SECTION 1 INTRODUCTION

A. Development of restitution

(1) Law of restitution deals with the principle against unjust enrichment and historically overlaps with the law of contract and tort

19.1.1 The law of restitution is a very young subject in the common law, compared to the law of contract and torts. The law of restitution may loosely be described as the law dealing with the principle against the unjust enrichment of the defendant at the expense of the plaintiff. There is much in the historical common law and principles of equity where unjust enrichment has been or could have been the justificatory explanation. But the history of the forms of action in the common law obscured many of the real bases of various causes of action. Authors from the eighteenth century investigated many of the historical cases and managed to carve contract and torts out of them as distinct intellectual disciplines. Few of the early authors ventured beyond this into the residuary case law. Early writings tended to concentrate on "quasi-contracts" because the form of action used in the common law to impose an obligation on the defendant to return an enrichment to the plaintiff had been borrowed from that used for enforcing implied promises to pay in contract, and in the typical development of the early common law through the technique of fictions, the lack of agreement could not be traversed by the defendant.

(2) Recognition of unjust enrichment as an independent source of law of obligations

19.1.2 The contract-like appearance of the cause of action was eventually shed, and the principle against unjust enrichment was explicitly recognised judicially as a distinct source of the law of obligations independent of contract and torts by the House of Lords in England in 1991 (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548). The Singapore Court of Appeal took the same momentous step in 1995 (*Seagate Technology Pte Ltd v Goh Han Kim [1994] 3 SLR(R) 836*). This was more of an evolutionary step than a revolution. It meant that a large pool of historical cases can now be officially explained by the principle against unjust enrichment. A claim based on this principle still depended on the piecemeal development of case law, but with a clearer and modern explanation. It has also been recognised that "restitution" describes a response to an event – usually "unjust enrichment" – which defines the claim, but it could also be a response to a wrong (*Alwie Handoyo v Tjong Very Sumito [2013] 4 SLR 308*).

(3) Chapter only intends to outline restitutionary claims likely to be encountered in the context of a contractual relationship

19.1.3 In the common law world, there is an enormous amount of academic debate and literature on the shape, size and content of the subject; this is due largely to the amorphous nature of the historical case law and the lack of modern judicial elucidation in view of the relative youth of the subject. The question of its independent existence is still moot in some common law countries. The objective of this chapter is very modest. It is only intended to outline the kinds of restitutionary claims that could arise in situations that parties who are, have been, or intend to be, in a contractual relationship are likely to encounter.

B. Elements of the Claim

19.1.4 Generally, the plaintiff would succeed in a claim for restitution if, within the limits of precedent (which could be expanded incrementally), it can be shown that: (1) the defendant had been enriched; (2) the enrichment was at the expense of the plaintiff; (3) the enrichment was unjust; and (4) there are no relevant defences to the claim (*Skandinaviska Enskilda Banken AB (Publ) Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2011] 3 SLR 540*).

C. Comparing restitutionary and contractual remedies

19.1.5 Where a contract has been rescinded for misrepresentation, duress, undue influence, or unconscionability, the parties are required to make mutual restitution to restore one another as far as possible to the position before the contract was made (*restitutio in integrum*). This can be seen as an aspect of the law of restitution to prevent unjust enrichment, but can also be seen as the working out of the consequences of rescission within the law of contract, as well as the law of property, since rescission can also involve the revesting of property transferred under the contract.

