THE CHANGE OF POSITION DEFENCE IN MALAYSIAN UNJUST(IFIED) ENRICHMENT: REFLECTIONS FROM ENGLISH LAW

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Abstract

In England and in Malaysia, the recognition of unjust or unjustified enrichment has necessitated the simultaneous acceptance of a defence of change of position. In stark contrast with the English experience, the leading apex-court decision in Malaysia, which recognised this new private law action, made no elaboration on the defence. This article hopes to fill that gap by evaluating the normative place of change of position against four peculiarities of the Malaysian unjust(ified)-enrichment-and-restitution landscape. The first feature is the existence of a statutory restitutionary regime provided for by the Contracts Act 1950, which stands in parallel with this newly recognised liability at common law. The second feature is the seemingly adopted 'value surviving' test for enrichment, as opposed to a 'value received' model. The third feature is Malaysian law's adoption of the Civilian-inspired 'absence of basis' approach. The fourth feature is the elusive 'unconscionability' inquiry that has crept into the unjust(ified) enrichment framework. Each of these features interacts with the change of position defence in a manner which presents unique and unresolved challenges to the doctrinal coherence of this still-nascent legal subject.

Keywords: *Restitution, Unjust Enrichment, Unjustified Enrichment, Change of Position, Contracts Act 1950*

I. INTRODUCTION

In many jurisdictions, including England and Malaysia, the recognition of unjust or unjustified enrichment has necessitated the simultaneous acceptance of a defence of change of position. A defendant in an action for unjust(ified) enrichment is entitled to raise this defence if it can be proven that the receipt of the benefit led them to change their position in good faith; where this applies, the defendant's liability to make restitution is accordingly reduced to that extent. Unfortunately, unlike its English

counterpart *Lipkin Gorman v Karpnale*,[1] the leading case in Malaysia, which recognised the common law unjust(ified) enrichment action,[2] *Dream Property v Atlas Housing*, had nothing explicit to say about the defence.[3] This stands in stark contrast with the English experience, which anticipated the need to scrutinise the intricacies of change of position comparatively early on. Despite the Federal Court's silence on the matter, later Malaysian courts have assumed that the defence must exist in Malaysian law,[4] and this is supported by the Federal Court's express reliance on a number of

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1 [1991] 2 AC 548.

2 A note on terminology: the nomenclature of 'unjustified enrichment' is arguably a more precise description of the cause of action newly uncovered by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (Federal Court of Malaysia); see also Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in* Malaysia (LexisNexis, 2015) [1.49]; cf Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 274–5 ('The truth is, however, that it makes no difference whatever whether one speaks of unjust enrichment or of unjustified enrichment. But for the need to retain a trace of normativity, one might just as well speak of pink enrichment').

3 This was because 'no special defence was relied on' by the enrichee in that case: *Dream Property* (n 2) 485 [120].

4 *Kong Hoi Chieng v AK Land Sdn Bhd* [2021] 6 MLJ 725 [36] (Court of Appeal of Malaysia); *Ronset Sdn Bhd v Hong Leong Bank Bhd* [2019] MLJU 2080 [51], [68]–[72] (High Court in Malaya). See also the pre-*Dream Property* decisions of *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364, 371 [13], 373 [25]–[31], 380 [58] (High Court in Malaya); *Green Continental Furniture (M) Sdn Bhd v Tenaga Nasional Bhd* [2011] 8 MLJ 394, 411 [56]–[59] (High Court in Malaya); *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262, 269–70 (High Court in Malaya). An implicit change of position defence was applied in *Madu Jaya Development Sdn Bhd v Kosbina Konsult (K) Sdn Bhd* [2017] MLJU 1517 (High Court in Malaya). In *Madu Jaya*, *D* was the main contractor of a highway development project with the Malaysian government. *D* entered into a subcontract with *C* where it was agreed that *C* would receive 92% of all payments made to *D*. Unexpectedly, the Malaysian government terminated the contract with *D* after C had commenced the work, and *D* was eventually granted an award amounting to more than RM11 million in arbitration proceedings

English appellate court authorities which post-dated the incorporation of change of position into English law.[5] This article will not delve any further into the question of whether the defence exists as a matter of positive law, save for the discussion later as to whether it has any application beyond the action at common law.

This incorporation of a change of position defence in Malaysian law must be viewed in the light of four unique peculiarities that characterise the Malaysian unjust(ified)-enrichment-and-restitution landscape. The first feature is the existence of a statutory restitutionary regime provided for by the Contracts Act 1950, which stands in parallel with this unjust(ified) enrichment liability newly recognised at common law (discussed in section 3).[6] The matter in question is whether the defence of change of position in this common law action can, or ought to, be developed in tandem with that of the Contracts Act regime. The second feature is the seemingly adopted 'value surviving' model of enrichment, as opposed to a 'value received' one (discussed in section 4). This goes to the heart of what the nature of change of position is, and in particular, whether it works to attack an inherent element of unjust(ified) enrichment liability or whether it operates as an independent reason to lessen or absolve the liability to make restitution.[7] The third feature is the Federal Court's questionable decision to embrace a Civilian-inspired 'absence of basis' approach when analysing the 'unjust' element of the common law claim (discussed in section 5).[8] A troublesome discussion is to be held on how the Malaysian 'absence of basis' model will cope with the proposition that the change of position defence is available to some

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against the government. *C* then sued *D*, arguing (*inter alia*) that *D* had been unjust(ifiab)ly enriched at *C*'s expense. The High Court allowed C's unjust(ified) enrichment claim, giving *C* an amount worth about 50% of the arbitral award. In arriving at the 50% figure, Lee Swee Seng J (as his Lordship then was) asked what 'a fair proportion that [*D*] should not keep for themselves but that should be disgorged and paid over to [*C*]. His Lordship thought that '[l]ooking at the overall circumstances of the case it would be fair, reasonable and just for [*D*] to be able to retain 50% of the Arbitral Award'; see ibid [84]–[85]. This was admittedly quite a broad-brush quantification exercise, contrary to the rule that a defendant's liability should only be reduced to the extent that he or she was no longer enriched (see below).

5 *Dream Property* (n 2) 481 [112]. Those authorities include *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221; *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin); *Cressman v Coys of Kensington* [2004] EWCA Civ 47; *Chief Constable of Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 and *Investment Trust Companies (in liquidation) v HMRC* [2012] EWHC 458 (Ch).

6 In particular, sections 65, 66, 69, 70, 71, 72, 73 and 74(3) of the Contracts Act 1950 (Act 136) (Malaysia).

7 This alludes to the distinction between 'denials' and 'defences *proper*' which is explained in section 4.

8 See *Dream Property* (n 2) 486 [128]–[130].

'unjust factors' but not others.[9] The fourth feature is the elusive 'unconscionability' requirement that has regrettably crept its way into the Malaysian unjust(ified) enrichment framework, and in particular, its relationship with the 'bad faith' disqualification in change of position (discussed in section 6).[10] These four features of Malaysian unjust(ified) enrichment law each present unique and unresolved challenges to the continued livelihood of the change of position defence.

II. THE MALAYSIAN UNJUST(IFIED) ENRICHMENT LANDSCAPE

By way of necessary exposition, this preliminary section shall sketch out the Malaysian unjust(ified) enrichment landscape, starting first with the common law, and then the restitutionary provisions of the Contracts Act. This section will conclude by explicating some of the key doctrinal features of the change of position defence.

A. *The common law unjust(ified) enrichment action*

In *Dream Property*, the facts of which will be discussed in further detail below,[11] the Malaysian Federal Court gave authoritative recognition to a new species of private law liability at common law, stating that:[12]

> [T]he time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.

