Christopher Bathurst Prize 2018
Question

IN THE MATTER OF INTENDED ACTIONS BETWEEN
SIR MICHAEL "MICK" MOON AND COOL THE PLANET

INSTRUCTIONS FOR
COUNSEL TO ADVISE

Instructing Solicitors act on behalf of the well-known, albeit ageing, rock star Sir Michael "Mick" Moon, who believes passionately in supporting environmental causes. In November 2017 Sir Mick gave money to a charity by the name of Cool the Planet, and two individuals, in the following circumstances.

Cool the Planet is an umbrella charity which exists to promote international efforts to reduce global warming, and has branch organisations operating under that name around the world, including in the UK and in Singapore. In October 2017, Sir Mick approached a senior employee of Cool the Planet (UK), a Mr Warm, saying that he believed he could help promote the work of the charity if he were made an honorary ambassador for it, and that he was prepared to pay £100,000 to Cool the Planet (UK), and £20,000 to Mr Warm "on the side", if he could procure that for him. Mr Warm said he thought that could be achieved given his position of influence within the organisation, and so on 3 November 2017, Sir Mick transferred £100,000 to Cool the Planet (UK) and £20,000 separately to Mr Warm.

Encouraged by what Mr Warm had said, and being a man with global ambitions, Sir Mick thought it would be a nice idea to get himself appointed an honorary ambassador in Singapore for Cool the Planet (Singapore) as well. Shortly after making the payments in England, therefore, Sir Mick travelled to Singapore where he met a senior official of the charity there (a Mr Wennuan). After a short discussion in which he offered to give SGD150,000 to Cool the Planet (Singapore), and SGD30,000 to Mr Wennuan "on the side", if he could get him appointed an honorary ambassador, Mr Wennuan said he thought that could be arranged since he knew the local trustees very well. On 20 November 2017, therefore, Sir Mick transferred SGD150,000 to Cool the Planet (Singapore) and SGD30,000 to Mr Wennuan.

Unfortunately, in December 2017, Mr Warm contacted Sir Mick to say that he had approached the trustees of Cool the Planet (UK) with the proposal, but that they had taken the view that a sanctimonious and ageing rock star was not quite the image they cared for in a high-profile position like honorary ambassador. They had therefore turned down the proposal point blank. However, when Sir Mick asked for the return of the money he had paid to Cool the Planet (UK) and Mr Warm, Mr Warm said that he was sorry but that would not be possible. He had, after all, tried his best.

Taking umbrage at this gross slight to his character, and the refusal to return his money, Sir Mick resolved that there was no way he was going to support any organisation that behaved in such a shoddy way. He telephoned Mr Wennuan in Singapore, therefore, and said that he no longer had the slightest wish to be an honorary ambassador for Cool the Planet (Singapore), and wanted the return of the SGD150,000 he had paid to the charity and the SGD30,000 paid to Mr Wennuan "on the side". Mr Wennuan said that it was OK by him if Sir Mick no longer wanted the position, but that there was no way he was going to get his money back.

Sir Mick is incandescent about the way he has been treated, and wants to sue Cool the Planet (UK) and Mr Warm in England, and Cool the Planet (Singapore) and Mr Wennuan in Singapore, for the return of his money. Counsel is requested to provide a short-written opinion on his prospects of success.

Christopher Bathurst Prize Submission 2018
Tan Ee Kuan

Summary

1 I advise that the intended actions against Cool the Planet ("CTP") (UK), CTP Singapore and Mr Wennuan will likely fail. A claim against Mr Warm has some prospects of success. However, Sir Mick should not sue Mr Warm or any of the potential defendants. Doing so would expose him to criminal liability. Moreover, even if he succeeded against Mr Warm and Mr Wennuan, the fruits of his victory are liable to be confiscated by the authorities.

Overview

2 To recover his monies, Sir Mick may bring claims in unjust enrichment for restitution of the sums transferred. I address the claims in turn.

