



THE API-API CONSTRUCTIVE TRUST TEST: COMING OUT OF THE MURKY INTO DANGEROUS WATERS?



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ABSTRACT

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In Malaysia, the doctrine of constructive trusts has always been accepted as a doctrine firmly grounded on principles of Equity and Trusts in England and Wales. A constructive trust must be imposed based on clear principles as opposed to being imposed on an arbitrary basis. Recently in July 2017, the Federal Court in *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* (2017) MLJU 1107 has laid down a somewhat “three pronged test” for the workings of constructive trust. This decision seems to now suggest that the Malaysian position is that constructive trusts are to be imposed as a ‘remedial device’ on the basis of ‘unjust enrichment’ i.e. as a remedial constructive trust. Whilst this may be argued as one of the clearer pronouncements of the apex court in Malaysia on the point of constructive trusts, the question that needs to be addressed is, has the apex court provided clarity or caused further trepidation amongst those who could be possibly affected by the application of the law pronounced in this case. The papers primary contribution is the finding that whilst the decision provides a relief from the past plethora of uncertainty as seen in the list of cases discussed, the elements laid down also seem to lack force and clarity of basis which may cause some far reaching implications.

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1. INTRODUCTION

It has always been thought that the Malaysian position on constructive trusts were based on the constructive trust principles enunciated in England and Wales. This is apparent as the judges presiding over Malaysian cases, would generally refer to case law from England and Wales when laying down the law in Malaysia. However, there has been a gravitation towards an acceptance of remedial constructive trusts in Malaysia starting from the Court of Appeal decision of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & Ors* [2009] 1 MLJ 289 and later in the Federal Court decision of the *RHB Bank Berhad v Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175. Recently, the Federal Court in *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* (2017) MLJU 1107 (since the subject matter of the case was in relation to the piece of land in the district of Api-Api, Kuala Selangor, the case will hereinafter be referred to as the “*Api-Api Case*”), further reiterated the stance that the remedial constructive trust model will be the accepted model in Malaysia with unjust enrichment as the

basis on which the constructive trust would rest. This presumably could give rise to a claim which is proprietary in nature which may then have far reaching implications for third parties (Liew, 2016).

2. METHODOLOGY OF THE RESEARCH

The researchers have adopted a pure legal research methodology to conduct this research. There has been extensive library and database searches for primary and secondary sources. The primary sources will be mainly case laws from Malaysia which also refer to case law from other jurisdictions. The secondary sources include, journal articles, books and written commentaries on the case law. The researchers have used the content analysis and critical analysis method focusing on doctrinal, content and comparative analysis of the law.

3. THE DISTINCTION BETWEEN INSTITUTIONAL AND REMEDIAL CONSTRUCTIVE TRUSTS

A constructive trust is a trust that is implied by the courts. It is different from an express trust where the intention of the initial owner of the property to create the trust is immaterial to the recognition of the trust. Constructive trusts have been used by the courts as a residual category when they desired to impose a trust and when no other category was available (Abdul Malik Ishak JCA in *Tan Sri Datuk Dr Mohan Swami v MISL and Associates Sdn Bhd (No 3)* [2003] MLJU 414). Such trusts arise by the operation of the law (Hingun and Wan, 2013).

Constructive trusts arise in response to a general principle that a person who knows something which affects their conscience in relation to their use of property becomes a 'constructive trustee' of that property (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669). Constructive trusts are most commonly used in circumstances of breach of fiduciary responsibility. This results in it being placed into the same category as the 'restitution for wrong' (Millett, 1998).

The law in this area has developed to result in an understanding that there are two types of constructive trusts, namely, 'Institutional Constructive Trusts' and 'Remedial Constructive Trusts' (*Zaharah bte A Kadir (acting as the Authorised Representative of Abdul Kadir b Ami, deceased) v Ramunia Bauxite Pte Ltd & Anor* [2012] 1 MLJ 192; Hingun and Wan (2013). The distinction between institutional and remedial constructive trusts is a fundamental one and the results of the imposition of one or the other could be different.

