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Restitution for the Mistaken Improver of Land

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Restitution for the Mistaken Improver of Land

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd

Alvin W-L See¹

Introduction

The recent Malaysian case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* marks a rare occasion where an improver of another’s land is allowed to claim from the latter for the improvement.² In a landmark judgment, the Federal Court of Malaysia recognised the right of recovery as based on the law of unjust enrichment, but curiously departed from certain well-established principles under the common law which are less generous to the improver. The significance of this decision clearly lies in its contribution to the continuing endeavour to achieve an appropriate balance between the interests of the landowner and the improver.

Facts and decision

In 2004, Atlas Housing Sdn Bhd (“the Seller”) agreed to sell a piece of land to Dream Property Sdn Bhd (“the Purchaser”) for a price of RM33.5 million. The Purchaser’s plan was to construct a shopping mall on the land (“the Mall”) and aim to have it fully operational by January 2007. To facilitate this plan, the contract provided that the Purchaser was entitled to immediate access to the land and to commence construction work even prior to the completion of the sale. The Seller also granted a power of attorney in the Purchaser’s favour to facilitate other dealings with the land pending completion of the sale. Upon paying the required 10% deposit the Purchaser took possession of the land and begin building the Mall. Unfortunately, a dispute arose when the Seller claimed that the contract was automatically terminated following the Purchaser’s failure to pay the remaining purchase price within the completion period. The Seller refused to complete the contract and commenced legal proceedings to recover the land in September 2006. After almost a decade of litigation, the matter was conclusively decided in the Seller’s favour in February 2015. In the meantime, despite the on-going litigation, the Purchaser pressed on with construction of the Mall, which was completed in December 2006. The Mall is now the busiest mall in town with over 250 retail outlets. As of November 2007, its market value was estimated to be around RM387 million, far exceeding the value of the land. The contest over the land was likely in essence a contest over the Mall.

In the High Court, the Purchaser was held to have committed a repudiatory breach of the contract and was ordered to return the vacant possession of the land to the Seller. This was upheld on subsequent appeals to the Court of Appeal and the Federal Court. The only point of contention lay in the amount if any that the Purchaser would be entitled to recover from the Seller for the improvement to the land. While the High Court and the Court of Appeal held that the Purchaser was entitled to recover the cost of constructing the Mall amounting to RM124 million, the

* Assistant Professor of Law, Singapore Management University. I am grateful to Tang Hang Wu, Nicholas Hopkins, Man Yip, Goh Yi-han and the anonymous referee for their helpful comments on the earlier drafts of this case note. All errors are my own.

² [2015] 2 CLJ 45.

Federal Court decided that the Purchaser was entitled to recover a sum amounting to the market value of the Mall at the date of the judgment, which would be a much higher sum. Importantly, the Federal Court explained that the Purchaser’s right of recovery was based on the law of unjust enrichment³ and went on to address the issue by applying the traditional four-stage inquiry: (1) Is the Seller enriched? (2) Is it at the Purchaser’s expense? (3) Is it unjust? (4) Does the Seller have a defence?⁴ This note will focus mainly on the first and third inquiries. Also meriting attention is the court’s implicit recognition that unconscionability on the Seller’s part contributes to the decision to allow restitution, although this requirement does not feature anywhere in the four-stage inquiry.

Three enrichment issues

Value of the mall

The Federal Court held that the Seller’s enrichment is to be assessed by “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”.⁵ This may suggest that the Seller’s enrichment is to be assessed by the following formula: the market value of the Mall minus the market value of the bare land. However, it is submitted that the court intended nothing more than to emphasise the obvious point that the Mall was to be assessed independently of the land. In another crucial part of the judgment, the court referred simply to “the market value of the mall” without mentioning any need for further deduction.⁶

