Wee Chiaw Sek Anna
v
Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another

[2013] SGCA 36

Court of Appeal — Civil Appeal No 140 of 2012
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tan Lee Meng J
9 April 2013

Contract — Misrepresentation — Fraudulent
Contract — Misrepresentation — Exaggeration
Family Law — Matrimonial Assets — Division
Restitution — Unjust Enrichment
Trusts — Constructive Trusts — Remedial Constructive Trusts

28 June 2013 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the trial judge's ("the Judge") decision in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2012] SGHC 197 ("the Judgment").

2 The threshold issue is whether the Appellant's ex-husband, Mr Ng Hock Seng ("the Deceased"), who died in 2004, had fraudulently misrepresented to the Appellant that he had little or no assets, thus inducing

her to forgo division of matrimonial assets at ancillary proceedings. Prior to his death, the Deceased had transferred the monies in his estate into four trusts, two of which are held by the Second Respondent as trustee for the benefit of the Appellant's two children by the Deceased and the Appellant's stepdaughter, who is also the First Respondent and executrix of the estate of the Deceased ("the Estate"). If the Appellant succeeds on the threshold issue, the fruits of her claim lie, potentially, in these four trusts. She ultimately made a claim against two of these trusts, arguing that she would have received the monies which had been transferred into those trusts had she asked for a division of the matrimonial assets.

The facts

Parties to the dispute

3 The Appellant and the Deceased were married on 19 December 1988 and separated sometime in August 1998. The parties signed a deed of separation ("the Separation Agreement") on 7 December 1998 and the decree *nisi* was granted on 27 April 1999.

4 The First Respondent, Ms Ng Li-Ann Genevieve, is the sole executrix of the Estate and the Deceased's first daughter from a previous marriage.

5 The Second Respondent, BNP Paribas Jersey Trust Corporation Limited, is the trustee of two British Virgin Islands ("BVI") trusts with the Deceased as settlor. The first trust was established on 23 April 1999 ("the 1999 trust") with Banque Paribas International Trustee Limited ("BPITL"). On 12 September 2003, the Second Respondent took over BPITL's duties as

trustees of the 1999 trust. The second trust was established on 14 June 2004 (referred to by parties as "the 2002 trust").

6 There are two children of the marriage, Joshua Ng ("Joshua") and Azura Ng ("Azura"), who are beneficiaries of the 1999 trust. The Appellant, however, is listed as an "excluded person" in the 1999 and 2002 trusts. Under BVI law, this precludes the Appellant from being a beneficiary of the 1999 and 2002 trusts.

Background to the dispute

7 The Deceased and the Appellant were in Singapore at the commencement of their marriage. After the Deceased's business failed, they moved to Kuching to be closer to the Appellant's family. The Appellant was the main breadwinner of the family and paid for the Deceased's living and medical expenses. The Appellant claimed that the Deceased had many failed businesses.

8 In 1998, the Deceased entered into two agreements with Meissner & Wurst Sdn Bhd ("M&W") for his appointment as the Strategic Business Advisor for M&W's first Silicon Wafer Fabrication Project ("the Project"). The agreements were as follows:

(a) The first agreement, made on 24 April 1998 ("the First M&W Agreement"), provided that the Deceased advise M&W on the business, financial and political conditions in Sarawak, assist in getting preferential prices and terms for the Project and ultimately assure that the Project was awarded to M&W. 60% of the US$25,000,000 consideration was to be paid upon successful procurement of the

Project, and the remaining 40% would be paid for the Deceased's services as Strategic Business Advisor independent of the procurement of the Project (10% payable within 7 days of signing the First M&W Agreement and 30% payable by 28 October 1998). The Project was successfully procured and formalised on 30 March 1999, after the Deceased and the Appellant had signed the Separation Agreement. The last tranche of payment under the First M&W Agreement was paid on 4 November 1999.

(b) The second agreement, made on 1 July 1998 ("the Second M&W Agreement"), reiterated the Deceased's responsibilities in the First M&W agreement, save that he was now responsible for supporting the "execution of the project" rather than assuring the "successful signing of the contract for the project". The Deceased's remuneration was RM900,000 to be paid in monthly instalments of RM50,000.

9 Thereafter, the relationship between the Deceased and the Appellant further soured. Things came to a head in August 1998, and the Deceased moved out of the matrimonial home. The Deceased continued to visit the matrimonial home from August to November 1998. During this time, the Deceased set up Armanee Assets Limited ("Armanee") on 28 October 1998, a BVI company intended as a vehicle for use and investments of the monies received under both M&W agreements ("the monies"). On 22 October 1998, the Appellant signed a divorce petition ("the Divorce Petition") but did not file it until after the parties had formally separated in December 1998.

10 On 7 December 1998, the parties entered into the Separation Agreement "for better regulation of the relationship of the parties during the interim period pending the outcome of the hearing of the Divorce Petition". The Separation Agreement dealt with care and control as well as support and maintenance of Joshua and Azura, the separation of living arrangements between the Appellant and the Deceased, part payment of RM100,000 in debt owing from the Deceased to the Appellant, and transfer of full beneficial ownership in the matrimonial home to the Appellant. The Separation Agreement also specified that the Appellant was to support and maintain herself. A supplementary memorandum signed on the same day contained an undertaking by the Deceased to settle in full additional debts amounting to RM850,000 and S$30,000 owed to the Appellant and her family members.

11 The following day, the Appellant and the Deceased drew up an agreed parenting plan (providing for monthly maintenance by the Deceased of RM3,750 per child) and a notice of consent to the divorce proceedings. The year of separation on the notice of consent was falsely stated as 1995. The Divorce Petition was modified to include this consent and filed on 22 December 1998.

12 The Deceased received his first payment of the monies on 28 January 1999. On 10 March 1999, the Deceased set up a second company, Prominent Market Investments Limited ("Prominent"), to hold the monies.

13 On 23 April 1999, the Deceased set up the 1999 trust with $1,000. This was later endowed with all funds and assets under Prominent and Armanee. The beneficiaries of the 1999 trust are Joshua, Azura and the First Respondent (should Joshua and Azura pre-decease her). By this time, the Project had been

successfully procured (see [8(a)] above), and the balance of US$15,000,000 owing under the First M&W Agreement had become due to the Deceased.

14 The decree *nisi* was granted on 27 April 1999. The Appellant's and the Deceased's lawyers entered into protracted correspondence with regard to ancillaries and outstanding issues before the divorce was to be made absolute. This correspondence related to, *inter alia*, the settlement of outstanding amounts which the Deceased had spent on the Appellant's supplementary credit card, proof of the Deceased's financial status and income, and the provisions which the Deceased planned to make to take care of Joshua and Azura. The Appellant claimed that this correspondence contained active representations in respect of the financial state of the Deceased. There was no mention of division of matrimonial assets in this correspondence.

15 On 28 June 1999, the Deceased bought another BVI company, South Sea International Limited ("South Sea"), to hold his *personal* investments. At the time, the Deceased made efforts to keep the South Sea accounts separate from Armanee's and Prominent's accounts, which assets were for the benefit of the 1999 trust. The assets in the South Sea account were eventually put into the 2002 trust on 14 June 2004, almost four years after the divorce had been made absolute. The beneficiaries of the 2002 trust were the First Respondent and the trustees of the 1999 trust. By that time, there was US$4,349,999 in the South Sea account.

16 As part of ancillary proceedings, the Appellant filed her affidavit of assets and means on 3 December 1999. The Deceased filed his affidavit of assets and means on 13 January 2000 ("the Affidavit"). The Affidavit stated that the Deceased's income came from family, friends and well-wishers.

17 The Appellant and the Deceased subsequently reached an agreement on the outstanding ancillary matters, in particular for care and control as well as support and maintenance of Joshua and Azura. The Appellant also agreed to forgo any claim to a division of matrimonial assets. This agreement was recorded in a consent order dated 28 February 2000. Under the consent order, the Deceased and the Appellant had joint custody of Joshua and Azura. The Deceased was to pay RM3,750 in monthly maintenance for Joshua and Azura, and provide for their medical insurance and all educational needs up until tertiary level. The Appellant subsequently claimed that she had only agreed to forgo division because she believed that the Deceased had little or no assets to divide. She also claimed that, had she known of the existence of the monies, she would have asked for division and been awarded a portion of the monies. This is the basis for her claim in fraudulent misrepresentation.

18 Not long after, on 26 April 2000, the Deceased transferred US$2,000,000 from the Armanee account into another trust managed by Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill Lynch"). This was in addition to US$1,000,000 which had already been transferred to a second trust managed by Merrill Lynch on 2 February 2000, before the consent order was made. The Appellant has not made a claim against either of the Merrill Lynch trusts.

19 On 6 October 2000, the decree *nisi* was made final. However, given that the Appellant and the Deceased shared joint custody of Joshua and Azura, the Appellant remained in contact with the Deceased. The Appellant highlighted five conversations she had with the Deceased in an email dated 25 June 2005 which she wrote to the trustees after the Deceased's death to ascertain the status of the 1999 trust:

(a) Two meetings at Kuching Hilton in December 2003;

(b) One meeting at the Deceased's mother's funeral in February 2004; and

(c) Two tele-conversations in April and early May 2004.

20 In these conversations, the Appellant claimed that the Deceased had discussed the appointment of a Protector with her to ensure that Joshua's and Azura's needs would be taken care of. The Appellant testified that she received repeated assurances from the Deceased that the children would have no concerns with money matters for the rest of their lives.

21 On 15 June 2004, the Deceased died of tongue cancer. The Appellant was notified of the trusts in existence and proceeded to make enquiries about these trusts on behalf of Joshua and Azura. She also filed a suit against the First Respondent as executrix of the Estate to recover a debt of RM500,000 owed to her by the Deceased. This suit was settled on 6 February 2006 for RM350,000. On 9 September 2005, the Appellant asked for the audited accounts of the 1999 trust, Armanee and Prominent from the time of their formations. The Second Respondent complied and supplied these accounts on 7 November 2005. These accounts dated from 28 October 1998 (Armanee), 10 March 1999 (Prominent) and 23 April 1999 (the 1999 trust). It should be noted that all three of these dates preceded the grant of the decree *nisi*.

22 Four years later, on 26 November 2009, the Appellant filed Suit No 1002 of 2009 against the First and Second Respondents. She claimed in fraudulent misrepresentation against the First Respondent in her capacity as executrix of the Estate, and claimed in both restitution and unjust enrichment

against the Second Respondent in their capacity as trustees of the 1999 and 2002 trusts. The remedy sought for both claims was a remedial constructive trust ("RCT") over the funds in the 1999 and 2002 trusts which would have been awarded to her as damages for the Deceased's fraud. In oral submissions for the present appeal, the Appellant abandoned her claim in restitution (see below at [28]).

The Judge's findings and decision

23 The Judge dismissed both the Appellant's claims.

24 Addressing the claim in fraudulent misrepresentation, the Judge found that there were no express representations or active attempts to conceal assets during the Deceased's lifetime. Rather, it was the Appellant's own perception and conclusion that the Deceased was a man of straw. Accordingly, even if there had been a representation, the Judge found that the Appellant had not relied on it. She further found that the monies were not matrimonial assets and thus any reliance on the alleged misrepresentation would not have caused the Appellant any loss.

25 Turning to the issue of unjust enrichment, the Judge found that there could not be a proprietary remedy over the 1999 and 2002 trusts as the funds had been comingled over the past 12 years and their sources could not now be ascertained. There were accordingly no identifiable funds over which an RCT could be imposed. The Judge further found that she had no power to determine what the Appellant would have received on division given the passage of time since the divorce and the remedy which the Appellant sought was thus elusive. The Judge also found that an RCT was a remedy and not a claim in restitution. She thus also disallowed the Appellant's claim in restitution.

The issues on appeal

26 As stated at [2] above, the threshold issue is whether the Deceased had made a fraudulent misrepresentation to the Appellant that he was impecunious or had little or no assets, intending that the Appellant would act on that representation to agree to forgo division of matrimonial assets ("Issue 1").

27 If the Appellant succeeds in proving this threshold question, the following issues arise:

(a) Did the Appellant rely on the Deceased's misrepresentation and suffer loss as a result? This relates to the rest of the claim against the First Respondent in fraudulent misrepresentation (pursuant to Issue 1).

(b) Was there unjust enrichment of the Second Respondent ("Issue 2")?

(c) Can an RCT be imposed for unjust enrichment ("Issue 3")?

(d) Does the defence of laches apply ("Issue 4")?

28 We note that, although the Appellant had begun with an additional claim that an RCT should be imposed in any event, counsel for the Appellant, Mr Hri Kumar Nair SC ("Mr Kumar"), conceded (correctly, in our view) during the appeal hearing that an RCT could not be imposed without a finding of unjust enrichment.

Issue 1

The applicable principles

29 The applicable principles relating to fraudulent misrepresentation are well-established.

30 It is, in our view, of the first importance to emphasise right at the outset the *relatively high standard of proof* which must be satisfied by the representee (here, the Appellant) before a fraudulent misrepresentation can be established successfully against the representor (here, the Deceased). As V K Rajah JA put it in the Singapore High Court decision of *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 (at [30]), the allegation of fraud is a serious one and that "[g]enerally speaking, the graver the allegation, the higher the standard of proof incumbent on the claimant". If an allegation of fraud is successfully made, the representor would be justifiably found to have been guilty of *dishonesty*. Dishonesty is a grave allegation requiring a high standard of proof. In a similar vein, this court in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] 3 SLR(R) 263 observed thus (at [14]):

> [W]e would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; *but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case*. [emphasis added]

31 This high standard of proof is also consistent with the fact that an award of damages for fraudulent misrepresentation covers a *wide* ambit – including all loss which flowed directly as a result of the entry by the representee into the transaction in question, *regardless of whether or not such*

loss was foreseeable, and which would include all consequential loss as well (see, for example, the decision of this court in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*") at [21]–[27]). The leading English decision in this regard (which was followed in *Wishing Star*) is that of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"). In *Smith New Court*, Lord Steyn pertinently observed that a *stricter* approach towards the fraudster which disregards the usual limiting factors is adopted in the context of fraudulent misrepresentation because "[f]irst it serves a deterrent purpose in discouraging fraud" (at 279) and "[s]econdly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud" (at 280).

32 The oft-cited statement of principle in so far as the elements of fraudulent misrepresentation are concerned is that of Lord Herschell in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337, as follows (at 374):

> I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (*1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.* Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent* a false statement being fraudulent, there must, I think, always be *an honest belief in its truth.* And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. [emphasis added]

33 Lord Herschell's statement of principle is now an established part of the Singapore legal landscape relating to fraudulent misrepresentation (see, for example, the decision of this court in *Wishing Star* (at [16]–[17], as well as the authorities cited therein)).

34 However, the concept of *recklessness* must *not* be equated with negligence or carelessness. As Bowen LJ aptly observed in the English Court of Appeal decision of *Angus v Clifford* [1891] 2 Ch 449 ("*Angus*") (at 471):

> It seems to me that a second cause from which a fallacious view arises is from the use of the word "recklessness". ... Not caring ... did not mean not taking care, it meant *indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth*, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn – evidence which consists in a great many cases of gross want of caution – with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence. [emphasis added]

35 This approach has been adopted locally in the Singapore High Court decision of *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR(R) 196 ("*Raiffeisen Zentralbank*"), where the learned judge opined (at [40] and [43]) as follows:

> 40 ***Dishonesty is the touchstone*** *which distinguishes fraudulent misrepresentation from other forms of misrepresentation.* This *turns on the intention and belief of the representor.* A party complaining of having been misled by a representation to his injury has no remedy in damages under the general law unless the representation was not only false, but fraudulent. See Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("Spencer Bower") at para 98.
>
> ...
>
> 43 Thus, ***negligence, however gross, is not fraud***.

> [emphasis added in italics and bold italics]

36 An important point which will be of significance in the context of the present appeal is this: in assessing whether an alleged representation was in fact made, "[t]he particular words used *must* of course be read in *their* ***context***" (*per* Waller LJ in the English Court of Appeal decision of *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 ("*Jaffray*") at [52] [emphasis added in italics and bold italics]; reference may also be made to the English High Court decision of *FoodCo UK LLP v Henry Boot Developments Limited* [2010] EWHC 358 (Ch) at [197]). Indeed, Waller LJ proceeded (in *Jaffray*) to observe as follows (at [52]):

> In particular, it is *necessary* to have regard to the *purpose* for which the document came into existence, why the statements contained in it were made and by whom they were intended to be read. [emphasis added]

37 Another important point – which is also of no small relevance to the analysis of the facts of the present appeal – relates to *the representor's* (here, the Deceased's) *perspective*. Put simply, it is *the representor's own (subjective) belief* that is crucial. Such subjective belief must be ascertained by the court based on the *objective evidence* available, but the court *cannot substitute its own view as to what it thinks the representor's belief was*. This is not merely a semantical difference. As just noted, *the concept of objectivity* is to be applied to *the evidence* demonstrating what *the representor's subjective* belief was *and not* to what *the court thought a reasonable person would think* the *representor's belief* was. Hence, even if a reasonable person would think that the belief the representor claimed to have had at the time he or she made the statement in question was unreasonable, that would *not* thereby render that particular statement fraudulent *if the representor honestly believed in what he or she was representing*. As Bowen LJ put it in *Angus* (at 471):

> So far from saying that you cannot look into a man's mind, *you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.* [emphasis added]

38 The learned Lord Justice also observed as follows (see *Angus* at 472):

> A man ought to have a belief that what he is saying is true; but a man may believe what he is saying – the expression which he uses – to be true, *because he is* ***honestly*** *using the words* ***in a sense of his own****, which,* ***however inappropriate, however stupid, however grossly careless****,* if you will, is ***the special sense*** *in which* ***he means to use*** *the words,* ***without any consciousness being present to his mind that they would convey to other reasonable persons a different sense from that in which he is using them*** *– a man may* ***believe*** *a statement* ***in that sense of his own, and yet the use of the language may be wholly improper****, that is to say, in respect of want of caution in the use of it.* ***It does not follow because*** *a man uses language* ***that he is conscious of the way in which it will be understood by those who read it****. Unless he is conscious that it will be understood in a different manner from that in which he is honestly though blunderingly using it, he is not fraudulent, he is not dishonest.* ***An honest blunder in the use of language is not dishonest. What is honest is not dishonest.*** [emphasis added in italics and bold italics]

39 In a similar vein, in the Privy Council decision of *Baron Uno Carl Samuel Akerhielm v Rolf De Mare* [1959] AC 789, Lord Jenkins, delivering the judgment of the Board, observed (at 805) as follows:

> On the assumption that contrary to their Lordships' opinion the Court of Appeal were justified in substituting their own conclusion for that of the judge on the question of honest belief, the conclusion so substituted appears to their Lordships to be open to the criticism that the Court of Appeal construed the language of representation as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. ***Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the***

