between unjust enrichment and contract, within the context of the

[40] [1967] 2 MLJ 118 PC

Contracts Act 1950. Under the English common law, the area of 'failure of consideration' for unjust enrichment now has expanded to include various principles that has not in the past been understood to be inter-related, therefore it is imperative for the courts and legal practitioners in Malaysia to be aware of and understand this development in English law and other common law jurisdictions (where they sometimes fundamentally diverge), and therefore when courts apply them together by just "cutting and pasting" decisions from different jurisdictions at once, the court's reasoning may become seriously flawed and turn the area of law into disarray.

For example, this precisely happened in two Federal Court cases when the courts conflated the principles governing remedies with principles governing breach, which had cause the court to reformulate/restate the test of "total failure of consideration" erroneously, in that the court regarded "total failure of consideration" as being part of the test for terminating a contract for breach. This can be seen in the Federal Court case of ***Berjaya Times Square v M- Concept***[41] (where the decision of Justice Gopal Sri Ram has been heavily criticised by scholars[42]) and the case of ***Damansara Realty Bhd v Bangsar Hill Holdings***[43]**.** This would then have real adverse effect on commercial decisions and certainties.

Therefore, judges and practitioners need to carefully understand how the law of unjust enrichment interacts with other areas of the law of obligations, so as to avoid distortion of principles or confusion and uncertainty in the law. 'Legal education' in this aspect merits an attention. Lastly, another area which is seeing an ongoing debate and unresolved by case-law as of yet, is on the limitation period for unjust enrichment claims. This needs to be made clear so as to ensure procedural correctness in bringing a claim for unjust enrichment that is independent of a contractual claim.

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[41] [2010] 1 CLJ 269

[42] See for example D Fung, "*Berjaya Times Square* Revisited: What's in a Name?", *Journal of the Malaysian Judiciary* (2019): 169.

[43] [2011] 9 CLJ 257