In preferring this method of assessing the Seller’s enrichment, the Federal Court relied on the Australian case of *Lexane Pty Ltd v Highfern Pty Ltd*, which involved a similar but less complicated dispute.⁷ There Macpherson J of the Supreme Court of Brisbane said: “... the purchaser is entitled to restitution in respect of permanent improvements made to the land while in his possession to be measured by the extent to which the value of that land has been enhanced”.⁸ The prevailing position under English law, on the other hand, is significantly less generous to the improver. In *Cobbe v Yeoman’s Row Management Ltd*, the plaintiff obtained a planning permission for the defendant’s land in anticipation of a joint venture, which did not materialise.⁹ The House of Lords held that the plaintiff was entitled to a quantum meruit payment for his services, which will take into account relevant costs in procuring the planning permission as well as his fee. Importantly, Lord Scott explained that the defendant’s enrichment shall not be assessed by the difference in market value between the land without the planning permission and the land with it, for the planning permission did not create the development potential of the land but merely unlocked it.¹⁰ The English approach clearly places a premium on the

³ [2015] 2 CLJ 45, [95].

⁴ [2015] 2 CLJ 45, [117], [119].

⁵ [2015] 2 CLJ 45, [160]. See also *ibid*, [136].

⁶ [2015] 2 CLJ 45, [159].

⁷ (1985) 1 Qd R 446, 455, 457, 460.

⁸ (1985) 1 Qd R 446, 455. This was approved by Brennan J in his dissenting judgment in *Stern v McArthur* (1988) 165 CLR 489 (the bench was divided on a different point).

⁹ [2008] UKHL 55; [2008] 1 WLR 1752.

¹⁰ [2008] UKHL 55; [2008] 1 WLR 1752, [41]. This endorses Stevens’ explanation of the decision in *Greenwood v Bennett* [1973] Q.B. 195: R. Stevens, “Three Enrichment Issues” in A. Burrows and Lord

landowner’s freedom to exploit his land, which is an important aspect of land ownership.¹¹ The approach preferred by the Malaysian and Australian courts, on the other hand, may appear to make the landowner pay for what is rightly his. However, *Dream Property* is arguably distinguishable from *Cobbe* on an important aspect. In *Dream Property*, the Seller had, by entering into an agreement to sell the land, willingly bargained away the land together with its development potential.¹² The Seller is thus barred from arguing that it could have exploited the development potential of the land in the same manner as the Purchaser did at its own cost and effort.

Incontrovertible benefit and subjective devaluation

The Federal Court said that the Mall was an “indisputable benefit” and that the Seller “unquestionably benefitted” from it.¹³ This appears to hint at the principle of incontrovertible benefit, which denies subjective devaluation of benefits that are so obviously beneficial that no reasonable person will deny it.¹⁴ To be certain, the Seller did not put forth any argument of subjective devaluation, e.g. by asserting that it preferred the land to be vacant or that it preferred the land to be developed in some other manner, and therefore the issue was not directly addressed. Nevertheless, the Federal Court’s statement is significant in addressing the question of when the principle of incontrovertible benefit will apply to benefits in kind.¹⁵

As money is the core example of incontrovertible benefit, it follows that a benefit in kind that has been turned into money incontrovertibly enriches the seller to the extent of the proceeds received (the “realised benefit” test). In *Dream Property*, however, the land has yet to be sold and realised in money. But the Federal Court agreed with the Purchaser’s argument that “if the mall were to be sold to a third party, the unjust enrichment and undue benefit accrued to the plaintiff would be enormous”.¹⁶ In holding that the Seller had been unquestionable benefitted for this reason, the court was essentially applying the “realisable benefit” test, of which Goff and Jones were strong proponents.¹⁷ This extension of the principle incontrovertible

Rodger of Earlsferry, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006) 49, 50–54.

¹¹ See generally A.M. Honoré, “Ownership” in A.G. Guest ed., *Oxford Essays in Jurisprudence* (Oxford: OUP, 1961) 107.

