Singapore Academy of Law
Law Reform Committee

Report on Law of Part Payments and Deposits

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ISBN 978-981-09-8256-0

About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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A. INTRODUCTION

1 At the meeting of the SAL Law Reform Committee, the Honourable Justice Judith Prakash appointed Rebecca Chew to head a Subcommittee to look into the reform of the law of part payments and deposits ("the Subcommittee").

2 The Subcommittee comprising Rebecca Chew, Jason Chan, Goh Yihan and Paul Tan discussed what issues of law reform can arise in the law on part payments and deposits.

B. OVERVIEW OF THE ISSUES

3 The Subcommittee's view is that law reform is probably not necessary in this area as the existing common law more than adequately deals with the potential problems that may arise. The Subcommittee has also taken into account the fact that part payments and deposits is a challenging area of the law and impacts on other areas of the law. As such, any reform may have consequential implications that are probably not necessary at this stage. The Subcommittee therefore recommends that no reform is needed but that the common law's responses be monitored in the event that this issue needs to be revisited in the future.

4 This paper will discuss some of the problems that can potentially arise at present, and how the existing common law addresses these problems such that reform is not necessary at this stage. For ease of exposition, this paper has identified the following issues for discussion:

(a) whether a stipulation that part payment or deposit is non-refundable should be construed as excluding or negating restitutionary claims; and

(b) even if the stipulation should be construed as excluding or negating restitutionary claims, whether the Unfair Contract Terms Act[1] ("UCTA") should apply and the related consequences of such application.

5 These issues will be discussed in turn.

1 Cap 396, 1994 Rev Ed.

C. WHETHER A STIPULATION THAT PART PAYMENT OR DEPOSIT IS NON-REFUNDABLE SHOULD BE CONSTRUED AS EXCLUDING OR NEGATING RESTITUTIONARY CLAIMS?

1. Overview

6 Where a contract cannot be performed, the payer of a non-refundable payment may attempt to seek a refund. Whether the payer may do so depends on which of two scenarios applies: (1) where the impossibility is due to the payer's breach or (2) where the impossibility is due to the payee's own breach.

7 The first scenario does not raise significant problems. There is no contention if a payer cannot recover payment due to his own breach. A party should not evade the consequences of his own breach.

8 If a payer cannot recover under the second scenario where he is not in breach, this raises potential difficulties that may at first glance seem to call for law reform. However, the discussion below will show that the second scenario in fact does not pose a problem which requires law reform. A payee committing a repudiatory breach of contract, regardless of contractual terms, cannot exclude his restitutionary liability.

9 It will be shown that the true effect of the words "non-refundable" as applied to a payment are *evidence* of parties' intentions: the words "non-refundable", absent other qualifications, indicate that this is not a *standard* part payment. The *purpose* of this purported non-refundability must then be considered to determine if the payment is meant to be a "true" deposit, or to serve some other purpose. If the purpose is to effect a "true" deposit, this is neither a description of the general principles of deposits nor a contractual term. Rather, this term serves to narrow the *basis* for which the payment was made. It is the narrowing of this basis that gives a "true" deposit its legal effect; a payment made for a valid basis cannot be retrieved.

2. Cases involving "non-refundable" payments or deposits

10 The Subcommittee has considered case authorities from Singapore, the UK (including Privy Council cases), New Zealand, Canada and Australia. Currently, Singapore and New Zealand have no relevant case law on this issue.

11 Before embarking on a summary of the cases, two general observations may be made. First, cases involving "forfeiture of deposits" should be distinguished from cases involving "non-refundable payments or deposits". It is clear that a term in the contract allowing for the forfeiture of

a payment or deposit is a contractual right given to the payee.[2] However, a payment made on a non-refundable basis does not *expressly* confer a contractual right to the payee; the question is what effect would this have on the *payer's* claim for a refund, where the payee simply keeps the payment rather than forfeiting it pursuant to the contract.

12 Second, cases have dealt with "unreasonable" deposits or part payments through the equitable doctrine of relief from forfeiture. In *Amble Assets LLP v Longbenton Foods Ltd*,[3] a return of a "non-refundable deposit" was sought, but was dealt with as though it were a deposit controlled by the traditional rules of "reasonableness" rather than through restitutionary principles. Such cases will not be examined.

(a) The United Kingdom

(i) *Chillingworth v Esche*

13 In *Chillingworth v Esche* ("*Chillingworth*"),[4] the plaintiffs agreed to purchase land subject to contract and paid a purported "deposit" for the same. The contract never materialised. The court held that the deposit was refundable on the ground that the deposit was paid pursuant to a non-existent contract and an action at restitution was valid.

14 Pollock MR, however, observed that "appropriate words" (perhaps "non-refundable") associated with the payment of the deposit might have justified the retention of the deposit. It is unclear whether this would have the effect of a contractual term or whether it would merely be evidence of a collateral contract regarding the deposit.