SECTION 2 SPECIFIC INSTANCES OF RESTITUTIONARY CLAIMS

A. Money paid under a contract: recoverable under contractual agreement of by showing total failure of consideration

19.2.1 A contracting party may be able to sue for the recovery of money paid under a contract based on an express or implied contractual agreement to repay the sum in the circumstances, in which case the action is entirely contractual. Alternatively, the action for the recovery of money paid may be restitutionary if the party can show that there has been a total failure of consideration (*Parkway Properties Pte Ltd v United Artists Theatre Pte Ltd [2003] 2 SLR(R) 103*; *Ooi Ching Ling Shirley v Just Gems Inc (No 2) [2003] 1 SLR(R) 14*). Consideration in this context does not mean contractual consideration. The inquiry in every case is whether the promisor has performed any part of the contractual duties in respect of which the payment is due (*Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574). Moreover, the requirement of the totality of failure is not as strict as it sounds, as there can be total failure of a severable or discrete part of the consideration. It appears that the party in breach of contract may also avail himself of this action (*Dies v British and International Mining and Finance Co Ltd* [1939] 1 KB 724; *Rover International Ltd v Cannon Film Sales Ltd* (No 3) [1989] 1 WLR 912), subject, of course, to potential counterclaims for damages for breach of contract.

B. Services conferred under a contract: generally recoverable except where claimant is party in breach

19.3.1 In theory, the position should be the same whether the benefit conferred is monetary or non-monetary. However, the law is less clear in respect of contracts terminated by breach where the plaintiff, who is claiming restitution for non-monetary benefits conferred on the defendant, is in fact the party in breach of the contract. Although such a plaintiff is not barred from making a restitutionary claim in principle (Miles v Wakefield Metropolitan District Council [1987] AC 539), such a plaintiff is not likely to attract the sympathy of the court, and there is a concern that a contracting party in such a position may abuse a position of strength by refusing to complete a contract. Techniques have therefore been used to defeat the claim. For example, the court may refuse to recognise a benefit where the defendant who had asked for full performance only obtained partial performance. Where there is a lump sum contract, the court may hold the parties to the risk allocation in the contract and leave the parties to their contractual remedies, with no remedy in restitution.

C. No double recovery

19.4.1 There is in any event a prohibition against double recovery. While in theory an innocent party can recover both damages for breach of contract and restitution of benefits conferred for total failure of consideration, double-counting or double recovery for what is effectively the same loss is not permitted. Thus, for example, if the plaintiff has paid a price for services which were not provided, a claim for damages for breach of contract must take account of the price of the plaintiff's expectancy, so that if the plaintiff sues for restitution of the price as well, the damages for breach of contract must be reduced accordingly (*Baltic Shipping Co v Dillon* (1993) 176 CLR 344).

D. Frustrated contracts: governed by the Frustrated Contracts Act

19.5.1 Although the principles discussed above apply to the case of a contract terminated by frustration, where the Frustrated Contracts Act (Cap 115, 1985 Rev Ed) applies, the common law has been modified. The statutory provision goes beyond the common law not only in not requiring total failure of consideration for restitution, but also in directing the court to allocate losses in the form of wasted expenditure incurred in the course of performing the contract. The statute provides that once a contract is frustrated, all sums payable to any party in pursuance to the contract before its discharge would cease to be payable and all sums paid shall be recoverable by the payor, subject, however, to the court's discretion to make deduction for expenses incurred by the payee before discharge for the purpose of performing the contract. It also provides for the restitution for non-monetary benefits conferred before the discharge, subject also to the court's discretion to make deductions taking into account the expenses incurred by the benefited party for the purpose of the performance of the agreement, as well as the effect of the frustration on the benefit itself.

E. Anticipated contracts that fail to materialise: recoverable if basis of enrichment is unjust

19.6.1 In the course of negotiating a contract, the negotiating parties may confer benefits on one another, but the anticipated contract may subsequently fail to materialise. It may be possible to base a restitutionary cause of action for such benefits. It will have to be shown that the defendant had indeed received a benefit. Services rendered must have economic value and be such that they merit remuneration (*Grossner Jens v Raffles Holdings Ltd [2004] 1 SLR(R) 202*). It is usually easy to demonstrate that the enrichment is at the expense of the plaintiff. It is more difficult to find that the basis of the enrichment is unjust. It will be unjust if there had been a total failure of consideration in respect of the conferred benefit, and possibly if the benefit had been freely accepted while there had been a reasonable opportunity to reject it. Claims based on total failure of consideration are not necessarily confined to cases where there is an actual contract between the parties (*Roxborough v Rothmans of Pall Mall Australia Ltd Australia Ltd* (2001) 208 CLR 516). However, the fault of a party in causing the negotiations to fail may be a relevant factor in determining liability (*Cendekia Candranegara Tjiang v Yin Kum Choy [2002] 2 SLR(R) 283*).