In Malaysia, the distinction between institutional and remedial constructive trusts was acknowledged by their Lordships in the Court of Appeal in 2012 in *Zaharah Bte A Kadir Zaharah bte A Kadir (acting as the Authorised Representative of Abdul Kadir b Ami, deceased) v Ramunia Bauxite Pte Ltd & Anor* [2012] 1 MLJ 192 quoting the following paragraph from the judgement of Lord Browne Wilkinson in the United Kingdom case of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669;

"Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court".

In an institutional constructive trust, the role of the court is to confirm or declare a 'pre-existing' trust where the person who is the 'constructive trustee' has attempted to deny the interest of the person who is deemed to be the beneficiary. These are commonly understood to be trusts which are imposed without the exercise of judicial discretion (Liew, 2016) and may arise automatically. Presumably based on this spirit, it has been cautioned that the

term “constructive” is to be used with care (Hemsworth, 2000). Accordingly, the courts do not “construct a trust” but the courts would “construe” from certain circumstances, that there is already a trust.

So, as a general rule of the thumb, a constructive trust of this type is seen where there is a fiduciary obligation between the claimant and the defendant, in that, the defendant is under the obligation of acting in the best interest of the claimant. The defendant is the owner of the legal title and must have acted in some way to breach that fiduciary obligation. The courts are, therefore, merely declaring the trust that comes about as a result of the fiduciary obligation. A fiduciary obligation is an obligation of loyalty (Kuan Pek Seng @ Alan Kuan v Robert Doran [2013] 4 AMR 1) and the various forms in which the fiduciary obligation could exist was discussed in the decision of Saroja d/o MN Muthupallaniappa v Muthuraman s/o M Karupiah [2012] 10 MLJ 411 and in the United Kingdom in Bristol & West Building Society v Mothew [1997] 2 WLR 436.

A fiduciary has to carry out his responsibilities within the ‘no profit rule’ (Smith, 2013) which means that the fiduciary should not use the property for his personal benefit (Noor and Safinaz, 2000). The ambit of the rule has been aptly formulated by Lord Russell in the United Kingdom decision of Regal (Hastings) Ltd v Gulliver [1942] 2 AC 134 as follows;

“The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action ... The liability arises from the mere fact of a profit having, in the stated circumstances, been made”.

It is important to note that when there is a fiduciary obligation between the parties, the imposition of a constructive trust is merely declaratory in nature when the fiduciary has acted outside the scope of his fiduciary obligation. The fiduciary then has a trust obligation and not a mere personal obligation towards the beneficiary. It is submitted that, therefore, if there is no fiduciary obligation present in the circumstances, the courts will need to use the constructive trust as a ‘remedy’ in the form of a remedial constructive trust.

A remedial constructive trust is where the court exercises its inherent discretionary powers in equity and imposes a constructive trust by way of a remedy based on the situation at hand (Hemsworth, 2000). A constructive trust in this category “has no prior existence...and the circumstances are such that” (Hingun and Wan, 2013) equity imposes the obligation onto the person, who holds the property, to hold it for the benefit of the rightful owner. In this category also, authorities suggest that the trust comes into play “at the discretion of the judge, who has the liberty to consider whether or not to create new property rights on a case-by-case basis” (Y. K. Liew, 2016). It has also been described as “nothing more than a formula for equitable relief” (Selangor United Rubber Estates Ltd v Cradock (No. 3) [1968] 1 W.L.R 1555) whether personal or proprietary in nature, as a “judicial remedy” (Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] A.C 669) “an order of the court granting, by way of a remedy, a proprietary right” (Re Polly Peck International plc (in administration) No. 2 [1998] 3 All E. R 812) and the imposition of a “trust by way of a remedy”. (Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638)

The Malaysian courts have tended to follow in the footsteps of their English counterparts in that, the preferred approach has been that to hold that the courts role is that to declare the trusts that exists from the beginning (Hingun and Wan, 2013). However, the courts have been open to consider the idea of remedial constructive trusts.