In so doing, the court adopted the familiar four-stage analytical framework under English law:[13]

> [A] cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
> (a) the [defendant] must have been enriched;
> (b) the enrichment must be gained at the [plaintiff's] expense;
> (c) that the retention of the benefit by the [defendant] was unjust; and
> (d) there must be no defence available to extinguish or reduce the [defendant's] liability to make restitution.

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9 This topic has been thoroughly explored in Elise Bant, *The Change of Position Defence* (Bloomsbury Publishing, 2009).

10 See the authorities in n 39 below.

11 See below: section 3.

12 *Dream Property* (n 2) 484 [118].

13 Ibid [117]. References to 'plaintiff' and 'defendant' were originally reversed due to the unjust(ified) enrichment action being of a counterclaim in the *Dream Property* litigation.

By far the most controversial aspect of the Federal Court's decision is its adoption of a Civilian-inspired 'absence of basis'[14] approach when analysing the third 'unjust' element, as opposed to the 'unjust factors' model that tends to be a feature of Commonwealth jurisdictions (except Canada). In simplified terms,[15] under an 'unjust factors' analysis, a claimant must prove positively that at least one out of an established list of grounds for restitution (such as mistake, failure of consideration, duress, undue influence, constitutional policy against ultra vires taxation) has arisen from the facts of his case. In the case of a mistaken payment, the claimant can recover from the defendant by showing that he paid the defendant under a mistake, for instance, a mistake that he owed the defendant the money. By an 'absence of basis' technique however, the plaintiff's right to restitution is given effect when she shows that the defendant's enrichment was unjustified because he had benefited the defendant for (juristic) reasons which did not exist. The plaintiff who mistakenly pays is granted restitution by proving that the reason for paying, namely the debt, did not exist. We will return to how this shift in analysis interacts with the change of position defence in section 5.

B. *The Contracts Act 1950*

Unlike in English law, where most non-wrongs-based restitutionary entitlements are to be found in the common law,[16] in Malaysia, several major methods of restitutionary relief are found in statute, specifically in a handful of provisions in the Contracts Act. In brief, section 69 provides that a plaintiff may be reimbursed for the supply of necessaries to persons incapable of contracting. Section 70 gives plaintiffs a right to recoupment where they had discharged a debt that another person was bound to pay. Section 71 allows a plaintiff who does an act for, or delivers a thing to, another person without intending for it to be done or given gratuitously, a right to be reimbursed or to have the thing restored. Section 72 confirms that she who finds and holds in her possession things belonging to another holds it as bailee. Section 73 provides, rather broadly, that '[a] person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it'.[17] In addition, sections 65 and 66 provide respectively for the return of benefits by the defendant upon the rescission of a

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14 Of course, it would be a mistake to think that there is a standard 'absence of basis' model that is uniform across all Civilian jurisdictions.

15 See generally, Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) [1-25]–[1-28]; Birke Häcker, 'Unjust Factors versus Absence of Juristic Reason (*Causa*)' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020).

16 The larger exceptions being the Civil Liability (Contribution) Act 1978 (UK) and the Law Reform (Frustrated Contracts) Act 1943 (UK).

17 The provision has been described as a Malaysian *condictio indebiti*, see Low (n 2) [3.71], [10.01]–[10.03]. See also Alvin See, 'Restitution of Mistaken Enrichment Under Section 73 of Malaysia's Contracts Act 1950: Pouring New Wine into an Old Bottle?' (2014) 31 *Journal of Contract Law* 206.

voidable contract and where the benefits were transferred pursuant to a contract that was rendered void.

To be clear, as will be discussed further below, although the common law *Dream Property* action and the Contracts Act provisions are two rather different regimes, it does not follow that the latter forms no part of Malaysian unjust(ified) enrichment law.[18] It is logically permissible to hold that the rules governing restitutionary relief under the Contracts Act are premised on the same normative principle(s) as the common law unjust(ified) enrichment action,[19] without having to concede that all rules must strictly adhere to some universally applicable four-stage analytical framework.[20] Just as in English law, occupiers' liability forms part of negligence despite being largely statutory,[21] Malaysian unjust(ified) enrichment can similarly encompass at least, (i) the common law 'absence of basis' action recognised in *Dream Property*, (ii) relief under the restitutionary provisions of the Contracts Act and (iii) restitutionary relief under other various legislation (including section 15 of the Civil Law Act 1956,[22] section 24H of the Consumer Protection Act 1999,[23] and section 9(2) of the Sale of Goods Act 1957[24]).[25]

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18 See also *WH Electrical Marketing (M) Sdn Bhd v Kenwingston Sdn Bhd* [2022] MLJU 2143 [25] (High Court in Malaya) ('the juristic basis behind s 71 of the [Contracts Act] which is premised on the equitable principles of restitution, good conscience and prevention of unjust enrichment' (Liza Chan Sow Keng JC)).

19 What exactly those principles(s) are is a complex and fascinating question that exceeds the confines of this present study. On a more surface level, the unifying principle could be expressed as dictating a person who has been gained at another's expense without justification should give up what they had received. On a deeper level, notions of corrective justice, relational justice or autonomy have been deployed to justify the imposition of such liability; see, for example, *Investment Trust Companies* [2017] UKSC 29 [42]–[43] (Lord Reed); Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2016) 56–60; Hanoch Dagan, *The Law and Ethics of Restitution* (*Cambridge University Press*, 2009); Ernest Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44(2) *Duke Law Journal* 277; See also the various contributions in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009).

20 Lord Reed in *Investment Trust Companies*, ibid [41], recognised that the four elements are 'no more than broad headings for ease of exposition' and 'are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements'. See also Low (n 2) [3.84].

21 Nicholas McBride and Roderick Bagshaw, *Tort Law* (Pearson, 6th ed, 2018) 219.

22 Civil Law Act 1956 (Act 67) (Malaysia) (restitution of benefits given under a frustrated contract).

23 Consumer Protection Act 1999 (Act 599) (Malaysia) (restitution of benefits transferred pursuant to enforceable consumer contracts).

24 Sales of Goods Act 1957 (Act 382) (Malaysia) (claims for the reasonable value of goods).

25 What this category does *not* include, of course, are restitutionary claims in response to wrongs, such as those premised on a breach of contract, a tort or an equitable wrong. See also *Dream Property* (n 2) 480 [110].

C. *Change of position*

After the above subsection's exposition on the nascent law of Malaysian unjust(ified) enrichment and before diving into the normative place of change of position, one more preliminary aspect of this article's methodology needs to be clarified. Due to the embryonic nature of unjust(ified) enrichment in this jurisdiction and the paucity of Malaysian case law on the matter, certain assumptions need to be made about the change of position defence. Indeed, despite *Dream Property* being the predominant apex-court recognition of unjust(ified) enrichment liability, the defence was not mentioned in the Federal Court's judgment even once. As such, when discussing the various doctrinal elements of the defence, reference shall be made to English cases in order to fill this juristic gap.[26] Two reasons justify such a methodology. First, common law unjust(ified) enrichment in Malaysia was itself derived from English case law. Second, later post-*Dream Property* courts have shown a tendency and willingness to refer to English decisions in developing their own views on unjust(ified) enrichment.[27]

Accordingly, the key doctrinal features of the change of position defence may be summarised as follows.[28] First, the onus is on the defendant to plead and prove his or her account of the change of position.[29] Second, the change of position must have happened to the detriment of the defendant.[30] Such a detriment may include situations where the defendant has expended the benefit in question, as is usually the case when the enrichment is monetary. But non-financial expenditure and changes in lifestyle in reliance on the receipt of the benefit may also suffice.[31] Third, a causal link must exist

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26 Cf Low (n 2) [4.41].

27 See for example, *Ronset* (n 4) [69].

28 Graham Virgo, 'A Taxonomy of Defences in Restitution' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 403–4, Ross Grantham, 'Change of Position-based Defences' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 425–31.