> ***representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made.*** *This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true.* But that is not this case. [emphasis added in italics and bold italics]

40 Reference may also be made – in the local context – to the decision of *Raiffeisen Zentralbank* which adopts an identical approach (at [41]–[43]):

> 41 In deciding whether the representation was fraudulent, the question is *not* whether the representor honestly believed it to be true *in the sense assigned to it by the court, or on an objective consideration of its truth and falsity, but* ***whether he honestly believed it to be true in the sense in which he understood it when it was made.*** See Spencer Bower at para 101.
>
> 42 Belief, not knowledge, is the test. Good faith need not be rational, it may indeed be opposed to reason and good sense, but it must be good faith, ie, ***it must be sincere***. See Spencer Bower at para 107.
>
> 43 … ***Irrational or ill-founded belief is… not fraud***. *The plaintiff has to show that the belief was* ***so incredible or unreasonable as to infer an absence of honest belief***. See Spencer Bower at paras 109-110.
>
> [emphasis added in italics and bold italics]

41 Where the meaning of the statement is ambiguous, the question is what the representor subjectively intended the statement to mean. In the High Court of Australia decision of *John McGrath Motors (Canberra) Pty limited v Applebee* (1964) 110 CLR 656 ("*John McGrath Motors*"), the court had to determine what the representor car salesman meant by the word "new" in his description of a motor car. The representee purchaser had taken "new" to

mean "not second-hand". Both parties accepted from the outset that the word "new" was susceptible of more than one interpretation and there was no evidence that the description by the salesman was to his knowledge false or made with reckless indifference as to its truth or falsity. The judge in the Supreme Court of the Australian Capital Territory disbelieved the representor salesman's testimony that he had not known the history of the car and thus did not know that the car was in fact, a second-hand one. On appeal, the High Court of Australia resolved the ambiguity of the word "new" in favour of the representor. In arriving at this conclusion, the court reasoned (at 659) as follows:

> What had to be determined on this aspect of the case was the meaning with which Aurousseau [the salesman] used the words and, in the light of that meaning, whether his statement was, to his knowledge, false or made with reckless indifference as to its truth or falsity. *He may well have used them to mean "not second-hand". **The evidence suggests that he did and there is no evidence that he did not**. **In these circumstances** a finding that he was fraudulent cannot be supported.* [emphasis added in italics and bold italics]

42 We also note that there has been some discussion as to whether or not proof of reliance is necessary in the context of fraudulent misrepresentation. This particular issue has been dealt with admirably by Assoc Prof Pearlie Koh ("Prof Koh") in her excellent and comprehensive chapter entitled "Misrepresentation and Non-disclosure" in ch 11 of *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Koh*") at paras 11.067–11.071, and we therefore do not propose to rehearse the analysis contained therein. Suffice it to state that the learned author, after surveying all the relevant decisions from the various jurisdictions, concludes thus (see *Koh* at para 11.071):

> [T]he courts are undoubtedly indicating the *preferred* approach *vis-à-vis* fraud, which is that in the case of fraudulent misrepresentation, a *presumption* of inducement

> applies, unless rebutted by the representor. [emphasis in original]

43 It is clear, in our view, that the element of reliance cannot (as a matter of both logic as well as commonsense) be dispensed with, even in the context of fraudulent misrepresentation (see also the decision of this court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [43]–[44]; the recent English Court of Appeal decision of *EC03 Capital Limited v Ludsin Overseas Limited* [2013] EWCA Civ 413 at [77]; as well as Prof John Cartwright's specialist text, *Misrepresentation, Mistake and Non-Disclosure* (3rd Ed, Sweet & Maxwell, 2012) ("*Cartwright*") at pp 206–209). Reliance is the logical end of inducement, but viewed from a different vantage point. The question of inducement is approached from the perspective of the representor (here, the Deceased). The question of reliance is approached from the perspective of the representee (here, the Appellant); in particular, reliance looks at the actions of the representee arising from a state of mind or will engendered by the representation concerned. The *Oxford English Dictionary* (2nd Ed, Clarendon Press, 1989) defines inducement in the following way:

> **1.** *trans.* To lead (a person), ***by persuasion or some influence*** or motive that ***acts upon the will***, *to* some action, condition, belief, etc.; to ***lead on***, ***move, influence, prevail upon*** (any one) to ***do*** something. [emphasis in italics original, emphasis added in bold italics]

44 Put simply, there can be no inducement *stricto sensu* if the statement intended to induce does not act upon the will of the representee (here, the Appellant) such that it influences or leads the representee to change her behaviour *in reliance on the misrepresentation*.

45 Although we note Prof Koh's proposition set out at [42], it may well be the case that if what is suggested is the raising of a legal presumption, that

might go a little too far although it could, at the very least, be stated that "it is *a fair inference of fact* (although not an inference of law) that [the representee] was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent" (see *Chitty on Contracts* vol 1 (31st Ed, Sweet & Maxwell, 2012) ("*Chitty*") at para 6-039 [emphasis added]). Indeed, it is significant that Prof Koh cites the observation by Lord Blackburn in the House of Lords decision of *William Smith v David Chadwick* (1884) 9 App Cas 187 (at 195–196) immediately after the passage from her proposition (set out above at [42]), which observation utilises the phrase "*a fair inference of fact*". As a matter of practical application, we would emphasise that much, in the final analysis, would depend – as is the case with the doctrine of fraudulent misrepresentation generally – on the precise facts before the court (see also *Chitty* at para 6-039).

46 On a related note, Prof Koh also observes as follows (see *Koh* at para 11.079):

> It must also be established by the representee that the representor *intended* to induce the representee, or the class to which the representee belongs, to act on the representation. In the absence of such an intention, it would appear that the representor will not be liable whether in damages or for rescission, at least not for fraud, even if the representee did act on the representation. [emphasis in original]

47 The proposition just stated is logical as well as commonsensical. Where, on the facts, it is demonstrated that the representor had *not intended* to induce the representee to act on the representation, there can be no fraud. This is merely an application of the well-established principle that fraud cannot be established without dishonesty; what matters is the representor's (here, the Deceased's) subjective state of mind which is, for fraud to be made out, directed towards manipulating the actions of the representee (here, the

Appellant). The "onerous evidential burden of proving the necessary intention" lies with the representee (see the English High Court decision of *Goose v Wilson Sandford & Co* [2001] 1 PN 189 ("*Goose*") at [52]). Motive, or the lack thereof, may be relevant in assessing what the representor's subjective state of mind was (see *Goose* at [52]). In other words, if the representor had no interest in the representee changing his or her position in reliance on the representation, then it may be inferred that the representor did not intend to induce the representee to rely on his misrepresentation. Once again, this is (as we shall see below) a proposition which will figure in the analysis of the facts of the present appeal.

48 In so far as the *representee's* (here, the Appellant's) perspective is concerned and commenting on the issue of *ambiguity*, Prof Koh observes as follows (see *Koh* at para 11.015):

> Sometimes, a particular utterance is capable of being interpreted in *more than one sense*. In such cases, it is for the plaintiff to plead the particular meaning he is relying on. ***He must show that he understood the utterance in the particular sense pleaded, and that the utterance was false in that sense.*** [emphasis added in italics and bold italics]

49 It is important, in our view, to note that it is *not* sufficient for the representee (here, the Appellant) to *merely assert – without more* – that she understood the words utilised by the representor (here, the Deceased) *in a particular way*. Whether or not she *did, in fact,* so understand those words in *that* particular way would depend, in the final analysis, very much upon all *the evidence* available *(including, where applicable, the testimony by the representee herself)*.

50 Let us now turn to apply the various principles to the facts of the present appeal.

Our decision

Introduction

51 This case – as is the situation with regard to virtually all cases of alleged misrepresentation – turns entirely on the facts (as analysed in their *context* (see above at [36])). Whether the Deceased had made a fraudulent misrepresentation depends not only on whether a false representation was made, but also (as noted above at [37]–[47]) on the Deceased's *subjective* state of mind, *viz*, whether he knew the statement was untrue and whether he intended the Appellant to act in reliance on that statement (based, of course, on the objective evidence available). Whether the entire claim of fraudulent misrepresentation is made out depends, additionally (as also noted above at [44] and [48]–[49]), on the *Appellant's* own subjective state of mind, *viz*, how she understood the alleged misrepresentation and whether she was acting in reliance on it or whether she had (instead) already closed her mind to the possibility that the Deceased might have assets significant enough for her to want to ask for a division of matrimonial assets.

52 Quite clearly, the Deceased's testimony would have been essential to the Judge's finding had he been available to be cross-examined, as only the Deceased could have testified first-hand as to his state of mind at the material time. The only evidence, however, which we now have of the Deceased's state of mind lies in the documents which he had written as well as the Appellant's testimony as to what had been communicated to her. Where the documents and statements made are ambiguous or susceptible of more than one

interpretation, it is the Appellant's testimony as to what had been said to her and the Deceased's behaviour at the material time which would provide the necessary context as well as shed light on how these statements ought to be interpreted.

53 It is equally clear to us that the Appellant's testimony is – in the nature of things – also crucial in this case (see above at [49]). The Appellant is the only one who can tell us how she had understood the alleged statements the Deceased had made in his correspondence with her and in the Affidavit, why she understood them that way, and whether she was acting in reliance on them when she opted not to go for division. Such crucial evidence as to her subjective state of mind cannot be divined or surmised from the documentary evidence alone.

54 Indeed, the documentary evidence sheds little or no light on the subjective states of minds of the Appellant and the Deceased in the context of the present appeal. In our view, this is *not* a case based largely on documentary evidence as the Appellant claims. This is a case where the Appellant's testimony and the credibility thereof are *critical* to the case.

55 In our view, this case is distinguishable from, for example, the decision of this court in *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 ("*Ng Chee Chuan*"). In *Ng Chee Chuan*, the sole issue of fact was whether there was an oral agreement between the parties whereby the deceased mother had agreed to relinquish her interest in the trust shares in exchange for a monthly payment. This court proceeded to rely on documentary evidence of what happened after the alleged oral agreement was entered into, how the trust shares were taken care of, and

the behaviour of the other members of the family in relation to the deed for transfer of shares which had been signed for no consideration. In other words, the court could refer to documentary evidence objectively showing the existence of an agreement. It is in this context that this court concluded (at [19]) that the question of the credibility or veracity of witnesses was not critical. In contrast, the present case is not one which can be disposed of by objective evidence of the existence of a false representation or of an agreement; an inquiry into the subjective states of minds of the Appellant and the Deceased needs to be made. In respect of the former, the court is faced with nothing else but her oral evidence. It is precisely such a situation which this court in *Ng Chee Chuan* contrasted the facts before it to when it commented (at [19]):

> We would underscore that this was not a case where the court was faced with nothing else but the oral evidence of the appellant and that of the respondent, in which event the question of the credibility and veracity of the witnesses would have been critical.

56 This case is, to our minds, one where the veracity and credibility of the witnesses, and in particular the Appellant (given that the Deceased was not available to give evidence), is critical. The following observations made by this court in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 (at [41]) in relation to the basis for review by this court of the Judge's findings of fact is therefore entirely apposite:

> Given that this appeal largely involves the evaluation of the Judge's finding of facts below, it is apposite that we remind ourselves of an appellate court's role with respect to the finding of facts made in the course of a trial. The appellate court's power of review with respect to finding of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned (*Seah Ting Soon v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22]). However, this

> rule is not immutable. Where it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate court can and should overturn any such finding (see *Alagappa Subramanian v Chidambaram s/o Alagappa* [2003] SGCA 20 at [13] and *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [34]–[36]). Furthermore, where a particular finding of fact is not based on the veracity or credibility of the witness, but instead, is based on an inference drawn from the facts or the evaluation of primary facts, the appellate court is in as good a position as the trial judge to undertake that exercise (*Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [54] and *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [20]). In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts (*Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939 at [22]).

57 With these important preliminary observations in mind, and noting the fact that certain crucial elements of the claim in fraudulent misrepresentation rest on the veracity and credibility of the witnesses, we now turn to examine the substantive issues at hand.

The alleged misrepresentations

58 The Appellant points, in the main, to two sets of documents which she alleges contained fraudulent misrepresentations:

(a) The correspondence between the Deceased and Appellant after 7 December 1998; and

(b) The Affidavit.

59 It bears emphasising that it is not sufficient for the Appellant to show that some misrepresentation had been made. She must prove that that misrepresentation was *fraudulent* in accordance with the high standard of proof referred to above (at [30]). We should add that the court will not readily

adopt her interpretation of any particular statement where such statement may be ambiguous and where more than one inference may be drawn from the same statement (see, for example, the High Court of Australia decision of *John McGrath Motors*, cited above at [41]). Such circumspection applies with particular force where the Judge has made a finding with regard to the Appellant's credibility and has disbelieved her interpretation of events, a course of conduct, or even a statement made.

The correspondence between parties

60 The Appellant points, in particular, to the Deceased's statement in a letter from the Deceased's lawyers to the Appellant's lawyers dated 11 October 1999 in which it was stated that the Deceased was in "no financial position" to pay RM3,750 per month per child in maintenance. However, this statement must be read in the *context* of the Separation Agreement to which it makes reference and the correspondence between the Appellant's lawyers and the Deceased's lawyers in 1999 which prefaced the statement. The context does not, in our view, indicate that the Deceased had little or no assets. In fact, the Deceased made no attempt in the Separation Agreement or in the correspondence to hide the fact that he had assets.

61 Under cl 5 of the Separation Agreement, the Deceased had agreed to be "*solely responsible* to pay all costs and expenses of the children's education through primary, secondary and tertiary levels, both locally *and/or abroad including the fees, deposits and charges of boarding schools*" [emphasis added]. This was a heavy financial commitment which the Deceased continued to represent that he was willing and able to undertake. In a letter dated 4 June 1999, the Deceased's lawyers wrote to the Appellant *via* her lawyers, proposing that the Deceased pay "all costs and expenses of the

children's education". This letter also contained a request for a reduction in monthly maintenance "considering the fact that" he would be paying for these costs and expenses. In other words, a reduction of maintenance was being sought only *in light of* the Deceased's contribution to the children's educational expenses and not, contrary to the Appellant's assertion, because the Deceased was unable to pay.

62 The Appellant also asserts that the correspondence suggested that the Deceased was unable to pay even the small sum of RM8,445.69 which he had incurred on the Appellant's supplementary credit card in December 1998. With respect, this is a gloss on what was actually contained in the correspondence. On 30 June 1999, the Appellant's lawyers wrote to ask for settlement of the monies owing to the Appellant for the Deceased's expenditure on the supplementary credit card. The Deceased's lawyers wrote back on 26 July 1999, agreeing without demur to make full settlement of the amount owing. By this time, it was clear that the Deceased was no longer financially dependent on the Appellant; the supplementary credit card had been cancelled and the Deceased was living apart from the Appellant.

63 The correspondence also contained other clues that the Deceased was not in fact impecunious. The letter dated 26 July 1999 informed the Appellant *via* her lawyers that the Deceased was purchasing private property in Singapore for the benefit of Joshua and Azura and assured the Appellant that the children's financial needs would be taken care of. This was a direct response to the Appellant's letter dated 7 June 1999 asking for "evidence that [the Deceased] is fit and capable to provide the necessary care for the children *as befitting the lifestyle that they are accustomed to*" [emphasis added]. It is undisputed that this is a high standard of living requiring quite some wealth.

The letter contained the curt reply: "It suffices for our client to say that he has the financial means to provide for the children's needs." The implication was that the Deceased did have assets but did not want the Appellant to know the full extent of them save that they were enough to maintain Joshua's and Azura's high standard of living. If anything, this should have caused the Appellant to suspect that the Deceased was actually very wealthy. In fact, there is some evidence that this was indeed the Appellant's suspicion (see below at [67]). The documents point to the opposite conclusion from what the Appellant asserts, *ie*, they show that the Deceased was not concealing the fact that he was a man of means. While he probably did not want the Appellant to know the full extent of his assets, he did not seem to be taking any pains to conceal their existence.

64 Mr Kumar argued that the statement "it suffices for our client to say that he has the financial *means to provide for the children's needs*" [emphasis added] was made in the context of correspondence specifically relating to maintenance for Joshua and Azura and was a deliberate concealment of the Deceased's other assets. By such concealment and omission, Mr Kumar argues that the Deceased implied that he had no other financial means outside of those required for the care of Joshua and Azura. Mr Kumar's argument was, in our view, wholly unpersuasive.

65 It is trite law that "mere silence, however morally wrong, will not support an action of deceit" (see, for example, the House of Lords decision of *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211). There can be no misrepresentation by omission, although active concealment of a particular state of affairs may amount to misrepresentation (see, for example, the English Court of Appeal decision of *Gordon v Selico Co*

Ltd [1986] 1 EGLR 71, where a landlord deliberately covered up an extensive outbreak of dry rot in his flat, intending to deceive the long-term lessees of the flat). However, Mr Kumar's case does not even meet the threshold of active concealment. It is his own case that the correspondence related specifically to the issue of Joshua and Azura and provision for their needs. Mr Kumar pointed us to a letter dated 30 June 1999 from the Appellant's lawyers where the Appellant demanded that the Deceased provide her "particulars of the [financial] provisions made by him for [the children's] care". In this context, it is not surprising that the response elicited from the Deceased stated that he had the financial means to provide for the children's needs. The Deceased was merely answering the Appellant's question of 30 June 1999; an omission to mention his financial means outside that context was not an active concealment and could not thus have been a false statement of fact amounting to a misrepresentation. There is no evidence that the Deceased deliberately and dishonestly concealed the truth from the Appellant *with the intention* to mislead her into thinking that he had no assets to divide.

66 Ascertaining assets for division was clearly not the intention of either party in the correspondence. The question the Appellant asked was whether the Deceased could provide for the children *out of his own assets*. The Deceased responded that he could. It was more likely than not that the Deceased was already operating from the mindset that the monies were *his assets* and not assets which would be available for division. Given the fact that most of the monies had been paid out *after* the Deceased and the Appellant had separated, it is not unlikely that the Deceased would have been labouring under the impression that the monies were not matrimonial assets and therefore not available for division. The argument that the monies were not matrimonial assets was, in fact, an argument successfully run by the First

Respondent in the trial below (although we disagree with the Judge's analysis for the reasons given at [76]–[78] below), and would have been a reasonable supposition for the Deceased to have made. This would explain the general tone of the correspondence and the underlying assumption that the Deceased had assets *of his own* to deal with in the support and care of Joshua and Azura. It is immediately apparent that the Deceased could not have intended to mislead the Appellant if he did not even realise that the monies were matrimonial assets to begin with. It bears reiterating that it is the *Appellant* who has to prove, in accordance with a high standard of proof (see above at [30] and [59]), that the Deceased had the requisite fraudulent intent. Where the evidence suggests that there may be a reasonable belief that the monies were not matrimonial assets and so would not have been available for division, it is for the *Appellant* to prove that matters were otherwise.