The English defendants

Mr Warm

3 A claim against Mr Warm has some prospects of success, but there are difficulties.

Enrichment

4 First, it is unclear whether Mr Warm has been enriched. He has received £20,000 from Sir Mick. But this was a bribe. As CTP (UK)'s agent, Mr Warm held the bribe on constructive trust for CTP (UK) upon receipt: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250. In *Bellis v*

Challinor [2015] EWCA Civ 59 ("*Bellis*"), Briggs LJ held at [114] that where monies were held on trust upon receipt, the recipient was not enriched. Hence, Mr Warm was arguably not enriched: Paul S Davies, "Illegality in Equity" in *Defences in Equity* (Hart Publishing, 2018) ("*Davies*") at pp 258–259.

5 However, the reasoning in *Bellis* is questionable. It seems to conflate factual enrichment (the receipt of benefits with an economic value) with legal enrichment (the receipt of a legal right or discharge of an obligation): the former should suffice to establish enrichment: Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ("*Virgo*") at p 73. *Bellis* is also hard to square with the controversial but predominant view under English law that the defence of ministerial receipt only applies if there was payment over to the principal, even if the agent was liable from the moment of receipt to account for the benefit to the principal: Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") at para 28-08. I thus advise that Mr Warm has been enriched in the sum of £20,000 at Sir Mick's expense.

Unjust factor

6 The most promising unjust factor seems to be failure of basis:

(a) Mistake does not apply: a false belief regarding a *present fact* is necessary (*Pitt v Holt* [2013] 2 AC 108 at [104]); whereas it seems that, at

most, Sir Mick paid out believing he would secure the appointment, *ie*, under a misapprehension regarding *a possible future event*.

(b) The *locus poenitentiae* doctrine probably does not apply:

(i) The orthodox view is that the doctrine only applies if the illegal purpose has not been substantially carried out. Although Lord Neuberger and the minority in *Patel v Mirza* [2017] AC 467 ("*Patel*") rejected this requirement (at [169], [197], [220] and [253]), Lord Toulson, delivering the majority's judgment, did not address the doctrine. The orthodox view was affirmed by the Court of Appeal in *Patel* and thus appears to represent the law: *Goff & Jones* at paras 25–23 and 25–24.

(ii) The illegal purpose of the agreement with Mr Warm can be described in various ways. Yet unless the purpose is cast very restrictively as "securing the honorary ambassadorship" – and it seems unlikely that an English courts will do so, by analogy from *Q v Q* [2008] EWHC 1874 – the purpose has likely been substantially carried out, since Mr Warm has taken significant steps to procure Sir Mick's appointment.

7 Failure of basis therefore seems the most promising unjust factor. What is critical here is the precise agreement Sir Mick struck with Mr Warm, for this will determine the basis of the payment. There are two main possibilities:

(a) Mr Warm agreed to *attempt* to procure the appointment. If the agreement was such, a claim against Mr Warm will likely fail since he did attempt to secure the appointment; there has been no failure of basis.

(b) Mr Warm agreed to *secure* the appointment. If the agreement was such, there has been failure of basis.

8 More information is necessary to determine whether the agreement was (a) or (b). At present, the possibilities seem evenly balanced. On one hand, Mr Warm may not have agreed to *secure* the appointment given that he was only a senior employee, whereas the final decision lay in the hands of the trustees. On the other hand, it seems he emphasised his position of influence, which suggests that both parties may have contemplated that he *would* succeed in procuring the appointment, and the payment made on this basis.

Defence of illegality

9 Two questions arise:

(a) First, was Sir Mick's agreement with Mr Warm illegal?

(b) Second, even if it was illegal, will this bar Sir Mick's claim?

Illegality of the agreement

10 Sir Mick's agreement with Mr Warm was likely illegal, both at common law and under the Bribery Act 2010 (UK) (c 23) ("BA"), because it involved a bribe.

11 First, an agreement that entails the payment of a bribe is probably illegal at common law. In *Walker v Chapman* (1773) Lofft 342 ("*Walker*"), the plaintiff paid a bribe to the defendant, a page to the King, who agreed to procure a place in the Customs for the plaintiff in return. Lord Mansfield awarded restitution of the bribe, but plainly considered that the contract was illegal. Although the bribe in *Walker* was given to influence the decision of a public official, Lord Toulson observed in *Patel* at [118] that "[b]ribes *of all kinds* are odious and corrupting [emphasis added]", plainly envisioning that any agreement entailing payment of a bribe would violate public policy (see also *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 at [92], *per* Hamblen J).