(ii) *JSD Corporation Pte Ltd v Al Waha Capital PSJC*

15 There are other relevant cases. *JSD Corporation Pte Ltd v Al Waha Capital PSJC* ("*JSD Corporation*") involved an action to recover non-refundable payments regarding a lock-out agreement for the sale of an aircraft.[5] A sum of US$1m held by the defendant was stated to be "non-refundable", with no exceptions. The defendant was found to be in breach of contract by advertising the aircraft and terminating the lock-out early. (Other payments, totalling US$3.5m, which were also paid on a non-refundable basis were said to be refundable due to the explicit "seller default" exception.) The judge observed that US$4.5m, of which US$1m was simply non-refundable, was a significant sum to pay for a lock-out agreement, but was inclined to uphold this due to the principle that a

2 *Mayson v Clouet* [1924] AC 980.
3 [2011] EWHC 1943 (Ch).
4 [1924] 1 Ch 97.
5 *JSD Corporation Pte Ltd v Al Waha Capital PSJC* [2009] EWHC 3376 (Ch).

commercial contract should be generally upheld. However, he eventually allowed the refund on three grounds:

> (a) the clause was meant to protect against default by the plaintiff-purchaser, of which there was none; if negotiations failed but the purchaser did not default, the lock-out agreement would carry on indefinitely, and a court would only permit termination on an undertaking that the deposit was returned, and;
>
> (b) applying the "modern" approach to construction/implication of terms in *Attorney General of Belize v Belize Telecom Ltd* ("*Belize*"),[6] a term should be implied that a breach by the seller allowed the refund of an otherwise non-refundable payment due to the overwhelming common sense of the matter, and;
>
> (c) counsel for the defendant-seller conceded that if the seller were in breach, the deposit would become refundable, and the "non-refundable" term in the contract did not mean non-refundable in all circumstances.

16 This case may be taken to stand for the principle that when the term "non-refundable" is used, it may be construed, in appropriate circumstances, to mean that the amount in question may still be refunded. However, this would have to be interpreted in light of the overall context of the relevant agreement, which would require an examination of various factors such as the purpose for which payment is made, and whether it was made to protect the very party (for example, purchaser) claiming the return of the payment. However, the Subcommittee notes that the approach applied in *Belize* may not be applicable in Singapore; the approach adopted by the Singapore court in *Sembcorp Marine v PPL Holdings Pte Ltd*[7] may not have room to accommodate the *Belize* approach. In particular, there does not appear to be any gap in the contract that needs to be filled; the words "non-refundable" are, on their face, clear.

17 The judge also dismissed an argument that there was a total failure of consideration on the ground that there was in fact partial performance; the defendant had posted one advertisement in breach of the lock-out and had only wrongfully terminated the contract early. Thus there was partial performance.

18 It is argued below that the "consideration" identified by the judge may not be accurate.[8]

6 [2009] 1 WLR 1988.
7 [2013] 4 SLR 193.
8 See para 20 below.

(iii) *Kani Ltd v Akhavan*

19 In another case of *Kani Ltd v Akhavan*,[9] a sum was paid by way of deposit for the assignment of a lease. The plaintiff would have been entitled to immediate occupation pending formal assignment. The defendants did not actually have the lease at the time the agreement was made and the sum was paid, but alleged that this was a non-refundable deposit (though the words were not in the written agreement). The defendants were, however, able to complete at the time the case was heard. The judge found that not having the lease to assign at the time the agreement was made was a breach of contract that was sufficient for the defendants to be ordered to refund the deposited sum. However, the court did not expressly address the effect of the "non-refundable" term.

20 There are two possible readings of this case. The principle that a person cannot profit from their breach could disentitle the defendants from relying on any "non-refundable" term, which was not in the written agreement in any event. Alternatively, the judge remarked that such a breach "went to the heart of … this contract".[10] This may be an invocation of the "total failure of consideration" doctrine, such that the basis for the payment of this allegedly "non-refundable" deposit was not sustainable and thus the payment had to be returned.

(b) Canada

(i) *No 151 Cathedral Ventures Ltd v Gartrell*

21 In *No 151 Cathedral Ventures Ltd v Gartrell*,[11] the defendants attempted to defend a claim in unjust enrichment on the ground that payments made were stipulated as "non-refundable deposits". The argument failed, as the defendants had repudiated the contract. The court held that it was unreasonable for the defendants to rely on the term. This case may stand for the proposition that a "non-refundable" payment may not be returned even in a claim for restitution, but not if the defendant that is seeking to prevent the return of the deposit is the party that is in breach. Koenigsberg J suggested that the test for whether a deposit may be retained was whether the plaintiff itself had rescinded or repudiated the contract notwithstanding the "non-refundable" term:[12]

> Although all the deposits were described as 'non-refundable', the defendants could only reasonably keep them if it was the plaintiff who had rescinded or repudiated the contract. Both parties intended that the deposits would be put toward the purchase price upon closing of the contract. It is unreasonable for the defendants to rely on the contract to

9 [2010] EWHC 505 (QB).
10 *Kani Ltd v Akhavan* [2010] EWHC 505 (QB) at [24]–[25].
11 (2003) 41 BLR (3d) 226.
12 *No 151 Cathedral Ventures Ltd v Gartrell* (2003) 41 BLR (3d) 226 at [236].

keep these 'non-refundable' deposits, when they themselves ended the contract through their breach of good faith.