67 Against this backdrop, the Deceased's statement that he was "in no financial position" to provide RM3,750 per child in monthly maintenance is not sufficient, in and of itself, to constitute a misrepresentation that the Deceased was impecunious. This was a one-off statement which was not repeated subsequently and was out of sync with the rest of the correspondence. Unsurprisingly, the Appellant wrote back on 22 October 1999 arguing (at para 6) that the Deceased's living arrangements indicated that he was able "to maintain a lifestyle and [was] not … someone who is 'in no financial position' to maintain his two children". It is crucial to note that at no point in time did the Deceased renege on his commitment to pay for the children's educational and medical expenses, nor did he ever express any doubt that he could maintain Joshua and Azura to their accustomed standard of living whenever they stayed with him. The statement was limited only to the question of monthly maintenance and could equally have meant that the Deceased did not

have a regular income. Given that the monies constituted almost all of the Deceased's wealth at the material time, the Deceased's confidence that he could commit to making provision for Joshua's and Azura's educational, medical and lifestyle requirements must have derived (from *his* perspective) from the fact that he was in possession of the monies *and* was of the view that the monies were *his*. If the Deceased had thought, to the contrary, that these were monies which were available for division and which he stood to lose, he would most likely have taken further and more consistent efforts to conceal his wealth *and* would have been *unlikely* to individually (as well as with such confidence) take on such large financial commitments in relation to Joshua and Azura.

68 In our view, the correspondence between the Deceased and the Appellant, when taken *in their proper context* as an attempt to settle the outstanding issue of care and control, maintenance and custody of the children, did not contain a misrepresentation to the effect that the Deceased had little or no assets for division. As Mr Kumar himself put it, the correspondence was not even about division of assets. As we have also observed (above at [66] and [67]), it was likely that the Deceased did not even consider that the monies were matrimonial assets available for division and in any event seemed to be operating on the basis that the monies were *his assets* and not joint assets which could be divided at the ancillary stage of divorce proceedings and which he stood to lose. The Appellant did not adduce evidence that the Deceased regarded the monies as matrimonial assets which could be divided. We further find that there was nothing in this correspondence which pointed to an active concealment of assets by the Deceased, who was simply providing answers to the questions put to him by the Appellant. We find that the Judge's assessment of the correspondence

between the Deceased and the Appellant was not plainly wrong or against the weight of the evidence.

The Affidavit

69 The Deceased had stated in the Affidavit as follows:

> 1) I am presently unemployed due to my ill health and age (I am fifty-one (51) years old).
>
> 2) I obtain financial support from my parents, siblings, friends and wellwishers.
>
> 3) *Despite my financial position*, I assure the Court that I will pay to the Petitioner the sum of RM 1,200.00 (or lesser as the Court may determine) as maintenance for each of my two (2) children.
>
> [emphasis added]

70 Mr Kumar pointed to the phrase "[d]espite my financial position" in para 3 of the Affidavit and argued that, in the context of para 2, this phrase impliedly represented to the Appellant that he did not even have the financial means to pay maintenance for Joshua and Azura, much less assets to be divided.

71 It is true that the Deceased had a duty of full and frank disclosure in filing the Affidavit (see, for example, the decision of this court in *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR(R) 347 (at [54]–[55])). The monies had been received by the Deceased by the time the Affidavit was filed. He was thus in a good financial position and was not wholly dependent on financial support from his parents, siblings, friends and wellwishers, as he claimed in para 2 of the Affidavit. In our view, however, the phrase "[d]espite my financial position", whilst *literally* conveying the impression that the Deceased was not in the financial position to pay a higher sum for maintenance of Joshua and

Azura, was merely a form of exaggeration or posturing, and, looked at in this context, was not a misrepresentation to begin with. The phrase "[d]espite my financial position" which the Appellant hangs her whole case on is, at best, ambiguous or obscure. As already emphasised (at [36]), each alleged representation must be read in its specific *context*. Where a statement is ambiguous, the representee (here, the Appellant) has the burden of proving that the representor (here, the Deceased) *understood and intended those words* in the sense alleged (*viz*, that the Deceased had no assets to divide) in the context in which they were made. In this case, the context was set by the correspondence between the parties prior to the filing of the Affidavit. Indeed, consistently with our analysis of *the correspondence between the parties* above, it was clear, in so far as *the Appellant* was concerned, that the Deceased was by no means impecunious. It was also likely that the Deceased regarded the monies as *his own assets* and not as matrimonial assets which were susceptible to division (see above at [66] and [67]). In our view, the issue of division was probably not in the contemplation of the Deceased when he made that statement.

72 However, *even if* we assume that the Deceased had made a misrepresentation, the Deceased's subjective state of mind is important in ascertaining whether or not (in accordance with the principles set out above at [29]–[49]) he had been guilty of *fraud*. The Deceased's subjective state of mind is of particular importance in the present case because the statement alleged to be false is capable of more than one interpretation. As stated in Edwin Peel, *Treitel: The Law of Contract* (13th Ed, Sweet & Maxwell, 2011) ("*Treitel*") at para 9-006:

> A statement may be intended by the representor to bear a meaning which is true, but be so obscure that the representee

> understands it in another sense, in which it is untrue. In such a case the representor is not liable if his interpretation is the correct one; and even if the court holds that the representee's interpretation was the correct one, the representor is not guilty of fraud. This is so in spite of the fact that the representor's interpretation was an unreasonable one, so long as he honestly believed in it. A fortiori the representee has no remedy in deceit if the representation is ambiguous and he did not in fact understand it in a different sense from that intended by the representor.

73 If the allegation is that the Deceased intended, by the obscurity or ambiguity of his statement, to mislead the Appellant, his subjective state of mind is equally important. *Treitel* goes on to observe in the same paragraph as follows:

> A representor is guilty of fraud if he makes an ambiguous statement intending it to bear a meaning which is to his knowledge untrue, and if the statement is reasonably understood in that sense by the representee. In such a case it is no defence for the representor to show that, on its true construction, the statement bore a meaning that was in fact true.

74 It is immediately apparent that the subjective states of mind of both the Deceased and the Appellant acquire crucial significance in relation to the statement made in the Affidavit. If the Deceased did not intend the phrase "[d]espite my financial position" to convey the meaning that he had no assets capable of being divided, then his statement, however false or misleading, cannot constitute fraud. Equally, if the Appellant could not have understood that phrase, read in its proper context, as conveying the meaning that the Deceased had no assets capable of division, then there is no fraud.

75 Before proceeding to further consider the issue of alleged fraud on the part of the Deceased, an important preliminary point ought to be clarified. In this regard, we could not, with respect, accept the Judge's finding that the

Deceased could not have intended the misrepresentation because the monies were not matrimonial assets. This is a legal question which we found that the Judge had, with respect, erred on. Whether the date of the decree *nisi* or the date of the Separation Agreement is taken to be the operative date of separation, the monies would, in our view, constitute matrimonial assets. Both M&W Agreements were entered into before 7 December 1998.

76 The M&W Agreements were not, as the First Respondent claims, merely conditional contracts. The Second M&W Agreement was a straightforward engagement of the Deceased as strategic financial advisor for the Project. There is no mention of assuring the successful procurement of the Project (see [8(b)] above). The First M&W Agreement was only *partially* conditional, with 40% being payable regardless of the fulfilment of the condition. Accordingly, only a part of the monies was an unvested conditional right. The rest of the monies had vested in the Deceased prior to the date of Separation and were matrimonial assets. As for the remaining 60% on the First M&W Agreement, the Appellant correctly points out that *choses in action*, *even if they are unvested*, may be matrimonial assets. In *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76 ("*David Chan*"), this court held (at [28]) that while a contract to grant an option upon the fulfilment of a condition is "one step removed from having a present option to purchase the shares", the granter could not revoke the agreement to grant the option without cause and the grantee had a valuable contractual right capable of being factored into the pool of assets for division. It is clear to our minds that the remaining 60% of the monies under the First M&W Agreement is indistinguishable from the assets mentioned in *David Chan*. Both are conditional, unvested rights capable of being assigned a value in division, although their exact value may be difficult to determine.

77 The First Respondent's reliance on the Singapore High Court decision of *Lim Ngeok Yuen v Lim Soon Heng Victor* [2006] SGHC 83 ("*Lim Ngeok Yuen*") as support for the proposition that assets could be excluded from the time the parties separated does not assist her case in this particular regard. The monies would be matrimonial assets even if the Separation Agreement was taken as the operative date of separation. In *Lim Ngeok Yuen*, the judge took the date of the couple's separation as the date after which they intended to live their separate lives. Accordingly, she excluded assets accumulated by the husband *after* the date of separation but before the grant of the decree *nisi* on the ground that there was no intention that these assets would go towards what was shared by the couple in their marriage. The judge in *Lim Negok Yuen* had, however, acknowledged (at [45]) that these assets "technically … did form a matrimonial asset". This assumes that *prima facie*, the assets were part of the pool of matrimonial assets. It was only *during* the division, and *not before*, that the judge exercised her discretion to exclude those assets. This cannot be used to support the proposition that division is *precluded* because there is an earlier date of separation which should be taken to be the effective end of the marriage. We also note that *Lim Ngeok Yuen* dealt with property acquired *de novo* after the parties had parted ways whereas in the present case, the M&W Agreements had been made while the Appellant and Deceased had been living together as husband and wife with the fortuitous circumstance that the condition resulting in the vesting of the monies in the Deceased occurred after their separation.

78 We find that there is no legal basis for the argument that the monies were not matrimonial assets. Accordingly, the First Respondent's argument that the Deceased's alleged misrepresentation could not have caused the Appellant any loss cannot be sustained. However, it does *not* logically follow

that the Deceased could not have been labouring under the impression that the monies were not matrimonial assets, but rather, were *his assets* to keep. While it was clear to us that the monies were matrimonial assets, we do note that this was not a straightforward case of matrimonial assets *and* that the Deceased did not have any legal training in order to understand the subtleties of when a *chose in action* which vested *after* separation could be included as part of the pool of matrimonial assets. There is also no evidence that the Deceased sought legal advice on this point, particularly since the available evidence points to the proposition that the question of division was probably not even on the table at the material time (see above at [71]). As we have already stated, the Deceased could very well have thought that the monies were *not* matrimonial assets. Our analysis (above at [66] and [67]) of the Deceased's *most likely* state of mind is *unaffected* by our analysis of whether the monies were available for division *in law*. Having dealt with this particular issue, we now turn to the evidential arguments which the parties make.

79 Returning to the Affidavit, Mr Kumar argued that the *only* intention which the Deceased could have had in the context was to induce the Appellant not to apply for division. He pointed to an internal memorandum from BPITL's Kenneth Lee, recording the contents of a tele-conversation with the Deceased. One of the points recorded in this internal memorandum, dated 24 November 1999, was that the Deceased "would not like the ex-wife [the Appellant] to benefit from the trust funds and would not like her to know the Trust's existence". Mr Kumar argued that this clearly showed an intention to conceal his assets from the Appellant as recently as two months before the Affidavit was filed.

80 Counsel for the First Respondent, Ms Deborah Barker SC ("Ms Barker"), argued that the Separation Agreement had the nature of a binding compromise agreement for final settlement of issues between the Appellant and the Deceased and this was reflected in the amended Divorce Petition filed on 22 December 1998. Ms Barker argued that, by the time the Affidavit was filed, the notion of division was no longer operating on the mind of the Deceased as he had considered the issue settled from 7 December 1998. The Deceased thus could not have intended for the Appellant to rely on his statements to forgo division of matrimonial assets.

81 Unfortunately, the Deceased could not be offered for cross-examination. The only account of the circumstances surrounding the Separation Agreement as well as the circumstances leading up to the filing of the Affidavit is the Appellant's account. Whether the Judge believed the Appellant's account of what was said and done at the material time by the Deceased is therefore a matter of critical importance. The Judge found that the Appellant's position in relation to what representations were made to her (and when) shifted from the start of her case to the close of it. The import of the Judge's findings was that the Appellant was not a reliable witness and her interpretation of events could not be relied on. The Appellant had averred in the court below, and continues to aver, that the Deceased's actions were *only* consistent with an intention to mislead. With respect, this is purely speculative.

82 It has already been observed (above at [64] and [70]) that it is the Appellant's own case that the correspondence immediately preceding the filing of the Affidavit and which continued for more than six months prior was for the *limited* purpose of discussing the *maintenance* of the children. The only

context in which the Deceased's financial means had been raised was in the context of whether the Deceased could provide for Joshua and Azura. It was the Appellant's own case that the only thing outstanding at the time the Affidavit was filed was the issue of custody, care and control as well as support and maintenance of Joshua and Azura. This is consistent with the correspondence which passed between the parties during that particular period of time. It is also consistent with the correspondence between the parties that the Deceased regarded the monies as *his own assets* and not matrimonial assets which were available for division (see above at [66]). It was thus unlikely that the Deceased would have been thinking about the division of the monies when he filed the Affidavit.

83 The Appellant's arguments in relation to the correspondence cuts both ways. If, indeed, the only issue left to be resolved between the Appellant and the Deceased at the material time was custody, care and control as well as support and maintenance of Joshua and Azura, it is difficult to believe that the issue of division was still a live issue operating on the minds of the Deceased and the Appellant. The Appellant never gave evidence as to when the decision was taken to forgo division and when this decision was communicated to the Deceased. Indeed, the Judge observed (at [94] of the Judgment) that the Appellant's stance kept changing. Even until the present time, it is not clear when the issue of division ceased to be a live issue. What is clear from the correspondence and from the Appellant's own case is that, by the time the Affidavit was filed, the question of division, and in particular the division of the monies which the Deceased could well have regarded as assets which *were not susceptible to division*, was probably *not* in the minds of the Deceased or the Appellant at all. Whether the Separation Agreement was a full and final

settlement of the issues between the Deceased and the Appellant does not affect this analysis.

84 Given the fact that division had ceased to be a live or important issue between the Appellant and the Deceased, the Appellant's argument that the *only* intention consistent with the Deceased's behaviour was an intention to induce the Appellant to forgo division is fanciful. In the context of maintenance of the children, the Deceased was (putting the Appellant's case at its highest) merely attempting to persuade the *court* to reduce the monthly *maintenance* sum he was to pay the Appellant for Joshua and Azura. As far as the Appellant was concerned, the Deceased had communicated his intention of paying a lower monthly maintenance sum for Joshua and Azura to the Appellant *via* the lawyers' correspondence described in the preceding section. Consistent with his earlier position, the Deceased had in his mind the question of maintenance, care and control as well as custody. If the question of division was not present and acting on his mind, he could not be said to have intended to induce the Appellant to forgo division, let alone that he had made the statements in the Affidavit (in particular, at para 3 thereof) fraudulently.

85 Could it then be said that the Deceased made the statement in the Affidavit recklessly, without care and regard for its truth and falsity? As emphasised above (at [34]), the concept of recklessness in the context of fraudulent misrepresentation *cannot* be equated with mere negligence or carelessness. The statement which the Deceased made again related to the maintenance of Joshua and Azura. The four words "[d]espite my financial position" do not alter the content of his statement nor the context in which it was made. The Deceased made (at worst) a careless statement which implied that his financial means only permitted him to pay up to RM1,200 a month *in*

maintenance for each child. It is worth noting that he had never represented to the Appellant that he was unable or unwilling to pay for Joshua's and Azura's educational and medical expenses, and that he had never made a deliberate and consistent effort to conceal his assets (see above at [63] and [67]). He was thus clearly not making the representation that he had no financial means *in vacuo*. At best, the Deceased, by his exaggeration, made a statement not amounting to fraud as there is little evidence that the Deceased intended, either directly or indirectly, to induce the Appellant to forgo division. Indeed, where there is a reasonable chance, as in this case, that the Deceased believed that the monies were not matrimonial assets for the purposes of division, the analysis in this paragraph applies *a fortiori.*

86 It has already been observed (above at [43] and [44]) that inducement acts upon the will of the representee to persuade, influence or lead on. This is more than mere encouragement. Indeed, there is an element of deliberateness to the word "inducement". It would be highly improbable, if not impossible, for inducement to occur without the intention to persuade or influence. This assumes that the Deceased thought that the Appellant *might* ask for division and intended to subvert that possibility by persuading her that division of assets would not be worth her time. The Judge had disbelieved (at [97] of the Judgment) the Appellant's denial that she wanted to avoid disclosing her assets and having them taken into account on division at the time the Affidavit was filed. Given that this was an assessment of the credibility of the Appellant, whose demeanour on the stand we were not able to witness, we are hesitant to disturb that finding. In any event, such a finding by the Judge is not clearly contrary to the evidence. It could not have been the case that the Appellant had nothing to put in the pool of matrimonial assets. The correspondence between the Deceased's and the Appellant's lawyers made

reference to the Deceased's financial means to maintain Joshua and Azura to the high standard of living they were accustomed to, his commitment to pay all Joshua's and Azura's educational and medical expenses (even tertiary education and boarding school abroad), his ability to pay off the outstanding sums incurred under the Appellant's supplementary credit card, his luxurious lifestyle in Kuching, and his buying of private property in Singapore (see above at [61]–[68]). Yet, the Appellant never once asked about the division of matrimonial assets; there was nothing in her evidence at trial that suggested that she did so orally and there was nothing in the correspondence to indicate that the possibility of division was even on her mind. This was so even after the Appellant had written on 22 October 1999 that she did not believe that the Deceased was not in a financial position to pay RM7,500 a month in maintenance for both children. This would have given the Deceased the impression that the Appellant had already made up her mind not to ask for division. If it had been otherwise, why was the question of division not even discussed or alluded to at the material time? There is no sense in which the Deceased could then have led, influenced, or persuaded, the Appellant to persist with her decided course of action when he was not even aware that there was the scope for persuasion in the first place. At the very most, any representation on his part would have affirmed her already settled course of action, but could not have induced or persuaded her as she had already made up her mind.

87 The phrase "[d]espite my financial position" which forms the crux of the Appellant's case is, at its highest, an ambiguous statement made in a different context, *viz*, that of attempting to secure a reduction in monthly maintenance. The evidence demonstrates that the Deceased had simply not directed his mind to the question of division or assets available for division as

this issue was not even on the negotiation table. The misrepresentation contained in the Affidavit was thus *not* fraudulent. Indeed, this conclusion is also consistent with the Judge's finding in the court below that the Appellant had waived her right to a division of matrimonial assets because she had decided that the Deceased was a man of straw.