29 *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579 [154]; *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 2)* [2016] EWCA Civ 1180 [256].

30 *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 [39]; *Australian Financial Services & Leasing Pty Ltd (AFSL) v Hills Industries Ltd* [2014] HCA 14 [23] (High Court of Australia); cf Low (n 2) [11.09]–[11.11].

31 *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827–30; *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369 [33]. There is also English dicta and Australian authorities supporting the proposition that lost earning opportunities may qualify as a detriment for the purposes of the change of position defence, see ibid, *Derby* [32]; ibid, *Commerzbank* [39]; ibid, *AFSL* [26]–[31]; cf *National Westminster Bank Plc v Somer International (UK) Ltd* [2001] EWCA Civ 970 [47].

between the defendant's receipt of the enrichment and his or her change of position.[32] Provided there is such a causal relation, anticipatory change of position, that is to say, a change of position which predates the receipt of the enrichment, may also suffice.[33] Fourth, the defence operates pro tanto, such that the defendant's liability is reduced only to the extent that he or she is no longer enriched at the claimant's expense at the date of judgment.[34] Fifth, the defendant is barred from relying on the defence if he or she has acted in bad faith,[35] or if he or she is a wrongdoer.[36] Sixth, under the English 'unjust factors' model, the operation of the defence is sometimes precluded when certain 'unjust factors' are being relied upon to ground restitution. This will be discussed in much detail in section 5 below.

III. CHALLENGE ONE: CHANGE OF POSITION AND THE CONTRACTS ACT 1950

The first contention relates to the interaction between the change of position defence as it exists under common law and the restitutionary rights of the Contracts Act. In relation to this, one main question must be asked, and depending on its answer, a sub-question follows. The main question is whether the Contracts Act regime recognises a change of position defence in its own right. If the answer to that is yes, then an ancillary question arises as to whether the defence, as it applies to common law unjust(ified) enrichment action, can or should be developed convergingly with the defence in the legislation. If the answer to the main question is no, then a different question arises as to whether the common law can or should provide the necessary guidance for the recognition of a change of position defence, or at least a version of it, within the Contracts Act regime.

On the main question of whether a change of position is recognised under the statute, Low Weng Tchung, in his pioneering work, *The Law of Restitution and Unjust Enrichment in Malaysia*, was emphatic in that it does not. The courts must slowly proceed with great caution when seeking to develop or interpret the restitutionary provisions of the Contracts Act with reference to common law unjust(ified)

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32 Ibid, *Derby* [31]; *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 2) (FII No 2)* [2014] EWHC 4302 (Ch) [343]; *Standard Bank London Ltd v Canara* [2002] EWHC 1032 (Comm) [104].

33 *Dextra Bank & Trust Company Ltd v Bank of Jamaica* [2001] UKPC 50 [38]–[39]; *Commerzbank* (n 30) [38]; Ibid, *FII No 2* [394], [310].

34 *Lipkin Gorman* (n 1) 560.

35 Ibid 580; see also *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm) [135], [2003] EWCA Civ 1446 [164]; *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 [48]–[49]; *AmBank v KB Leisure* (n 4) 373 [25]–[27], 380 [58](a); *Kong Hoi Chieng* (n 4) [36].

36 *Lipkin Gorman* (n 1) 580; *Barros Mattos Junior v General Securities & Finance Ltd* [2004] EWHC 1188 (Ch); *AmBank v KB Leisure* (n 4) 380 [58]; *Kong Hoi Chieng* (n 4) 741 [36], using the phrase 'innocent' ('the conduct of the second defendant is not bona fide or innocent').

enrichment. In his words:[37]

> It is one thing to clarify or explain the scope of the provisions of the Contracts Act 1950 as a matter of statutory interpretation. It is a wholly different thing altogether to seek the restrict, qualify or limit the scope and effect of the restitutionary claims by reference to English common law, or to apply common law defences[38] to restitutionary claims under the Contracts Act 1950 where none are expressly provided by the Act itself.

The learned author provided a number of key arguments, including the fact that the Contracts Act stands on a different juridical basis than the English common law with the former being modelled on Roman law,[39] that the restitutionary provisions are 'to be interpreted as they stand',[40] that the Contracts Act pre-dated the English recognition of change of position,[41] that English cases should not be blindly applied,[42] and that cross-reference between regimes would be liable to cause confusion.[43] Strictly speaking, however, reference to a number of the arguments posited by the learned author is, with respect, unnecessary to drive home the essential point that legislative intent is to be given effect whenever the courts are tasked with construing the wording of any given statute.[44] In deciding whether the Contracts Act restitutionary regime could be interpreted to contain a change of position defence, or at least a version of it, the elemental question to ask is the same when construing any other piece of legislation. Namely, what was the legislature's intention in enacting the statute? By enacting the Contracts Act, the legislature accorded plaintiffs a right to restitution in a number of defined circumstances. What it did not do, however, was provide any means for a defendant to avoid making restitution either partially or wholly.[45] The wording of the Contracts Act leaves no room for interpretation that would undermine

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37 Low (n 2) [4.27], see also [4.42] (2).

38 Including the change of position defence. See also ibid [11.32A].

39 Ibid [1.55], [3.79], [3.85]–[3.87], [4.33], [4.35], [11.36]. Query however, how much weight ought to be placed on this fact (assuming it were correct) beyond a comparative standpoint.

40 Ibid [4.42](1), [4.30]. Similar to this is the argument that the Contracts Act represent a 'deliberate departure from English law', see Low (n 2) [1.26], [1.31], [3.02], [11.36].

41 Ibid [1.56], [11.34].

42 Ibid [4.41].

43 Ibid [1.59].

44 Cf ibid [3.86] ('It is important to bear in mind that a plaintiff's claim for restitution under the Contracts Act 1950 rests, not on any principle or formula of either English or Roman law, but on the words of the particular restitutionary provision sought to be invoked, and it has to be seen whether the facts of any case come within its scope') and [4.29].

45 There appears to be a number of loose obiter dicta which suggest otherwise, discussed in Low (n 2) [11.32]: *Abdallah Syed Ismaeel Co v Evermaster Wood Products Sdn Bhd* [2011] AMEJ 0344 [21] (High Court in Malaya); *AmBank v KB Leisure* (n 4) 380 [59].

the allocation of loss that the statute has so prescribed.[46]

Although it is sometimes said that the judiciary, whether in Malaysia or in England, has moved towards a more teleological approach to statutory construction, there are nonetheless still stringent limits on the courts' ability to supply a perceived legislative gap in the law through their interpretive reach.[47] The author of *Craies on Legislation* notes that it is not difficult to find instances 'where the courts have felt compelled to resist the temptation to repair an apparent substantive deficiency in legislation on the grounds that the necessary extension would exceed a purposive construction of what is said and amount to judicial legislation.'[48] In this instance as well, the Malaysian courts should also show similar restraint.[49]

Viewed in this light, we can see how the first 'contention' of this article falls away. The defence of change of position is not a feature of the Contracts Act restitutionary regime, so there is no question of referring to a statutory defence (which does not exist) to develop the common law defence. On the flip side, it would also be inappropriate to use the common law as a springboard to 'interpret' a change of position defence into the Contracts Act.

IV. CHALLENGE TWO: CHANGE OF POSITION AND THE 'VALUE SURVIVING' MODEL OF ENRICHMENT

In order to effectively investigate this second contention, two distinctions need to be explained. Given that the change of position defence is most inextricably connected to the opening element of the unjust(ified) enrichment framework (the 'enrichment'), the first distinction drawn is that of a 'value received' and a 'value surviving' test for enrichment. As the names suggest, the former 'value received' model tests the value of the benefit at the date of receipt, whereas the latter 'value surviving' model examines the benefit at the time of judgment. The second distinction is that of 'denials' and 'defences *proper*', which has been characterised by private law commentators. Instructive is the following analysis by James Goudkamp and Charles Mitchell.[50]

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46 This is not to say that the Contracts Act provisions can never be interpreted with reference to non-statutory law, see Low (n 2) [4.25].