(ii) *Symonds v All Canadian Hockey School Inc*

22 In *Symonds v All Canadian Hockey School Inc*,[13] the Ontario Superior Court of Justice denied recovery of a "non-refundable deposit" for a payer who had been in breach. The judge observed that the deposit provision was explicitly to guarantee a child a place in that school (and was also applicable to school fees, in the event that the child attended), which the plaintiffs had got, and that the words "non-refundable" should thus be given effect to. The judge also rejected arguments regarding the poor quality of education (which would presumably go toward misrepresentation and a rescission of the contract, including the deposit). As there was no total failure of consideration, so the "non-refundable" term stood.

(iii) *Tang v Zhang*

23 In *Tang v Zhang*,[14] the British Columbia Court of Appeal held that the words "non-refundable" as applied to a "true" deposit merely added emphasis and did not change the legal meaning of "deposit". This would be a descriptive rather than a contractual term. As there is a distinction in terms of the consequences arising from the party who breaches the contract, the words "non-refundable" cannot be an absolute term. The person seeking to keep (or seek the return of) the deposit must first establish that he is not in breach.[15]

(c) Australia

24 In *Primus Telecommunications Pty Ltd v CCP Australian Airships Ltd*,[16] the plaintiff ("Primus") had paid a "non-refundable" deposit of A$400,000 to the defendant ("CCP") to secure the exclusive use of their airships for advertising purposes. The plaintiff terminated the contract for the defendant's repudiatory breach and sought the return of the deposit either as damages or in restitution. The Australian Court of Victoria upheld the claims and held that an innocent party may recover (in restitution) a "non-refundable" deposit. Habersberger J opined that the addition of the word "non-refundable" before "deposit" does not necessarily change a normal deposit into something else; "the extra word simply makes it clear that on default by Primus it is not able to claim a refund of the deposit, even if CCP had suffered no loss. The contrary view would lead to the extraordinary result that, having received the $400,000 deposit, CCP could have walked away from the contract, yet Primus could not complain about

13 (2009) 180 ACWS (3d) 276.
14 (2013) 41 BCR (5th) 69.
15 *Tang v Zhang* (2013) 41 BCR (5th) 69 at [4].
16 [2003] VSC 120.

its loss of the $400,000 simply because it was described as non-refundable".[17] The Victoria Court of Appeal unanimously dismissed the defendant's appeal. It was noted that the parties, being reasonable business people, could not have possibly intended for the "non-refundable" deposit to be kept in the event of a total failure of consideration caused by the defendant or due to the defendant's breach of contract. Nettle JA opined: "In my opinion it would fly in the face of honest dealing and common sense to construe clause 4.1 in the manner suggested by the appellants."[18] A "non-refundable" deposit here is merely a deposit which does not need proof of damage suffered to retain.

25 The cases above do not appear to stand for any general principle other than the principle that a contract breaker cannot take advantage of their own wrong. The Subcommittee is of the view that the above cases do not conclusively indicate whether the words "non-refundable" are contractual in effect or descriptive in nature.

3. Control of deposits in context

26 There is a fundamental difference between fixing a sum to be paid upon breach and a forfeiture of a sum already paid (that is, deposit). Traditionally, courts have been more reluctant to allow recovery of money already paid by the contract breaker than to deny recovery of a penalty agreed to be payable upon breach by the contract breaker.[19]

27 Modern English courts do not appear to apply the rules relating to penalties to deposits or clauses providing for the forfeiture of sums paid. Deposits are generally not seen as a penalty provision and it is not assumed to be oppressive or unconscionable for the seller to retain the deposit upon termination by the purchaser. However, this is subject to the traditional control of an "unreasonably high" amount. There are two grounds on which recovery of a deposit is possible: (1) at common law, and (2) under section 49 of the English Law of Property Act 1925[20] ("LPA").

28 In *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*, the Privy Council hearing a case from Jamaica said, in general terms, that the law on penalties applies to "a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to other party".[21] The plaintiff was allowed recovery because the contract for sale of land requiring a 25% deposit was closer to a "penalty" than a "deposit". Lord Browne-Wilkinson endorsed the holding of

17 *Primus Telecommunications Pty Ltd v CCP Australian Airships Ltd* [2003] VSC 120 at [152].

18 *Primus Telecommunications Pty Ltd v CCP Australian Airships Ltd* [2003] VSC 120 at [9].