Whether there was reliance and loss

88 Given our finding that there was no fraudulent misrepresentation, it is not strictly necessary to address the issue of reliance. However, given that reliance is intimately bound up with inducement in this case, we make some brief observations.

89 Mr Kumar argued that the only explanation for the Appellant's subsequent behaviour, *viz*, forgoing the RM500,000 owed to her by the Deceased, forgoing requests for maintenance and forgoing division was that she had relied on the Affidavit and the context in which it was made to conclude that the Deceased had no assets.

90 With respect, this begs the question at hand. What Mr Kumar is actually arguing is that the Appellant would have asked for division if she knew that the Deceased had US$25,000,000 sitting in the bank. This skips the crucial step of asking whether reliance had been placed on the alleged fraudulent statement, *viz*, the Affidavit and specifically the four words "[d]espite my financial position". Mr Kumar assumes that it was the Affidavit and/or the correspondence that led the Appellant to believe that the Deceased had no assets. However, that is precisely the issue which Mr Kumar must prove on a balance of probabilities. Mr Kumar's argument is nothing more than an assertion that the alleged misrepresentation caused the Appellant to

believe that the Deceased had no assets. When the Judge found (at [94] and [103] of the Judgment) that it was the Appellant's own perception that the Deceased was a man of straw, the Judge's findings addressed the crucial missing step in Mr Kumar's argument, *viz*, what the source of her perception was. Unless reliance on the alleged misrepresentation is first proven, Mr Kumar cannot proceed to say that the Appellant's actions were a result of her perception of the Deceased's financial position.

91 Mr Kumar's argument, with respect, misses another crucial link: it assumes that the Appellant had interpreted the words in the sense in which they were false, rather than as an exaggerated statement that the Deceased could not pay regular maintenance of RM7,500 for both children. With respect, there is no evidence that the Appellant had interpreted the words "[d]espite my financial position" in the sense in which they were false. The burden lies on the Appellant to prove that she was induced by the alleged misrepresentation. Her subjective state of mind is an essential part of the analysis and she must give evidence on what she took those words to mean in the context of the Affidavit. It should be noted that there is little in the record of appeal which specifically addresses the question of how the Appellant had interpreted the words "[d]espite my financial position". In fact, only two paragraphs in the Appellant's Affidavit of Evidence-in-Chief specifically address the statement made in the Affidavit. These contained nothing more than the assertion that the Affidavit was a continuing misrepresentation and was "deliberately crafted to create the impression" that the Deceased was impecunious. The record of appeal reveals that the Appellant gave no evidence specifically on what she understood by the phrase "[d]espite my financial position", or how it might have influenced her. The observations of the House of Lords in *Smith v Chadwick* (1884) 9 App Cas 187 ("*Smith v Chadwick*") are

apposite in this regard. In *Smith v Chadwick*, a prospectus was issued with an ambiguous statement which could mean, in that particular context, either that the company presently turned out produce worth over £1,000,000 a year (an untrue statement) *or* that the company was capable of turning out that amount of produce in a year (a true statement). The House of Lords found that it lay on the representee to prove that he had interpreted the words in the former sense (*ie*, the sense in which they were false) and had *in fact been deceived* by them to subscribe to shares in the company. Lord Blackburn observed (at 200):

> … I think the fair conclusion is, that they feared to ask the question in examining the plaintiff in chief, lest he should answer that he did not understand the prospectus as meaning that there had been an actual output during the last year, or at least that he would not swear that he was influenced by his belief in that statement. The counsel for the defendants did not choose on cross-examination to risk bringing out of a hostile witness evidence which his own counsel had not brought out in chief. If I am right in the opinion which I have already expressed, that the burthen lay on the plaintiff to prove that he was induced, I think they acted wisely. If the plaintiff had made a prima facie case which required affirmative proof of an answer from the defendants, I think it would be otherwise.

92 We have already stated our reasons (at [82]–[86]) for finding that the Appellant was unlikely to have been thinking about division at the time the Affidavit was filed. The reason why the Judge did not address the Affidavit in much detail in the Judgment was because the Affidavit was irrelevant by then; it could not have made an impact on the Appellant's thinking or decisions. We should note that, contrary to the Appellant's assertion, the Judge had directed her mind to the Affidavit. At [103] of the Judgment, the Judge stated that it was "unlikely that any representations were made… apart from what was stated in his affidavit of means". This indicated to us that this was not a case of the Judge having ignored the Affidavit, but of having considered it and

found that it had no bearing on the dispute as the relevant time frame in which the Appellant could have been influenced or persuaded to act in the way she did had already passed. Even in respect of the decree *nisi*, the outstanding issues related to the charging of the Deceased's CPF accounts, and custody, care, control and maintenance of the children. When cross-examined on the decree *nisi*, she stated that she "recall[ed] clearly that we had issues on custody and maintenance of kids". There was no indication that she thought the issue of division was still a live issue at the time of the decree *nisi*, much less eight months later when the Affidavit was filed.

93 By the time the Affidavit was filed, the Appellant and the Deceased had been separated for more than a year. The Deceased had not borrowed any money from the Appellant during that time, and was living independently from her. He had made repeated assurances to her in the correspondence that he had the means to take care of Joshua and Azura according to their accustomed standard of living. It is significant to note that the Appellant does not mention the Affidavit in much detail in her Affidavit of Evidence-in-Chief in this suit; neither was she examined specifically on the Affidavit during the trial below. She set out the words of the Affidavit at para 108 of her Affidavit of Evidence-in-Chief and proceeded to state that the Affidavit was "in support of his claim that he did not have the financial means to meet the quantum of maintenance that I had sought for the Children". She further stated that she believed that the Deceased had little or no assets "based on his representations of his financial position, his constant claims that he had no means, his statements in his Affidavit of Means, his statement of his inability to make maintenance payments for the children and his conduct in general". However, when it came to cross-examination, the Appellant testified that she had relied on the Deceased's conduct throughout the marriage although he continued to

make this representation "towards the end". The relevant section of the record of appeal is as follows:

> Q: Okay. You say that he made fraudulent misrepresentations to you about his income and assets, okay. So when did he do this? Can you tell us?
>
> A: Throughout the marriage. I think throughout the marriage. The beginning it was true but towards the end, he continued to represent it to be so.
>
> Q: So obviously when he was telling you in the early years that he had little money or assets, that was not---
>
> A: Sorry?
>
> Q: ---that was not wrong. When he told you in the early years that he had---or he led you to believe he had little money or assets, you agree that was true, right?
>
> A: Yes, I think that was true but he did not tell me but it was by his conduct.
>
> Q: So he didn't say in so many words, "I have no money and no assets". You---you deduced from his conduct that he had no money or assets?
>
> A: Well, if somebody borrows money from you, it's---it would mean that he had no assets and he had no means to have a need to---to borrow.

94 The only specific reference to the Affidavit in the Appellant's testimony actually indicated that the Appellant had *already made up her mind prior to* the point in time when the Affidavit was filed. When asked whether the Deceased had said that he did not have the means to pay maintenance for the children, the Appellant testified instead that it was "more by conduct" that she came to that conclusion. In itself, the response "more by conduct" may not be conclusive as the representor's statement need not be the sole inducement, so long as it had played a real and substantial part and operated in the representee's mind, no matter how strong or how many were the other matters which also played on the representee's mind (see, for example, the Singapore

Court of Appeal decision of *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435, as well as the English Court of Appeal decisions of *JEB Fasteners Ltd v Marks, Bloom & Co* [1983] 1 All ER 583 and *Edgington v Fitzmaurice* (1885) 29 Ch D 459). However, *in the context and for the reasons given above*, it is clear that the phrase "[d]espite my financial position" was not only not a real or substantial inducement for the Appellant to forgo division of assets, it was also *no longer operating in the Appellant's mind in the sense in which it was false* (here, as a representation that the Deceased had little or no assets available for the division of matrimonial assets which the parties were then contemplating).

95 The Judge, having had the benefit of examining the Appellant's demeanour on the stand, found that it was *wholly her own perception* of the Deceased's financial situation that led to her conclusion that he had no assets. Put simply, the Appellant had, by then, closed her mind to the idea that the Deceased could have anything of value to divide and accordingly was most likely not even thinking about the division of matrimonial assets.

96 There is nothing in the Judge's findings of fact that was clearly contrary to the evidence available on record. We see no reason to disturb the Judge's findings of fact, particularly given the fact that only the Appellant could testify as to her state of mind at the time and that the Judge's finding on her credibility is crucial. The Deceased had not made any fraudulent misrepresentation. Even if the Deceased had made a fraudulent misrepresentation, the Appellant did not rely on it and there is therefore no need to consider whether she has suffered loss.

Issue 2

97 Given that we have found that there had been no fraudulent misrepresentation on the part of the Deceased, the threshold question is answered in the negative and the claim in unjust enrichment against the Second Respondent therefore cannot succeed as there is no relevant unjust factor on the facts of the present appeal. For completeness, however, we will make some observations as to the merits of the claim against the Second Respondent premised on this particular claim.

The Applicable Principles

Introduction

98 The Appellant set out the following (general) elements required in order to successfully maintain a claim in unjust enrichment:

(a) Has the defendant been benefited or been enriched?

(b) Was the enrichment at the expense of the claimant?

(c) Was the enrichment unjust?

(d) Are there any defences?

99 The law of unjust enrichment is still developing and there remain (as we shall see) many unresolved issues (and even controversies). However, the above elements are uncontroversial and may be found in all the major texts (see, for example, Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th Ed, Sweet & Maxwell, 2011) ("*Goff & Jones*") at para 1-09; see also, in the local context, the decision

of this court in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska Enskilda*") at [110]). In the present appeal, we are concerned, in the main, with the second and third elements set out in the preceding paragraph (*viz*, elements (b) and (c)). It should be noted that in order to ground a successful claim in unjust enrichment, it is *not sufficient* that the defendant has been benefitted and that it would be fair or just for the plaintiff to recover the sum of that enrichment. The Appellant's case suffers from an over-simplification of each of these elements into the general proposition that any benefit to the Second Respondent may be recovered so long as a link can be established between the enrichment and the Appellant's loss by reference to some concept of unconscionability.

100 It is important to note at the outset the difference between unconscionability as a doctrine and unconscionability as an underlying rationale. The Appellant's case uses unconscionability as a guiding doctrine or test to determine whether a claim in unjust enrichment has been established. Instead of pointing to a specific unjust factor, the Appellant merely asserts that "[t]he unjust factor is *founded simply on the fact* that the recipient cannot in conscience retain the money" [emphasis added]. In our view, unconscionability and the phrase "in conscience" are capable of different shades of meaning and are too uncertain to be applied as a doctrine or test. It is worth noting that the Appellant says nothing beyond asserting that the recipient's retention of the monies is "unconscionable". No attempt is made to understand what "unconscionability" encapsulates. Lord Nicholls in the Privy Council observed the following in the context of knowing assistance in a breach of trust by a company (see the Privy Council decision (on appeal from

the Court of Appeal of Brunei Darussalam) of *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 ("*Royal Brunei Airlines*") at 392):

> Mention, finally, must be made of the suggestion that the test for liability is that of unconscionable conduct. Unconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience. It must be recognised, however, that unconscionable is not a word in everyday use by non-lawyers. If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, it is essential to be clear on what, *in this context*, unconscionable *means*. If unconscionable means no more than dishonesty, then dishonesty is the preferable label. If unconscionable means something different, it must be said that it is not clear what that something different is. Either way, therefore, the term is better avoided in this context. [emphasis in original]

101 Indeed, unconscionability is often used as an overarching *justification or rationale* undergirding the whole of equity. More correctly, the label of unconscionability applies *once* the relevant equitable *doctrine* has been applied *and not before*. In other words, unconscionability does not operate as a free-standing doctrine but expresses the rationale which underpins the doctrine or test being applied. As Gaudron, McHugh, Gummow and Hayne JJ aptly opined in the High Court of Australia decision, *Garcia v National Australia Bank* (1998) 194 CLR 395 (at 409), "the statement that [the] enforcement of [a] transaction would be 'unconscionable' is to characterise the *result rather than to identify the reasoning* that leads to the application of that description" [emphasis added]. In the same vein, Hayne J observed extra-judicially in "Letting Justice be Done Without the Heavens Falling" (2002) 27 Mon ULR 12 (at 16) as follows:

> Identifying some conduct as unconscionable or unconscientious is a statement of a conclusion which would sit as well in the discourse of an ethicist, as it does in reasons

> for judgment. But *in the law, they are not terms that invite, or even permit, recourse to a judge's idiosyncratic sense of justice.*
>
> What sets apart the two fields of discourse of the ethicist and the judge is the *need for the judge* ***to articulate what it is that leads him or her to the conclusion that the conduct in question should wear this label***. …
>
> [emphasis added in italics and bold italics]

We also note that whilst a broader doctrine of unconscionability has been canvassed in the context of the law of *contract*, such a doctrine is presently still in *a state of flux* in so far as *Singapore* is concerned (see generally Andrew Phang Boon Leong & Goh Yihan, "Duress, Undue Influence and Unconscionability" in ch 12 of *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 12.219–12.220).

102 In so far as the Appellant is suggesting that unconscionability as a doctrine is equivalent to a general notion of unfairness, this is far too radical an approach. In the local context, this court has recognised the dangers of this approach in the context of restraining calls on performance bonds in a building contract. Chao Hick Tin JA observed in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 as follows (at [30]):

> The appellants would appear to suggest that based on this opinion, unfairness, *per se*, could constitute "unconscionability". We do not think it necessarily follows. Lai Kew Chai J said the concept of "unconscionability" involves unfairness. We agree. That would be so. In every instance of unconscionability there would be an element of unfairness. *But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to "unconscionability"*. [emphasis added]

103 Given the myriad circumstances in which the concept of unconscionability is used to express the justification or conclusion of the tests and doctrines applied, we are unable to find that unconscionability can be used

as a "catch-all" doctrine which grounds and determines the application of *unjust enrichment*. Unconscionability is, at best, an overarching rationale which attaches to equitable doctrines, *including* (where applicable) that of unjust enrichment (which, however, is a doctrine that is recognised in both common law and equity); however, the two are not equivalent. Unjust enrichment has acquired its own shape through the development in the case law, and contains distinct elements which must be met before a claim in unjust enrichment can be established.

104 In the seminal House of Lords decision on the subject, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*"), Lord Templeman quoted with approval (at 559) Lord Wright's observations in the (also) House of Lords decision of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (at 61) that:

> ... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.

105 This rather broad statement of principle was, however, circumscribed by Lord Goff of Chiveley's further observations, as follows (at 578):

> I accept that the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors. The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But *it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court.* A claim to recover money at common law is made as a matter of right; and even though the

> underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle. [emphasis added]

106 *Lipkin Gorman* thus does not suggest that unconscionability *per se* forms the foundation of a claim in unjust enrichment. In a similar vein, in a joint judgment, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ observed, in the leading High Court of Australia decision of *Farah Constructions Pty Limited v Say-Dee Limited* (2007) 230 CLR 89, thus (at [150]):

> [W]hether enrichment is unjust is not determined by reference to a subjective evaluation of what is unfair or unconscionable: recovery rather depends on the existence of a qualifying or vitiating factor [*ie* the unjust factor in element [98(c)] above] falling into some particular category.

107 Prof Graham Virgo in his book, *The Principles of the Law of Restitution* (2nd Ed, Oxford University Press, 2006) ("*Virgo*") (at pp 55–56, quoting Ben Kremer, "The Action for Money Had and Received" (2001) 17 JCL 93 (at 107)), explored the reasons for this in similar terms to what we have discussed in the preceding paragraphs:

> "Unconscionability" is too uncertain to constitute a cause of action in its own right or even operate as a unifying principle which can impose liability clearly and predictably. Kremer's assessment of the function of conscience is particularly pertinent:
>
> > 'conscience' is used as a concept to underlie and structure the operation of an area of the law; it provides a generative, basal principle which is in turn used to construct rules… It is those rules which are applied judicially in determining a dispute. Conscience is thus not a determinant; it is a reference concept, a purpose, which is used to generate determinants.
>
> … The test of unconscionability requires a fundamentally different focus from that of unjust enrichment, a focus which is inappropriate to personal restitutionary claims. For a test of unconscionability focuses on the fault of the defendant in not

> returning an enrichment and becomes a species of wrongdoing. For the unjust enrichment principle on the other hand the focus on the injustice of the defendant's enrichment at the claimant's expense, rather than the state of the defendant's conscience, emphasizes that questions of fault are largely irrelevant to establish unjust enrichment.

108 A second closely related (and crucial) principle must be clarified before we examine the various elements of unjust enrichment. It is immediately apparent from the quotation in the preceding paragraph that a claim in unjust enrichment is conceptually different from a fault-based claim focusing on the unconscionable behaviour of *the recipient of the enrichment* (here, if at all, on the part of the Second Respondent). In our view, the crucial distinction is this: in unjust enrichment, a claimant seeks recovery of the enrichment on the basis that the *claimant* should not be *deprived* of the benefit. In a fault-based claim, such as that of knowing receipt, a claimant seeks recovery of the enrichment on the basis that the *recipient's conscience has been affected* and he should be required to *account for the loss suffered by the claimant or the gain that he has received from the commission of his wrong*. We note, parenthetically, that there is the anomaly of free acceptance as a potential unjust factor which requires the recipient to exercise a positive choice not to reject the proffered benefit. *Goff & Jones*, the first expositors (in the first edition) and strongest proponents of the concept of "free acceptance" as an unjust factor, argue that free acceptance has a dual function as both a test for enrichment and as an unjust factor (*ie*, free acceptance could either go to element [98(a)] or element [98(c)] as outlined above). If free acceptance is merely a test for enrichment and not, as *Goff & Jones* argue, an unjust factor, then the ground for liability under unjust enrichment must still be a separate, claimant-focused, factor. It is only where free acceptance is an unjust factor that it does not fit readily within the distinction between fault-based claims

and a claimant-focused unjust enrichment claim. Free acceptance as an unjust factor is not universally accepted in the case law or academic literature. Even *Goff & Jones* admit (see *Goff & Jones* at para 17-18) that the case law examining free acceptance as a test for enrichment and free acceptance as an unjust factor makes "no systematic distinction" between the two. Prof Andrew Burrows ("Prof Burrows") has argued strenuously that free acceptance is anomalistic and contrary to the principled distinction outlined at the beginning of this paragraph. In free acceptance, the claimant is the risk-taker who offers free services in the hope that the recipient would pay. Prof Burrows argues that on "any common sense view there would be no injustice in [the recipient] not paying a risk-taker… the plaintiff's risk-taking cancels out any shabbiness in [the recipient's] free acceptance" (see A S Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576 at 578). Both *Virgo* and Prof Burrows, *The Law of Restitution* (3rd Ed, Oxford University Press, 2011) ("*Burrows*") observe that many of the cases involving free acceptance as purportedly an unjust factor may also be adequately explained by other unjust factors and in particular the unjust factor of failure of consideration, such that it would be difficult to say with certainty that free acceptance was being used as the *basis* for liability in those unjust enrichment claims and not merely used as a test for enrichment (see *Virgo* at pp 82–83 and *Burrows* at pp 338–339). *Virgo* went on (at pp 82–83) to observe that "[t]he preferable view … is that there is no role for free acceptance as a ground of restitution in its own right, since the doctrine of failure of consideration adequately does the work which it is thought can be done by free acceptance and without incorporating any element of fault". We make no pronouncement on whether free acceptance should be an unjust factor or independent test of enrichment as this matter has not arisen squarely for our consideration in the present case. We do note, however, the academic controversy surrounding its acceptance into the list of

unjust factors and we do not regard the concept of free acceptance as detracting in any way from the general proposition that unjust enrichment is claimant-focused and claimant-motivated, and is distinct from fault-based claims. Even if there are exceptions to this general rubric, the present case is *not* one of free acceptance or one approaching free acceptance, and therefore falls within the more *general* rules of an unjust enrichment regime focusing on the claimant's loss or deprivation and not on any fault of the recipient.