This began in 1990 in the case of Ng Tien v Chow Nim Yan [1990] 3 MLJ 373. The judge in the case, *Jemuri Serjan SCJ* was happy to use a constructive trust as a remedial device. However, in the 2008 decision of Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822, *Gopal Sri Ram JCA* gave effect to the intention of the parties

at the onset suggesting the imposition of the constructive of the institutional regime although no express mention was made of the same.

In 2009, in the Court of Appeal decision of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & Ors* [2009] 1 MLJ 289, *Mohd Ghazali JCA* in delivering this important judgement for constructive trusts in Malaysia did not dwell into the finer points or the foundational basis of the workings of the English version of an institutional constructive trusts and remedial constructive trusts although their lordships had the opportunity to do so. In the same year, *Gopal Sri Ram FCJ's* decision of *Takako Sakao v Ng Pek Yuen* [2009] 6 MLJ and *Suriyadi Hamid Omar FCJ's* decision in 2014 in the case of *Datuk M Kayveas v See Hong Chen and Sons Sdn Bhd & Ors* [2014] 4 MLJ 64 merely skimmed over definitions of express trusts, resulting trusts and constructive trusts but did not make clear reference to the distinctions of the application of institutional or remedial constructive trust, again, although there was an opportunity for the courts to do the same.

In 2012, in the case of *Maybank Trustees Bhd v CIMB Bank Berhad* [2012] 6 MLJ 354, *Jeffrey Tan JCA* implied that remedial constructive trusts may be imposed if the circumstances warranted the same. Unlike in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & Ors* [2009] 1 MLJ 289 and the majority of other decisions, the Court of Appeal in the unreported decision of *Tudingan Timur Sdn Bhd v Che Mat Bin Padali*, Civil Appeal No. A-02-1613-2011, 19 September 2013 relied on decisions of the United States of America to argue along the lines of Constructive Trust being imposed as a remedy to accord a proprietary right in the hands of the claimant. These decisions that were referred to are *Beatty v Guggenheim Exploration Co* [1919] 225 N.Y. 380, 122 N.E. 378; *Kuck v Sommers* [1950], 59 Ohio Law Abs 400; *Ferguson v Owen* [1984] 9 Ohio St.3d 223, 225, 9 OBR 586, 459 N.E 1293.

In the recent 2016 High Court decision of *Rapat Ribuan Sdn Bhd v Cheang Boon Ngoh & 4 Ors* [2016] 1 AMR 170, the court did not expressly distinguish the concepts of an institutional constructive trust and remedial constructive trust. However, the court based its decision on the “real intention” of the parties from the onset suggesting that the decision was based on merely declaring what the parties had agreed to in the first place, which is the declaration of an institutional constructive trust. This case followed the position in *Datuk M Kayveas v See Hong Chen and Sons Sdn Bhd & Ors* [2014] 4 MLJ 64 although *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & 3 Ors* [2009] 1 MLJ 289 was cited as the authority being followed.

In the Federal Court decision of *RHB Bank Berhad v Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175, the concept of remedial constructive trust was accepted and a proprietary remedy was allowed. Whilst this case accepted the application of a remedial constructive trust, there was little guidance given to the application of constructive trusts in this domain.

4. PERBADANAN PERTANIAN NEGERI SELANGOR V JW PROPERTIES SDN BHD (“THE API-API CASE”)

Recently, the Federal Court in the *Api-Api Case* laid down a three pronged test for the workings of constructive trusts. For the purpose of this paper, the relevant facts of the case are summarised from the judgement as follows to facilitate the understanding of the readers.

In this case, the appellant, Perbadanan Pertanian Negeri Selangor was the registered and beneficial owner of a parcel of land in the area of the Api-Api in the district of Kuala Selangor (hereinafter referred to the ‘Api-Api Land’). The Api-Api Land was subject to the category of land use as being for aquaculture only and was subject to a restriction in interest that the land shall not be sold, leased, charged or transferred in any way whatsoever without the consent of the State Authority. The appellant sold the land to one PKPS Aquaculture Sdn Bhd (‘PKPS’), delivered vacant possession and thereby divesting all its rights, title and interest in the Api-Api land to PKPS. PKPS then agreed to sell the Api-Api land to the respondent, JW Properties Sdn Bhd. Under a Deed of Assignment, PKPS assigned all its rights, title and interest in the Api-Api land to the respondent.