19 *Chitty on Contracts, General Principles* vol 1 (Sweet & Maxwell, 31st Ed, 2012) at p 1881, para 26-197.

20 c 20.

21 *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 1 AC 573 at 578.

Lord Dunedin in *Linggi Plantations Ltd v Jagatheesan*[22] that a larger deposit would only be valid if the seller could show it was *reasonable* to demand one; in the absence of which the whole deposit would be invalid and must be repaid.[23] It was accepted that a 10% deposit which is customary in contracts for the sale of land may be forfeited by the seller on the buyer's default, irrespective of the amount of the seller's loss. Interestingly, the Privy Council overruled the Court of Appeal which allowed the defendant to retain the 10% deposit that was regarded as reasonable. The Privy Council advised that an unreasonable deposit must be returned as a whole because when the parties had not contracted for a 10% deposit but a 25% deposit. Again, it would appear from this authority that the consideration centres on reasonableness and fairness in allowing the payee to retain the deposit.

4. Restitution for unjust enrichment

29 In assessing the issue of a return of a deposit paid in part payment of a contract, the analysis must necessarily involve looking at the law of unjust enrichment. The law of unjust enrichment in Singapore has been helpfully restated in the Court of Appeal decision of *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*.[24] The court reiterated that unjust enrichment was premised on strict liability at common law (subject to defences). Singapore has adopted the English position in *Lipkin Gorman v Karpnale Ltd*[25] ("*Lipkin Gorman*") that a claim in restitution for unjust enrichment is a strictly legal claim which evolves incrementally. Lord Goff observed:[26]

> [A] recovery of money in *restitution is not*, as a general rule, *a matter of discretion for the court*. A claim to recover money at common law is made as matter of right; and *even though the underlying principle of recovery is the principle of unjust enrichment*, nevertheless, where recovery is denied, it is denied on the basis of legal principle. [emphasis added]

30 In other words, a claim must fall under the established categories of unjust enrichment in order to succeed in restitution. It is not sufficient that the defendant had benefitted and that it would be fair or just for the plaintiff to recover the sum of that enrichment.

31 Where the underlying contract will not or cannot be performed, it is uncontroversial that a "deposit" from *A* to *B*, which is *prima facie* unrefundable, would satisfy the first two elements.

32 The Subcommittee was concerned here mainly with whether permitting the payee to retain the deposit would create an enrichment that

22 [1972] 1 MLJ 89.

23 It remains to be seen whether English courts will follow the lead of the Privy Council in treating deposits this way. However, the question of challenging "customary" deposits remains unresolved; as there was no justification required for a 10% deposit.

24 [2013] 3 SLR 801.

25 [1991] 2 AC 548.

26 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 578.

could be construed as being "unjust". Absent other facts, the most likely route of recovery appears to be through the factor of "failure of consideration/basis".

33 Failure of consideration in restitution has a different meaning from the doctrine of consideration in contract and is sometimes also referred to as "failure of basis". Due to the sparse common law and academic commentary in Singapore, the Subcommittee shall consider the position under English law.

34 The meaning of failure of consideration in this context was clearly stated in Viscount Simon LC's comment in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* ("*Fibrosa*"):[27]

> In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act … and thus, in the law relating to the formation of a contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. *The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.* [emphasis added]

35 The term "failure of basis" is therefore used in in this report to avoid confusion.

36 It has been a traditional requirement that there must be a total failure of basis (traditionally known as "total failure of consideration"); the defendants must have failed totally to perform its promise to the claimant. *Goff & Jones: The Law of Unjust Enrichment*[28] ("*Goff & Jones*") states that this requirement is not fully observed where the benefit conferred is non-monetary (for example, a contract for services).[29] However, where the benefit conferred takes the form of money, the failure of basis must be total. If even a very small part of the benefit which formed the basis for the payment has been conferred, no action will lie. It can often be said that the basis of the transfer was that the recipient would give or do something in return; if nothing has been done in return, the basis has failed. Hence, Viscount Simon LC's remark in *Fibrosa* that "when one is considering the law of failure of consideration … it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise".[30]

27 [1943] AC 32 at 48.

28 Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (UK: Sweet & Maxwell, 8th Ed, 2011).

29 Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (UK: Sweet & Maxwell, 8th Ed, 2011) at p 368, para 12-16.

30 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 48.

37 *Goff & Jones* states that the more convincing approach is to see the principles governing deposits as an application of the more general principles of failure of basis.[31] They assert that the basis of paying the deposit is that it provides security against the payer's failure to perform his future contractual obligations. The condition of the payment being retained by the vendor is that the purchaser defaults on his obligations. If the transaction fails due to default by the vendor, the payment must be returned. It is, therefore, essential to examine the parties' agreement closely, and to identify what they have undertaken to do.