¹² As is in *Lexane Pty Ltd v Highfern Pty Ltd* (1985) 1 Qd R 446.

¹³ [2015] 2 CLJ 45, [123].

¹⁴ P. Birks, *An Introduction to the Law of Unjust Enrichment* (Oxford: Clarendon Press, 1985) 116.

¹⁵ The facts of this case do not appear not attract the application of other tests for overcoming subjective devaluation. The Mall is not something that is readily returnable to the Purchaser (c.f. *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775). The Seller also did not demand or request for the Mall to be built (c.f. *Marston Construction Co Ltd v Kigass Ltd* (1989) 15 Con LR 116). Neither is this a case of free acceptance since the Seller did not have the opportunity to reject the benefit. Even if the Seller indicated clearly that it would not pay for the Mall, the Purchaser will still proceed with the construction because its decision to do so was uninfluenced by any probability that the Seller will pay for it. In any case, the Seller was only required to do what is reasonably necessary, which would seem to exclude any steps that require the incurrence of expenses. On the facts, the Seller did request for the return of the land and sent to the Purchaser a stop work letter. On free acceptance, see P. Birks, “In Defence of Free Acceptance” in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford: OUP, 1991) 105; C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) Ch 17.

¹⁶ [2015] 2 CLJ 45, [122].

¹⁷ Lord Goff and G. Jones, *The Law of Restitution*, 7th edn (London: Sweet & Maxwell, 2007) [1-023].

benefit had also received judicial approval by the English Court of Appeal in at least two instances.¹⁸ As the English courts recognised, one advantage of this test is that it avoids a potential pitfall of the realised benefit test, namely that it may encourage tactical decision on the defendant’s part to sell the improved property only after judgment.¹⁹ In moving towards this direction, however, it is necessary for the courts to keep an eye on any potential injustice to a defendant, e.g. where it would force a sale of a property which he is sentimentally attached to.²⁰ In such a case, perhaps a fairer solution would be to grant the plaintiff a lien over the property, entitling him to a share of the proceeds only if the property is sold.²¹ In *Dream Property*, however, there is no such concern. In fact, even if the Seller were allowed to raise an argument of subjective devaluation, it would be difficult to convince the court that the Mall is of no benefit to it.²² It is clearly in the interest of the Seller, a profit-seeking property developer, to realise the benefit in money either by selling the land or by continuing to operate the Mall to generate profits.

Time of assessing enrichment

The Federal Court held that the market value of the Mall was to be assessed at the date of judgment.²³ Although this approach has the merit of certainty, it fails to take into account the possibility of fluctuation in the Mall’s market price between the date of judgment and the date on which vacant possession is delivered to the Seller. If the value of the Mall had depreciated when the Seller eventually received it, the Seller’s payment to the Purchaser would have to be partly out of its own pocket. A more extreme example of when the Federal Court’s preferred timing of assessment could cause injustice is where the Mall is destroyed by natural disaster before the land is delivered to the Seller but after judgment was handed down. In such a case, it would be absurd to regard the Seller as having been enriched by the market value of the Mall assessed at the date of judgment. As the law of unjust enrichment is not premised on the defendant’s fault but instead strictly on his unjust enrichment, it would be against principle to make the Purchaser bear the cost of the Mall’s depreciation in value on the ground that he is a contract-breaker. To do so would also be inconsistent with the realisable benefit test, which is premised on the Seller’s ability to sell the Mall and pay the defendant. The prevailing common law approach avoids this problem by assessing the defendant’s enrichment at the date of receipt.²⁴ Admittedly, since that the Seller had all along retained title to the land, it could be said to have received the Mall the moment it was completed. But given the concerns that were raised earlier,

¹⁸ *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 W.L.R. 2775, [34]–[37]; *Harrison v Madejski, Coys of Kensington (A Firm)* [2014] EWCA Civ 361, [58]–[59].

¹⁹ *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 W.L.R. 2775, [35].

