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ABSTRACT

The dissertation starts with an introduction on restitution in general in common law and Islamic law together with the idea of obligation and parties to an obligation. Chapter 2 covers the general principles of restitution and comparison of restitution with quasi-contract, compensation, contract and tort. Chapter 3 covers the principles and various tests of unjust enrichment. Chapter 4 covers the position of English law and Malaysian law on recovery of money paid under a mistake. Chapter 5 covers restitution in Islamic law together with the remedies whilst Chapter 6 has a brief comparison of restitution under comon law and Islamic law. Chapter 7 covers the various Defences which may defeat a claim for restitution. The dissertaion concludes with Chpater 8 which vovers the working methods of the law of restitution and an observation.

PREFACE

The idea of writing this topic first surfaced when I was doing the subject Lw of Obligations in my first year of study for the Masters of Comparative Laws programme. Whilst as a subject of study, the law of obligations is itself highly complex and extremely interesting, it is the law of restitution which took hold of me, literally beckoning me to undertake further in-depth research.

This dissertation is presented in a simple form and language. It is by no means exhaustive. It would be appropriate to mention here that this dissertation is my personal project and the comments and views contained therein are expressed in my personal capacities, and I apologise for any shortcomings.

As ending note, I would like to thank my supervisor, Prof. Dr. Syed Misbahul Hassan for mooting the idea of this topic and for providing me with so much support. Most of all, I thank my wife, Joanna Tan for being my source of inspiration and encouragement. She and my son, Chee Wei, have been so understanding throughout and have never complained that I have been spending most of my non-working hours on this dissertation instead of being with them.

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CHAPTER 1 INTRODUCTION

1.1 GENERAL

It has been traditional to regard tort and contract as the two principal sources of civil liability at common law, although liability arising out of a fiduciary relationship has developed largely outside these two categories. There is another category that must be separated from all of these; this is liability based in unjust enrichment.

Restitution based upon unjust enrichment cuts across many branches of the law, including contract, tort, and fiduciary relationship, but it also occupies much territory that is its sole preserve. Thus, when one person mistakenly confers a benefit on another, as by paying a debt the other owed to a third person, the sole basis of liability is unjust enrichment and the only remedy available to the mistaken party is restitution at law or in equity.

For a long time restitution developed more or less independently at law and in equity. If the defendant stole the plaintiff's goods and sold them, the plaintiff was given a money judgment in the amount of the proceeds in an action at law. This has come to be known as "quasi contract,"(1)

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1. The action also is variously referred to as assumpsit, or on the common counts, or in this instance as an action for money had and received, which was one of the common counts in general assumpsit out of which quasi contract developed. In current usage, courts often refer to the quantum meruit recovery, sometimes in the sense in which that term was used to refer to the common count for work and labour, but often as a description of any form of value restitution - that is, when goods or services have been received and restitution is for their value.

although the broader term "restitution" is gaining general acceptance. The action developed out of the common-law action of assumpsit.

Unjust enrichment is an indefinable idea in the same way that justice is indefinable. But many of the meanings of justice are derived from a sense of injustice,(2) and this is true of restitution since attention is centred on the prevention of injustice. Not all injustice but rather one special variety: the unjust enrichment of one person at the expense of another. This wide and imprecise idea has played a creative role in the development of an important branch of modern law.

Restitution came into existence as a means of providing new remedy by restoring benefit under the rule of unjust enrichment. This is a situation where the defendant find himself in possession of a benefit which in justice, he should restore to the plaintiff. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense. This is not allowed by law therefore the principle of unjust enrichment was recognised by law and gives effect to in a wide variety of claims of this kind.

Where the plaintiff has conferred some benefit upon the defendant, the court may force the defendant to disgorge the benefit.(3) Action for

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2. Cahn, The Sense of Injustice (1949)
3. Cooke and Oughton, The Common Law of Obligations, 1989

restitution may lie if there has been an unjust enrichment of the defendant at the expense of the plaintiff. The court may also order restitution for an unjust enrichment made by the defendant as a result of a wrong he may committed. This wrong prove to be a tort or a breach of contract.(4)

In Islam money or property which is acquired through unfair means, is positively unclean and unlawful, and anyone who makes use of it or spends it on his needs does himself a great harm. As the Holy Prophet has warned, his prayers will not find acceptance with Allah, his supplications will not be answered, his petitions will not be granted, and in case he does good deeds they will avail him nothing. In the Next world, there will be no share for him in the special favours for Almighty Allah.