F. Void or unenforceable contracts: recoverable unless doing so undermines objectives of law that makes contract void or unenforceable in the first place

19.7.1 If a contract turns out to be unenforceable or void, then money paid under it may be recoverable. The enrichment of the defendant is no less unjust if he is not obliged to perform his obligations under the contract. Of course, in such cases, it is likely that there will be cross-claims from both sides. Restitution has been allowed where the contract turns out to be void because it was ultra vires the powers of one of the parties to enter into such a contract (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669). If services have been conferred under a contract that turns out to be void for failure to comply with formalities, the defendant who stands on his lack of legal (contractual) obligation to pay the contract price could nevertheless be liable in restitution for the value of the services conferred (*Pavey & Matthews v Paul* (1986) 162 CLR 221). The basis of recovery is likely to be total failure of consideration, mistake of fact or law, possibly the free acceptance of benefit while there had been a reasonable opportunity to reject it, or perhaps absence of consideration (here not meaning contractual consideration but the absence of a legal reason for the conferment of the benefit). However, restitution would be denied if the award of restitution would undermine the objectives of the law which make the contract void or unenforceable in the first place.

SECTION 3 RISK ALLOCATION AND RECOVERY OF DEPOSITS

A. Restitution not allowed if risks are pre-allocated

19.8.1 In all the cases above, whether the restitutionary claim is in respect of money or services conferred in relation to a contract, generally the contract must have been non-existent, void or unenforceable, or if valid must have come to an end by frustration, termination or rescission (*Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd [2000] 3 SLR(R) 386*). However, this may not be a universal rule (*Roxborough v Rothmans of Pall Mall Australia Ltd Australia Ltd* (2001) 208 CLR 516). The

courts will not allow a restitutionary action where it will upset the allocation of risk by the parties in a subsisting contract (*Ngee Ann Development Pte Ltd v Nova Leisure Pte Ltd [2003] SGHC 168*). This applies also where there is evidence of agreement as to the allocation of risk even if it does not amount to a contractual agreement (*Grossner Jens v Raffles Holdings Ltd [2004] 1 SLR(R) 202*). In addition, if the defendant is willing to provide the consideration bargained for by the plaintiff in spite of the absence of a valid and enforceable agreement, it would not lie in the mouth of the plaintiff to complain that the consideration for his payment has failed (*Thomas v Brown* (1876) 1 QBD 714), unless there is a legal impediment to the proffered performance of the defendant. Similarly, the court will not allow a restitutionary claim by a director against a company for services rendered to the company where to do so would contradict the articles of association of the company which have pre-allocated the risks (*Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd [2005] 1 SLR(R) 45*). Where there is no applicable contractual allocation of risk, the issue of risk allocation may still arise in the form of the question whether the plaintiff intended the defendant to have the benefit of the enrichment in all events, ie, whether the plaintiff has voluntarily assumed the risk of the vitiating factor occurring; this is a question of fact in every case (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2011] 3 SLR 540*).