²⁰ C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) [4–17]; A. Burrows, *The Law of Restitution*, 3rd edn (Oxford: OUP, 2011) 48.

²¹ A.G. Spence, “In Defence of Subjective Devaluation” (1998) 43 McGill LJ 889; C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) [4–17].

²² The burden of proof lies with the Seller: *Benedetti v Sawiris* [2013] UKSC 50; [2013] W.L.R. 351.

²³ [2015] 2 CLJ 45, [160].

²⁴ *Benedetti v Sawiris* [2013] 3 WLR 351; [2013] UKSC 50, [14] (‘[I]t is clear that the enrichment is to be valued at the time when it was received’); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 386. See also C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) [4–34]–[4–42].

the date of receipt is best regarded as when vacant possession of the land is returned to the Seller.

The unjust inquiry: changing direction

Under the common law, the prevailing approach to the unjust inquiry is to require the plaintiff to establish a specific unjust factor, e.g. mistake, duress or failure of consideration (the “unjust factors” approach). Civilian jurisdictions approach the inquiry differently, requiring the Plaintiff to show only that there is no basis to benefit the defendant (the “absence of basis” approach). In an unprecedented move, the Federal Court decided to depart from the prevailing unjust factors approach²⁵ and adopt the absence of basis approach for the reason that “it would produce a fairer outcome”.²⁶ The absence of basis approach was appealing because it readily supplied the answer that the court sought. The Seller’s enrichment was unjust because it was not conferred pursuant to any legal obligation on the Purchaser’s part, and neither was it a gift.²⁷

A closer examination of the facts, however, appears to reveal an established unjust factor. It could be said that the Purchaser was acting under a mistaken belief that it was entitled to the land.²⁸ The right to restitution on the ground of mistake is provided under section 73 of the Contracts Act 1950 although the section does not spell out what amounts to a mistake.²⁹ According to *Goff & Jones*, a “mistake” means “an incorrect belief or assumption about a past or present state of affairs”.³⁰ Importantly, this definition excludes misprediction, which entails a speculation about a future event.³¹ Given the inherent uncertainty in litigation outcome, it would be unrealistic to say that the Purchaser’s decision to continue with the construction of the Mall was based on a misprediction that the courts will decide in its favour. Rather, the Purchaser’s judgment about its entitlement to the land was based on events which have already occurred when it decided to proceed with construction of the Mall.³²

²⁵ Although in the past the Malaysian courts have not expressed preference for the unjust factors approach, they have always looked for specific grounds to justify restitution. It is also interesting to note that Malaysia (as well as a number of other ex-British colonies, notably India) is in a unique position of having some of the established unjust factors provided in the Contracts Act 1950: see e.g. restitution on the grounds of mistake and duress under s 73, and on the ground of (total) failure of consideration in ss 65 and 66 (albeit not explicitly; but see *Wong Lee Sing v Mansor* [1972] 2 MLJ 154).

²⁶ [2015] 2 CLJ 45, [129].

²⁷ [2015] 2 CLJ 45, [129].

²⁸ If the Seller’s refusal to complete the contract occurred before expiry of the completion date, as the Purchaser alleged, then the Seller will be in breach of contract, in which case specific performance is likely to be ordered. See Specific Relief Act 1950, s 11(1)(c).

²⁹ See generally A. W.-L. See, “Restitution of Mistaken Enrichment Under Section 73 of Malaysia’s Contracts Act 1950” (2014) 31 JCL 206.

³⁰ C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) [9–06].

³¹ See *Pitt v Holt*; *Futter v Futter* [2013] 2 WLR 1200 at 1237–9; [2013] UKSC 26, [109]–[113]; *Dextra Bank and Trust Co v Bank of Jamaica* [2002] 1 All ER (Comm) 193, 202–203.

