Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)
[2002] SGHC 119

Case Number : Suit 934/2001

Decision Date : 30 May 2002

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Davinder Singh SC, Cavinder Bull and Shirin Tang (Drew & Napier LLC) for the plaintiffs; Jules Sher QC, K Shanmugam SC, Prakash Pillai and Marcus Yip (Allen & Gledhill) for the defendants

Parties : Info-communications Development Authority of Singapore — Singapore Telecommunications Ltd

Restitution – Unjust enrichment – Money paid under mistake of law – Recovery of moneys so paid – Principles governing recovery – Whether statutory nature of payment precludes recovery – Whether mistake relates to formation of pre-existing contract or mistaken payment simpliciter – Whether there was any operative mistake existing in the circumstances of case – s 28 Telecommunication Authority of Singapore Act (Cap 323, 1993 Ed)

Restitution – Unjust enrichment – Money paid under mistake of law – Recovery of moneys paid under mistake of law – Defences – Compromise – Assumption of risk – Estoppel – Change of position

Words and Phrases – 'Compromise'

Judgment

Cur Adv Vult

GROUNDS OF DECISION

Introduction

1 In March 1997 the statutory predecessor in title of the plaintiffs ("IDA"), then known as the Telecommunications Authority of Singapore ("TAS") paid the defendants ("SingTel") $1.5 billion as compensation for the modification of SingTel's telecommunication licence, following the decision of the Government of Singapore to liberalise the telecommunications industry. The modification allowed the entry of competition against SingTel in the provision of basic telecommunication services as from March 2000, 7 years ahead of the expiry of SingTel's monopoly over basic telecommunication services in March 2007. TAS had grossed up tax in the compensation and included in it was the sum of $388 million. Before accepting the offer of compensation, SingTel knew only in passing of the fact that the compensation was grossed up for tax. The offer was an undifferentiated lump sum of $1.5 billion. The compensation was offered, accepted and eventually paid in one lump sum, and the "full and final payment" ended a process of interchanges between the two parties, which had started in March 1996.

2 The nature of the bilateral exchanges which led to the acceptance of TAS's statutory offer on 30 May 1996 and the precise circumstances in which this sum was grossed up for tax are highly controversial. In my view, much of this case will turn on them. Suffice it to note at this preliminary stage that there was a dearth of evidence as to how TAS decided to gross up for tax. In October 2000 IDA learnt that the Inland Revenue Authority of Singapore ("IRAS") had ruled that the compensation of $1.5 billion for the loss of SingTel's monopoly would not attract any income tax liability. IDA formed the view, no doubt on advice, that a mistake of law on the part of TAS had

caused the inclusion of the tax element in the compensation and that SingTel's "unjust enrichment" ought to be reversed. As the IRAS ruling was said to be final and binding for all intents and purposes, IDA decided to and in this action seek restitution from SingTel.

3 IDA asserted in this action that TAS had made a mistake in law as a result of which SingTel was unjustly enriched in the sum of $388 million. As the successor in title of TAS, IDA asks that SingTel be ordered to return it.

4 It is not in controversy that the common law of Singapore has recently been declared as allowing a claim in restitution grounded on a mistake of law. In *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2001] 4 SLR 90, Judith Prakash J followed the famous, though not unanimous, decision of the House of Lords in *Kleinwort Benson v Lincoln City Council* [1998] 4 All ER 513 and on 31 July 2001 allowed the reversal and recovery of payments made by a mistake of law. On 6 March 2002 the Court of Appeal affirmed the ruling of the High Court: see the report at [2002] 2 SLR 1. The case before the Court of Appeal shall be referred to as "the *De Beers* case" in this judgment. I shall return to these cases shortly for the precise width of the ruling, its basis and the defences which were considered so far as they are relevant for present purposes.