47 Problems do not arise where a defence was explicitly provided for under another statute, as in the case of limitation. See also ibid [4.26].

48 Daniel Greenberg, *Craies on Legislation* (Sweet & Maxwell, 12th ed, 2020) [18.1.9].

49 Cf Alvin See, 'Restitution of Non-Gratuitously Conferred Benefit in Malaysia: A Case for Sowing the Unjust Enrichment Seed' (2016) 11(2) *Asian Journal of Comparative Law* 141, 157; Alvin See and Man Yip, 'Restitution of Mistakenly Transferred Bitcoins' (2022) *Lloyd's Maritime and Commercial Law Quarterly* 46, 48.

50 James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Hart Publishing, 2013) 133. See also *Goff & Jones* (n 15) [1-32]–[1-34]; Virgo, *Handbook* (n 28) 400; James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 1–7; Ben Cartwright,

> [T]here are two and only two types of response that a defendant can make with a view to avoiding or limiting his liability in unjust enrichment: he can argue that the claimant has failed to establish an element of his action; or he can admit that the claimant has established all of the elements of his action and invoke a rule that wholly or partly exempts him from liability nonetheless. We term these responses 'denials' and 'defences' respectively.

In this article, the expression 'defences *proper*' will be used to refer to the latter concept, as the bare phrase 'defences' is often used to denote both concepts without any clear distinguishment.[51]

A *Malaysian 'enrichment': 'Value surviving'*

On balance, it seems that Malaysian law has adopted a 'value surviving' model to enrichment. The first and most obvious token of evidence for this is the seminal case of *Dream Property* itself. As is well known at this point, the case concerned two parties entering into an agreement whereby the seller was required to hand over vacant possession of the land to the buyer, after evicting the squatters who lived there and relocating a primary school that stood on the land. After paying the deposit, the buyer went onto the land and began the construction of a mall. The terms of the agreement also stipulated that the buyer was required to pay the balance of the purchase price within four months of the date they obtained vacant possession. Later, a dispute had arisen over when vacant possession of the land had exactly been handed over, and as a corollary, over what date the buyer was required to pay the balance. Despite this dispute looming in the background, the development of the mall continued. Both the High Court and the Court of Appeal found the buyers liable for breach of the agreement on the ground that they had failed to pay the sellers in time. The buyers appealed, arguing *inter alia* by way of counterclaim that, the sellers should make restitution for 'the improvement and enhancement it made to the land'.[52]

The Federal Court allowed the buyers' counterclaim on unjust(ied) enrichment, the quantum of which it held to be 'the current market value of the mall, that is to say the value of mall *on the date of this judgment*, excluding the market value of the land without the mall on the said date'.[53] In this same spirit, permeating throughout the Federal Court's judgment is reference to the sellers' 'retention' of the benefit of the mall, which again points towards a 'value surviving' calculation to enrichment.[54] The

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'Denials, Defences and Damages-limiting Rules in Breach of Contract' (2022) 22(1) *Oxford University Commonwealth Law Journal* 21.

51 Goudkamp and Mitchell, 'Denials and Defences' (n 50) 137–38.

52 *Dream Property* (n 2) 475 [95].

53 Ibid 496 [160] (emphasis added). See also, ibid [136].

54 Ibid [117] ('that the *retention* of the benefit by the plaintiff was unjust' (emphasis added)), and [128] ('The most important question which we must now [ask] is whether it is unjust for the plaintiff to *retain* the benefit' (emphasis added)).

same language of 'retention' has also been vehemently repeated by the lower courts.[55]

However, by way of counterexample, there has been a flurry of litigation in recent times on how limitation statutes apply to unjust(ified) enrichment claims.[56] On the assumption that time begins to run from the date the cause of action accrues, the courts have asked themselves, 'when a defendant has *retained* the benefit in question'.[57] If this is taken literally, the results would be absurd: if the defendant continues to hold the benefit in his or her hands at the date of trial, that would suggest that the limitation period is still running at the date of trial, and possibly even after judgment is handed down. This could not have been what the courts had in mind. Therefore, it may well be that, at least in the context of limitation, the Malaysian courts are using 'receipt' and 'retention' somewhat synonymously or are at least using the word 'retention' to mean '*first* retention' though even this makes dubious linguistic sense. This hints that a 'value received' model of enrichment may be at play.

Yet, despite this counterexample of limitation,[58] we cannot ignore the reasoning in *Dream Property,* which almost emphatically supported the date of judgment as the time for assessing enrichment. Indeed, the adoption of 'value surviving' is arguably also consistent with at least two other features of Malaysian restitution law. For one, as will be discussed in more detail below (in section 5), the Federal Court in *Dream Property* placed some weight on the sellers' state of mind deciding the sellers'

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55 See, for instance, *Munisamy a/l Rajagopal v Subashini a/p Karuppiah* [2023] 8 MLJ 406 [39] (High Court in Malaya); *Loke Sim Yoon v OCBC Bank (Malaysia) Bhd* [2023] MLJU 252 [8] (High Court in Malaya); *WH Electrical Marketing* (n 18) [27]–[28]; *Kee Hin Ventures Sdn Bhd v Great Partners Industries Ltd* [2022] 9 MLJ 875 [57] (High Court in Malaya); *Professional Element Sdn Bhd v YFG Engineering Sdn Bhd* [2021] MLJU 1355 [65], [100](3) (High Court in Malaya); *Edward Stanislaus De Silva v Yeng Chong Realty Bhd* [2021] MLJU 947 [62] (High Court in Malaya); *Yoke Ngoke Seong v Seou Lim Khoon* [2020] MLJU 973 [259] (High Court in Malaya); *Novaviro Technology Sdn Bhd v QL Plantation Sdn Bhd* [2018] 7 CLJ 119 [60] (High Court in Malaya).

56 This is the case both in Malaysia and in England. See, for example, in Malaysia, Ibid *Professional Element*; *Lin Wen-Chih v Pacific Forest Industries Sdn Bhd* [2023] 5 MLJ 422 (Federal Court of Malaysia); *Syarikat Letrik Chen Guan Sdn Bhd v Imej Tenggara Sdn Bhd* [2022] MLJU 1912 (High Court in Malaya); *Edward Stanislaus De Silva v Yeng Chong Realty Bhd (formerly known as Yeng Chong Realty Sdn Bhd)* [2021] MLJU 947 (High Court in Malaya); *Uni Construction & Realty Sdn Bhd v Tersaim Lall* [2021] MLJU 1074 (High Court in Malaya); *Koperasi Perumahan Kluang Bhd v Tan Fun Theng* [2020] MLJU 1810(High Court in Malaya).

57 *Kee Hin Ventures* (n 55) [57]; *Novaviro Technology* (n 55) [60].