The Prophet has narrated about a man who after undertaking a long and tedious journey arrives at his destination in such a state that his hair is dishevelled and his body is covered from head to foot with dust. He raises up his hands towards the heavens and cries out. 'O Lord! O my Preserver!' but his sustenance is of the impure and he has been brought up on what is polluted: -how can his prayer be granted when such is the case?"

The above Hadith amply demonstrates that when a person draws his livelihood from impure means his prayers no longer remain worthy of being answered.

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4. Ibid.

1.2 THE VALUATION OF THE BENEFIT GAINED AT THE PLAINTIFF'S EXPENSE

Usually the plaintiff will be allowed to recover a reasonable value of the services or goods received by the defendant at the date the services or goods were rendered or delivered. This method of recovery involve an action `in personam' and the principle actions are for money received for:

> `Quantum meruit' (as much as the deserves) or where there is a reasonable amount to be paid for services rendered or work done, when the price thereof is not fixed by contract, or, `Quantum valebat' (as much as it is worth).

A person may be deemed to have received a benefit even if he did not gain any actual benefit in the form of services rendered or goods delivered. In **Plache v. Colburn** (5) where the defendant repudiated a published contract, he sued and recovered on a quantum although he had not delivered a single page of manuscript. The quantum meruit award has compensate the plaintiff for his reliance loss.

1.3 THE IDEA OF OBLIGATION

`OBLIGATION' suggests duty;(6) something someone has to do or not to do. On the other hand, obligations also involved a responsibility that a

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5. (1831) 1 L.J.C.P. 7

6. A. M. Tettenborn, An Introduction to the Law of Obligations

state of affairs exists, or will exist. For example a seller of a car may warrant that it has covered only 20 000 miles but be liable in damages, if the car has covered more than 20 000 miles. Here, the seller is in a breach of their obligation, even though neither has done, or fail to do, anything.

1.4 PARTIES TO AN OBLIGATION

Under civil law, there are two parties in obligation, namely :

An 'obligor' (or the defendant) - who obliged or responsible as the case may be, and

An 'obligee' (or the plaintiff) - for whose benefit the obligations exists, and who can enforce it.

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CHAPTER 2 GENERAL PRINCIPLES OF RESTITUTION

2.1 RESTITUTION AND QUASI CONTRACT

The common law of quasi contract is the ancient and significant part of restitution.(1) Quasi contract is actually a part of restitution which stems from the common `indebitatus' counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims.

The `action for money had and received' lay to recover money which the plaintiff had paid to the defendant, on the ground that it has been paid under a mistake or compulsion, or for a consideration which had wholly failed. The plaintiff could also recover money which the defendant had received from a third party. The action also lay to recover money which the defendant had acquired from the plaintiff by a tortious act.

On the other hand, the `action for money paid' was the appropriate action when the plaintiff's claim was in respect of money paid, not to the defendant, but to a third party, from which the defendant had derived a benefit.

Whereas quantum meruit and quantum valebat claims lay respectively to recover reasonable remuneration for services and a reasonable price for goods supplied by the plaintiff.

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1. Lord Goff of Chieveley & Gareth Jones, The Law of Restitution, 1986

To draw a boundaries of quasi contract, it is necessary to refer to the limits of these forms of action. Not every right enforced by these remedies can be classified as quasi-contractual. Each one of the remedies might be used to enforce purely contractual claims. Thus the action for money had and received was used to compel a contracting party, such as an agent, to account; and the action for money paid lay to enforce the contractual right of indemnity.(2)

To arrive at a satisfactory description of quasi-contract, jurists have been forced to search for a principle which will enable them to unify the majorities of claims enforced by these forms of action. This principle, according to Goff and Jones,(3) is widely accepted to be `Unjust Enrichment'.

Quasi-contractual claims, are therefore, those which fall within the scope of the actions for money had and received or for money paid, or for quantum meruit or quantum valebat claims, and which are founded upon the principle of unjust enrichment.

There are, however, other claims of different origin which are also based on that principle. So, for example, are claim in equity analogous to quasi-contractual claim to recover money paid under a mistake; there are claims for profits made from a breach of trust; equitable relief from undue

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2. For example, by a surety against his principal debtor. Quantum meruit and quantum valebat claims were employed to recover reasonable remuneration for services or a reasonable price for goods which had been rendered or supplied under a contract in which the remuneration or price had not been agreed.