38 A deposit is very different from a part payment, because a part payment may be recoverable where the payer repudiated the contract in respect of which they were made. The factor determining whether a payment is a deposit or a part payment is what the parties have agreed should happen to the payment. It is sufficient to state that the payment is a "deposit", in the absence of any description of the payment, it will be assumed to be a part payment. Where both parties have performed their obligations, the vendor is no longer technically entitled to retain the deposit as security. In this instance, both parties will typically agree that the deposit is to serve as an instalment of the purchase price. Contractual terms in a contract serve to identify what the parties have agreed should be the basis of the payment, but a non-contractual articulation of the basis of payment is equally effective.

39 If the transaction fails due to default by both parties, it has been held that the payer's default should take precedence and the deposit would be forfeited.

40 Applying these principles to the two scenarios (payer in breach/payee in breach), one immediately runs into the first issue: What is the "basis" for this non-refundable payment?

41 One could argue, as *Goff & Jones* do, that "non-refundable" indicates a "basis" which is in fact a basis of *retention for breach*, rather than a basis of *transfer*.[32] Again, this explains a scenario where either the payer or payee is in breach.

42 Where *A* has breached the contract and *B* therefore forfeits the payment, *A* has paid the deposit on the basis that if *A* breached the contract, *B* would be able to retain it. This is consistent.

43 The converse would be when *B* has repudiated the contract. The contract cannot be performed. *B* has no right to retain the deposit, as the conditional basis upon which the payment was made cannot be fulfilled;

31 Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (UK: Sweet & Maxwell, 8th Ed, 2011) at para 14-01.

32 Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (UK: Sweet & Maxwell, 8th Ed, 2011) at para 13-01.

there is no sale to apply the deposit toward, and there is no further breach possible for *A* to commit. This must be correct as a party should not be allowed to take advantage of their own breach.

44 It should be noted that these scenarios would be similar if this were merely a *part payment*. In the former, *A* might be allowed a refund. However, *A* being in breach, *B* would have the right to set-off any damages against the part payments. *B* might effectively forfeit the deposit. In the latter, *A* can, of course, recover the part payment.

45 This, however, does not explain the frustration/*force majeure* scenario adequately. If moneys paid is a "payment" and the contract is frustrated, the money is recoverable either under common law (as the contract cannot be performed) or under statute. It is unclear what effect the word "non-refundable" would have in such a scenario.

46 If a "non-refundable payment" is to have a distinct effect from a "payment", one must start with the principle that parties must intend words in a contract to have meaning. A "non-refundable payment" *ought to* mean something more than a "payment". Should it be the case that the effect of the words "non-refundable" is to make a payment refundable only upon the recipient's breach without more?

47 In *Chillingworth*, Pollock MR qualified the status of deposits paid under a void (or non-existent) contract, contemplating that appropriate clauses could render a deposit truly non-refundable:[33]

> There was no provision made in the documents which would justify the vendor in declining to return it; *though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld*. [emphasis added]

48 It may be preferable that the words "non-refundable" actually *does* alter the default position, in ordinary cases. Leaving aside notions of consumer protection, it is open to parties to alter the scope of the term. For example, parties could draft a term "non-refundable *in the event the buyer does not complete*" or "non-refundable *in any event*" (which might be a contractual exclusion even excluding the payee's breach, subject to controls).

49 An alternative argument to *Goff & Jones*'s position which reconciles this could be that the payment itself is meant to achieve a *different* legal effect. This effect would be the *basis* of the payment. This is not simply "payment in return for the property", given that this is *non-refundable*. What is the effect of this?

33 *Chillingworth v Esche* [1924] 1 Ch 97 at 108.

50 A "deposit" in this context is *one* payment in the sequence of at least *two* payments, separated by a period of time. Parties, we assume, generally wish to carry out their contracts. It therefore follows that at the point of time of the *second* payment, parties envision that *the contract can still be performed*.

51 The decision of *Sharma v Simposh Ltd*[34] supports this theory. The word "non-refundable" serves to sever the one payment into two where at the point of the second payment the contract is completed. Here, the parties had orally agreed to a non-refundable deposit upon which the property development company would cease marketing the flats to other potential buyers. The claim in restitution for the return of the deposit failed, notwithstanding the oral agreement being void at law. It was held that the claimant paid the deposit to acquire a right, not an obligation, to purchase a flat. There was no total failure of consideration, as the claimant had received the benefit for which the payment was made; retaining the option to purchase the flats.

52 It is argued that this is the true "basis" for a deposit. This is not necessarily only security for the obligations of the payer. This also creates obligations on the part of the payee. In return for a deposit, the payee is obliged to, *at that future point referred to in the contract*, ensure that they are in a position to perform. The deposit is paid for the *performance* of this obligation.

53 The basis of the "deposit" payment is, therefore, the recipient *not acting inconsistently* with the idea that the contract will be completed. This is in contrast with the basis of a *part payment*, which is for the ultimate receipt of *the subject matter*. The two payments are made for different purposes.