58 Another authority that perhaps points towards the direction of a 'value received' test is *WH Electrical Marketing v Kenwingston* (n 18) [27]–[28], where counsel for the plaintiff submitted that the enrichment should be tested at the date of receipt, citing *Benedetti v Sawiris* [2013] UKSC 50, and the learned judge adopted those submissions in toto.

restitutionary liability, as evidenced by its reliance on *Blue Haven Enterprises Ltd v Tully*[59] and *JS Bloor Ltd v Pavillion Developments Ltd*.[60] These decisions stood for the proposition that a mistaken improver of land may only have a claim against the landowner if, *inter alia*, the landowner had acted improperly or unconscionably. Due to this enhanced role played by the defendant's fault, it is unsurprising that Malaysian law would allow a claimant to recover more than the value received by a defendant where the benefit has increased in value between the date of receipt and the date of judgment. In English law, this possibility is confined to applications for a proprietary remedy, for instance, upon proof that the defendant has received a right to the property transferred or its traceable substitutes.[61]

Second, the 'value surviving' view is also consistent with the Malaysian courts' repeated omissions to acknowledge benefits in kind as qualifying enrichments. In *Dream Property* itself, the Federal Court thought that it would be 'manifestly unfair and unjust' to cap the award at only the value of the buyer's labour. In the case of *Kerajaan Malaysia v Tanjung Teras,* which concerned section 71 of the Contracts Act,[62] the court also found the plaintiff not to have benefited from a contractor's work, on the dubious ground that the work had been 'incomplete',[63] ignoring the fact that the services themselves possessed market value.[64] If the enrichment test were one of 'value received', as in the case of English law, the recipient of services would be precluded from denying that they were ever enriched on the ground that they had changed their mind about wanting the services. This is because the enrichment is tested at the date the services were rendered. An example given by the learned editors of *Goff & Jones* is as follows: 'if a developer asks an engineer to draw up plans for a building, but then decides on a different design, he cannot deny that he was enriched

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59 [2006] UKPC 17.

60 [2008] EWHC 724 (TCC). See also Alvin See, 'Restitution for the Mistaken Improver of Land' [2016] *Conveyancer & Property Lawyer* 60, 67.

61 If the value of the benefit has depreciated between the date of receipt and the date of judgment, it seems that the Malaysian courts can avoid the plaintiff being returned less than what they had given by using the concept of 'unconscionability', in essence by holding that it would be 'unconscionable' to let the plaintiff bear the costs of depreciation. See, for instance, the remarks in *Madu Jaya* (n 4) [71] ('The law governing unjust enrichment is such that the Court maintains that flexibility of making the necessary adjustment such that so much as may be considered as unjust enrichment needs to be coughed out to meet the demands of fairness, reasonableness, justice and equity'), and [83] ('This is where the flexibility and with it the beauty of the concept and common law claim of unjust enrichment comes into play. The law would not allow a party to keep that to himself if to do so would result in that party being unjustly enriched at the expense of another'). Again, this could be avoided if enrichment were tested at the date of receipt.

62 [2014] 8 MLJ 259 (High Court in Malaya).

63 Ibid 267 [20].

64 See, 'A Case for Sowing the Unjust Enrichment Seed' (n 49) 146.

by the engineer's work even though he will never use the plans'.[65] That the opposite outcome could be attained by the developer under Malaysia law is on par with the failure to recognise services and labour which leave no tradeable residue, as objects of financial value.[66]

B *English 'enrichment': 'Value received'*

By contrast, English law almost unequivocally supports a 'value received' test for enrichment.[67] The English position, discussion of which can only occupy a compact place in this present work, is succinctly elaborated by the editors of *Goff & Jones*:[68]

> [T]he claimant does not have to show both that the defendant received the value *and that he still retains it*: he only has to show that the value was received, and subsequent disenrichments must then be proved by the defendant seeking to rely on a change of position defence. In Millett LJ's words, 'the cause of action for money had and received is complete when the plaintiff's money is received by the defendant' and it 'does not depend on the continued retention of the money by the defendant'.[69]

C *Denial or defence proper?*

A denial, as stated above, targets an inherent prerequisite to unjust(ified) enrichment liability, whereas a defence *proper* limits or excludes said liability notwithstanding the satisfaction of all doctrinal elements. On the 'value surviving' model of enrichment, the Malaysian change of position would be classified as a denial. A defendant's successful proof that she has ceased to retain the benefit for the purposes of change of position, converges neatly, if not completely, with the reason for saying she was not enriched. Under English law, which adopts a 'value received' test for enrichment,

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65 *Goff & Jones* (n 15) [4-68].

66 Cf the Federal Court's endorsement in *Dream Property* (n 2) 481 [112] of English decisions in which services were the principal 'enrichment', including *Rowe* (n 5) which concerned sewerage service, and *Wigan Athletic* (n 5), which concerned policing services.

67 The qualification of 'almost' is needed here due to the absence of a definitive judicial statement on the matter and the likely misinterpretation of case law which seems to point in the other direction, as discussed in *Goff & Jones* (n 15) [4-69]–[4-75].

68 *Goff & Jones* (n 15) [4-70] (emphasis in original). This is so even where a cause of action does not accrue until later, for example, where the claim is founded on a subsequent failure of basis which post-dates the receipt of the benefit, the enrichment is still tested at the date of receipt.

69 Quote from *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 207 (Millet LJ).

change of position is a defence *proper*.[70] The fact that a defendant can successfully raise a change of position defence, for instance by showing that he or she has spent away the benefit in good faith and without wrongdoing, does not mean that the defendant was never 'enriched' in the sense of the first unjust(ified) enrichment element. The mere fact that the defendant had at an earlier point held the benefits in her hands suffices under the 'value received' model.

The characterisation of Malaysian change of position as a denial which attacks the element of 'enrichment' coincides with theories that cite 'disenrichment' as the main or only rationale of the defence. The most notable advocate of which is, of course, Peter Birks, who used the expression 'disenrichment' almost synonymously with the change of position defence.[71] Nevertheless, this characterisation of change of position as a denial premised on 'disenrichment' encounters a series of significant problems. First, non-financial change of position becomes hard to explain, for instance in cases where the defendant would not have suffered some sort of physical or mental harm but for his enrichment.[72] Second, a pure 'disenrichment' analysis struggles to explain cases where the defence was granted to defendants who had willingly selected or requested for the 'disenrichment'. For the purposes of the first criterion of unjust(ified) enrichment, the test for 'enrichment' is typically subject to the principle of subjective devaluation, which accounts for the defendant's autonomy,[73] but this is not applicable where the defendant had freely chosen to be benefited at the claimant's hands.[74] Consistent with this 'enrichment' approach, if change of position were truly based on 'disenrichment', then where a defendant had freely chosen to change her position in reliance of the receipt of benefits, she should be precluded from relying on the defence; she cannot say that she has been 'disenriched' because she had *chosen* to be in that position.[75] Yet, the case law suggests that a choice such as this does not bar the defence's operation.[76] The third point was made lucidly by James Edelman who wrote:[77]

> If the defence were based only upon a rationale of disenrichment, then the defence should be available regardless of whether the defendant acted in bad faith or whether the defendant has knowledge of the claim or a liability to repay the money.

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70 Goudkamp and Mitchell, 'Denials and Defences' (n 50) 156–8, 163; *Goff & Jones* (n 15) [27-06].

71 Birks, *Unjust Enrichment* (n 2) ch 9.

72 *Commerzbank* (n 30) [65]–[72]; *Goff & Jones* (n 15) [27-34]–[27-35].

73 *Benedetti* (n 58) [12]–[26] (Lord Clarke), [110]–[119] (Lord Reed), [185]–[192] (Lord Neuberger). See also *Sempra Metals Ltd v IRC* [2007] UKHL 34 [119].

74 *Benedetti* (n 58) [25] (Lord Clarke), [189]–[190] (Lord Neuberger). See also *H&P Advisory Ltd v Barrick Gold (Holdings) Ltd* [2025] EWHC 562 (Ch) [222].

75 See Bant (n 9) 127–30.

76 *Philip Collins v Davis* (n 31).

77 James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92(3) *Boston University Law Review* 1009, 1021.

However, as case law demonstrates, those bars *do* exist in Malaysian law.[78] Fourthly, and intimately related to the next section, the characterisation of change of position as a denial makes it difficult to explain why it is sometimes unavailable in cases where it would otherwise 'stultify' the policies giving rise to the ground of restitution in the first place.