5 What had been hotly contested in this action are questions of fact and questions of mixed fact and law upon the answers of which the outcome of this action will turn. In terms of issues of fact, the central areas of dispute are firstly whether in fact TAS had made the kind of operative mistake of law which would generate a restitutionary relief. The second issue of fact is whether there had been negotiations between TAS and SingTel in March and April 1996 which led to the conclusion of a contract on 30 May 1996 under which SingTel accepted the lump sum compensation of $1.5 billion for the earlier termination of its exclusive rights. Further or alternatively, and closely linked, is the question whether a compromise was concluded on 30 May 1996 of all issues and differences between the parties resulting in SingTel's acceptance of $1.5 billion as compensation, as SingTel alleged, or whether there were only 'pre-Notification consultations' which merely led to an agreement on 30 May 1996 to the limited effect that the amount of $1.5 billion when paid would be "full and final payment", as IDA alleged. Fourthly, what was the precise nature of the decision to gross up for tax and the true intention of both TAS and SingTel in relation to the provision for the tax? A central issue of fact is whether a deal had been concluded on 30 May 1996 to the intent that the lump sum compensation was offered and accepted on the basis that there was a full and final settlement of all issues between the parties. The findings of fact of this court on these and related subsidiary issues of fact will bear on (1) the grounds of restitution and the identification of the unjust factor(s) necessary to designate the tax element as "unjust enrichment" in the hands of SingTel which is justifiably described in the law of restitution as "at the expense of" TAS; and (2) the defences which are relied on by SingTel and which are referred to in the issues arising for determination in this case. In addition to the proper evaluation of the evidence led in these proceedings, the other challenge to the court is to discover and identify the principles governing the rather new cause of restitutionary claim grounded on mistake of law and the application of the facts, as found, to those principles.

6 There arose during the trial incidental disputes of fact, for example, as to whether TAS acting through its then Director-General, Mr Lim Chuan Poh, had "threatened" and "applied extreme pressure" on SingTel's CEO BG Lee Hsien Yang and Ms Chua Sock Koong, then a Senior Vice President, SingTel's Corporate Affairs & Finance, to accept TAS's offer of compensation without making any representations or appeal to the Minister of Communication in accordance with the procedure as laid down in the Telecommunication Authority Act of Singapore Act, Chapter 323 ("the TAS Act"). As will be shortly apparent from my evaluation of the evidence led before me and in the light of my findings of fact based on those evidence, nothing turned on these peripheral issues which would have any impact on the outcome of these proceedings. In relation to these side disputes, these were at the

end of the day usefully clarified. SingTel's top management honestly felt the 'threat' and pressure. However, when the then Minister of Communications ("Minister Mah") and the then Permanent Secretary ("Mr Teo Ming Kian") of the Ministry of Communications ("MINCOM") went into the witness box and took the stand that they had not done anything wrong or questionable, it was clarified that nothing unlawful such as duress or any wrongdoing on the part of the regulators was suggested by SingTel. It emerged, however, that the regulators, particularly the then Director-General of TAS, was 'very aggressive' in implementing and generally directing Government's policy to liberalise the industry. In that context, TAS was very keen to bring about closure on the issue of compensation so that competition could be introduced as planned. The raising of those peripheral issues necessarily raised the 'heat' of these proceedings. In the end, matters were clarified. One has to be careful, however, that the dust of conflict generated by these forensic skirmishes is not allowed so to distract us as to miss the wood for the trees.

The material issues

7 I now turn to the material disputes between the parties. Those controversies involve questions of mixed fact and law or the applications of the facts as I find them to the law. They are as follows.

> (1) Whether a mistake of law was made which entitles IDA to restitution, as IDA contended?
>
> (2) Whether the mistake, if operative, was a mistake in the formation of the pre-existing transaction, not in the payment itself, as SingTel contended to bar restitution?
>
> (3) Whether payment under section 28 of the TAS Act precludes recovery for mistake of law?
>
> (4) Whether there was a compromise and settlement of all issues and differences between the two parties which precludes recovery as SingTel alleged?
>
> (5) Whether there was, in any case, a relevant mistake of law when it was, as SingTel contended, a misprediction on the part of TAS?
>
> (6) Whether it was not an 'operative' mistake of law, as SingTel contended, because the non-taxability of the compensation for the loss of the monopoly rights has not been established by a court of law?
>
> (7) Whether the defence of change of position is available to SingTel?
>
> (8) Whether the defence of estoppel is available to SingTel?
>
> (9) Whether there had been no injustice in the enrichment because of the loss of tax credit, as SingTel contended?
>
> (10) Whether any mistake as to tax was immaterial and irrelevant, seeing that SingTel's claim greatly exceeded the $1.5 billion compensation?