B. Deposits generally non-recoverable: unreasonable sums may be treated as advance part-payment and made recoverable

19.9.1 The risk allocation principle is seen most clearly in the law relating to the recovery of deposits. A deposit is earnest money, intended to secure the performance of the contract. The party in breach of a contract cannot recover a lawfully forfeited deposit even if total failure of consideration can be demonstrated. It has been said that the deposit is invariably irrecoverable at common law (*Lee Chee Wei v Tan Hor Peow Victor [2007] 3 SLR(r) 537*). On the other hand, other authorities support the proposition that if the deposit is an unreasonable amount, it will not be considered genuine earnest money, but will be treated as advance part-payment (Linggi Plantations Ltd v Jagathesan [1972] 1 MLJ 89; Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573); Polyset Ltd v Panhadat Ltd [2002] 3 HKLRD 319; *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd [2001] 1 SLR 370*) which is recoverable if a restitutionary basis can be made out.

SECTION 4 RESTITUTIONARY CLAIMS AGAINST MINORS

A. General age of majority for contractual capacity is 18

19.10.1 The age of majority for individuals under Singapore law is 18 for most types of contracts, though it remains at 21 for certain contracts relating to land. Depending on the type of contract, a contract with a minor may be: (i) valid (if it is for necessaries or it is a contract of service to the benefit of the minor), or (ii) valid but subject to repudiation by the minor before or shortly after reaching the age of majority (eg, contracts concerning land, shares in companies, or partnership), or (iii) unenforceable against the minor unless it is ratified upon reaching the age of majority.

B. Restitutionary claims against minors governed by the Minor Contracts Act

19.10.2 If the minor chooses to repudiate the second type of contract, or not to ratify the third type of contract, he may be liable in restitution. However, because a restitutionary claim against the minor may amount to an indirect enforcement of the contract, the common law is rather restrictive, and will require either fraud or other wrongdoing on the part of the minor. Having said that, it should be noted that the Minor Contracts Act (Cap 389, 1994 Rev Ed) supplements the common law. Under the statute, the court may, in its discretion, require the defendant who is not liable on a contract on the basis of minority to transfer any property acquired under the contract or any property representing it, if it is just and equitable to do so.

C. Minors may bring a claim in restitution, but minority alone is insufficient grounds to hold enrichment as unjust

19.10.3 Where the contract cannot be enforced, the minor may also claim in restitution in respect of benefits conferred on the other party under the contract. The minority of the party providing the benefit in itself does not make the conferment of the enrichment an unjust one, and the minor has to establish other grounds to seek restitution, eg, total failure of consideration. However, additional protection is provided to the minor in that the minor can make out a claim for total failure of consideration even if the other party stands ready to perform his part of the bargain, and even if the (unenforceable) agreement of the parties was that money had been paid by the minor as a deposit to secure the minor's performance of the contract.

SECTION 5 RESTITUTION FOR BREACH OF CONTRACT

A. Account of profits may be available as an equitable remedy

19.11.1 The normal remedy for breach of contract is damages: monetary compensation to place the plaintiff in a position as if the contract had been performed. However, in exceptional circumstances, the court may in its discretion order the defendant to account for the profits made from the breach of contract (A-G v Blake [2001] 1 AC 268; *Teh Guek Ngor Engelin v Chia Ee Lin Evelyn [2005] 3 SLR(R) 22*). This appears to be an equitable remedy. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision that has been breached, the circumstances and consequences of the breach and the circumstances in which the relief is sought. It is not enough that the breach was cynical, or that the defendant had done the very thing he had promised not to do, or that the defendant had gained savings from the failure to perform. One important and useful guide is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

B. Proportion of profits based on a sliding scale of what is a reasonable sum

19.11.2 It would appear that exceptional circumstances could be a sliding scale. In some less severe exceptional circumstances, the court may award a proportion of the defendant's profits instead of the whole, eg, on the basis of a reasonable fee as a price to be paid to be allowed to commit the breach (*Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER Comm 830). The court can also grant damages on the basis of a reasonable fee under the statutory jurisdiction to award damages in lieu of an injunction (Supreme Court of Judicature Act, (Cap 322, 1999 Rev Ed), s 18(2), First Schedule at para 14, and *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798). It also appears that common law damages may also be obtained on the same basis (ie, reasonable fee) (awarded in the alternative in *Experience Hendrix LLC v PPX Enterprises Inc*, above).