The better view, therefore, is that even though enrichment is likely tested on a 'value surviving' model in Malaysia, change of position is nonetheless a defence *proper*, as opposed to a denial. The reason why the defendant can escape or reduce his liability is due to some external reason, interrelated to, but not exclusively concerned with, 'disenrichment'. In other words, should the 'value surviving' test remain, rightly or wrongly, then it is perhaps only through recognising that there are other, more apt rationales underpinning change of position, may the recognition of such a defence in the Malaysian law of unjust(ified) enrichment be warranted. Various alternative rationales have been propounded by writers and judges, in light of the deficiencies of the 'disenrichment' theory, but to investigate this complex and fascinating topic effectively, it would take, and has taken,[79] a book-length work. For the more modest goals of this article, suffice it to note that broader policy goals, particularly the achievement of a fairer distribution and allocation of resources, can conceivably be pursued by the operation of the change of position defence.[80]

To summarise the findings of this section, change of position is not a 'denial' that falsifies enrichment, despite the adoption of a 'value surviving' model of enrichment in Malaysia. Instead, it is a 'defence' *proper*. But precisely because it does not serve to disprove the existence of a value-surviving-calculated enrichment, its rationale cannot be 'disenrichment'.

V. CHALLENGE THREE: CHANGE OF POSITION AND 'ABSENCE OF BASIS'

A third, more subtle, contention concerns the interaction between the defence of change of position with Malaysia's questionable decision to adopt a Civilian-style 'absence of basis' model for its 'unjust' analysis, as opposed to the English 'unjust factor's approach.[81] The relationship between 'unjust factors' and change of position has been thoroughly examined by Bant in her magisterial work, *The Change of Position Defence*, reference of which, as will become apparent, is made throughout the following discussion.

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78 See the Malaysian authorities cited in n 39 and 40.

79 Bant (n 9).

80 See also *Goff & Jones* (n 15) [30-18] ('Change of position is about the fair allocation of loss where the value transferred from the claimant to the defendant has been dissipated through no fault of the defendant's'); Virgo, *Handbook* (n 28) 413.

81 See text to n 15 above.

A *'Unjust factors' and change of position*

From an English perspective, the reason why this turn of 'unjust' apparatus affects the operation of change of position, is due to the now well-established view that the defence is only available to some 'unjust factors' but not others. Despite existing dicta suggesting that change of position is a 'general defence to all restitution claims (for money or other property) based on unjust enrichment', this proposition is clearly wrong as a matter of English positive law.[82] As some writers have pointed out, the unavailability of change of position in cases involving certain unjust factors is explicable on grounds which are distinct from the more orthodox bars to the defence, namely bad faith and wrongdoing. Bant notes, 'this is a form of policy reasoning that arguably reflects *an independent "stultification" bar* to the change of position defence'.[83] A note on the use of the word 'independent' here is warranted. This stultification bar is 'independent' in the sense that it is not grounded in bad faith, nor is it premised on wrongdoing. However, the need to avoid stultification is not 'independent' in the sense that it originates from a policy that is external to the unjust(ified) enrichment framework. Rather, the concern is internal: to prevent the protection afforded by the respective 'unjust factor' from being undermined by reducing or removing the defendant's restitutionary liability.[84]

Yet, on an absence of basis apparatus, the plaintiff is not relying on any 'unjust factor'. No concern for 'stultification' arises where restitution is grounded on an absence of basis, because by definition, there is nothing to stultify. As writers have posited, the normative adequacy of 'unjust' enrichment in determining private law entitlements between plaintiff and defendant is itself subject to hesitation.[85] 'Unjust factors' do not arise from the commission of a wrong. Therefore, one might contend that English law's proneness to disqualify the defendant from change of position based on an 'unjust factor' is quite generous. An 'absence of basis' may be regarded as twice removed from a wrong.

Before returning to the Malaysian 'absence of basis' model, what follows is a number of illustrations on how this 'independent' (but, unjust-factor-dependent) stultification bar operates under English law.

1 Duress and undue influence

In a majority of cases where benefits were procured by the defendant's exertion of illegitimate pressure, resort to a separate stultification bar is unnecessary to explain the unavailability of change of position, given that the defendant would fall under either

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82 *Haugesund* (n 29) [122].

83 Bant (n 9) 172 (emphasis added), and see also, ibid 187.

84 Ibid 12, 244–50.

85 For example, Ernest Weinrib, 'The Structure of Unjustness' (2012) 92 *Boston University Law Review* 1067; Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37(4) *Oxford Journal of Legal Studies* 844. See also, Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) ch 2.

the bad faith or wrongdoing disqualifications. The same may be said of (at least some) cases of undue influence, depending on one's views on the nature of the doctrine.[86] However, cases where the pressure or undue influence originated from an 'innocent' defendant are far more contentious.[87] Take the classical case of *Williams v Bayley*, for example, where a father agreed to pay promissory notes in favour of a bank, by way of settlement, in order to turn aside the bank's threat to prosecute his son for having previously committed signature forgery to defraud the bank.[88] The notes were secured by a charge over the father's property. The UK House of Lords accepted that the bankers acted with good faith, but held that the securities could be avoided nonetheless. Bant recognised that, though not expressly pleaded, the bank had changed their position by continuing their everyday business in reliance on that settlement.[89] The House of Lords did not, however make any qualification to the bank's liability, and rightly so, for reducing the bank's liability the extent they had changed their position would have stultified the 'soundest considerations of policy and morality [that a person] shall not make a trade of felony' identified by the court.[90]

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86 There is a long-standing debate on whether the doctrine of undue influence is premised on the defendant's wrongdoing or not, with scholars and judges found on both sides of the trenches. On the defendant-sided view, endorsed by, for example, Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 [6]–[7], we may find that recourse to stultification is not strictly necessary, given that the unconscientious defendant would be barred from relying on the defence anyway due to his or her faulty conduct. However, others have regarded that the crux of the doctrine is not the wrongful conduct on the defendant's part, but the claimant's defective consent (see, for example, *Pesticcio v Huet* [2004] EWCA Civ 372 [20] (Mummery LJ); Peter Birks and Nyuk Yin Chin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1994)) or a relational omission to protect (Mindy Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis' in Andrew Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford University Press, 2006); Mindy Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' [2006] *Current Legal Problems* 231).

87 Also contentious are cases of third-party duress, see Bant (n 9) 171–6; and lawful act duress. The extent to which bad faith plays a role in the finding of an operative lawful act duress has only recently been debated in the UK Supreme Court to no decisive answer: *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 [45]–[46] (Lord Hodge), cf [112], [136] (Lord Burrows).

88 (1866) LR 1 HL 200.

89 See Bant (n 9) 174.

90 *Williams v Bayley* (n 88) 220 (Lord Westbury).

2 Failure of consideration

Trickier too are a subset of 'failure of consideration' cases. In broad terms, the unjust factor of 'failure of consideration'[91] allows the recovery of benefits transferred on a conditional basis in circumstances where that condition either immediately or subsequently ceases to exist. In *Goss v Chilcot*, after receiving a loan from the claimant financing company, the defendants lent the money onwards to their relative, a third party.[92] When the arrangement between the claimant and the defendants was eventually avoided, on account of the third party's fraud, the claimant sought restitution of the loan money on the ground that the loan was given with the expectation that it should be repaid. The defendants argued that no claim should lie as they had changed their position when they paid the money to the third party. Lord Goff, in the Privy Council, rejected the defendants' plea of change of position, as the defendants had 'allowed the money to be paid to [the third party] in circumstances in which, as they well know, the money would nonetheless have to be repaid to the [claimant] company'.[93] By doing this, the defendants had voluntarily taken the risk that the third party would be unable to repay them, in which case, the loss would ultimately fall on them. Again, here, the defendants had not acted in bad faith, nor was their conduct tainted by illegality, and yet, change of position was not available to them. In Bant's words, '[t]he reason for denying the defence is thus linked to the operation of the unjust factor', namely, the defendant had full knowledge of the conditional basis on which the loan was given to them at the time they paid the sum over to the third party.[94]

3 Ultra vires tax payments

Perhaps the most lucid illustrations of an unjust factor's background policy prohibiting change of position are cases involving unjust factors not based on the claimant's vitiated or conditional consent, but on policy.[95] Paradigmatic is the English unjust factor known as 'the *Woolwich* principle';[96] in *Woolwich*, the UK House of Lords recognised a novel right to restitution based on the constitutional principle that there should be no taxation without Parliamentary authority, to the effect that any claimant

91 Otherwise known as 'failure of basis' or 'failure of condition'.

92 [1996] AC 788.