109 The fact that unjust enrichment focuses on the claimant's loss or deprivation and not on any fault of the recipient explains why an unjust enrichment claim may be generally characterised as a claim based on *strict liability at common law* (subject to the defences of change of position and, possibly, *bona fide* purchase as well). Bearing this distinction in mind, we now turn to the Judge's characterisation of the Appellant's unjust enrichment claim in the court below. The Judge *perceived* the Appellant's *claim* in *unjust enrichment* (see the Judgment at [128]) thus:

> To succeed in her claim against the second defendant in unjust enrichment and consequently for restitution, the plaintiff must show that the second defendant *was a party to or knew of the fraudulent conduct of the deceased* ***or,*** *that there [was] such a want of probity on the part of the second defendant that it would be* ***unconscionable*** *for the latter to retain the assets that the deceased placed into the two BNP Trusts* (see *Comboni Vincenzo & Anor v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 *cited by both the plaintiff and the second defendant*). [emphasis added in italics and bold italics]

110 With respect, and in light of the important distinction made above (at [109]), we do not agree with the Judge's characterisation of the Appellant's unjust enrichment claim. Most crucially, it approaches the matter from the perspective of the recipient (here, the Second Respondent) and thus misses the

nub of the unjust enrichment claim by recasting the elements in terms of a claim for knowing receipt of trust property. *Unlike* a claim in unjust enrichment which focuses on the *claimant*, a claim under the doctrine of knowing receipt focuses on the *recipient or defendant* and is *fault-based*. In this regard, it is now well established that, in order to succeed in a claim under the doctrine of knowing receipt, the claimant must prove that the recipient (here, the Second Respondent) had received the property concerned (here, the trust monies) in a situation where it was *unconscionable* to do so (see, especially, the decision of this court in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*") (at [32]), which was applied (also by this court) in *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 (at [81]); and see, to like effect in the context of Hong Kong, the Court of Final Appeal decision of *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 2)* (2010) 13 HKCFAR 479 at [134]). It is at this juncture that we should also note the Appellant's argument that the claim in unconscionability arises *from the point that this claim was brought* and not at the time of transfer. With respect, there is nothing in the case law which supports this position. In any case, the fact remains that the Appellant's claim still attributes some form of knowledge on the part of the recipient (here, the Second Respondent) touching his or her conscience; this argument does not rehabilitate her case within the rubric of a strict liability, claimant-focused unjust enrichment paradigm. We will have occasion to return to these observations in our discussion of element (c) (below at [139]). Suffice it for the moment to state that the characterisation of the unjust enrichment claim is a matter of crucial importance and, with respect, is an important reason why we cannot agree with the Judge's findings in relation to the Appellant's unjust enrichment claim. It bears reiterating at this point that given our decision on

the issue of fraudulent misrepresentation, the observations that we make are not essential so far as the present appeal is concerned and a definitive solution to these thorny issues would only need to be laid down when such matters arise squarely for determination by this court on a future occasion.

111 With these two important preliminary principles in mind, we now turn to briefly consider the various elements (above at [98]) before proceeding to consider whether the claim in unjust enrichment has been established on the facts of the present appeal.

Benefit at the expense of the claimant

112 We first consider the applicable principles in relation to the preliminary elements (*viz*, elements (a) and (b) referred to above (at [98])). To establish a claim in unjust enrichment, the claimant must demonstrate that the defendant had received a *benefit* at *the expense of* the claimant. The benefit requirement does not present any difficulties where the enrichment is monetary in nature, as is the case in the present appeal. However, the rule that the benefit must have been at the expense of the claimant is less straightforward in a situation involving multiple parties, especially where the defendant is not the immediate recipient of the benefit from the claimant. Explaining this rule, *Goff & Jones* observe as follows (at para 1-15):

> This rule reflects the principle that the law of unjust enrichment is not concerned with the disgorgement of gains by defendants, nor the compensation for losses sustained by claimants, but with the reversal of transfers of value between claimants and defendants.

113 This may be described, alternatively, as the requirement of a nexus between the value that was once attributable to the claimant and the benefit received by the defendant, *ie*, the defendant has received a benefit from a

subtraction of the claimant's assets. It has been said that unjust enrichment can only take place in the context of "direct transfers", although the meaning of "direct transfer" has been extended to three-party cases where the transfer of the benefit from the claimant to the defendant is not immediate and exceptions are recognised in the form of "indirect transfers" (see *Goff & Jones* at para 6-18). In particular, the courts have generally allowed recovery in a three-party "indirect transfer" situation where the claimant transferor can trace his money into the pocket of the eventual defendant transferee although the money has passed through the hands of intermediate recipients. In *Lipkin Gorman*, the plaintiff firm of solicitors was claiming a right to the monies in the defendant casino's account. A partner, Cass, in the plaintiff firm had withdrawn cash from the plaintiff's client account without the plaintiff's knowledge and gambled it away at the defendant casino. The defendant casino was thus one step removed from the plaintiff firm and the plaintiff sought restitution from the defendant casino as an indirect recipient. Lord Goff characterised (at 572) the plaintiff's claim in unjust enrichment as a personal claim; "it *[was] not a proprietary claim*, advanced on the basis that money remaining in the hands of the respondents is *their property*" [emphasis added]. His Lordship went on to discuss (at 574) how the plaintiff's right to its monies in the bank (*ie*, the debt owed by the bank to the plaintiff) was a *chose in action* and hence in the nature of legal property which could be traced into its product, the cash which had been drawn by Cass from the client account and paid to the defendant casino. *Burrows*, commenting on *Lipkin Gorman*, interpreted the case thus (at p 413):

> The House of Lords recognised that, as personal restitution was sought here from an indirect recipient, it was necessary to show that the money paid by the third party (Cass) was the claimant's.

114 Although Lord Goff stated expressly that the plaintiff firm was only seeking a personal remedy in order to recover the money from the third party defendant casino, the plaintiff had to "establish a basis on which he [was] *entitled to the money*" (see *Lipkin Gorman* at 572) [emphasis added]. The Appellant has argued that there is nothing in law which requires the claimant to have a *proprietary* claim. With respect, the Appellant has conflated an evidential requirement with a legal one. Whilst there is robust academic debate over whether the decision in *Lipkin Gorman* was premised on the vindication of the claimant's subsisting proprietary rights or unjust enrichment (see *Virgo* at pp 570–571; *cf Burrows* at pp 413–415), the proprietary *link* from tracing for the narrow purposes of establishing this particular element – as distinct from a proprietary or title-based *claim* – identifies that what is (or once was) in the hands of the defendant once *belonged to the claimant* and that there was value flowing from the claimant to the defendant. The tracing exercise serves an evidential function; it does not, in and of itself, establish a cause of action or remedy (see, for example, the decision of this court in *Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 2 SLR(R) 94 at [53], citing with approval Lord Millett's decision in *Foskett v McKeown* [2001] 1 AC 102). In a similar vein, *Burrows* comments (at p 69) that "the third party issue therefore relates *purely to the cause of action* of unjust enrichment" [emphasis added].

115 In our view, there are two interpretations of the basis for this element:

(a) The defendant received an immediate benefit from the claimant, establishing a direct personal link; or

(b) The defendant received a benefit traceable from the claimant's assets, establishing an indirect link through the value in the defendant's hands that once belonged to the claimant.

116 Both these interpretations would create a nexus between the parties satisfying the "at the expense of" requirement, either because the monies could be traced into the pocket of the defendant or because there is a direct *in personam* transfer between the parties.

117 The late Prof Peter Birks ("Prof Birks") has attempted to argue (from the perspective of an indirect link) that a claimant in the Appellant's position may be able to establish a nexus by what he calls the theory of interceptive subtraction. An interceptive subtraction arises where assets are "on their way, in fact or law, to the claimant when the defendant intercepted them" but "are never reduced to the ownership or possession of the claimant" (see Peter Birks, *Unjust Enrichment* (2nd Ed, Oxford University Press, 2005) ("*Birks*") at p 75). In such a situation, the benefit would have accrued to the claimant but for the defendant's interceptive receipt. It is as though the defendant had taken wealth directly from the claimant's purse. It may be argued that this is the situation here: the monies were on their way to the Appellant, who was entitled to ask for division, but had been intercepted by the Second Respondent.

118 We should note at the outset that Prof Birks appears to be alone in adopting this interpretation of the case law. As Prof Lionel D Smith ("Prof Smith") argued in "Three-Party Restitution: A critique of Birks's Theory of Interceptive Subtraction" (1991) 11 OJLS 481 (at 488) ("*Smith*"), in the general case of personal claims to money which has been intercepted, there

has been no subtraction from the plaintiff at all as subtraction is a zero-sum game and the plaintiff's original claim to the intercepted money still persists; "the plaintiff has suffered no expense, and so one of the basic elements of a restitutionary claim is absent".

119 The very notion of "subtraction" assumes that there must have been something to be subtracted from. This would require the claimant (here, the Appellant) to assert a definitive claim to the assets which found their way into the recipient's (here, the Second Respondent) hands and the requirement of certainty of the claimant otherwise receiving the wealth in question is critical. Prof Birks's own explanation of interceptive subtraction is as follows (see Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1989, Rev Ed ("*Birks's Introduction*") at pp 133-134):

> If the wealth in question would *certainly* have arrived in the plaintiff if it had not been intercepted by the defendant *en route* from the third party, it is true to say that the plaintiff has lost by the defendant's gain…
>
> The *certainty* that the plaintiff would have received the wealth in question does genuinely indicate that he became poorer by the sum in which the defendant was enriched.
>
> [emphasis added]

120 Prof Smith, criticising Prof Birks's use of the requirement of certainty, points out that (see *Smith* at 486):

> Birks does not tell us precisely what he means when he talks of certainty. As will be shown below, several possible interpretations exist, and Birks does not choose one unequivocally. In fact, there is some circularity in the way in which Birks presents his theory. Rather than specifying the meaning of the certainty requirement, he gives as examples of its fulfilment the very cases which the theory is supposed to explain. Thus, his theory is not given an existence independent from that of the cases which it purports to explain.

121 Prof Steve Hedley, in *A Critical Introduction to Restitution* (Butterworths, 2001), commenting on the certain expectation of receipt in the context of reasonable expectation of payment, opined thus (at p 33):

> It is not enough that, from the claimant's point of view, payment by the defendant seemed like a possibility. He or she must have had reasonable grounds for expecting it, indeed for *demanding* it was a ***legal entitlement which they have earned***. Where the claimant reasonably believes that there is a contract, or that there certainly soon would be, then this requirement is usually satisfied. [emphasis added in bold italics]

122 In a similar vein and in the context of multi-party situations in unjust enrichment, James Edelman & Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) ("*Edelman & Bant*"), comment (at p 126) that the problem with Prof Birks's theory is *not* that the enrichment has not come personally from the plaintiff but that the link that Prof Birks seeks to establish between the enrichment and the loss is "only a causal link to the assets of the beneficiaries, not to their property rights". *Edelman & Bant* go on to make the following pertinent observations (at p 127):

> ***The key restriction in these impoverishment cases is therefore that the enrichment of the defendant [here, the Second Respondent] must come directly from the plaintiff's [here, the Appellant's] assets***. A case like *Re Diplock* (where the assumed legal entitlement of the next of kin sufficed to say that the payment to the charities was directly from their assets) contrasts with a case such as *In Re BHT (UK) Ltd*. In the *BHT* case, receivers of a company considered that a charge over book debts was a fixed charge, and paid the charge holder ahead of other preferential creditors. The liquidator sought directions whether (1) the charge was fixed or floating; and (2) if it was a floating charge, whether the charge holder was required to repay the money to the company so that it could be distributed to the preferential creditors. Judge Garnett QC, deciding the second question as a preliminary issue, held that the charge holder was not required to repay the money because the charge holder would not have been enriched at the company's expense. Although

> the other preferential creditors ranked higher in the insolvency, the floating charge holder's rights over the book debts had *crystallised at the time of liquidation*. The company no longer had any right to the book debts and would *never have been* ***entitled*** *to receive* any part of the book debt realisations. Therefore, the distribution was not from the assets of the company. [emphasis added in italics and bold italics]

123 The words "on the way" imply that the passing of hands was the last step in the chain of legal entitlement which the claimant would be entitled to demand. It is at this last step that interception is made on Prof Birks's theory of interceptive subtraction. We thus note that even on Prof Birks's theory of interceptive subtraction, certainty is still required. In our tentative view, the preferable position is that the claimant must show some form of *legal (and not merely factual) entitlement* to the property which is received by the recipient. However, until such issue arises squarely for determination by this court and we have had the benefit of hearing full arguments from parties, we do not take a definitive position.

124 *Goff & Jones* have provided a third account of what this "nexus" could consist of. They argue that what is required is a "but for" causal connection between the claimant's loss and the recipient's gain, "and a transfer of value can be found even where D gains and C suffers a subtraction from his wealth as a consequence of two separate events or transactions that are themselves joined by a 'but for' causal connection" (see *Goff & Jones* at para 6-27). *Goff & Jones* examined this causal connection in four situations: (1) the discharge of another's debt; (2) contracts for provision of services; (3) sequential transfers; and (4) interceptive subtractions. *Goff & Jones* admit that this is *their explanation* of what is happening; the courts themselves have not used this interpretation in arriving at their decisions. In any event, we do not see why these situations cannot be explained as a transfer of value from

the claimant to the defendant. In the discharge of another's debt, the defendant gains a benefit or more accurately, a credit, from a release of liability. The source of this credit is a debit on the claimant's account where the claimant has made a payment to the third party *on the defendant's behalf*. In other words, the credit that the defendant now gains has been taken from the assets of the claimant and in this sense he has received a benefit at the claimant's expense, notwithstanding that there has been no payment from the claimant to the defendant. With respect, we do not see how the traditional analysis is inadequate to explain this case. The claimant has no problem showing that the payment out came from his assets, which he otherwise would have been entitled to at the point of and prior to the transfer.

125 Similarly, in the case of contracts for provision of services, the claimant provides services of value to the defendant *via* a third party agent. The defendant is liable to pay the third party agent, but the debt is, in fact, owed to the claimant who is the ultimate provider of the services. The value thus *moves from the claimant* and the claimant does not face any obstacles showing that he has an entitlement to the value of his services. In our view, Prof Burrows provides a more convincing and straightforward explanation for such transactions. He explains (at p 77):

> Let us assume that, applying the normal principles of the law of agency governing the creation of agency and an agent's authority, [the third party] is [the claimant]'s agent in rendering a benefit to [the defendant]. It appears that [the claimant] (the principal), as well as [the third party] (the agent), will be entitled to restitution from [the defendant] where that enrichment is unjust. As regards [the claimant]'s right to restitution, this is so even though the benefit has been directly provided to [the defendant] by [the third party]. This is therefore an exception to the 'direct providers only' general rule and is justified *because the agency relationship between [the third party] and [the claimant] means that the two cannot be treated as if separate*. [emphasis added]

126 The third category of sequential transfers deals with the case where the claimant confers a benefit on the third party which is then given to the defendant. Alternatively, the third party confers a benefit on the defendant which it claims from the claimant. *Goff & Jones* identify three types of such cases. The first is where the payment or receipt of money is by an agent, and the second is where transactional links satisfy the law's rules on following and tracing. Both these categories easily fit within the traditional analysis, where a benefit has been conferred on the defendant *out of the assets of the claimant*, or out of *assets to which the claimant has an entitlement*. In the second category, the proprietary link is *even stronger* than where a simple transfer of value has been made. The third category *Goff & Jones* identify is the happening of other causally connected events. We note, however, that the examples provided for the third category (see *Goff & Jones* at paras 6-48–6-51) can also be explained by reference to the fact that property belonging to the claimant had passed to the defendant. For example, in *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 ("*Agip*"), a fraudulent employee of Agip, the claimant company, had caused money to be wrongfully paid out of the claimant's bank account to the defendant company. The defendant's argument was that because the bank had no authority to pay out the monies in question, the bank was in effect paying out its own money. The English Court of Appeal, affirming the English High Court decision of *Agip* in *Agip (Africa) Ltd v Jackson* [1991] Ch 547, found that this was a technical argument which should be rejected as, for all intents and purposes, the money paid out belonged to the claimant company. The *ratio decidendi* of the case (at pp 561–562) could not be clearer:

> It does not advance the matter to say that the Banque du Sud had no mandate from Agip to make the payment at Agip's expense. What actually happened was that Banque du Sud did so. Moreover, when Agip sued Banque du Sud in the

> Tunisian courts - and I take it that Tunisian law was the proper law of the banking relationship between Agip and Banque du Sud - to have its account re-credited, it failed to obtain that relief. In those circumstances, to regard Agip as not having paid Baker Oil is highly unreal. Banque du Sud had no intention of paying with its own money. The substance of its intention, which it achieved, was to pay with Agip's money. The order, after all, was an order to pay with Agip's money. I agree, therefore, with the view of Millett J. [1990] Ch. 265, 283 H that "the fact remains that the Banque du Sud paid out the plaintiffs' money and not its own." If Banque du Sud paid away Agip's money, Agip itself must be entitled to pursue such remedies as there may be for its recovery. The money was certainly paid under a mistake of fact.

We do not see why the analysis of "but for" causation was necessary in this case as the court simply found that the assets which were received by the defendant came from monies which were part of the assets of the claimant company or to which the claimant company was legally entitled. Taken from the claimant's point of view, there is no question that the benefit to the defendant was at its expense.