54 Consider again *JSD Corporation*, the judge identified the "consideration" as the benefit of a lock-out agreement, and partial performance was rendered by not advertising up to the point of the breach. However, is this what the purchaser intended to buy? The purchaser appears to have intended to buy the *performance* of this lock-out agreement. By breaching it, the seller has acted inconsistently and has not performed.

55 It is argued that this is more similar to an "entire contract" scenario – full and complete performance must be rendered in order for there to be "performance". Consider the analogous position of a payment for confidentiality for six months. A party should not be allowed to argue that they have rendered *some* performance, say, for one week, and that damages should be assessed. In this circumstance, the payee would and should be expected to render full performance of the agreement. What was paid for

34 [2011] EWCA 1383.

was the full period, and not whatever time was actually performed, plus a right to damages.

56 To summarise the position: where *A* is in breach, *B* is, in the words of Burrows, still "ready, able and willing to perform" the main contract.[35] *A* cannot recover the non-refundable payment as there is no failure of basis.

57 Where *B* is in breach, *A* must be able to recover the deposit. *B* is not "ready, able and willing to perform" the contract, having put themselves in a situation where the contract cannot be completed, for example, selling the subject of the contract to a third party. The basis would have failed completely and the main contract cannot be performed. Recovery would therefore be allowed.

58 Where neither party is in breach, *B* will still *prima facie* be entitled to retain the "non-refundable" payment. *B* has, *up to the point of frustration*, complied at all times with their obligation. They have *performed* that obligation by keeping the contract in a state where it can be performed. It is the *frustrating event* which terminates the relationship. It cannot be said that at any point, *B* has destroyed the basis of the payment; *A* has received everything they paid for – performance by *B*. It may not have been *full* performance as *B* has been disabled from performing, but *B* has rendered sufficient performance to bring the scenario out of a "failure of basis". *A* therefore cannot recover.

59 It is argued that this is a better explanation of the effect of the word "non-refundable"; absent other qualifying phrases, serves to indicate a *separate basis* for the payment on *top* of the remainder of the payment the payer has to eventually render.

60 The Subcommittee therefore agrees with Yeo's analysis in "Deposits: At the Intersection of Contract, Restitution, Equity and Statute".[36] Whether payment is refundable is ultimately a matter of contractual construction. That is, what does the word "non-refundable" mean? Is it *descriptive*, in that it has no contractual effect and it indicates a non-refundable payment (that is, deposit)? Or is it *contractual*, in that this is a term excluding restitution? It is, however, argued, that it is neither a "descriptive" nor "contractual" term, without a more detailed clause. Yeo observes that parties may exclude liability in restitution by clear words in contract (possibly subject to statutory controls). This must be correct. However, he also observes that it is "possible for the contracting parties to spell out the intended

35 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2010) at p 326.

36 Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", lecture delivered at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013).

consequence expressly".[37] It is argued, as above, that the word "non-refundable" *prima facie* indicates the *basis* and not the *term*. This would not be sufficient expression to exclude liability without more evidence as to the meaning of the term.

61 This is rather *evidential*. The phrase "non-refundable payment" is simply an indication of what parties must have intended the risk allocation and *mutual* obligations to be and must be considered in the *precise context* of this payment. "Non-refundable" would be *prima facie* evidence that parties intended this to function as a deposit rather than a simple payment.

5. Summary

62 To recapitulate:

(a) Parties ought to be presumed to have intended the words they use in a contract to have significance.

(b) When parties use the word "non-refundable" in relation to a "payment", it should be taken to confer on the payment consequences different from the usual.

(c) The intention that ought to be read into this is that the "non-refundable payment" was intended to secure something in *addition* to that which the purchase price procures. What this should mean is that the payer wishes the payee to act in a manner consistent with his ultimate obligations and to ensure that the balance of the contract will be performed at a future date.

(d) The payee, therefore, will only destroy the basis when he fails to perform consistently with his ultimate obligations, such as by destroying the subject matter of the contract.

(e) Accordingly, the payer can only recover his "non-refundable payment" when the receiver is in breach or where the basis of the consideration for this "non-refundable payment" has disappeared. This is in contrast to a simple part payment, which can always be recovered (subject to any possible set-off if the payer is in breach).

(f) This is consistent with doctrine (contractual and restitutionary consideration/basis) and the policy of freedom of contract.

D. APPLICABILITY OF THE UNFAIR CONTRACT TERMS ACT

63 Since the term "non-refundable" is a matter of contractual construction and the consideration covers the issues of fairness, the

37 Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", lecture delivered at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013) at para 39.

question is whether UCTA deals with terms that describe payment as "non-refundable" or terms creating a "non-refundable deposit". One could argue that such terms creating "non-refundable deposit" are "unfair". After all, UCTA has been described as playing "a very important role in protecting vulnerable consumers from the effects of draconian contract terms".[38] However, it also should be noted that the title of UCTA has been described as a "misnomer".[39] The inaccuracy was highlighted during the second reading of the Unfair Contract Terms Bill on 23 May 1977 when Lord Lyell commented:[40]

> My Lords, there is one aspect of the title which interests me; it is the change from 'avoidance of liability' to 'unfair contracts'. Apart from the purely emotive aspect, I think there is some mild inaccuracy. The old title is perfectly clear to me and, I believe, to others in your Lordships' House … Would not the noble Lord, Lord Jacques, agree that this new title may give the impression that contracts which are freely struck and concluded are oppressive on one side or another? I do not think that he or the Government, or the Bill, intends this; yet the lingering impression is that some, and indeed many, contracts are oppressive.