12 Second, in paying and receiving a bribe, Sir Mick and Mr Warm likely committed crimes under ss 1 and 2 of the BA.

Effect of illegality

13 Nevertheless, it is unlikely that Sir Mick's claim against Mr Warm will fail by reason of the defence of illegality.

14 First, Lord Toulson expressly suggested in *Patel* that a bribe would be recoverable in restitution (at [118]). Again, both Lords Toulson and Neuberger cited *Walker* (see [11] above) – where restitution of the bribe was allowed – without criticising that decision (at [98], [115] and [147]).

15 Second, under the framework laid down by Lord Toulson in *Patel*, in determining whether the defence of illegality applies, the court will consider, *inter*

alia: (1) whether allowing/denying the claim would stultify/further the policy underlying the rule rendering the contract illegal and (2) whether denying the claim would be proportionate to the illegality: *Patel* at [120]; *Goff & Jones* at para 35-02. Applying this framework here:

(a) *Factor (1)*: The Supreme Court in *Patel* considered that a claim for restitution of a sum paid under an illegal contract would generally carry little risk of stultification, since its effect would be to unwind the prohibited transaction (rather than to enforce it): *Patel* at [115], [199] and [268]; *Goff & Jones* at para 35-41.

(b) *Factor (2)*: Factors relevant to factor (2) are the seriousness of the conduct, whether there is a marked disparity in the parties' respective culpability, and the likelihood of criminal confiscation: *Patel* at [107]–[108]. As for the seriousness of the illegality, a bribe involves less moral turpitude than drug trafficking or hiring a contract killer, the cases Lord Toulson had in mind where a court would refuse restitution: *Patel* at [116]. There is no marked disparity in the culpability of Sir Mick (giving a bribe) and Mr Warm (accepting a bribe). Moreover, if the bribe comes to light, it is likely to be confiscated under the Proceeds of Crime Act 2002 (c 29) (UK) ("the POCA") (I return to this point at [38] below).

Therefore, under the *Patel* framework, it is unlikely that a claim against Mr Warm will be barred by the defence of illegality.

16 In sum, a claim against Mr Warm has some prospects of success though much will depend on the agreement with Mr Warm in respect of which further information is necessary (see [8] above). Nonetheless, for the reasons given at [38] below, I advise Sir Mick not to sue Mr Warm.

Claim against CTP (UK)

17 CTP (UK) has clearly been enriched at Sir Mick's expense in the sum of £100,000. However, Sir Mick's prospects of success against CTP (UK) are slim, because it does not appear that any unjust factor applies.

18 The most promising unjust factor again appears to be failure of basis. To establish failure of basis, Sir Mick would probably have to plead and prove his agreement with Mr Warm, to demonstrate that he paid CTP (UK) on the basis that he would become honorary ambassador. (Without pleading the agreement, it would appear that the payment to CTP (UK) was a gift, paid because Sir Mick believes in the environmental cause CTP (UK) promotes. A gift would be a legally effective basis for the transfer that would bar the claim: *Virgo* at p 148.) However, it is unclear that the agreement will aid Sir Mick against CTP (UK).

19 First, although more information on the agreement is necessary (see [8] above), it does not seem that Sir Mick paid CTP (UK) on the basis that he would become honorary ambassador. The payment to CTP (UK) seems importantly different from the payment in *Parkinson v College of Ambulance* [1925] 2 KB 1

("*Parkinson*"). In *Parkinson*, the plaintiff, relying on a representation by the secretary of a charity, donated a sum to the charity on the understanding that he would receive a knighthood in return. There was just one payment, made to the charity, to "buy" a knighthood. There was thus a clear failure of basis when the knighthood did not materialise: *Virgo* at p 330. By contrast, it does not seem that Sir Mick paid CTP (UK) to "buy" the appointment in so direct or crude a fashion. Critically, he paid a sum to Mr Warm "on the side". This indicates that he knew he could not simply "buy" the position by donating a sum to CTP (UK). It seems that the purpose of the payment was to sweeten the proposal Mr Warm was to make to the trustees: the plan was for Mr Warm to point to Sir Mick's ostensible generosity in proposing his appointment. If this is right, the payment was probably made merely in hope of, but not on the basis of, the appointment.