³² The parties disagreed, on the same set of facts, as to when exactly vacant possession of the land was delivered to the Purchaser, which in turn determines the completion date. If the Purchaser was right (contrary to the Seller’s assertion) that vacant possession of the land was delivered to it at a much later time and therefore it was not late in making payment of the purchase price, then the Seller will be the one in breach for demanding the return of the land.

Given the possibility of finding a solution in the unjust factors approach, should the Federal Court retract from its change in direction? Considering that the unjust factors approach and the absence of basis approach seek to perform the same function, it is unsurprising that in most cases they do in fact point to the same conclusion.³³ However, the absence of basis approach is arguably unsuitable for the development of the Malaysian law of unjust enrichment, which is still in its formative stage.³⁴ Given its appearance of simplicity and convenience, it is likely to be invoked indiscriminately, especially by those who have little understanding of the subject. In the hope of discovering what belongs to the law of unjust enrichment, the courts will instead struggle to keep irrelevant things out. Moreover, despite its elegance, its operation at a high level of abstraction oversimplifies the unjust inquiry to such extent that some of the subtleties and nuances of the existing law are lost.³⁵ For example, the distinction between mistake and misprediction, which is traditionally regarded as important, is not apparent in the absence of basis approach. Thus, Virgo aptly analogised the absence of basis approach with an iceberg, “where nine-tenths of the object is hidden below the surface”.³⁶ In England, an invitation for a shift to the absence of basis approach was met with caution by the courts.³⁷ In *Deutsche Morgan Grenfell v IRC*, the House of Lords preferred to maintain the unjust factors approach, for now at least.³⁸ Lord Hope, notably, stressed the virtue of incremental development and warned against “attempts at dramatic simplification” of the law without fuller study.³⁹ If a real life example is sought as evidence of how the absence of basis approach is not as easy as it may seem, one could look at the challenges faced by the Canadian courts in applying the absence of juristic basis approach.⁴⁰ Having all these in mind, it is submitted that, for now at least, the development of the Malaysian law of unjust enrichment is better served by requiring the courts to articulate the precise reason for regarding an enrichment as unjust. Keeping in line with the other major common law jurisdictions will also allow the Malaysian courts to continue tapping from a familiar pool of resources that has long influenced the development of Malaysian law. It is only necessary to add that despite the Federal Court’s explicit preference for the absence of basis approach, the reality is that the unjust factors approach is so well entrenched that it is likely to retain its place in Malaysian law. Where the facts of case reveal an established unjust factor, the court will most likely still refer to it. It is unthinkable, for example, that a court will ignore section 73 of the Contract Act 1950 when addressing a clear case of mistake or duress.

³³ See A. Burrows, *The Law of Restitution*, 3rd edn (Oxford: OUP, 2011) 99–116.

³⁴ The Federal Court itself acknowledged the underdevelopment of Malaysian law on this area: [2015] 2 CLJ 45, [118], approving the observation of A. W.-L. See, “An Introduction to the Law of Unjust Enrichment” [2013] 5 MLJ i.

³⁵ G. Virgo, “Demolishing the Pyramid—the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment” in A Robertson and HW Tang, eds., *The Goals of Private Law* (Oxford: Hart, 2009) 477, 484–86.

³⁶ G. Virgo, “Demolishing the Pyramid—the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment” in A Robertson and HW Tang, eds., *The Goals of Private Law* (Oxford: Hart, 2009) 477, 486.

³⁷ For the most notable call for a shift in direction, see P. Birks, *Unjust Enrichment*, 2nd edn (Oxford: OUP, 2005) Chs. 5–6.

³⁸ [2007] 1 AC 558..

³⁹ [2007] 1 AC 558, [156]–[157].

⁴⁰ See D. Sheehan, “Unjust Factors or Restitution of Transfers *Sine Causa*” (2008) Oxford U Comparative L Forum 1; C.D.L. Hunt, “Unjust Enrichment Understood as Absence of Basis: A Critical Evaluation with Lessons from Canada” (2009) Oxford U Comparative L Forum 6.