93 Ibid 799. See also *Haugesund* (n 29), especially [125] (Aiken LJ).

94 Bant (n 9) 12.

95 The language of 'policy' is of course, notoriously slippery. In the realm of unjust enrichment, policy-based restitution denotes a category of restitution cases that were not predicated on the claimant's absent, defected or conditional intent; see Charles Mitchell, 'Other Reasons for Restitution' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020).

96 Endorsed in the pre-*Dream Property* case of *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 825 (High Court in Malaya).

can recover taxes[97] which were levied unlawfully, without the claimant having to plead mistake, duress or other intent-based unjust factor.[98]

There is debate amongst scholars on how influential the 'public law element' is in the unjust enrichment inquiry,[99] but what is relatively uncontroversial is that public law considerations supply the ground for restitution; in other words, they govern the 'unjust' question. The same public law considerations which give rise to the 'unjust factor' also preclude the public body defendant from raising a change of position defence, by stating for example, that they had already expended the overpaid taxes to fund other projects.[100] This was made explicit by Henderson J (as he then was) at first instance in *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 2)*:[101]

> In essence, to allow scope for the defence would unacceptably subvert, and be inconsistent with, the high principles of public policy which led to recognition of the *Woolwich* cause of action as a separate one in the English law of unjust enrichment, with its own specific 'unjust factor'.

It is important to emphasise that such a standalone reason operates distinctively and separately from the other recognised bars to the defence, and not merely shoehorned into them.[102] Henderson J in an earlier case,[103] thought that it was appropriate to explain the unavailability of change of position in *Woolwich*-type cases by holding the public authority defendant out to be a 'wrongdoer' in the *Lipkin Gorman* sense.[104] But his Lordship then correctly retracted his analysis and proceeded instead on the

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97 And, in principle, other forms of benefit.

98 *Woolwich Equitable Building Society v IRC* [1993] AC 70.

99 See Rebecca Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (Hart Publishing, 2010); Rebecca Williams, 'Overpaid Taxes: A Hybrid Public and Private Approach' in Stevens Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013).

100 The converse of the *Woolwich* principle is typically regarded as the principle in *Auckland Harbour Board v R* [1924] AC 318 (United Kingdom Privy Council), which is also an unjust factor in its own right that permits a public authority *claimant* to recover benefits that it had unlawfully paid out. Whether a defendant in such *Auckland*-type claims can raise a defence of change of position is more controversial, see Niamh Connolly, 'We'll Meet Again: Convergence in the Private Law Treatment of Public Bodies' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 209.

101 *FII No 2* (n 32) [315]. This is buttressed by the proposition that, on the same set of facts, an unjust enrichment claim based solely on mistake, not the *Woolwich* principle, would invite the change of position defence's operation.

102 See Edelman (n 77) 1032.

103 *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 1)* [2008] EWHC 2893 (Ch) [339].

104 *Lipkin Gorman* (n 1) 580.

'stultification' theory initially propounded by Bant, as quoted above.[105]

Yet, on a Malaysian absence of basis apparatus, no such 'high principles of public policy' are being relied upon by the plaintiff, at least directly, to ground restitution. It may be that the plaintiff initially relies on a rule of constitutional policy to 'knock down' the basis of the transaction, which in turn forms the backdrop for a later restitutionary claim. However, insofar as restitution is concerned, the operative cause for the 'unjustifiability' is the lack of juristic reason.

B *'Absence of basis' and change of position*

The illustrations above show that in certain cases, the 'unjust factor' provides 'an explicit and reasoned basis for denying the defence'.[106] Such an explanation cannot be readily supplied under the Malaysian technique, for it would demand too much of the 'absence of basis' concept.

Bant used change of position as support for the 'unjust factors' approach:[107]

> [T]he 'unjust factors' approach is preferable in that it makes explicit the underlying reason for restitution. In contrast, on the juristic reasons approach, the ultimate reason for restitution is often obscured and only revealed in the recognition of various exceptions and defences to the general rule… [I]n the context of the change of position defence, the transparency offered by the 'unjust factors' approach is particularly to be welcomed… it often helps to determine whether or not the defence should apply in the context of a particular claim. In contrast, on the juristic reason approach, there is no obvious reason for distinguishing between different classes of claim and attempts to do so arguably undermine the otherwise attractive unity of that approach.

Faced with this, there are at least two routes that Malaysian law could take. The first is to hold that change of position should *prima facie* be applicable regardless of the type of case. The second is to hold that a defendant in these special cases should indeed be precluded from raising change of position, but through some independent reason, which would otherwise have been supplied by an 'unjust factor' under the English approach.[108]

The latter option is to be preferred, as the first approach risks allowing the defence to operate in situations where the defendant may not have deserved it. Returning to *Goss v Chilcot* noted above, Birks, who in his last work switched from

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105 *FII No 2* (n 32) [309]–[315].

106 Bant (n 9) 12. See also 197–8; Birks, *Unjust Enrichment* (n 2) 274, stating that the word 'unjust' in 'unjust enrichment' is 'a constant reminder of the conclusion which the rules aim to reach'.

107 Bant (n 9) 11–2.

108 Again, it is necessary to emphasise that such a standalone reason must operate independently from the other recognised bars to the defence, namely, bad faith and wrongdoing.

advocating an 'unjust factors' model to an 'absence of basis' approach, argued that the result in *Goss v Chilcot* is 'problematic' because the defendants had acted in good faith.[109] But for essentially the reasons propounded by Lord Goff, it is normatively unclear whether a party in the shoes of the defendants in that case should attract the defence's application.[110]

VI. CHALLENGE FOUR: CHANGE OF POSITION AND THE 'UNCONSCIONABILITY' REQUIREMENT

We come now to the final and most peculiar feature of the Malaysian unjust(ified) enrichment model. This last contention concerns the relationship between change of position and the 'unconscionability' inquiry seemingly relied upon by Federal Court in its reasoning.

A *The anomalous 'requirement' of 'unconscionability'*

How significant of a part the Federal Court expects 'unconscionability' to play is far from evident. A stronger view may hold that 'unconscionability' on the part of the defendant must always be present to yield restitution; on this view, 'unconscionability' operates as an indispensable element of the unjust(ified) enrichment framework. On a weaker view, a finding of 'unconscionability' is not strictly necessary to ground restitution, though what precisely then is the operative function of 'unconscionability' under this weaker approach is unclear.

If the stronger view of 'unconscionability' prevails, its repercussions would be manifold. The most obvious of which is that it would effectively turn unjust(ified) enrichment into a species of fault-based liability. This could not have been the intention of the Federal Court, who cites a line of English authorities recognising a strict receipt-based liability at common law,[111] but unfortunately the language of 'unconscionability' which many lower courts have now repeated[112] has obscured the Federal Court's intended design, whatever it may be. In this regard, from a fault perspective at least, the Malaysian brand of unjust(ified) enrichment liability is more akin to liability in knowing receipt than it is to the English version of unjust enrichment liability.[113] Liability in unjust(ified) enrichment, which is not wrongs-

109 Birks, *Unjust Enrichment* (n 2) 217–18.

110 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 544; Bant (n 9) 12.