127 The same analysis applies to interceptive subtractions. We have already observed (above at [119]–[123]) that interceptive subtractions do not do away with the need for a nexus to the claimant's assets. Such a nexus may be established by showing legal entitlement (see above at [123]). This is not simply a causal link; it still requires the claimant to show that he had, at the time of the transaction, a right to the monies before they were transferred. As Prof Burrows has observed (see *Burrows* at p 65):

> [I]t is not sufficient to say that a defendant's gain is at the expense of the claimant merely because there is a 'but for' causal link between the defendant's gain and the subtraction from the claimant. *As a matter of principle, to apply a mere causal test would extend the ambit of unjust enrichment too far.* So, for example, in *Sempra Metals v IRC*, it was accepted by the House of Lords that the claimant could not have recovered profits that the defendants might have made from the use of

> the mistakenly paid advanced corporation tax. Such profits could not have been recovered in a claim for restitution of an unjust enrichment (rather than in a claim for restitution for a wrong); and the best explanation for this is that such profits, albeit causally linked to the subtraction from the claimant, would not have been gained 'at the expense of' the claimant.[emphasis added]

128 The requirement that the benefit is given to the recipient "at the expense of" the claimant is therefore not a *carte blanche* to substitute any sort of connection, causal or otherwise, between the gain and the loss. It refers specifically to the requirement that the claimant (here, the Appellant), must prove that she had lost a benefit *to which she is legally entitled or which forms part of her assets* and which is reflected in the recipient's gain, regardless of whether that gain is one of traceable property or of a transfer of value.

Unjust factor

129 We should note – but only briefly as well as parenthetically – that there is an ongoing debate as to whether one should adopt the "unjust factors" approach or the "absence of basis" approach after Prof Birks advocated a structural change in the English common law approach from the former to the latter (see generally *Birks*, especially at pp 102–108). However, the "absence of basis" approach has (understandably, given its relatively recent arrival on the legal landscape and notwithstanding Prof Birks's justifiable pre-eminence within the discipline itself) yet to take root within the common law of restitution and unjust enrichment, and has generally appeared not, as yet, to have found favour amongst scholars in this particular field of law (see, for example, *Goff & Jones* at paras 1-18–1-22 and *Burrows* at ch 5). Given what we perceive to be the present state of the law of restitution and unjust enrichment, we will proceed on the assumption that the "unjust factors"

approach applies, as recently endorsed by this court in *Skandinaviska Enskilda*.

130 We have already observed that unjust enrichment is not based on a general notion of unconscionability or unjustness. It follows that the crucial question of whether the enrichment is unjust is circumscribed by the traditional common law rules. Lord Hoffmann observed in the House of Lords decision of *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2007] 1 AC 558, as follows (at [21]):

> … unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. In the Woolwich case [1993] AC 70 , 172 Lord Goff said that English law might have developed so as to recognise such a general principle-the *condictio indebiti* of civilian law-but had not done so. In England, *the claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognizes as sufficient to make retention by the recipient unjust*. [emphasis added]

131 The case Lord Hoffmann referred to, the House of Lords decision of *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 ("*Woolwich*"), concerned a claim for the repayment of overpaid tax. The claimant was attempting to establish an obligation on the part of the Inland Revenue Commissioners to repay the tax exacted without lawful authority on the basis that the Inland Revenue Commissioners had been unjustly enriched at the time the payment for tax was made. Lord Goff laid out (at 164–165) four situations where monies paid out would be recoverable under the law of unjust enrichment. These situations included (1) money paid under mistake of fact, (2) money paid under compulsion and in particular, as a result of actual or threatened duress to a person or actual or threatened seizure of a person's goods, (3) money paid to a person in a public or quasi-public

position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him, and (4) money paid to a person for performance of a statutory duty which he is bound to perform for a sum less than that charged by him. *Woolwich* was an instance of a "public policy" motivated unjust factor (as distinct from the present appeal), but it suffices for present purposes to note that the analysis in *Woolwich* proceeded on the basis that recovery of the overpaid tax had to be founded on some *unjust factor*, and the claimant could not rely on a universal principle that it was unconscionable for the tax authority to retain the monies.

132 This list of "unjust factors" has been catalogued in academic treatises. *Burrows*, for example, summarised the unjust factors as follows (at p 86):

> As regards the cause of action of unjust enrichment, the main unjust factors can be listed as follows: mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality and public authority ultra vires exaction and payment.

133 *Goff & Jones* summarised them as follows (at para 1-22):

> Lack of consent and want of authority; mistake; duress; undue influence; failure of basis; necessity; secondary liability; *ultra vires* receipts and payments by public bodies; legal incapacity; illegality; and money paid pursuant to a judgment that is later reversed.

134 It is important to reiterate that there is no freestanding claim in unjust enrichment on the abstract basis that it is "unjust" for the defendant to retain the benefit – there must be a particular recognised unjust factor or event which gives rise to a claim. The following observations by Prof Birks in a seminal article are, in this regard, apposite (see Peter Birks, "The English recognition of unjust enrichment" [1991] LMCLQ 473 (at 482)):

> "Unjust" is the generalization of all the factors which the law recognizes as calling for restitution. Hence, at the lower level of generality the plaintiff must put his finger on a specific ground for restitution, a circumstance recognized as rendering the defendant's enrichment "unjust" and therefore reversible.

135 The Appellant has not pointed to any specific unjust factor underlying her claim in unjust enrichment. The Statement of Claim (Amendment No 2) pleaded (at para 37(d)):

> The enrichment was unjust in that the assets settled by NHS into the BNP Trusts were effected at the expense of the Plaintiff in respect of that part of the assets of the BNP Trusts which the Plaintiff would have been entitled to had she applied for a division of matrimonial assets pursuant to Section 112 of the Women's Charter.

136 The Appellant's claim is simply an assertion that the trust (and therefore the Second Respondent as a trustee) received monies which the Appellant would have been entitled to and that it would be "unjust" for the Second Respondent to keep these monies. With respect, there is no support for this argument in law. Borrowing the words of Mann J in the English High Court decision of *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) (at [18]), "the claim fails because it does not plead facts which are capable of bringing the case within one of the established restitutionary claims or some justifiable extension of them". As *Goff & Jones* have explained (at para 1-23):

> A claimant must be able to point to *a* ***ground of recovery*** *that is established by past authority, or at least is justifiable by a process of principled analogical reasoning from past authority.* "As yet there is in English law ***no general rule*** *giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense*", and the courts' jurisdiction to order restitution on the ground of unjust enrichment is subject "to the binding authority of previous decisions": they ***do not have "a discretionary power to order repayment whenever it seems … just and equitable***

> ***to do so".*** *Claims in unjust enrichment must be pleaded by bringing them "within or close to some* ***established category or factual recovery situation****".* [emphasis added in italics and bold italics]

137 This is not to state that there were no possible arguments in relation to the unjust factor available with regard to the claim in unjust enrichment, but these were not canvassed before us. As alluded to above (at [135]), the Appellant appeared – in *the court below* – to have premised her claim on the argument that the Second Respondent had been *unjustly enriched*. This, as we have noted, is a claim based on *strict liability* at *common law* (subject to the defence of change of position (and, possibly, *bona fide* purchase as well)). In the crucial passage in the Judgment underlying the Judge's reasoning (cited above at [109]), the Judge perceived the Appellant's claim as one for *restitution of unjust enrichment* but focused on the defendant's participation in or knowledge of fraudulent conduct or want of probity.

138 With respect, however, the Judge appears to have attached the label of unjust enrichment to the elements of a *distinct and separate* claim in equity for *knowing receipt*. The citation of the Singapore High Court decision of *Comboni Vincenzo and another v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 ("*Comboni*") is perhaps unfortunate. As has been perceptively pointed out by two leading experts (both of whom are well-known locally as well as internationally) in the fields of both unjust enrichment and equity, *Comboni conflated* two *disparate causes of action* (see Yeo Tiong Min, "Restitution" (2007) 8 SAL Ann Rev 364 at 377–381 and Tang Hang Wu, "The Constructive Trust in Singapore – Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 138 and (especially) 144–147). The conflation in *Comboni* related to a claim under the doctrine of knowing receipt and a claim for an RCT; by combining both claims under a single analytical framework, the

judge in *Comboni* (perhaps due in part to the terminological confusion that has bedevilled this area of equity) did not distinguish between a personal claim for liability to account and a proprietary claim. Unfortunately, it appears, with respect, that the Judge in the present case has, in stating the issue in the way she did, also effected a *conflation* (albeit of a somewhat different nature). Two doctrines are apparently referred to in the passage of the Judgment cited (above at [109]). The first centres on a claim in *unjust enrichment* (which, as noted, is a claim based on *strict liability* at *common law*). In analysing the elements for a claim in unjust enrichment, the Judge appears to have elided this with a second doctrine, *viz*, the equitable doctrine of knowing receipt of trust property (which centres, in turn, on the criterion of whether the recipient's *state of knowledge* is such that it would be unconscionable for him to retain the property). The question that arises from the Judge's analysis is this: Notwithstanding the fact that the *doctrine* of knowing receipt is *itself* an *independent cause of action under equity,* was the Judge correct to regard this doctrine as a form of unjust enrichment or can the concept of knowing receipt be shaped to constitute *an unjust factor upon which liability for unjust enrichment* (at *common law*) can be premised?

139 With respect, we state at the outset that the Judge's analysis cannot, as a matter of *conceptual consistency*, be correct. In short, if the Judge accepted that it was necessary to establish a want of probity on the part of the recipient such that it was unconscionable for him to retain the benefit, this cannot *ex hypothesi* be a *strict liability* claim under unjust enrichment. The equitable fault-based doctrine of knowing receipt (as currently understood) therefore cannot at once be part of the law of unjust enrichment and yet premise the imposition of legal liability on the disapprobation of the defendant's conduct. The Judge's analysis nevertheless raises a more subtle issue that has been the

subject of much robust academic debate on a normative level: can or should the concept of knowing receipt be reworked into a claim in unjust enrichment by the fact of receipt *simpliciter*? The academic debate over the relationship between knowing receipt and unjust enrichment stems from what is commonly viewed as an anomalous asymmetry between the third party's liability for receipt of property at common law and in equity. The former common law claim appears, on the authority of *Lipkin Gorman*, to be governed by the law of unjust enrichment, whereby the receipt of traceable property suffices to ground liability (subject to defences to an unjust enrichment claim). The cases imposing strict liability at common law for the receipt of a benefit have often been analysed *ex post facto* by commentators on the basis of the unjust factor of ignorance (see *Birks's Introduction* at pp 140–146 and *Burrows* at ch 16) or lack of consent (see, generally, *Goff & Jones* at ch 8); it has been argued that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. We should note, however, that there is *no* authority that has expressly acknowledged the unjust factor of ignorance or lack of consent (see also below at [166]), and we do not express any conclusive opinion as to whether both fall within the present catalogue of unjust factors. The latter equitable claim is, on the present state of the law, confined to a claim under the equitable doctrine of knowing receipt, with the additional necessary element of a state of knowledge that renders it unconscionable for the defendant recipient to retain the benefit.

140 There are three possible approaches in structuring the legal regime of liability for *receipt* of a benefit. The *equitable* doctrine of knowing receipt may be *subsumed* under the *common law* doctrine of unjust enrichment, discarding any inquiry into the fault of the recipient. *Alternatively*, one could

confine third party liability for receipt to the equitable sphere only – in which case the equitable doctrine of knowing receipt that lies in the sphere of wrongs would be the only remedy, without a cause of action in *unjust enrichment for receipt per se*. There are strong proponents of *both* views (the literature, as might be expected, is vast and even passionate, but will not be rehearsed within the more modest confines of the present judgment). Indeed, there appears to be yet a *third* view which Prof Birks himself has accepted after retreating from his earlier position that liability for knowing receipt should be analysed from the lens of unjust enrichment (see Peter Birks, "Misdirected Funds – Restitution from the Recipient" [1989] LMCLQ 296) – that *both* the aforementioned approaches can subsist *simultaneously* as possible alternatives (see, for example (and amongst many other writings by this prolific author), Peter Birks, "Receipt" in ch 7 of *Breach of Trust* (Peter Birks & Arianna Pretto gen eds) (Hart Publishing, 2002) ("*Birks's Receipt*") at pp 223–225). The reason for this (third) alternative (at least in so far as Prof Birks is concerned) is nevertheless clear; in his words (*ibid* at pp 223–224):

> Although I have myself strenuously argued that "knowing receipt" should be regarded as a claim in unjust enrichment, and should therefore discard the incongruous requirement of fault implicit in the word "knowing", *the courts appear to have set their face against that view. It now seems right to abandon that analysis once and for all. It was a mistake to insist that "knowing receipt" was simply a species of unjust enrichment which had been slow to understand itself and, in particular, slow to understand that liability in unjust enrichment is strict though subject to defences.*
>
> The better way of proceeding is to accept that the ambiguities and uncertainties in the case law of knowing receipt arise from its *having failed to distinguish between two very different kinds of liability, one wrong-based and the other based on unjust enrichment.* The task is then, not to force "knowing receipt" into one or other category, but to demonstrate that both kinds of liability are necessary and that neither renders the other redundant.

> [emphasis added]

141 While we would not (at least in the absence of full argument) take the firm position that both forms of liability are necessarily logically opposed or incompatible, this last-mentioned approach is not without problems. However, what *is* clear (as Prof Birks himself concedes in the above quotation) is that the existing case law does appear to militate against the adoption of the approach from unjust enrichment *only*. That this is so is exemplified by decisions such as those of the English Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 ("*Akindele*"), where Nourse LJ (with whom Ward and Sedley LJJ agreed) was of the view (cited, in fact, by Prof Birks in *Birks's Receipt* at p 224) that the strict liability regime pursuant to an approach from unjust enrichment is commercially unworkable; in the learned judge's view (at 455–456; reference may also be made to the more recent (also) English Court of Appeal decision of *Charter Plc v City Index Ltd* [2008] Ch 313 at [7]–[8] as well as to Susan Barkehall Thomas, "'Goodbye' Knowing Receipt. 'Hello' Unconscientious Receipt" (2001) 21 OJLS 239):

> We were referred in argument to "Knowing Receipt: The Need for a New Landmark", an essay by Lord Nicholls of Birkenhead in *Restitution Past, Present and Future* (1998) p 231, a work of insight and scholarship taking forward the writings of academic authors, in particular those of Professor Birks, Professor Burrows and Professor Gareth Jones. It is impossible to do justice to such a work within the compass of a judgment such as this. Most pertinent for present purposes is the suggestion made by Lord Nicholls, at p 238, in reference to the decision of the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548:
>
> > "In this respect equity should now follow the law. Restitutionary liability, applicable regardless of fault but subject to a defence of change of position, would be a better-tailored response to the underlying mischief of misapplied property than personal liability which is exclusively fault-based. Personal liability would flow

> from having received the property of another, from having been unjustly enriched at the expense of another. It would be triggered by the mere fact of receipt, thus recognising the endurance of property rights. But fairness would be ensured by the need to identify a gain, and by making change of position available as a defence in suitable cases when, for instance, the recipient had changed his position in reliance on the receipt."

Lord Nicholls goes on to examine the *In re Diplock* [1948] Ch 465 principle, suggesting, at p 241, that it could be reshaped by being extended to all trusts but in a form modified to take proper account of the decision in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

No argument before us was based on the suggestions made in Lord Nicholls's essay. Indeed, at this level of decision, it would have been a fruitless exercise. We must continue to do our best with the accepted formulation of the liability in knowing receipt, seeking to simplify and improve it where we may. ***While in general it may be possible to sympathise with a tendency to subsume a further part of our law of restitution under the principles of unjust enrichment, I beg leave to doubt whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions, for example where, as here, the receipt is of a company's funds which have been misapplied by its directors. Without having heard argument it is unwise to be dogmatic, but in such a case it would appear to be commercially unworkable and contrary to the spirit of the rule in*** *Royal British Bank v Turquand* (1856) 6 E & B 327 ***that, simply on proof of an internal misapplication of the company's funds, the burden should shift to the recipient to defend the receipt either by a change of position or perhaps in some other way. Moreover, if the circumstances of the receipt are such as to make it unconscionable for the recipient to retain the benefit of it, there is an obvious difficulty in saying that it is equitable for a change of position to afford him a defence.***

[emphasis added in bold italics]

142 Significantly, in the Singapore context, this court (in *George Raymond Zage*) noted, in respect of the observations of Nourse LJ in *Akindele* quoted in the preceding paragraph, as follows (at [27]):

> Interestingly, Nourse LJ also considered but rejected Lord Nicholl's suggestion in his article (written extra-judicially), "Knowing Receipt: The Need for a New Landmark", from Cornish et al, *Restitution Past, Present and Future* (Hart Publishing - Oxford, 1998) at p 231 that the courts move from a fault-based regime of knowing receipt towards a consolidated unjust enrichment regime.

143 Although there was no *express* endorsement of Nourse LJ's views in *Akindele* as such, the endorsement (as noted in the preceding paragraph) of the test of unconscionability (specifically, the recipient's *state of knowledge* which renders retention of the property unconscionable) in the context of the doctrine of knowing receipt in *George Raymond Zage* itself suggests that, at the very highest, the doctrine of unjust enrichment can only be but an alternative and cannot displace or subsume the doctrine of knowing receipt (although Prof Yeo Tiong Min ("Prof Yeo") has apparently adopted a somewhat different interpretation in his Fourth Yong Pung How Professorship of Law Lecture entitled "The Right and Wrong of 'Knowing Receipt' in the Law of Restitution" ("*Yeo*"), delivered on 19 May 2011 at the Singapore Management University (presently accessible only online at http://www2.law.smu.edu.sg/yphdls/20120516/paper_2011.pdf) (accessed 27 June 2013), which suggests (at para 33, and quoted below at [144]) that even this possible route for the doctrine of unjust enrichment is somewhat bleak). On another view (*viz*, that of Nourse LJ in *Akindele*), the doctrine of knowing receipt would, of course, be *the only* approach that is applicable. Criticising Nourse LJ's attempt to "pour knowing receipt into an unjust enrichment bottle", Prof Birks goes on to explain (in *Birks's Receipt* at p 225):

> There should be no doubt that the rejection of strict liability is a rejection of the unjust enrichment analysis of knowing receipt. Strict liability is the essence of the law of unjust enrichment. If there were a general requirement of fault, the entire law of unjust enrichment would probably be swept into the law of civil wrongs. But that will not happen. …
>
> Nourse LJ expressed his preference for fault-based liability in the course of noticing, but leaving to higher authority, a very important article by Lord Nicholls. In fact it appears not to have been noticed that Lord Nicholls himself, while in favour of recognizing a liability in unjust enrichment in these situations in which the claimant is entitled only in equity, was not arguing for a subsumption of knowing receipt under unjust enrichment. His strategy … seeks to show that it is necessary to recognise the liability in unjust enrichment alongside the liability for knowing receipt in its quality as a wrong. His point all along is that there have to be both liabilities.