3. op. cit. supra note 1

influence is a rational extension of the limited relief which the common law once provided in cases of duress; catching bargains may be set aside in equity and unconscionable; and proprietary claims are granted in equity to revest title in the plaintiff, or to allow him the additional advantages which spring from the recognition of a right of property.

2.2 RESTITUTION AND COMPENSATION

Both restitution and compensation are responses to a particular event. The event which brings compensation is generally a wrong of some kind, whether it be a tort or a breach of contract. The person who suffers as a result of the wrong will be compensated by an award of damages. The event which triggers restitution is an unjust enrichment of the defendant.

Restitution may be said to have more than one meaning. In one sense it may signify the restoration of a person t a previous state of affairs. This interpretation of restitution is, in fact, a matter concerned with compensation in the sense that losses incurred must be paid for. For example, if a person is compensated so as to return him to the position he was in before the defendant's negligence, then it is his status quo interest that the law protects. The way restitution should be properly understood is that in certain circumstances a thin may be restored to a person because it has been taken from that person by someone else.

2.3 CONTRACT, TORT AND RESTITUTION

It has been observed that wrongs normally give rise to

compensation, But it is also possible to claim a restitutionary remedy for a wrong. For example, the victim of the tort of conversion may be able to recover what he has lost from the tortfeasor. Likewise, if an agent takes a bribe, his principal may recover the amount of the bribe in an action for restitution, even though it might appear that has suffered no loss.(4) Wrongs in equity, such as breaches of trust, are also relevant to restitution, since these too may be remedied by a restitutionary remedy.

Where a restitutionary right exists, it is conferred by operation of law in the same way as the right to compensation in the event of a tort. The consent of the enriched party has nothing to do with the availability of restitutionary remedy.

While restitution and contract are separate areas of the law of obligations there con be overlaps. For example, if I ask a plumber to do work for me and the cost of the work is not discussed, I am under a contractual obligation to pay a reasonable amount. If I do not pay, the plumber is entitled to restitutionary remedy in respect of the value of his work.

2.4 THE 'IMPLIED CONTRACT THEORY'

In the past it was suggested that quasi-contractual claim should,

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4. Reading v A-G [1951] AC 507.

on principle, receive separate treatment from the other matters on the ground that it is the special characteristic of these claims that they are founded upon an implied contract by the defendant to pay to the plaintiff the money claimed by him.

The "implied contract theory" has a little or no immediate attraction. There are some contexts in which an implied contract for repayment can be imputed to the parties. So if the plaintiff had paid money to the defendant under a contract, subsequently discharged by reason of the defendant's breach, it can be argued that the defendant should be taken to have impliedly contracted that he would repay the money to the plaintiff. But in most situations recourse to the theory becomes so absurd had serious doubts about its validity are aroused.

English lawyers did not originally distinguished between contractual and quasi-contractual claims. Their classification was founded on remedies. So debt, which lay for a certain sum, could be employed to recover not only rent, or the price of the goods sold or a loan of money, but also money paid to the defendant's use or for a consideration which had failed.

Account, though founded on a special relationship between parties, was extended, before it was superseded by debt and then by indebitatus assumpsit, to render to the defendant accountable to the plaintiff in the absence of a special relationship between them, and, exceptionally, to enable

a person to recover money paid under a mistake. But these developments, according to Goff and Jones, were piecemeal and pragmatic they neither presupposed nor disclosed the growth of any general principle.

It was the growth of indebitatus assumpsit which provided the opportunity for the development of quasi-contract as we know it. This action superseded debt and account in the sixteenth century. At that time, debt and account were returnable only in the Common Pleas, assumpsit in the King's Bench. The King's Bench judges were eager to manipulate assumpsit to enable it to do the work of debt. They did this by finding that the defendant was indebted to the plaintiff in a certain sum and had promised, at the time of the contract of afterwards, to pay that sum to him. If this promise were broken, loss would occur and so case would lie. They did not require the jury to find an express promise as the promise could be implied from the defendant's conduct.

Action so pleaded were known as indebitatùs assumpsit. In the last quarter of sixteenth century the Common Pleas began to attack the King's Bench use of assumpsit, stating that the assumpsit it was a mere fiction and a flagrant attempt to avoid wager of law.

Only in 1585, by the creation of a new exchequer Chamber, that it became possible to resolved the conflict between the courts after the decision of that Chamber in 1602, in Slade's case,(5) there was no further attempt to

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5. (1602) 4 Co. Rep. 929