64 The same reasoning can arguably be applied to exclusion of restitutionary liability. As "unfair" as such a clause may appear, such "unfairness" was never intended to be the focus of UCTA. The Act did not intend to weed out all terms that were "unfair": as its title would suggest, the Act deals with the "fairness" of contract terms but "regulates only certain exception clauses and subjecting others to the test of reasonableness".

65 Furthermore, the language of UCTA does not indicate that it is intended to deal with terms which exclude restitutionary liability. Tettenborn argues that UCTA was meant to "cover exclusion of one's duty to perform one's contract; whereas restitutionary liability arises extra-contractually".[41] The only duties mentioned in UCTA are duties arising in contract and tort.

66 The Subcommittee also noted another reason why UCTA is arguably never intended to address restitutionary liabilities. The principle against unjust enrichment was only unequivocally recognised in English law by the House of Lords in 1991 in the decision of *Lipkin Gorman*. As pointed out by

38 *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd* [2003] EWCA Civ 570 at [31], *per* Tuckey LJ.

39 Ter Kah Leng, "Assessing the Reasonableness of Exception Clauses" (2011) 23 SAcLJ 577 at 579.

40 United Kingdom, House of Lords, *Parliamentary Debates* (23 May 1977) vol 383 at cols 1100–1138.

41 Andrew Tettenborn, *The Law of Restitution in England and Ireland* (Cavendish Publishing, 3rd Ed, 2002) at p 269.

Yeo,[42] the principle was only made part of Singapore law by the Court of Appeal in 1994.[43] Prior to that, the idea that a claimant might be able to ground an action on the general principle of unjust enrichment received "pretty consistently bad press".[44] The relatively recent development of the principle of unjust enrichment reinforces the notion that UCTA was not drafted to address restitutionary liabilities.

67 Even if it is argued that UCTA should be amended to deal with restitutionary liability, this raises another thorny question as to how terms that exclude restitutionary liability ought to be treated within the scheme of UCTA. For example, should such terms be rendered ineffective automatically or should they be subject to the requirement of reasonableness? This is ultimately a question of public policy which could potentially recalibrate the notion of party autonomy. It is submitted that the better solution is to subject terms that exclude restitutionary liability to the common law's supervision instead of statutory regulation under UCTA. This is briefly discussed below.

1. Consumer protection from exclusion of restitutionary liability

68 The issue concerning exclusion of restitutionary liability has not generated much debate in the UK or Singapore. This is because both jurisdictions have domestic regulations that protect consumers from unfair terms. This section discusses the legal landscape in the UK as well as Singapore to show that there is arguably sufficient protection afforded to consumers from the potentially onerous effects of clauses that exclude restitutionary liability, without need to additionally rely on UCTA.

(a) The United Kingdom

69 The UK introduced the Unfair Terms in Consumer Contracts Regulations 1999[45] ("UTCCR") which revoked the 1994 regulations[46] of the same name which were intended to implement the European Council Directive on Unfair Terms in Consumer Contracts.[47] The directive was intended to harmonise laws on unfair terms between a seller or supplier and a consumer. The directive does not require complete uniformity, and Member States are free to provide more extensive protection through their

42 Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", lecture delivered at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013) at para 46.

43 *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836.

44 Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at p 151.

45 SI 1999 No 2083 as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001 No 1186).

46 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994 No 3159).

47 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

own national laws and the UK has not amended the English Unfair Contract Terms Act 1977.[48]

70 UTCCR offers protection to consumer contracts. A "consumer" is defined as "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession".[49] The definition of "consumer" in UTCCR is narrower than the definition in UCTA which has been interpreted as including companies when engaged in a transaction which is not a regular one for the particular business since "natural person" will exclude companies, partnerships, clubs and societies.[50] UTCCR also applies to all non-negotiated terms, unless the term is specifically exempted.

71 There is an indicative and non-exhaustive list of terms which may be regarded as unfair under UTCCR. There are several sections from UTCCR which arguably exclude restitutionary liability. The terms that arguably exclude restitutionary liability are as follows:[51]

> (b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
>
> …
>
> (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract

72 UTCCR thus, to an extent, prevents exclusion of restitutionary liability, but it is only intended to do so to protect consumers and not commercial entities.

(b) Singapore

73 Similarly, Singapore also affords such protection to consumers under the Consumer Protection (Fair Trading) Act[52] ("CPFTA"). CPFTA was passed on 11 November 2003 and came into effect on 1 March 2004. The aim of

48 c 50.