It was only after this sale of the Api-Api land to the respondent by PKPS that the issue document of title to the land was issued in early 1998 under the name of the appellant as the registered owner and the appellant remained the registered owner all through until the case was heard. In late 1998, the respondent had informed the appellant of the assignment of rights to it by PKPS and the respondent requested the appellant to procure the issuance of the issue document of title to the Api-Api land and then to transfer the land to the respondent. The respondent also notified the appellant that it had expended a large sum of money on the land by improving it and developing it into an operational aquaculture farm.

In 2011, a section 8 Notice in Form D was published in the Gazette for the intended acquisition of the Api-Api land which would have the effect of evicting the respondent from the land, on which the respondent had spent RM4 million to acquire and of which they had been in occupation without interruption for close to twenty years. A land enquiry that followed resulted in an award being made in 2012 by the Land Administrator in favour of the appellant in the sum of RM3,035,145.00. In view of the competing claims by the appellant and the respondent over the compensation, the Land Administrator ordered the awarded sum to be deposited into court pending the determination of their claims by the High Court.

In 2014, the learned Judge of the High Court decided that the respondent was not the beneficial owner of the Api-Api land and accordingly ruled that the person to whom the compensation sum to be payable was the registered proprietor of the land, and that was the appellant. The matter then reached the Court of Appeal and the Federal Court who both favoured the respondent and dismissed the case of the appellant.

The *Api-Api Case* seems to have strung together the principles that came with earlier cases on the point of constructive trusts although most of these cases were not mentioned. The apex court in the judgement of *Zulkefli Bin Ahmad Makinuddin PCA*, went on to confirm the workings of a constructive trusts in what the writers label as the 'three pronged test'. In this test, making reference to previous cases, his Lordship stated that a constructive trust;

- (1) "...arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another" (*Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751; *Vellasamy a/l Pennusamy v Gurbachan Singh a/l Bagawan Singh & Ors.* [2010] 5 MLJ 437)
- (2) "...is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties" (*Hassan Kadir & Ors v Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136)
- (3) "...is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it" (*Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & 3 Ors* [2009] 1 MLJ 289).

It is submitted that whilst the *Api-Api Case* laid these requirements which are welcome on one hand, the court did not explain the parameters within which this could function and left an open ended judgement to interpretation. It is therefore crucial that some guidance be attached to each part of the pronouncement which is discussed below.

4.1. Unconscionable For Owner of the Property (Usually But Not Necessarily the Legal Owner) to Assert His Own Beneficial Interest in the Property and Deny the Beneficial Interest of Another

The concept of 'unconscionability' or doing something 'unfair' is an accepted basis of the imposition of a constructive trust (*Noor and Safinaz, 2000*). To this point, it is perhaps necessary to take guidance from *Millet L.J.* His lordship said that a constructive trust arises "whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another" (*Millett, 1998*). A year later, in the United Kingdom Court of Appeal, in *Paragon Finance Plc v DB*

Thakerar & Co (a firm), Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, p 409), his Lordship stated that there are two categories in which a constructive trust may arise. The first category of Constructive Trusts, arises where “the constructive trustee is really a trustee”. This is where both parties intend to create a trust at the onset and it is clear that the trustee holds the property for the benefit, not for himself, but for another. There is then a breach of the duty of trust and confidence when the trustee takes the property for himself.