144 In our view, the law in this area is still in a state of *flux*. This is perhaps not surprising as the law of both restitution and unjust enrichment are relatively "young" doctrines. Although their development has now spanned several decades, this is but a drop in the proverbial legal ocean when viewed against the backdrop of the centuries during which time various doctrines at both common law as well as in equity have developed. However, the absence of a clear consensus is unhelpful, regardless of the reasons for such a situation. And the situation is exacerbated by the fact that the various controversies and difficulties have been canvassed, in the main, in academic writings which have hitherto been unhelpful when viewed from a more practical perspective. Unfortunately, that is the situation we now find ourselves in. The various issues, decisions, academic literature as well as controversies have been helpfully analysed with characteristic perceptiveness by Prof Yeo in his lecture to which reference has already been made (in the preceding paragraph). Indeed, it is to be hoped that, given its perceptive analysis and general importance, it will be published in a more formal venue in the not too distant

future. It is significant, in our view, that this lecture does not offer a positive prognosis in so far as an action in unjust enrichment is concerned. In this regard, it may be apposite to quote the conclusion to Prof Yeo's lecture (see *Yeo* at paras 31–33) in full, as follows:

> **Conclusion**
>
> 31 If we decide that knowing receipt is indeed a wrong we should take the logical steps to rationalise it as such. The developments in *Charter Plc v City Index* [[2008] Ch 325] in England and the *Thanakharn* case in Hong Kong [*Thanakharn Kasikorn Thai Chamkat (Mahahon) (aka Kasikornbank Public Co Ltd) v Akai Holdings Ltd (in liq)* (2010) 13 HKCFAR 479, [2010] HKCFA 63] represent incremental steps in this direction. Although the Singapore courts have not gone to the same extent, these developments are highly relevant for the courts to consider how they want to develop Singapore law.
>
> 32 These steps taken in England and Hong Kong SAR explicitly carve out the law on knowing receipt from the law of restitution to the extent that the latter means the law of unjust enrichment. By explicitly recognising the remedy as equitable compensation, it places knowing receipt clearly in the law of equity and trusts, or from a different classification perspective, the law of wrongs. This has implications beyond the debate on the standard of liability. On this basis, liability is measured by the loss to the plaintiff, but this includes loss in the value of property taken from the trust. Change of position is an irrelevant defence both in theory and practice. Causation, remoteness and mitigation are not relevant when it comes to the restorative measure of compensation, but may be relevant in respect of consequential losses. However, the value of the property to be restored must still be assessed, and this is not necessarily the value of the property at the time of receipt. Further, the assumption that the choice of law rules for restitution applies to claims in knowing receipt will need to be reconsidered. Finally, the analogy with the tort of conversion needs to be approached with some caution.
>
> 33 *Whether there is an alternative cause of action in unjust enrichment based on the receipt of equitable property (or perhaps property otherwise subject to a fiduciary institution) is a different question. It has been rejected by the Australian High Court, the Hong Court of First Instance and the English Court of Appeal, but the Supreme Court in the UK has yet to consider the question. It appears to have been rejected implicitly by the Singapore Court of*

> *Appeal, but it is not clear whether counsel had pressed the argument.* ***On the whole the judicial acceptance of this line of argument looks increasingly unlikely****.*
>
> [emphasis added in italics and bold italics]

145 Prof Yeo's conclusion follows the present trend of judicial development of receipt-based liability in unjust enrichment. Although there is some support for the contrary proposition from several judges in both extra-judicial (see, for example, the observations of Lord Millett in "Tracing the Proceeds of Fraud" (1991) 107 LQR 71 at 82 and of Lord Nicholls of Birkenhead, quoted above at [141]) and judicial (see, for example, *per* Millett J in the English High Court decision of *Agip* at 291–292 and Lord Millett in the House of Lords decision of *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [105] as well as *per* Lord Nicholls in the Privy Council decision of *Royal Brunei Airlines* at 386 and (it would appear) the House of Lords decision of *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 at [3]–[4]) contexts, the various observations were just that and do not, with respect, contain sufficiently detailed analysis as well as elaboration.

146 Given the apparent state of flux which the law is in, it would appear that the argument with regard to unjust enrichment as the *sole or governing* approach, or even as a co-existing alternative basis of liability, should be approached with some caution. However, for reasons that will be apparent in a moment, it is not necessary for this court to render a definitive view on this matter, although it would appear that – for the moment at least – the doctrine of knowing receipt as an *equitable wrong* is clearly part of the legal landscape in the Singapore context. To recapitulate, there is no *unjust factor in the law of unjust enrichment* (as (apparently) considered by the Judge in the court below)

premised on receipt and retention of assets with a state of knowledge which would render such retention unconscionable. Although the *substance* of liability for receipt is well-established *in equity* under the doctrine of *knowing receipt*, this last-mentioned doctrine is premised on the general notion of *fault*, *whereas unjust enrichment* is premised on *strict liability* at *common law* (subject to *defences* such as change of position). The basis of liability should not be elided.

Application of these principles

Has there been enrichment at the expense of the Appellant?

147 In our view, there has been no enrichment at the expense of the Appellant, either *via* a direct personal link between the Second Respondent's enrichment and her loss, or *via* an indirect link through tracing the benefit (or value of the benefit) to the Second Respondent from the Appellant's assets or monies to which she is entitled (see above at [115], [123] and [128]).

148 We first examine whether the Appellant has established a direct personal link (see above at [115(a)]) between the Second Respondent's benefit and her (alleged) loss. As has been observed in our discussion of the threshold issue, the Appellant's claim lies primarily against the Deceased and accordingly, the First Respondent. The Deceased (and through him, the Estate) received an immediate benefit from the Appellant in that the Appellant chose to forgo division and thus enabled him to keep the monies. The claim between the Appellant and the Deceased is a *claim for damages* for fraudulent misrepresentation. The problem with the Appellant's argument is that it is unclear how this claim can be linked to the Second Respondent's receipt of the Deceased's assets.

149 If the Appellant had succeeded on the threshold issue (which she did *not*) and leaving aside the question of whether a remedy of an RCT was even available (which we entertain serious doubts about), the best case scenario which the Appellant could hope for is an imposition of an RCT *over the monies held by the First Respondent,* and even then, *only at the time the claim is brought and is successful*. Mr Kumar attempted to argue that an RCT should be declared over the monies in the 1999 and 2002 trusts. With respect, there is no basis for this claim, given that the claim for damages exist*s only against the First Respondent* as executrix of the Estate and the Second Respondent *does not come into the picture at all* in the determination of the threshold issue. There has been some suggestion that a claimant may obtain restitution of benefits gained from the tort of deceit (see *Goff & Jones* at para 36-005 and *Cartwright* at para 5-35) in the form of disgorgement of benefits that the defendant derived from his wrong. We find that this does not apply in the present case.

150 First, the Appellant is not claiming disgorgement of the Deceased's benefit, but damages (see Appellant's written case at [263]). It was observed in the House of Lords decision of *United Australia Limited v Barclays Bank Limited* [1941] AC 1 (at p 19) that the "same set of facts entitles the plaintiff to claim either form of redress. At some stage of the proceedings the plaintiff must elect which remedy he will have". Having unequivocally elected to claim damages, the Appellant must be held to her pleadings.

151 Second, even if we were to allow the Appellant to amend her pleadings to substitute a claim for disgorgement of the benefit, this would not help her case at all. The Appellant's claim against the First Respondent is, at best, one for the alleged loss of a chance to make a claim against the monies at the

division stage. As the Judge observed, there was insufficient material to determine what the Appellant would have obtained on a division of matrimonial assets. In particular, the fact that the Appellant's own wealth at the material time was uncertain means that it is far from a foregone conclusion that the Appellant would have obtained 75% of the monies as she claims. In order for the Appellant's claim to succeed, she must be able to prove (from a practical perspective) that she had *little or no* assets at the material time. This was clearly not the case. If the Appellant had, in fact, *more* assets than the Deceased, she might have made *a net loss* on division. Since the Deceased is now dead and the court's jurisdiction under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) no longer exists, what the Appellant would have obtained is a speculative exercise which is founded upon her loss of a *chance* to get a share of the Estate. The appropriate remedy for loss of a chance must be damages as there is no way to disgorge an indefinite benefit.

152 More importantly (and in any event), it should be noted that any direct restitutionary claim *only exists* between the representor (here, the Deceased) and the representee (here the Appellant). The Appellant has argued that she fulfils the condition that the Second Respondent's enrichment was obtained as a result of a wrong done to her (*viz*, the Deceased's profit from wrongfully retaining the monies instead of giving part of them up to the Appellant), and this enrichment was therefore "at her expense" (*viz*, the Deceased was able to take the monies which he had wrongfully withheld from the Appellant and deposit them in the 1999 and 2002 trusts). This adopts a much broader understanding of the requirement that the enrichment be at the expense of the claimant than that which exists under the law of unjust enrichment. The former is properly regarded as part of the law of restitution for wrongs, while the latter is *more limited* and focuses on enrichment in the *subtractive* sense

(see above at [113]). The Appellant's argument is based on an incorrect understanding of the requirement of enrichment at the expense of the claimant. Even taking the Appellant on her own case and assuming that she could obtain a restitutionary remedy for the Deceased's fraudulent misrepresentation (in the form of disgorgement of gains within the rubric of restitution for wrongs) instead of damages in common law, this remedy could only be enforced against the First Respondent as executrix of the Estate. Although the final outcome of the Appellant's best case scenario would be the acquisition by the Appellant of a right *in rem* over the monies held by the Estate in the form of an RCT declared by the court, which will be enforceable against the whole world (including the Second Respondent), this will only happen *after* the determination of the personal issue between the two direct parties, *viz*, the Appellant and the First Respondent (and assuming the Appellant succeeds in her claim, this right will be based on an RCT). It bears noting that the monies which the Appellant now claims had been transferred to the Second Respondent *before* the determination of the personal issue between the Appellant and the First Respondent as executrix of the Estate. Any right *in rem* which the Appellant *may have received* would exist only against the *remaining monies* in the Estate and which is now administered by the First Respondent. No action could or would lie against the Second Respondent for monies transferred to it *prior* to the imposition of the RCT. In other words, there is no direct personal link between the Appellant and the Second Respondent; the claim for damages in misrepresentation has not been assigned to the Second Respondent simply because the latter has received a payment from the Deceased during his lifetime and *before* the Appellant had commenced an action against the Deceased.

153 If the Appellant had succeeded on the threshold issue, however, it is far more likely that this best case scenario would never materialise. The appropriate award for fraudulent misrepresentation is damages to compensate the representee for the loss which can properly be said to have been caused by the representation (see *Cartwright* at para 5-035 and W V H Rogers, *Winfield & Jolowicz on Tort* (18th Ed, Sweet & Maxwell, 2010) at para 11-14). It is trite law that a remedy of damages at common law cannot be enforced against a third party.

154 For completeness, we should add that a third party can itself be independently liable on a separate basis such as knowing receipt. A claim in knowing receipt, however, is founded upon quite a different basis from a claim in unjust enrichment (as noted above at [108] and [110]) and constitutes a *separate claim*. In any event, knowing receipt was *not part of the Appellant's pleaded case* and we do not need to deal with the question of whether the Second Respondent was liable in knowing receipt for the Appellant's loss. It is clear that, both here as well as in the court below, the Appellant was relying on *neither* the doctrine *nor* the concept of knowing receipt. In our view, this was the correct approach to adopt as there is nothing on record to indicate that the Second Appellant might be liable under the doctrine of knowing receipt. The Appellant's statement of claim was amended twice. By the time of the second amendment, her claim against the Second Respondent had substantially changed. Whereas the original statement of claim contended (at para 27 of the Statement of Claim) that the Second Respondent was "liable to account to the Plaintiff, on the ground of knowing receipt, for that part of the assets which were settled by [the Deceased] into the BNP Trusts", the amended statement of claim had deleted all references to knowing receipt and went so far as to delete *all references to unconscionability*. There is no

suggestion that the Second Respondent knew that the monies received were subject to some right *in rem* (or other legal entitlement) that may be asserted by the Appellant against the monies and there is no suggestion that the Second Respondent had acted dishonestly. On appeal, the Appellant tried to change tack by stating that the Second Respondent was liable to return the monies *when its conscience was affected*, *viz*, at the time this claim was brought (see above at [110]). It bears reiterating that the Appellant's reference to unconscionability (in so far as she was maintaining a claim in unjust enrichment) does not relate to the material time. A claim in unjust enrichment arises at the point of receipt and not at the point of knowledge. In fact, knowledge does not even enter the picture (see above at [106], [108] and [110]). A claim in unjust enrichment thus *cannot* arise *subsequent* to the point of receipt, nor can it arise as a result of the recipient's knowledge *after* receipt. We will have occasion to return to this point at [163]–[165] below.

155 We now turn to examine whether the Appellant can establish an *indirect link* (in the subtractive sense used by the law of unjust enrichment) through the value in the Second Respondent's hands in the form of a benefit traceable from her property. This would require her to demonstrate that she had a pre-existing right, or at least a *legal entitlement* to the monie*s at the time or before they were transferred to the Second Respondent* (see above at [119]). The comments on Prof Birks's theory of interceptive subtraction (above at [117]–[122]) apply, *a fortiori*, to the present case. As we have established in the preceding paragraphs, the Appellant has, even on her best case scenario, no pre-existing right or legal entitlement which could give rise to a benefit traceable into the Second Respondent's hands; at best, she has a *personal claim* for loss of a chance *against the Deceased*. This personal claim does not grant her a legal entitlement to the monies transferred to the Second

Respondent, much less does it make the transfer a transfer from her assets. As a claim in the tort of deceit for damages, the personal claim which the Appellant has exists *independently* of the assets which the Deceased owns. At the time the monies were transferred from the Deceased to the Second Respondent, the Appellant had no legal or equitable claim or entitlement to the monies. The Appellant is thus unable to derive a traceable benefit to the monies in the 1999 and 2002 trusts. There is thus no subtraction *stricto sensu* from the Appellant.

156 To say that the monies were on the way (in the interceptive subtraction sense) from the Deceased to the Appellant is, with respect, to assume what has in fact to be proved. The Appellant would have had to *change her mind*, ask for division, and subsequently been awarded a portion of the monies. None of these things were guaranteed to happen. More importantly, the Appellant has not proved that she would certainly obtain a portion of the monies. All she can establish is that she would probably have obtained a division of matrimonial assets. What proportion of assets the division would have given her, and whether it would have entitled her to more than the assets she already had as her contribution to the pool is a matter of speculation, not certainty. As mentioned at [151] above, all she had was the loss of a chance to get a share of the monies. Accordingly, there is no sense in which the monies were "on their way" to the Appellant. Further active steps would have to be taken before the Appellant could have gained ownership of, or became entitled to, the monies, and none of these steps would have guaranteed her a share of the monies.

157 Crucially, the enrichment of *the Second Respondent did not come from the Appellant's assets* (see above at [122]), nor was the Appellant *entitled* to receive those assets at the point in which they were given to the Second

Respondent. At best, the Appellant had a *chose in action* which *would only crystallise at the point of judgment being made in her favour*. Even if the Appellant had succeeded in this respect (which she did *not*), the enrichment that occurred did not come from her assets and so *could not* have been at her expense. The Appellant attempted to argue that the Second Respondent's benefit was gained at her expense because the monies were matrimonial assets or community property which she had an interest in. Presumably, the Appellant was trying to claim some sort of interest (although not one which was proprietary in nature) in the pool of matrimonial assets such that the benefit did come, in a nominal sense, from *her* assets. With respect, we do not see what kind of interest this could amount to and there is no support for her position in law.

158 To clarify, we are not stating that there is an absolute rule against "leapfrogging". Counsel for the Second Respondent, Mr Edwin Tong, argued before us that the flaw in the Appellant's case is that it permits the Appellant to leapfrog over the First Respondent, who is the real defendant, to get into the Second Respondent's deeper pockets. Whilst this argument has an intuitive appeal, *Goff & Jones* (at para 2-66) and *Birks* (at p 89) have already observed that no case clearly establishes this. We have also noted (above at [122]) the observations of *Edelman & Bant* that the problem lies not with the *parties* involved but the nexus between the Appellant's property rights and the Second Respondent's enrichment. All we are saying is that the Second Respondent was never enriched from the assets of the Appellant as the Appellant never had a property right to those assets to begin with, and accordingly, any potential nexus between the Appellant and Second Respondent had been broken by intervening events and the Deceased's actions. It does not help that

this case is riddled with uncertainties and the benefit which the Appellant is claiming to have lost is itself uncertain.

159 We are also not stating that the claim in unjust enrichment is a proprietary one. We have already noted (above at [114]) the evidential nature of the need to establish an entitlement or right to the assets in question. The Appellant must be able to establish a nexus to the assets which the Second Respondent now has; this does not require the Appellant to *trace* her original proprietary right into the assets which are presently in the hands of the Second Respondent, but only to establish that she initially had an entitlement to the assets, the value of which was transferred to the Second Respondent. The Appellant may be able to claim (as she does) that she is not required to show a proprietary claim, but this does not mean that there is no need to show a nexus between the monies transferred to the Second Respondent and her ownership of or entitlement to the same; the Appellant can have no cause of action if she cannot evidentially demonstrate, in the first place, an entitlement to the monies which were moved.

160 Even if we were to apply *Goff & Jones's* "but for" causation test (which we have our doubts about, as alluded to above at [124]–[127]), the Appellant is still unable to establish a nexus between her loss and the Second Respondent's gain. It cannot be said that, but for the Deceased's fraudulent misrepresentation (which resulted in the Appellant's relying on the same to forgo division of assets and thus the chance to assert a claim against the monies), the Second Respondent would not have received the monies. The gain of the Second Respondent is not causally linked to the Deceased's fraudulent conduct. The Deceased broke the chain of causation when he made the further independent decision to transfer the monies to the Second

Respondent. The Appellant's loss derives wholly from the Deceased's alleged fraudulent misrepresentation and would have resulted regardless of whether the Deceased subsequently transferred the monies to the Second Respondent. It bears reiterating the most salient point that completely undermines the Appellant's case in this particular regard right at its threshold: we have found that there had been *no* fraud committed by the Deceased pursuant to Issue 1. Hence, Mr Kumar's argument must perforce *fail right at the threshold*.

161 We find that there is no benefit at the Appellant's expense and the claim in unjust enrichment is not made out (as element (b) (above at [98(b)]) was *also not* satisfied).

Is there an unjust factor?

162 Given our decision on element (b), it is not strictly necessary to deal with element (c). For completeness, we will make some brief comments.