20 Second, CTP (UK) was not party to the agreement between Sir Mick and Mr Warm. This is relevant because the orthodox view is that failure of basis only applies if the parties shared a *joint* understanding that the recipient's right to retain the benefit was conditional: *Goff & Jones* at para 13–02, citing *Burgess v Rawnsley* [1975] 1 Ch 429, 442. Sir Mick may seek to address this as follows:

(a) *Denying the requirement*: First, he may deny that failure of basis requires a joint understanding of the basis, citing *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176 ("*Menelaou*") at [21] and *Swynson Ltd v Lowick Rose llp* [2018] AC 313 ("*Swynson*") at [30] where Lords Clarke and Sumption respectively suggested that a shared understanding of the

basis is unnecessary. But such an argument would be unpromising. A joint understanding of the basis is fundamental to failure of basis: *Goff & Jones* at para 13–05. Significantly, *Menelaou* and *Swynson* were both subrogation cases and Lord Sumption observed in *Swynson* at [30] that such cases are *sui generis*. It thus seems unlikely that the *dicta* in these cases will be extended beyond subrogation cases to the present facts.

(b) *Establishing the requirement*: Second, Sir Mick may argue that (1) Mr Warm knew that Sir Mick paid CTP (UK) on the basis that he would be appointed honorary ambassador and (2) this knowledge should be imputed to CTP (UK), Mr Warm's employer. Nevertheless, such an argument would be flawed for two reasons:

(i) First, a principal is usually only imputed with knowledge acquired by an agent in the performance of an authorised role for the principal: Peter Watts, "The acts and state of knowledge of agents as factors in principals' restitutionary liability" [2017] LMCLQ 385, 395. Although the facts are not entirely clear, it does not seem Mr Warm was carrying out any authorised role for CTP (UK) in meeting Sir Mick: he was acting "on the side".

(ii) Second, even if Mr Warm was performing an authorised role, it is unlikely that his knowledge – of an arrangement made in breach of Mr Warm's fiduciary duties to CTP (UK) – would be imputed to CTP (UK) for the benefit of Sir Mick. Sir Mick was no

innocent third party. He induced the very wrongful transaction knowledge of which he seeks to impute to CTP (UK). Imputation is unlikely to apply in this context: *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 at [207], *per* Lords Toulson and Hodge (considering the converse case where the principal sues the third party for being an accessory to the breach of fiduciary duty.)

21 Hence, Sir Mick will struggle to prove failure of basis to found a claim against CTP (UK). Such a claim would therefore have low prospects of success.

Claims against the Singapore defendants

Mr Wennuan

Enrichment

22 The issue noted at [4] above regarding whether Mr Warm was enriched might also arise in Singapore in a claim against Mr Wennuan: under Singapore law, an agent also holds a bribe on constructive trust for the principal: *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312. However, I advise that Mr Wennuan was likely enriched in the sum of $30,000 at Sir Mick's expense for the reasons given at [5] above.

Illegality

23 Under the framework laid down in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* ("*Ochroid*"), the

first issue is whether the agreement with Mr Wennuan was illegal. I advise that it was. An agreement that entails paying a bribe, but which does not compromise public duties, has yet to be held to be against public policy in Singapore (*The Law of Contract in Singapore*) (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 13.110). However, paying and receiving a bribe is criminalised under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed).

24 Sir Mick may seek to recover the bribe in two ways (*Ochroid* at [176(b]):

(a) by establishing that the *locus poenitentiae* doctrine applies; or

(b) by establishing that another unjust factor applies *and* meeting the defence of illegality.

The locus poenitentiae doctrine

25 This doctrine probably does not apply. Unlike the position in England (see [6(b)(ii)] above), Sir Mick withdrew from the agreement before the illegal purpose was substantially carried out. But critically, it does not seem he did so out of genuine repentance. He did not withdraw from the agreement because he regretted the bribe; he merely stopped wishing to be affiliated with CTP. This is crucial because in *Ochroid*, the Court of Appeal indicated that repentance is required for the *locus poenitentiae* doctrine to apply, on the basis that the rationale of that doctrine is to encourage withdrawal from illegality (at [173]–[175]).

A separate unjust enrichment claim

Failure of basis

26 For reasons similar to those given at [8] above, Sir Mick may be able to establish that the basis of the payment was that he would become ambassador of CTP (Singapore), an event that will not now materialise.