It thereafter, becomes “unconscionable” or wrong for the trustee to retain the beneficial interest in the property for himself. He then cited several cases which applied a constructive trust in this first category within the domain of secret trusts (James McCormick v William Grogan [1869] LR 4 HL 82), where there is an imperfect transfer of property (Rochefaucauld v Boustead [1897] 1 Ch 196) and breach of trust for the transfer of property (Pallant v Morgan [1952] 2 All ER 951). Accordingly to his Lordship, the second category of constructive trusts is where the “defendant is implicated in a fraud” making a defendant who is “sufficiently implicated in the fraud accountable in equity” and be “liable to account as a constructive trustee”. This lends weight to concept of ‘wrongful conduct’ on the part of one party who retains the property at the expense of the true owner as mentioned in case of Pharmmalaysia Bhd (In Receivership) v Dinesh Kumar a/l Jashbhai Nagjibha Patel & 13 Ors [2004] 6 AMR 661

Further, according to *Lord Browne Wilkinson* in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669;

“the common vein running through all the species of the constructive trust is this: that the liability of any person to as a constructive trustee is predicated on that person having knowledge of some factor which is deemed to affect his conscience...in order to justify the invocation of the principle of constructive trusts”.

The case of *Koh Siew Keng & Anor v Koh Heng Jin* [2008] 3 MLJ 822 had shown only some resemblance along these lines to the concepts of ‘good conscience’ and ‘wrongful conduct’ as one of the key features of when a constructive trust would be held on the circumstances.

4.2. Demands of Justice and Good Conscience

If we look to the United Kingdom for guidance on this, we will note that some of the hallmark decisions which made reference to such points came in the cases presided upon by *Lord Denning*. His Lordship had on many occasions championed the American model as the foundational basis for constructive trusts. His Lordship commonly referred to his model as the “new model” constructive trusts “whenever justice and good conscience, in the sense of fairness, requires it” (*Hussey v Palmer* [1972] 1 WLR 1286)

In *Maybank Trustees Bhd v CIMB Bank Berhad* [2012] 6 MLJ 354, the Court of Appeal, seems to have suggested that the Malaysian courts are inclined towards adopting constructive trusts based on principles of “broader justice” and “good conscience” and leaving behind the traditional basis of the Constructive Trusts. So this could be seen to mean that the courts would do ‘what is right’ in the circumstances of the case.

4.3. Remedial Device That is Employed to Prevent Unjust Enrichment

It is noteworthy that the *Api-Api Case* is the most recent indication from the apex court that a constructive trust be viewed as a ‘remedial device’ on the basis of ‘preventing unjust enrichment’. This concludes clearly that the court has favoured a remedial constructive trust over the institutional constructive trust. It is also noteworthy that the apex court surprisingly did not make any reference to the *RHB Bank Berhad v Travelsight (M) Sdn Bhd* (2016) 1 MLJ 175 decision which was presumably the case in which the Malaysian Federal, for first time had accepted that remedial constructive trust would be applied in Malaysia.

However, the concept of ‘restitution’, was omitted altogether from the equation for the prevention of unjust enrichment. One of the main theoretical basis on which a constructive trust stands has been mainly restitution of the claimant when the defendant has been unjustly enriched. This is probably referring to the outcome at the end

that needs to be achieved. P.J Millet has opined that “restitution...is still thought necessary if resort if to be had to equity’s more effective tracing rules” (Millett, 1998).

Restitution is the act of restoration. According to *Peter Birks*, “Restitution is the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money” (Birks, 1989). Therefore, the event that triggers restitution is when the defendant has received unjust enrichment at the expense of another.

The basic purpose of restitution is to achieve fairness and to prevent unjust enrichment. However, it is important to note that the courts will not impose a Constructive Trust simply because the recipient of the money will be ‘unjustly enriched’ as the Federal court seems to have suggested. In the *Api-Api Case*, unjust enrichment was not indicated as a triggering factor for restitution which gives rise to the question as to whether the courts have left the extent of the remedy open as opposed to limiting any remedy pronounced within the ambit of restitutionary relief.