The unconscionability rule: a good faith defence in the shadow

Under the common law, a mistaken improver of another’s land will succeed in an unjust enrichment claim against the landowner only upon further proof that the landowner has acted in an unconscionable manner. This rule, famously applied by the Privy Council in *Blue Haven Enterprises Ltd v Tully*,⁴¹ was subsequently imported into English law by the Court of Appeal in *JS Bloor Ltd v Pavillion Developments Ltd*.⁴² Much criticism has since been directed at the rule, particularly the lack of authoritative support and the error of conflating the conceptually distinct concepts of unjust enrichment and proprietary estoppel.⁴³ It is interesting to note that while it was Goff and Jones who originally suggested that a restitution claim in the case of mistaken improvement to land should be more restricted than in cases of mistaken improvement to chattels,⁴⁴ the latest edition of the authoritative text has since retracted from that view.⁴⁵

These academic criticisms, unfortunately, failed to prevent the controversial rule from seeping into Malaysian law. In *Dream Property*, the Federal Court sought to factually distinguish the present case from *Blue Haven* and *Bloor*, where one of the reasons for denying restitution was because the respective landowners were found to have acted conscionably.⁴⁶ That the court found it necessary to do so amounted to implicit suggestion or assumption that the requirement of unconscionability applied to the present case. Despite its expressed preference for a more structured approach in addressing issues of unjust enrichment, the court failed to explain in which part of the four-stage inquiry is the requirement of unconscionability accommodated. Neither did the court consider the criticisms directed at the requirement. The practical implication of *Dream Property* is far-fetched. The way in which the Federal Court approached the unjust inquiry suggests that the requirement of unconscionability is of general application, i.e. not confined to cases of mistaken improvement to land.

In its effort to find for the Purchaser, however, the solution adopted by the Federal Court was to substantially lower the threshold for finding unconscionability on the Seller’s part. Although the Seller had sent a letter to the Purchaser in mid-October 2006 demanding that construction work be ceased, the Federal Court nonetheless found that the Seller had acted unconscionably for failing to revoke the power of attorney that was granted to the Purchaser and to try to obtain an injunction.⁴⁷ This implies that a landowner could escape being branded as having acted unconscionably only by taking some legally significant steps to prevent improvement to his land. In contrast, in *Blue Haven*, the plaintiff landowner was found to have acted conscionably simply because it attempted to inform the defendant of its prior interest in the land. The Federal Court’s decision therefore marked a

⁴¹ [2006] UKPC 17.

⁴² [2008] EWHC 724 (T.C.C.).

⁴³ See H.W. Tang, “An Unjust Enrichment Claim for the Mistaken Improver of Land” [2011] Conv. 8; K.F.K. Low, “Unjust Enrichment and Proprietary Estoppel: Two Sides of the Same Coin?” [2007] L.M.C.L.Q. 14; B. McFarlane, “Case Note: *Blue Haven Enterprises v Tully & Another*” (2006) 1 J. Eq. 156.

⁴⁴ Lord Goff and G. Jones, *The Law of Restitution*, 4th edn (London: Sweet & Maxwell, 1993) 166.

⁴⁵ C. Mitchell, P. Mitchell and S. Watterson, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) [9-04].

⁴⁶ [2015] 2 CLJ 45, [125].

⁴⁷ [2015] 2 CLJ 45, [125].

substantial softening of the unconscionability requirement, lowering the hurdle for an improver of land to succeed in an unjust enrichment claim.