111 See n 5. But see a possible misstep by the English courts in *Morjaria v Mirza* [2025] EWHC 1961 (Ch) [579]–[580].

112 See, for example, *Munisamy a/l Rajagopal v Subashini a/p Karuppiah* (n 55) [39]; *Koperasi Pembangunan Kampung v Ete Sdn Bhd* [2019] MLJU 1223 [36], [41] (High Court in Malaya) (overturned on appeal in *Simcity-ETE Venture Sdn Bhd v Koperasi Pembangunan Kampung Tradisional Tasek Pulau Pinang Bhd* [2022] 2 MLJ 195 (Court of Appeal of Malaysia)); *WH Electrical Marketing* (n 18) [27]–[28]; *Professional Element* (n 55) [61]; *Madu Jaya* (n 4) [70]–[71].

113 See, for example, *LNE Networks (Asia) Sdn Bhd v Loi Chew Ping* [2015] MLJU 1884

based, is generally impervious to the relative faults of both parties. This is evident even in the classical case of *Kelly v Solari*, which is typically regarded, rightly or wrongly to be the quintessence of liability to reverse mistaken payments illustrated. There, Baron Parke was keen to emphasise that recovery should follow 'however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.'[114] Nearer to home, in the pre-*Dream Property* case of *The Royal Bank of Scotland Bhd v Seng Huah Hua*, Hasnah Hashim J (as her Ladyship then was) repeated the same sentiment, stating that '[i]t is settled law that in an action for the recovery of money paid under mistake the [plaintiff's] negligence is irrelevant'.[115]

The change of position defence, which was introduced in part to mitigate the harshness of a strict-liability restitutionary regime, makes questionable sense in a fault-based regime of unjust(ified) enrichment, should this stronger view of the 'unconscionability' requirement prevail in Malaysian law. If *prima facie* unjust(ified) enrichment liability is dependent on a finding of unconscionability, then there is no logical room for change of position to operate, since the defendant would be disqualified on account of his or her bad faith.[116] In line with this reasoning, change of position has been deemed irreconcilable with fault-based liability in knowing receipt.[117]

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[28] (High Court in Malaya) ('The key issue is therefore whether each of the relevant defendants' state of knowledge was such as to make it unconscionable for her to retain the benefit of the receipt') and [39](b).

114 (1841) 9 M&W 54 (Court of Exchequer). Baron Rolfe also said, 'With respect to the argument, that money cannot be recovered back except where it is *unconscientious* to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him it cannot be otherwise than *unconscientious* to retain it'. But it is important to recognise that Baron Rolfe here is not attempting to introduce a requirement of fault on the part of the defendant, as this was not at all relevant to the outcome of the case; see Birks, *Unjust Enrichment* (n 2) 5; Peter Birks, 'The Role of Fault in the Law of Unjust Enrichment' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999).

115 [2013] 9 MLJ 681 [27] (High Court in Malaya), citing *Bank Bumiputra v Hashbudin bin Hashim* (n 4). See also Low (n 2) [2.103] and *Noraini bt Yatim v Inter City Services & Travel Sdn Bhd* [2025] MLJU 1730 [52] (High Court in Malaya).

116 A more nuanced approach may be to hold that the change of position could still exist alongside the 'unconscionability' requirement, but the availability of which must be decided on a case-to-case basis. This was Bant's recommendation of allowing the defence to persist in cases involving restitution for wrongs, see Bant (n 9) 171–72. But even so, it is hard to imagine a scenario where an 'unconscionable' defendant can raise a change of position defence without reducing the meaning of 'unconscionability' to inconsequence.

117 See, for example, *LNE Networks* (n 113) [39](e) ('The defence of change of position should not have any application where the cause of action is knowing receipt'), citing

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Therefore, it seems that to reconcile the simultaneous presence of a defence of change of position and an 'unconscionability' requirement, the latter must operate on the weaker of the senses discussed above. Under this approach, a finding that the defendant has acted 'conscionably' is not a sufficient reason in itself to let him or her keep the benefit. But if 'unconscionability' is relevant but not necessary, then how exactly is it relevant? The possible answer to this is that the 'unconscionability' inquiry applies heuristically to assess the defendant's eligibility for a reduction or exemption of liability through change of position. The former anticipates the latter. More precisely, 'unconscionability' finds its parallel in the defence's 'bad faith' bar.

But even on this weaker view, it would be too quick to state that unconscionability and change of position are two sides of the same coin. As mentioned, even where the defendant had not acted 'unconscionably', that is, where he or she had acted in good faith, there may still be other bars, like wrongdoing or stultification, which serve to deprive him or her of the benefit of this defence. So, if, on the weaker view, the only function of unconscionability is to anticipate the bad faith argument in change of position, one might not unreasonably wonder why this analysis could not be conducted together alongside the other considerations (the presence of illegality, the need to avoid stultification, etc.) under the umbrella of change of position, but instead needed to be singled out as its own spotlighted element.

Furthermore, in change of position, the defendant's 'bad faith' is only secondary to the question of whether she has incurred a detriment. In other words, the 'bad faith' question does not arise if there was no qualifying detriment in the first place. If the defendant has merely kept the money under their bed and did nothing with it, nor did the receipt of money trigger a change in lifestyle, then she cannot raise change of position to avoid repayment.[118] The question of 'bad faith' does not even arise. By contrast, the independent 'unconscionability' requirement requires no proof of 'detriment'; the claimant need not prove that the defendant had done anything in reliance on the receipt. This is evident in *Dream Property* itself, the facts of which are noted above. The seller had, in fact, at one point sent a letter to the buyer requesting them to cease all construction works,[119] yet the Federal Court still found the seller's conduct sufficiently 'unconscionable' to decide against them. *A fortiori*, if such positive action was not enough to defeat 'unconscionability', then doing nothing at all would have also placed the party in that same arraignment.

Ultimately, the superior path would be for Malaysian law to abrogate the need to prove any 'unconscionability' on the part of the defendant, except where the defendant

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BCCI (Overseas) Ltd v Akindele [2001] Ch 437, 456 (Nourse LJ).

118 See authorities cited in n 34.

119 *Dream Property* (n 2) 486 [125] ('apart from issuing a single letter dated 18 October 2006 to ask that the [buyer] cease all construction work on the land, the [seller] took no other action to stop the [buyer] from constructing on the land'). See also See, *Mistaken Improver* (n 60) 67.

relies upon the change of position defence.[120]

VII. CONCLUSION

In Azahar Mohamed FCJ's words (as his Lordship then was), the law of unjust(ified) enrichment in Malaysia is 'still in its formative stage'.[121] A decade later, this observation still holds very much true. This project represents an attempt to sketch out some troubling tensions which may ensue from this jurisdiction's simultaneous recognition of a change of position defence and an unjust(ified) enrichment model predicated on a 'value surviving' test for enrichment, an 'absence of basis' technique to the 'unjust' inquiry and an unelaborated 'unconscionability' element.

The overall picture that emerges is thus one of doctrinal fragility. When considering the defence, future Malaysian courts may wish to observe greater sensitivity internally to the structural role played by each component of the four-stage *Dream Property* framework and externally to the wider restitutionary landscape. Only through such an approach may the change of position defence be developed into a tool to ensure the fairer allocation of loss without undermining the coherence of the unjust(ified) enrichment action altogether.

120 Possibly also the doctrine of laches, and more controversially, a bona fide purchase defence, but the latter's place in Malaysian unjust(ified) enrichment law is unclear.

121 *Dream Property* (n 2) 484 [118].