These issues will be discussed under the different legal aspects of the case and therefore they are not discussed sequentially but thematically.

The parties

8 IDA is a body corporate established pursuant to the Info-Communications Development Authority of Singapore Act (Cap 137A) as the successor authority to TAS. Prior to 1992, domestic and international telecommunications and postal services in Singapore were provided by TAS. In the late 1980s, the Singapore government announced its intention to privatise these services.

9 SingTel was accordingly incorporated in March 1992 under the name of "Singapore Telecommunications Private Limited" to take over the provision of domestic and international telecommunications services from TAS. After the incorporation of SingTel in March, 1992 TAS remained as a statutory board and assumed the role of the regulator of the telecommunication industry. Under the TAS Act, TAS had powers to regulate and monitor licensees as well as modify the terms of any licence, in accordance with the procedure for notification, compensation, representations and appeal under the TAS Act. Subsequently, the TAS Act was repealed and a new statute, the Info-Communications Development Authority of Singapore Act, Revised Edition 2000, came into force on 1 December 1999. IDA was constituted under it and the interests, rights and privileges and liabilities of TAS were transferred to IDA.

The Licence

10 Pursuant to the TAS Act, TAS granted SingTel a licence ("the Licence") effective 1 April 1992. The Licence allowed SingTel to provide telecommunication services. By the Licence SingTel, which was designated a Public Telecommunication Licensee, was authorised to establish, install and maintain the telecommunication systems specified in Part I of the Appendix to the Licence, which were referred to in the Licence as 'the Applicable Systems', and to operate and provide by or through the Applicable Systems all the telecommunication services specified in Part II of the said Appendix. In Part I of the said Appendix the Applicable Systems were all telecommunications systems within Singapore which were operated by TAS, all telecommunications systems that were previously connected thereto and all telecommunications systems which are necessary for the operation and provisions of any of the telecommunication services set out in Part II in Singapore.

11 Part II of the said Appendix reads as follows:-

> "(A) INTERNATIONAL AND DOMESTIC TELECOMMUNICATION SERVICES
>
> 1. Public Switched Telephone Services
>
> 2. Public Switched Message Services
>
> 3. Public Switched Integrated Services Digital Network (ISDN) Services
>
> 4. Leased Circuit Services
>
> 5. Public Switched Data Services
>
> 6. Public Radio-communication Services
>
> 7. Public Videotex Services
>
> 8. Public Switched Video Services
>
> (B) PUBLIC LAND MOBILE RADIO-COMMUNICATION SERVICES

1. Public Mobile Paging Services

2. Public Radio Paging Services

3. Public Cordless Telephone Services

4. Shared/Trunked Repeater Services"

12 The said services were therefore split into two categories. The first, under Part II(A) of the Licence consisted of 8 types of international and domestic services, the main one being international and domestic Public Switched Telephone Services. Exclusive rights to operate and provide the services set out in Part II(A) of the Licence were granted for 15 years (until 31 March 2007). These rights are hereinafter referred to as "the Exclusive Rights". Part II(B) consisted of 4 categories of what is known as Public Land Mobile Radio-communication Services. Exclusive rights to provide and operate those services were granted for 5 years until 31 March 1997. SingTel paid TAS $9.6 million upon the grant of the Licence and an annual licence fee for the year ended 31 March 1993. Thereafter SingTel has been obliged to pay a licence fee based on a percentage of SingTel's profits. For these items SingTel had so far paid about $130 million to the regulators.

1993 Modification of the Licence

13 SingTel was entirely owned by the Government until its initial public offering ("IPO") in October 1993. In October, 1993, just before SingTel's IPO, TAS, modified the Licence to include additional conditions ("the 1993 modification").