49 Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001 No 1186) reg 3.

50 *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321; [1988] 1 All ER 847.

51 Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) Sch 2 para 1.

52 Cap 52A, 2009 Rev Ed.

CPFTA is to "provide better protection to consumers" by allowing them to seek civil address against traders engaging in unfair practices.[53] The primary focus of the act is on "small consumers who lack the expertise and resources to fend for themselves against unfair practices".[54] Section 2(1) of CPFTA defines "consumer" to mean an individual who otherwise than exclusively in the course of business, receives or has the right to receive goods or services from a supplier or has a legal obligation to compensate a supplier for goods or services that have been or are to be supplied to another individual.

74 An "unfair practice" is broadly defined under section 4 of CPFTA as:

> It is an unfair practice for a supplier, in relation to a consumer transaction —
>
> (*a*) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
>
> (*b*) to make a false claim;
>
> (*c*) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer —
>
> (i) is not in a position to protect his own interests; or
>
> (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or
>
> (*d*) without limiting the generality of *paragraphs (*a*), (*b*) and (*c*)*, to do anything specified in *the Second Schedule*.
>
> [emphasis added]

75 While unfair practices can potentially have a very wide scope, the Second Schedule of CPFTA lists out 20 specific unfair practices. Focus should be drawn to the 11th example under the Second Schedule which reads "Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable."

76 It is arguable that an attempt to exclude restitutionary liability when entering into a contract with a consumer would amount to a term that is harsh and oppressive so as to make it unconscionable. Furthermore, section 4 of CPFTA is arguably wide enough to catch a term that attempts to exclude restitutionary liability.

77 The unfairness of terms excluding restitutionary liability is thus potentially ameliorated by CPFTA which ensures that consumers, who

53 *Singapore Parliamentary Debates, Official Report* (10 November 2003), vol 76 at col 3366 (Halimah Yacob).

54 *Singapore Parliamentary Debates, Official Report* (10 November 2003), vol 76 at col 3353 (Raymond Lim Siang Keat, Minister of State for Trade and Industry).

typically have limited bargaining power and therefore need protection, do not suffer from such clauses.

2. Exclusion of restitutionary liability is a common law defence

78 As a general rule it is open to parties to contract out of restitutionary liability. An exclusion clause may provide a valid defence to a claim for restitution.[55] This is subject to the existence of any statutory provision that invalidates such a clause. Burrows gives the following example:[56]

> By a clause in a contract between C and D, C agrees that D 'shall have no liability to repay money paid under the contract in the event of the contract being terminated for breach or frustration'. Such a clause excludes the right to restitution that would otherwise arise for failure of consideration.

79 Tettenborn explains similarly that:[57]

> Restitutionary rights, like any others, may be excluded by contract *inter partes*. Assume I order goods from you, sending a deposit which is agreed to be non-refundable in any event, even if you are in breach of contract. Or again, assume I have a running account with you subject to an agreement that no claim will lie for inadvertent overpayment unless made within one month. Such exclusions of restitutionary rights are perfectly valid at common law.

80 These are ultimately subject to statutes that control such exclusion terms. We have seen how UTCCR and CPFTA can control the effects of such terms, but their application is narrow as it is only applicable to consumers. The solution for commercial entities, perhaps, lies in expanding the equitable relief against forfeiture to non-refundable deposits/part payments. The jurisdiction to relieve against forfeiture is not founded on a power to relieve generally against bargains,[58] but when unconscionability is at play. While, the relief against forfeiture was traditionally applicable to proprietary interests in land, it is perhaps suitable to extend the equitable relief against forfeiture to cover terms that exclude restitutionary liability. However, when two commercial entities are entering into an arm's-length transaction, it appears unlikely that a court would easily find an element of unconscionability.

55 Keith Mason QC & John W Carter, *Restitution Law in Australia* (Australia: Butterworths, 1995) at p 799.

56 Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at p 151.

57 Andrew Tettenborn, *The Law of Restitution in England and Ireland* (Cavendish Publishing, 3rd Ed, 2002) at p 269.

58 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723.

E. CONCLUSION

81 The Subcommittee's discussion shows that law reform is not necessary in this area as the existing common law more than adequately deals with the problems that arise. The Subcommittee is also of the view that because part payments and deposits is a challenging area of the law and affect other related areas, any reform may have far-reaching implications that is not necessary at this stage. The Subcommittee therefore recommends that no reform is needed but that the common law's responses be monitored in the event that future reform is needed for the following reasons:

(a) No other jurisdiction has dealt with this issue through legislative reform; they have allowed the common law to govern the area.

(b) There may be knock-on effects on other areas of the law if there was reform.

(c) The current state of law is sufficient to deal with the problems as and when they arise.

(d) UCTA was never intended to deal with this issue.

ISBN 978-981-09-8256-0