163 As we have alluded to above, the Appellant has not pointed to *any* unjust factor that supports her claim. Instead, Mr Kumar attempted to argue, in oral submissions before this court, that the Second Respondent's conscience was touched from the point that the fraud was discovered. When pressed further, he stated that the operative date when an unjust enrichment claim could arise would be from the time that the fraud is pronounced by the court. However, Mr Kumar could not point to any legal authority that supported his proposition. In the Appellant's case, reference is made to the fact that it would be unjust for the Second Respondent to retain the monies because the Second Respondent "did not give value for the Assets". With respect, we do not see which particular unjust factor this points to.

164 Crucially, Mr Kumar's argument runs in a conceptually *opposite* direction from the basis of unjust enrichment (see above at [108], [110] and [139]). Mr Kumar's analysis is *fault-based* and *defendant-centric*; it ultimately focuses on getting the Second Respondent to account for the Appellant's loss (a reparative measure). It bears reiterating that unjust enrichment is conceptually a claim of *strict liability* and is *claimant-centric*; it ultimately focuses on allowing the Appellant to obtain a reversal of value that was subtracted from her. It follows that Mr Kumar's "unjust factor" is not, in any sense, an unjust factor which grounds a right of recovery under a claim in unjust enrichment. It does not fall within any of the categories of unjust factors laid out at [132] and [133] above, and it does not sit well conceptually with the basis for these factors. Mr Kumar has not pressed for the recognition of a new "unjust factor", and quite correctly so.

165 Moreover, Mr Kumar's argument focuses on the *wrong slice of time*. If the recipient's (in this case, the Second Respondent's) conscience is touched at the particular point in time when the monies were transferred to it*, it would tak*e the money or assets subject to the better right the Appellant has in that property. A legal pronouncement now (fourteen years down the line) cannot change the state of knowledge of the Second Respondent at the material time in so far as the concept of knowing receipt is concerned (whether operating as a potential unjust factor in the context of unjust enrichment *or* as a wrong pursuant to the broader law of equitable wrongs). Within the parameters of Mr Kumar's argument, there is no unjust factor which supports the finding of liability in unjust enrichment for the Second Respondent.

166 One such unjust factor which may rehabilitate Mr Kumar's arguments from a strict liability, claimant-centric point of view, is that of ignorance

(which was briefly discussed above), *viz*, that the Appellant was completely unaware of the transfer of the monies to the Second Respondent (this assumes, of course, that ignorance is recognised as an unjust factor, a proposition which is, admittedly, not wholly clear at this particular point in time; see above at [139]). As observed in *Burrows* (at p 404), the practical importance of recognising ignorance is in the context of indirect recipients. *Burrows* identifies two criteria for departing from the "general rule" (that only direct recipients are liable) and applying unjust enrichment to indirect recipients: (1) the plaintiff must show, through title and tracing rules, his legal or equitable title to the property transferred to the recipient; and (2) the indirect recipient must not have been a *bona fide* purchaser for value. This unjust factor must be *linked* to the benefit which has allegedly been gained at the Appellant's expense. As Prof Burrows explains (see *Burrows* at p 91):

> An unjust factor only has relevance if it is causally linked to the 'enrichment at the claimant's expense'. Indeed, that causal link can be regarded as an inherent element of each of the unjust factors…
>
> So, for example, this is the test applied for mistaken payments. The claimant must show that but for the mistake (which may be an active or a passive mistake) the claimant would not have made that payment.

167 Prof William Swadling ("Prof Swadling") argues that ignorance cannot be an unjust factor as the "at the expense of the claimant" requirement can never be satisfied. Prof Swadling observes, in "A claim in restitution?" [1996] LMCLQ 63 (at 64), that "there being no consent whatsoever to the transfer, there is no question of property passing from such a person, with the result that the 'ignorant' payor can still bring claims based on his continuing retention of property rights". While we do not necessarily agree with Prof Swadling's view that unjust enrichment is built on a transfer of property rights (see, for example, above at [108], [110] and [139]), we find that another way

of formulating Prof Swadling's argument is simply this: ignorance as an unjust factor does not work because its application to the multi-party situation *fails to get over the basic hurdle that the enrichment is not at the expense of the claimant because there has been no transfer of the claimant's assets.* In response, Prof Burrows makes the short argument (see *Burrows* at p 408) that Prof Swadling's objections rest on an artificial interpretation of "enrichment": that a transfer of a property right is necessary to satisfy the "at the expense of" requirement. Burrows argues that enrichment is an enrichment of value, not one of property or title. On either view, the point is that there has been no transfer of a property right *or* any value that the claimant (here, the Appellant) can point to as belonging to her *at the point of transfer*.

168 In the circumstances, we find that it is unnecessary to consider whether the Second Respondent would have a defence to the Appellant's claim in unjust enrichment (which is element (d) above (at [98(d)])).

Issue 3

169 Given that the Appellant's argument for the imposition of an RCT as a *remedy* is parasitic on the success of her unjust enrichment claim, an RCT cannot, based on our decision with regard to Issue 2, be imposed in the present appeal. We will, however, make the observation that an RCT may not be imposed for as wide ranging a set of circumstances as envisioned by the Appellant.

170 The Appellant submitted that an RCT may be imposed as a "discretionary tool for fairness and justice" and that an RCT was not premised on any fraud or wrongdoing on the part of the defendant. In our view, it cannot be the case that vague notions of fairness or justice are the sole yardsticks in

the exercise of the court's discretion. Indeed, a flexible and discretionary remedy sits ill with a claim in unjust enrichment which eschews the use of unconscionability as a doctrine for the determination of liability (see above at [100]–[107] and [130]). Like unconscionability, "fairness and justice" are more properly conclusions which are arrived *at the end* of principled legal analysis, and *not as a substitute for that legal analysis*. If the function of a court is to arrive at its decision based *solely* on the requirements of "fairness" and "justice", this would clearly be an unsatisfactory position, not least because it gives the court *carte blanche* to do whatever it likes without reference to case law or to any legal principle or doctrine.

171 In the first place, an RCT may only be imposed where the payee's conscience is affected (see the Singapore Court of Appeal decision of *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 ("*Ching Mun Fong*") (at [36])). Applying that standard in *Ching Mun Fong*, the Court of Appeal declined to impose an RCT in a situation where there was total failure of consideration and/or money was paid under a mistake. In our view, the High Court decision of *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 ("*Koh Cheong Heng*") cited by the Appellant does not provide support for the proposition that an RCT is generally imposed to do what is fair or right to the claimant without the necessity of establishing some kind of wrongful conduct on the part of the defendant. In *Koh Cheong Heng*, Prakash J held that in the context of the doctrine of *donatio mortis causa*, where the power of revocation is exercised after legal title has been vested in the donee, the donee holds the legal title on an RCT for the donor. We note the following observations by Prakash J (at [46]):

> The English reluctance to adopt RCT reasoning stems from the fear that the RCT would result in wide-ranging general

> judicial discretion to declare property rights. In *Cowcher v Cowcher* [1972] 1 WLR 425, Bagnall J considered that the RCT approach might create uncertainty *vis-à-vis* proprietary entitlements. While the professed fears of the English courts are certainly understandable, *in my view, it would not be overly extending the law or generating uncertainty in proprietary rights to utilise the RCT analysis as the theoretical basis for the power of revocation in a donatio mortis causa situation. The conditions required for a valid donatio mortis causa are stringent*, and there is no fear that adopting RCT analysis to explain part of the doctrine would result in the widespread uncertainty feared by English judges. [emphasis added]

172 The novel invocation of the RCT in *Koh Cheong Heng* as the theoretical basis for the power of revocation was therefore adopted within the limited confines of the *donatio mortis causa* situation. In our view, *Koh Cheong Heng* does not suggest that the imposition of an RCT under the *general law* was not subject to the requirement of wrongdoing on the part of the defendant such that his conscience was affected. The basis of an RCT in Singapore law at its present stage of development therefore appears to be founded on fault. The observations made by Prof Virgo and reproduced at [107] above are apposite here. The basis of unjust enrichment is *not* fault, unlike that of an RCT which is predicated on a state of knowledge which renders it unconscionable for the recipient to keep the monies. Imposing an RCT for a cause of action founded on a different basis from that which the RCT is meant to remedy is, to our mind, wholly inappropriate. For the sake of completeness, given our decision with regard to Issue 1, there has been no fraud on the part of the Deceased, thus precluding the Appellant from basing any possible claim on this particular issue.

173 We should also note that the remedy of an RCT is not merely a response to unconscionability (in the loose sense referred to above in [100], [102] and [103]) in Canada, Australia and New Zealand.

174 In Canada, the remedy of an RCT is available for claims in unjust enrichment (see, for example, the Supreme Court of Canada decision of *Pettkus v Becker* [1980] 2 SCR 834 ("*Pettkus*")). In *Pettkus*, the parties lived in a quasi-matrimonial relationship in which the defendant received little or nothing in return for 19 years of labour for the claimant. It was found that the defendant had prejudiced herself in the reasonable expectation of receiving an interest in the property and the claimant had accepted the benefits conferred by the defendant "in circumstances where he knows or ought to have known of that reasonable expectation" (see *Pettkus* at 835). Accordingly, the court found that it would be unjust for the claimant to retain the property absolutely and imposed an RCT. There appears to be an *additional* element of knowing receipt or conscience here, not unlike the classic English constructive trust decision of *Beswick v Beswick* [1968] AC 58, where a business was transferred from an uncle to the nephew in consideration of annual payments to the aunt. The House of Lords found that the agreement between the uncle and nephew was capable of specific performance and the aunt, suing in her capacity as the administratrix of the estate, could enforce the agreement as a trust. The House of Lords did not make this finding simply because the nephew had acted unconscionably, but (additionally) because of the fact that specific performance was available. In both *Pettkus* and *Beswick*, the claimant had some form of equitable right which could give rise to a constructive trust.

175 The Canadian approach does not endorse the availability of an RCT as an equitable remedy for a doctrine of unconscionability as the Appellant claims, but by way of a reasoned, incremental development of the law. As MacLoughlin J explained in the Supreme Court of Canada decision of *Soulos v Korkontzilas* [1997] 2 SCR 217 (at 237):

> A judge faced with a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

176 Even if we were to accept that the Canadian approach simply permits an RCT for all unjust enrichment claims, it should be further noted that the Canadian position on unjust enrichment is different from that in England and Australia, and also different from the approach adopted here. For instance, as has been observed in G H L Fridman, *Restitution* (2nd Ed, Carswell Thomson Professional Publishing, 1994) (at p 32), the Canadian concept of unjust enrichment recognises enrichment *without an impoverishment of the plaintiff*. It is also apposite to note the following comments in Peter D Maddaugh & John D McCamus, *Law of Restitution vol I* (Looseleaf Ed, Canada Law Book, 2012) on the application of an RCT for unjust enrichment claims (at para 2:200):

> Nonetheless, it is important to emphasize that the American theory of the remedial constructive trust, embraced by the Supreme Court of Canada in *Pettkus v Becker* and more recently reaffirmed by the Court, has *not as yet been adopted elsewhere in the Commonwealth*. Thus, although Canadian courts will no doubt continue to draw nourishment from Commonwealth jurisprudence in this as in other areas of private law, it is perhaps more obvious in this field than in others that decisions from other Commonwealth jurisdictions should not be considered an authoritative source of doctrine and must, to the extent they are to provide guidance, be measured against contemporary developments in Canadian Restitutionary law. [emphasis added]

177 Similarly, in New Zealand, parties must be able to point to a particular factor giving rise to unconscionability, rather than merely asserting that the event complained of was unconscionable. In *Fortex Group Ltd v MacIntosh*

[1998] 3 NZLR 171 ("*Fortex*"), the New Zealand Court of Appeal reasoned (at 175) as follows:

> In order to defeat, pro tanto, the secured creditors' rights as law under their security by the imposition of a remedial constructive trust, the plaintiffs must be able to point to something which can be said to make it unconscionable – contrary to good conscience – for the secured creditors to rely on their rights at law.

178 In *Fortex*, the plaintiffs were members of a staff superannuation scheme of the defendant employer, where both the plaintiffs and the employer made contributions. The employer subsequently went into receivership, and the plaintiffs claimed against the trustee of the employer's secured debenture holders for a trust over the monies in the superannuation scheme. The court held (at 178) that the remedy of an RCT did "*not* support … general discretion … on some general ground of fairness" [emphasis added] and declined to impose an RCT as the consciences of the debenture holders were not affected. Ross Grantham & Charles Rickett, *Enrichment & Restitution in New Zealand* (Hart Publishing, 2000) explained the position of the court (at p 416) thus:

> In imposing a remedial constructive the court is bluntly varying the existing property rights of the defendant's creditors, thereby effectively expropriating their rights away from them in favour of the plaintiff. *The* ***state of the conscience of those third parties*** *with an interest in the defendant's assets must, therefore, be* ***a significant factor*** *in the decision to impose a constructive trust and, in effect, disentitle them.* This is perhaps what Tipping J meant in *Fortex Group Ltd (in receivership and liquidation) v MacIntosh* when His Honour said: "it is the conscience of the secured creditors [of the defendant] which is at issue in this case." [emphasis added in italics and bold italics]

179 Both the Canadian and the New Zealand approaches thus seem to require some form or variation of knowing receipt, isolating an element of

fault or knowledge *in addition* to the claim in unjust enrichment which forms the basis of the imposition of an RCT as a remedy.

180 The position is the same in Australia. The observations by Deane J in the High Court of Australia decision of *Muschinski v Dodds* (1984-1985) 160 CLR 583 (at 615–616) ("*Muschinski v Dodds*"), which first recognised the RCT, could not be clearer:

> The institutional character of the trust has never completely obliterated its remedial origins even in the case of the more traditional forms of express and implied trust. This is a fortiori in the case of constructive trust where, as has been mentioned, the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances…. *The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice.* As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, *by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles.*
>
> Thus it is that there is *no place* in the law of this country *for the notion of "a constructive trust of a new model"* which, "[b]y whatever name it is described, … is … imposed by law whenever justice and good conscience" (in the sense of "fairness" or what "was fair") "require it": per Lord Denning M.R., *Eves v. Eves*; and *Hussey v. Palmer*. Under the law of this country — as, I venture to think, under the present law of England (cf. *Burns v. Burns*) — proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion (cf. *Wirth v. Wirth*), subjective views about which party "ought to win" (cf. Maudsley, Constructive Trusts, Northern Ireland Legal Quarterly, vol. 28 (1977), p. 123, esp. at pp. 123, 137, 139-140) and "the formless void of individual moral opinion": cf. *Carly v. Farrelly*; *Avondale Printers & Stationers Ltd. v. Haggie*. Long before John Selden's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of "justice" and what was "fair" had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. ***The mere fact that it would be unjust or***

> ***unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other***: cf. *Hepworth v. Hepworth*. Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another.
>
> [emphasis added in italics and bold italics]

181 K Mason, J W Carter & G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd Ed, LexisNexis Butterworths, 2008) ("*Mason & Carter*"), commenting on *Muschinski v Dodds* and subsequent cases adopting it, observed that there may be an additional element of unconscionability (or unsconscientious behaviour, as the Australian courts prefer to call it), which would attract the proprietary nature of an RCT. *Mason & Carter* compare *Muschinski v Dodds* with the House of Lords decision of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") in which the House declined to grant an RCT or recognise such remedy as part of its law. The learned authors observe, as follows (at para 252):

> Although there was no claim for a remedial constructive trust in that case [*Westdeutsche*] and although English law is still to recognise the remedial constructive trust, *we think that the same result would follow in Australia because of the absence of* ***unconscientious behaviour.*** In *Hospital Products Ltd v United States Surgical Corp* no fiduciary relationship was found to exist and a proprietary remedy was accordingly refused where parties to a commercial transaction dealt with each other at arm's length. The case illustrates the restraint Australian courts impose upon resort to equitable principles in commercial transactions ***unless something particularly catches the eye of equity***. [emphasis added in italics and bold italics]

182 Two things are immediately apparent from the survey of the case law in Canada, Australia and New Zealand: (1) an RCT is not simply a response to some broad notion of unconscionability but is being developed incrementally in response to certain events and factors, including unjust factors in unjust enrichment; and (2) unconscientiousness or unconscionability (as the conclusion of a process of legal reasoning in the main claim) affecting the knowledge of the recipient of the assets in question is an *additional element* which *must exist* before an RCT may be imposed. In other words, there is a further element of fault which *may* exist in the context of unjust enrichment but which is not an inherent part of the unjust enrichment claim. *Prima facie*, we would be hesitant to impose an RCT as a remedy for an unjust enrichment claim without more. We have our doubts, as alluded to at [170] above, as to the general appropriateness of applying an RCT to an unjust enrichment claim given that an RCT is a remedy awarded in response to fault whereas a claim in unjust enrichment is a claim in strict liability and is not fault-based. In this context, we would add that, although *Ching Mun Fong* is often cited for the proposition that an RCT may be imposed as a *restitutionary* remedy, on a careful reading of the case, the *ratio decidendi* was *not* that an RCT could be imposed as a remedy for a claim in *unjust enrichment*. The Court of Appeal in *Ching Mun Fong* cited (at [35]) the following dicta of Lord Browne-Wilkinson in *Westdeutsche* (at 716):

> Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. *The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived.* Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and

> Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue. [emphasis added]

183 The Court of Appeal stated as follows (at [36]):

> … In order for a remedial constructive trust to arise, the payee's *conscience must have been affected*, while the moneys in question *still remain* with him…. [emphasis added]

184 The fact giving rise to the court's discretion to impose an RCT was therefore not the fact of unjust enrichment, but the *knowing retention* of the monies in a way that affects the recipient's conscience. This arises separately from a strict liability claim in unjust enrichment, although the facts giving rise to an RCT may arise *subsequent* to or *concurrently* with this aforementioned claim.

185 However, until the issue arises squarely for our consideration, we do not propose to make a definitive ruling on the matter.

Issue 4

186 Given that the Appellant's case has failed on so many levels, it is not necessary to consider whether the Second Respondent would have succeeded in its defence of laches.

Conclusion

187 For the reasons set out above (in particular, our decision on the threshold question under Issue 1), we dismiss the appeal with costs. For the avoidance of doubt, the costs orders made by the Judge in the court below are also to stand. The usual consequential orders will apply.

Chao Hick Tin	Andrew Phang Boon Leong	Tan Lee Meng
Judge of Appeal	Judge of Appeal	Judge

Hri Kumar Nair SC and Tan Sze Mei Angeline (Drew & Napier LLC) for the appellant;
Deborah Barker SC and Ushan Premaratne (KhattarWong LLP) for the first respondent
Edwin Tong, Tham Hsu Hsien, Nakul Dewan and Peh Aik Hin (Allen & Gledhill LLP) for the second respondent.