27 Moreover, even if Mr Wennuan simply agreed to attempt to secure the appointment, Sir Mick may have another string to his bow:

(a) In *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 ("*Benzline*"), the Court of Appeal held at [52] that a payment may have more than one basis, and failure of basis will apply if a fundamental component of the basis (taken as a whole) has failed.

(b) Sir Mick may claim that a "fundamental component" of the basis of the payment to Mr Wennuan was his becoming honorary ambassador of *CTP (UK):* he only sought the CTP (Singapore) appointment because he expected to obtain the former appointment. In other words, obtaining the CTP (UK) appointment was a non-promissory contingent condition of the transfer (*Benzline* at [50])), which has now failed.

28 In this light, although more information is again needed regarding the agreement with Mr Wennuan, Sir Mick may be able to establish failure of basis.

Defence of illegality

29 Yet a claim against Mr Wennuan will likely fail due to the defence of illegality. The defence is premised on the principle of stultification; the test is whether allowing the claim "would undermine the fundamental policy … that rendered the contract in question void": *Ochroid* at [159]. Notably, the court in *Ochroid* did not take as sanguine a view of the risk of stultification presented by restitutionary claims as was adopted in *Patel* (see [15(a)] above). Instead, the court adopted Birks' view that restitutionary claims could cause stultification, by providing a plaintiff with leverage to induce the counterparty's performance of the illegal contract (the "lever argument") and insurance against the risk of non-performance (the "safety net argument") (at [158]).

30 It seems that the "fundamental policy" underlying the criminalisation of bribery is the goal of eradicating corruption in Singapore. In this light, both the lever and safety net arguments count in favour of denying Sir Mick's claim:

(a) *Lever*: Allowing restitution would provide bribers with leverage to compel recipients who had a change of heart to act corruptly.

(b) *Safety net*: Allowing restitution would not deter bribery because it would provide the briber with insurance against the risk that the bribe would not achieve its purpose, since in that case the briber could recover the bribe. By contrast, a rational briber would be less likely to bribe if he

knew he could never recover, knowing that if he could never recover, the recipient could breach the agreement with impunity: *Davies* at p 256.

31 I therefore advise that a claim in unjust enrichment based on failure of basis will probably be barred by the defence of illegality.

32 In sum, a claim against Mr Wennuan would likely fail.

CTP (Singapore)

33 CTP (Singapore) has been enriched at Sir Mick's expense in the sum of $150,000. Yet a claim against CTP (Singapore) would also likely fail: again, it does not seem that an unjust factor applies.

34 The most promising candidate also seems to be failure of basis. In relation to CTP (UK), I noted that Sir Mick may struggle to establish that the payment was made on the basis that he would obtain the appointment (see [19] above). A similar difficulty arises in relation to CTP (Singapore). However, Sir Mick may be able to surmount this by raising the argument noted in [27] above.

35 However, Sir Mick will still struggle to address the difficulty noted at [20] above. Under Singapore law, failure of basis requires a joint understanding of the basis. This requirement was recently reaffirmed in *Zhou Weidong v Liew Kai Lung and others* [2018] 3 SLR 1236 ("*Zhou*") at [72] and *Benzline* at [46]. Critically, *Zhou* was a multi-party case like the present case and the High Court affirmed the requirement in that context. There is therefore scant basis to challenge the requirement under Singapore law.

36 For reasons similar to those given at [20(b)] above), it is improbable that knowledge on Mr Wennuan's part of the basis of the transfers will be imputed to CTP (Singapore). In particular, regarding the point made at [20(b)(ii)] above, the Court of Appeal has held that an agent's knowledge will not be attributed to the principal for the benefit of a third party complicit in the breach of duty: *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [116].

37 In sum, since Sir Mick will struggle to establish failure of basis against CTP (Singapore), his prospects of success against the latter seem slim.

Criminal liability and confiscation

38 Apart from the legal issues with the intended actions, there are two more practical reasons why Sir Mick should not pursue his claims:

(a) First, the claims would bring the bribes to light and expose Sir Mick to criminal liability, both in England and Singapore.

(b) Second, even if Sir Mick succeeded against Mr Warm and Mr Wennuan, the bribes would probably be confiscated by the authorities, *eg*, by the POCA in England: *Davies* at p 258.

Conclusion

39 I therefore advise Sir Mick not to bring any of the intended actions.