NO LIMITATION FOR UNJUST ENRICHMENT CLAIMS IN WEST MALAYSIA?

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ABSTRACT

Unjust enrichment was only recognised as an independent cause of action in the United Kingdom in 1991 through the case of *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Singapore's Court of Appeal in the case of *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] SGCA(I) 1 ("Esben Finance") has held that claims in unjust enrichment, do not come within the ambit of the Singapore's Limitation Act 1959 and therefore such claims in unjust enrichment, are not time-barred. West Malaysia's Limitation Act 1953 share a common legislative history with the Singapore's Limitation Act 1959 as both are modelled after the English law of limitations. This principle in *Esben Finance* should thus be adopted in West Malaysia.

Keywords: cause of action, unjust enrichment, restitution, time-barred, Limitation Act 1953

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INTRODUCTION

An article to explore the possibility to adapt Singapore's position that claims in unjust enrichment are not time-barred under the existing limitation law.

SINGAPORE'S POSITION ON LIMITATION REGARDING CLAIMS FOR UNJUST ENRICHMENT

In the Singapore Court of Appeal case of *Esben Finance Ltd v Wong Hou-Lianq Neil,*[1] it was held: -

> 81 However, the law of restitution and unjust enrichment is a developing branch of the law of obligations and most claims in this particular area of the law would not have been in the contemplation of the legislature at the point of drafting the Limitation Act as well as its predecessor legislation. Indeed, in the SAL Report, the SAL Reform Committee noted that the Limitation Act is "couched only in terms of obligations known to the drafters at the time of drafting", and **this would therefore not include obligations such as unjust enrichment and other restitutionary claims, which were not known in 1959** when the act was drafted (at para 64). The Committee therefore recommended that the law of limitations in Singapore in relation to the law of restitution was "plainly in need of reform" (at para 67).
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> 82 In Consultation Paper No 151, the Law Commission of England and Wales noted that the 1980 UK Act laid down limitation periods for specific and limited restitutionary claims but did not explicitly apply to the "bulk of restitutionary claims". The Commission concluded that (at paras 5.2–5.3):
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> This means that the central choice facing the courts has been to construe the 1980 Act, albeit artificially, as applying to these claims; or to conclude that no limitation period applies to common law restitutionary claims and that any equitable

1 [2022] SGCA(I) 1, ('***Esben Finance***").

restitutionary claims should be left to the doctrine of laches. [emphasis added]

83 Further, in the report of the Law Commission of England and Wales on the law of limitation, it was noted that **unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991, in the case of Lipkin Gorman** (see Law Commission of England and Wales, Limitation of Actions: Item 2 of the Seventh Programme of Law Reform (July 2001) Law Com No 270 at para 2.48). **Given that the Limitation Act was modelled after the 1939 UK Act, it must follow that claims in unjust enrichment were not within the contemplation of the local legislature in 1959 (which, significantly, represents the present law in Singapore today).** There would also be no basis for claims for restitution of wrongs (apart from claims founded on a civil wrong in one of the established grounds under the Limitation Act) to be construed as coming under the Limitation Act, as Parliament similarly did not envisage such claims as coming within the Limitation Act.

84 Indeed, it should be noted that statutory limitation periods are emphatically as well as quintessentially creatures of statute, and **it is not the function of the courts to act as "mini-legislatures" by reading into the Limitation Act a statutory limitation period for a claim which the Legislature did not intend to impose**. **The Limitation Act does not, understandably, contain any "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself. This suggests that the Legislature did not intend all claims to be subject to a limitation period but only those which it deemed ought to have been so limited (namely, the claims expressly specified in the Act). It follows that claims which could not have been within the contemplation of the Legislature at the time the Limitation Act and its predecessor legislation were enacted could not have been intended by the Legislature to be subject to statutory limitations under the respective statutes (in particular, the Limitation Act)**.

> 85 We acknowledge that the position that we have reached is an unhappy one. However, in view of the statutory wording of the Limitation Act and its legislative history, **we decline to (artificially) hold that restitutionary claims, including those in unjust enrichment, come within the ambit of the Limitation Act. Until the lacuna in the law has been addressed by Legislature, restitutionary claims are therefore not time-barred**. As we further elaborate at [123] below, this should be an urgent clarion call for legislative intervention.

THE MALAYSIAN POSITION ON LIMITATION REGARDING CLAIMS FOR UNJUST ENRICHMENT

What would be the position in the West Malaysian jurisdiction where the Limitation Act 1953 (Act 254) applies?

Sections 6(1) and 6(7) of the Singapore's Limitation Act 1959 state: -

> 6(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued: (a) actions founded on a contract or on tort; (b) actions to enforce a recognizance; (c) actions to enforce an award; (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture …

> 6(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

Sections 6(1) and 6(6) of the Limitation Act 1953 (Act 254) state:

> 6 (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say: (a) actions founded on a contract or on tort; (b) actions to enforce a recognisance;(c) actions to enforce an award; (d) actions to

> recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. …
>
> (6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

It can safely be said that the two abovementioned provisions are *in pari materia*.