The softening of the unconscionability requirement, however, does nothing to dilute the force of the existing criticisms directed at it. It shall be added here that the requirement is also inconsistent with the prevailing framework adopted by the law of unjust enrichment in balancing the interests of the parties. Hidden under the shadow of the unconscionability requirement is essentially a good faith defence. The defendant is allowed to resist an unjust enrichment claim by showing that he has acted in a conscionable manner, i.e. in good faith. This approach cannot be supported for at least two reasons.⁴⁸ Firstly, it is not apparent how the defendant’s good faith has any bearing on the basis of the plaintiff’s claim. In fact, it is inconsistent with the law’s general inclination to allow recovery by the plaintiff, which is evidenced by the fact that even the plaintiff’s carelessness in conferring the enrichment is regarded as irrelevant.⁴⁹ Secondly, to allow a windfall on the defendant purely because he has acted in good faith is overly generous. It is inconsistent with the law of unjust enrichment’s primary method of balancing the parties’ interests, that is the change of position defence, under which an unjust enrichment claim is generally limited only by the defendant’s disenrichment. Whether the defendant has acted in good faith or in an unconscionable manner only goes to determine whether the change of position defence should be made available to him.⁵⁰ Given these concerns, the Federal Court is implored to abolish the unconscionability rule at the next available opportunity.

Counter-restitution as a pre-condition to recovery

A final point of curiosity lies in the Federal Court’s order that vacant possession of the land is to be returned to the Seller only upon it paying to the Purchaser the market value of the Mall.⁵¹ Counter-restitution is usually imposed as a pre-condition to recovery in cases involving rescinded contract⁵² or in exchange cases,⁵³ of which *Dream Property* is neither in so far as the Mall is concerned.⁵⁴ It is submitted that imposing such pre-condition in *Dream Property* is arguably inappropriate for there is a possibility of causing injustice to the Seller, who is an innocent party. For example, if the Seller could not afford to pay the market value of the Mall out of its own pocket, the consequence of the pre-condition would be to deprive the Seller of its own land indefinitely. Mutual restitution would be better facilitated by ordering an

⁴⁸ See P Birks, “The Role of Fault in the Law of Unjust Enrichment” in W. Swadling and G. Jones, eds., *The Search For Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 235.

⁴⁹ *Kelly v Solari* (1841) 9 M & W 54 at 59; affirmed in *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262; *Green Continental Furniture (M) Sdn Bhd lwn Tenaga Nasional Bhd* [2011] 8 MLJ 394; *The Royal Bank of Scotland Bhd v Seng Huah Hua* [2013] 9 MLJ 681.

⁵⁰ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580. See also *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain* [2011] 2 CLJ 545; *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787.

⁵¹ [2015] 2 CLJ 45, [160].

⁵² See e.g. *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors* [2015] 1 CLJ 309. Here a contract for the sale of land was rescinded by the purchaser on the ground of the Seller’s misrepresentation. The Federal Court held that the seller’s right to recover the land was pre-conditioned upon it refunding to the purchaser the purchase money.

(the contract was rescinded for misrepresentation).

⁵³ See e.g. *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All E.R. 890.

⁵⁴ In *Lexane Pty Ltd v Highfern Pty Ltd* (1985) 1 Qd R 446, which the Federal Court relied on, there was no suggestion that such a pre-condition was imposed.

immediate return of the vacant possession of the land to the Seller, allowing the Seller to raise the required money either by selling or mortgaging the land. Furthermore, as has been said in relation to the timing of assessing the Seller's enrichment, to deny the Seller of the ability to effect restitution by selling the Mall is inconsistent with the realisable benefit test, which was adopted by the Federal Court.

Concluding remarks

The *Dream Property* case is to be celebrated for two reasons. In Malaysia, it is the first case in which the highest court formally recognised and stressed the importance of the law of unjust enrichment. In this regard the case acquires a landmark status, inviting greater attention to the subject and paving the way for its future developments. More importantly, the case marks a rare occasion where Malaysian contribution is finally seen at the forefront of development in the law of unjust enrichment. Although the Federal Court's decision may be criticised for having gone too far in favouring the mistaken improver in certain aspects, it adds a different perspective to the debate, contributing to the continuing endeavour to achieve an appropriate balance between the interests of the landowner and the mistaken improver.