The concept of ‘restitution’ had been discussed previously in the several cases, namely by Court of Appeal in *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822 and the Federal Court in *RHB Bank Berhad v Travelsight (M) Sdn Bhd* (2016) 1 MLJ 175. The former case considered the basis of imposing a constructive trust on ‘restitutionary relief based on unjust enrichment’. Gopal Sri Ram JCA quoted Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 as follows:

“The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, pp 63-64, per *Lord Wright*; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227, 255; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at p 578C; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.”

In the latter case, the concept of restitution was discussed but in the context of the law of contract. It is unclear in the case if the law lords required that restitution forms that basis of the imposition of the constructive trust but was certainly used in the context of a proprietary claim allowed in that case.

The omission of reference to the concept of restitution was also previously apparent in the Court of Appeal decision of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & Ors* [2009] 1 MLJ 289, Whilst the court heavily relied on English authorities on constructive trusts such as *Hussey v Palmer* [1972] 3 All ER 744, *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, the courts went on to say that constructive trusts are imposed to reverse unjust enrichment hence resulting in a proprietary right with little reference to the hallmark concept of restitution.

For guidance on what is ‘unjust enrichment’, reference will need to be made to the Federal Court decision of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. This case laid down the four elements in proving unjust enrichment from two main English House of Lords decisions on point namely *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2008] 1 AC 561, hence, the formulation that “a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:

- (a) the plaintiff must have been enriched;
- (b) the enrichment must be gained at the defendant's expense;
- (c) that the retention of the benefit by the plaintiff was unjust; and
- (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution”

In the recent 2016 case of *Gerbang Perdana Sdn Bhd v MTD ACPI Engineering Berhad (Formerly known as “ACP Industries Berhad”) & Anor* [2016] 1 AMCR 359, *Azimah Omar JC* in the Shah Alam High Court said that

she was bound to follow *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad Bin Tengku Mansur & Ors* [2009] 1 MLJ 289 that the basis of a constructive trust is the unjust enrichment of the defendant. Her ladyship went on to apply the *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ test as above but no made clear application to the concept of restitution although it was required in part (d) of the test above.

Whilst the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 went to some length to explain the importance of 'restitution' (albeit in the context of a contractual relationship on the facts of that case), the apex court in the *Api-Api Case* made no reference to the need for 'restitution' based unjust enrichment. It is important to note that the cases of *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 and *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ had in the past provided some elucidation that the principle of unjust enrichment is the basis to justify an award of restitutionary relief. Therefore, it is submitted that it seems that the Federal Court has left room for pure discretion based remedies with a lack of clear parameters.

5. CONCLUSION

The apex court in the *Api-Api Case* had laid down the requirements of when a constructive trust is to be imposed. However, there is a lack of clarity as to the parameters of the elements laid down. The purpose of this article is to humbly submit that whilst, the decision provides, on one hand, a relief from the past plethora of uncertainty as seen in the list of cases discussed, the elements laid down also seem to lack force and clarity of basis which may cause some far reaching implications. This paper has attempted to provide some points of guidance to the principles laid down. More is definitely required for there to be structure and certainty to the law.

It is important to note that the imposition of a remedial constructive trust in this fashion may result in there being a proprietary claim which has the following consequences;

- (i) It gives the claimant an interest in the property and therefore priority over other creditors in the event of bankruptcy;
- (ii) If the property has been disposed of, in some circumstances it may be traced and the person who holds the property (or its traceable proceeds) may be liable and will hold the property on constructive trusts for the rightful owner of the property subject to defences that could become applicable; and
- (iii) The claimant will get any increased value (or profits made) from the property in question which could go against the principles of restitutionary relief.

Therefore, clarity of the parameters of the elements laid down is crucial. The application of proprietary claims in a discretionary manner without proper parameters may affect the rules applicable under the law of bankruptcy where the proprietary claim results in the claimant taking priority over the defendant's general creditors. This has a potentially detrimental effect on such third parties (Liew, 2016). The concept of restitution should be infused into the law so as not to allow for the unjust enrichment of the plaintiff at the expense of the defendant. There should be a structured approach by the courts to address and clarify the application of the requirements that are laid down in the cases as opposed to undertaking a mere mention of the law from other jurisdictions.

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