We can also see that the legislative history of the Limitation Act 1953 (Act 254) coincides with the legislative history of the Singapore Limitation Act 1959, as both are modelled after the English law of limitations at about the same time.

It is also trite that unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991, in the case of *Lipkin Gorman v Karpnale Ltd*.[2]

Having set the parameters above, can it then be argued that the rationale and the legal reasoning in ***Esben Finance (supra)***, (in that restitutionary claims, including those in unjust enrichment do not come within the ambit of the Limitation Act and are therefore not time-barred) should be adopted in the West Malaysian context?

Respectfully, there is no clear reason why it should not be applied in the West Malaysian courts.

In particular, paragraph 84 of ***Esben Finance (supra)*** comes to the aid of such an assertion that it should apply. The Singapore Court of Appeal said:

> The Limitation Act does not, understandably, contain any "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself.

When we study the Limitation Act 1953 (Act 254), we would find that it too does not contain any sweeping-up or catch-all provision

[2] [1991] 2 AC 548.

imposing a general limitation period for all other claims not expressly specified in the 1953 Act itself.

To demonstrate the intention of Legislature to the contrary, we may look at the Limitation Ordinance 1952 (Sabah Cap. 72). In the Malaysian Court of Appeal case of *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor*,[3] Justice S Nantha Balan JCA held:-

> **[179]** As stated earlier, the period of limitation for a cause of action for breach of contract (in writing) is 6 years (per item 95 of the Schedule). **And the limitation period for a cause of action for unjust enrichment is also 6 years (per item 97 of the Schedule)**. In the context of the claim for unjust enrichment, it is relevant to mention that the claim is for restitution.

Item 97 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap. 72) provides that for a suit for which no period of limitation is provided elsewhere in this Schedule, the period of limitation is 6 years.

Item 97 of the Schedule to the Limitation Ordinance (Sarawak) (Cap 49) also provides that for a suit for which no period of limitation is provided elsewhere in this Schedule, the period of limitation is 6 years.

These would be examples of a "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself, contemplated in ***Esben Finance supra***.

As pointed out earlier, the Limitation Act 1953(Act 254) does not contain an equivalent provision as Item 97 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap. 72) nor of that in the Limitation Ordinance (Sarawak) (Cap 49).

Therefore, it is respectfully submitted, and to use the words of the Singapore Court of Appeal in ***Esben Finance supra***, that this suggests that the Legislature did not intend all claims to be subject to a limitation period but only those which it deemed ought to have been so limited (namely, the claims expressly specified in the Act). As further pointed out by the Singapore Court of Appeal in ***Esben Finance supra***, this is

[3] [2021] 4 MLJ 367.

only strengthened by the rationale that unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991 in the case of *Lipkin Gorman v Karpnale Ltd*,[4] and therefore such a claim could not have been within the contemplation of the Legislature at the time the Limitation Act 1953 (Act 254) and its predecessor legislation were enacted.

Until and unless Parliament addresses the lacunae in the Limitation Act 1953(Act 254), the position should be that restitutionary claims, including those relating to unjust enrichment do not come within the ambit of the Limitation Act 1953(Act 254) and is therefore not time-barred.

Until such time, we should welcome the decision of ***Ebsen Finance supra*** into jurisprudence of West Malaysia.

There is also another point to consider. At paragraph 76 of ***Ebsen Finance supra***, the Singapore Court of Appeal held:

> 76 For completeness, we make two further points. First, the respondent had initially argued (although this point appears to have been dropped during the hearing itself) that the **appellants' claim in unjust enrichment was time-barred under s 6(7) of the Limitation Act, as the appellants had, in his view, sought equitable relief**. However, to begin with, the claim in question has to be one "founded upon any contract or tort or upon any trust or other ground in equity". **A claim in unjust enrichment does not fall into any of those categories**. In addition, the analysis above in relation to the legislative history of the Limitation Act demonstrates that claims in unjust enrichment were simply not envisioned in the drafting of the Act.

We saw earlier that Singapore's section 6(7) of the Limitation Act is equivalent to our Section 6(6) of the Limitation Act 1953(Act 254). Based on paragraph 76 of ***Ebsen Finance supra***, it would appear that a claim for unjust enrichment is not a claim for equitable relief envisioned in the drafting of the Limitation Act 1953(Act 254) and

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4 [1991] 2 AC 548.

therefore Section 6(6) of the Limitation Act 1953 (Act 254) is not applicable in such claims.

CONCLUSION

To conclude, as the wordings of the Limitation Act 1953(Act 254) currently stand, it is respectfully submitted, firstly, that the legal position in West Malaysia should be that restitutionary claims, including those in unjust enrichment do not come within the ambit of the Limitation Act 1953(Act 254) and is therefore is not time-barred. Secondly, a claim for unjust enrichment is not a claim for equitable relief for the purposes of the Limitation Act 1953(Act 254) and therefore, Section 6(6) of the Limitation Act 1953 (Act 254) is not applicable.