SECTION 6 DEFENCES

A. Change of position: where restitution is inequitable due to a bona fide change of position

19.12.1 There are several defences which are specific to claims in restitution for unjust enrichment. The most important one is the defence of change of position. This defence was legally acknowledged at the same time as the court recognised the law of unjust enrichment as an independent branch of the law. The defence is made out if (1) the payee has changed his position; (2) the change is bona fide; and (3) it would be inequitable to require the payee to make restitution or restitution in full (*Seagate Technology Pte Ltd v Goh Han Kim [1995] 3 SLR 836*). Expenditure in reliance on an anticipated receipt of a benefit can constitute change of position

(*Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd [2003] 1 SLR(R) 791*). The anticipated receipt need not be imminent; the question in every case is whether there is a casual link between the receipt and the change of position (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2011] 3 SLR 540*).

19.12.2 In addition, the change of position defence is not available to a wrongdoer (Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548; *Seagate Technology Pte Ltd v Goh Han Kim [1995] 1 SLR 17*). It is not clear whether this includes a party in breach of contract, as liability for breach of contract is generally strict. In the analogous context of restitution for wrongs, specifically a claim for restitutionary damages for trespass to land which is a strict liability tort, it has been held that the change of position defence is available although it may of course be defeated if the defendant had not been acting in good faith (*Cavenagh Investment Pte Ltd v Kaushik Rajiv [2013] 2 SLR 543*). In any event, it is unlikely to be available at least in cases of egregious breaches of contract which constitute the exceptional cases where account of profits may be ordered.

B. Contract of compromise between parties defeats restitutionary action

19.12.3 A contract of compromise between the parties in respect of the validity of the conferment of the benefit will defeat any restitution action in relation to that benefit. The court will hold the parties to their contractual promises unless the contract itself is vitiated, unenforceable or void (*The Info-Communications Development Authority of Singapore v Singapore Telecommunications Ltd [2002] 2 SLR(R) 136*).

C. Restitutionary action may be barred in interest of finality of transactions

19.12.4 In the interest of finality of transactions, if a party confers a benefit with the intention of making a gift, or while waiving any inquiry into the basis of the transfer, or with the intention to resolve a dispute where both parties are acting bona fide even if no contract of compromise is in fact formed, no restitutionary action will be allowed in respect of that benefit (*Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd [2002] 1 SLR(R) 418*).

D. Detrimental reliance on a representation may give rise to estoppel by representation

19.12.5 If the party conferring the benefit has made a representation to the recipient of the benefit going to the validity of the basis of the conferment of the benefit, and the recipient has relied on the representation to his detriment, this may create an estoppel against a restitutionary claim. However, the estoppel defence may not be applicable where the change of position defence is available (*Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd [2002] 1 SLR(R) 418*). This is apparently because the estoppel defence is an unwieldy all or nothing defence and has been superseded by the modern change of position defence, which does not require a representation and which examines the quantum of enrichment for which the defendant should be liable.

E. Illegality may defeat a restitutionary claim unless there is voluntary withdrawal from illegal enterprise

19.12.6 At common law, a restitutionary claim may be defeated by the plaintiff's involvement in an illegality. This illegality bar may not operate if the plaintiff has made a mistake, or if the plaintiff is substantially less blameworthy than the defendant in the illegality (*Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865). There is a class of restitutionary claims apparently founded on repentance of the plaintiff, which allows a party who withdraws from an illegal enterprise before the illegal purpose has been substantially achieved to sue for the restitution of benefits conferred on another party to the enterprise. The repentence must be voluntary. There is no need for repentence to be genuine at least if this refers to subjective feelings of remorse (*Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865). In addition, there may be specific statutory provisions which could expressly or impliedly make it illegal or against public policy for restitution to be effected.