14 By his letter of 5 October 1993 the then Director-General of TAS Mr Ng Hong Yew gave notice of the 1993 modification. It is necessary to quote it in full:-

> "We hereby notify Singapore Telecommunications Pte Ltd (STPL) in accordance with Section 28 of the TAS Act (Chapter 323) that we intend to modify the above Licence by inserting new Conditions 1.4, 1.5, 1.6 and 1.7 as set out below:
>
> Condition 1.4
>
> > 'Provided that nothing in Condition 1.2 shall give the Public Telecommunication Licensee the exclusive right to operate and provide Public Videotex Services and Public Switched Video Services.'
>
> Condition 1.5
>
> > 'Provided that nothing in Condition 1.3 shall give the Public Telecommunication Licensee the exclusive right to operate and provide Public Land Mobile Radio-communication Services specified in Part II(B) of the Appendix to the Licence except for Public Cellular Mobile Telephone Services and Public Radio Paging Services, and the Authority shall have the right to license on a case-by-case basis, other Public Telecommunication Licensees to provide telecommunication services which overlap with Public

Cellular Mobile Telephone Services and Public Radio Paging Services, provided that these are ancillary and incidental to the principal services provided by these other Licensees.'

Condition 1.6

'Provided that nothing in Condition 1.2 and 1.3 shall give the Public Telecommunication Licensee the exclusive right for the carriage of any signs or signals which are used in the provision of television and sound broadcast services for eventual reception by or distribution to the general public, whether within or outside Singapore, including satellite uplinks and downlinks, cable TV and related broadcasting services.'

Condition 1.7

'Provided that from 1 April 2002 the Authority shall have the right to license on a case-by-case basis, broadcasting operators and other Public Telecommunication Licensees to provide telecommunication services which overlap with the first six services listed in Part II(A) of the Appendix to the Licence, provided that these are ancillary and incidental to the broadcasting services or to the principal services provided by these broadcasting operators and other Licensees.'

2. The Licence granted to STPL on 1 April 1992 was meant to confer upon STPL only the exclusive right to operate and provide basic telecommunication services which STPL was then operating and providing. The newly included Conditions 1.4 – 1.7 seek to clearly define the extent of this exclusive right, in order that we do not inadvertently impede the introduction of any new telecommunication services by other operators as a result of rapid technological advances and the convergence of telecommunication, broadcasting and computer technologies."

15 The new condition 1.4, it will be appreciated, took away SingTel's exclusive rights to operate and provide Public Videotax Services and Public Switched Video Services, which were two of the 8 services listed in Part II(A) of the Licence, in respect of which SingTel was granted exclusive rights for 15 years. Further, under new Condition 1.5 the exclusive rights under Part II(B) of the Licence were limited to Public Cellular Mobile Telephone Services and Public Radio Paging Services. Its exclusive rights over two of the 4 services listed under Part II(B) of the Licence were taken away. Condition 1.5 gave TAS the right to license on 'a case-by-case basis, other licensees to provide telecommunication services which overlap with the public radio paging services *provided that these are ancillary and incidental to the principal services provided by these other licensees'* (emphasis added).

16 For present purposes, the true and natural interpretation of new condition 1.7 as set out above loomed large in 1996 when Government decided to accelerate the process of liberalisation of the telecommunications industry. I shall refer to condition 1.7 as "the A&I clause" when I re-visit the interpretation of the width and purport of it which was responsible for the enormous differences between the compensation assessed by the respective consultants of TAS and SingTel.

17 I should note that TAS did clarify the 1993 modification. By its written notice dated 5 October 1993 TAS stated clearly that the newly included conditions sought to define clearly the extent of SingTel's exclusive rights in order that TAS did not "inadvertently impede the introduction of any new telecommunication services by other operators as a result of rapid technological advances and the convergences of telecommunication, broadcasting and computer technologies." The Board of SingTel approved the acceptance of the 1993 Modification on the basis that it did not affect the Exclusive Rights which had been granted under the Licence.

18 In or around October 1993, following the 1993 Modification of the Licence, shares in SingTel were offered to the public. At the time of the IPO, SingTel spelt out its Exclusive Rights at page 51 of the Prospectus issued for the IPO, which stated as follows:-

> "…TAS has reserved the right to license, in certain cases, from 1 April 2002 broadcasting operators and other public telecommunication licensees to provide telecommunication services which overlap (with) services provided by (SingTel) *provided that such services are ancillary and incidental to the principal services provided by such broadcasting operators or other licensees*…" (words in brackets and emphasis are added).

19 This section of the Prospectus was approved by TAS. The Prospectus was also considered and approved by the Government's Steering Committee on SingTel's privatization. The then chairman of TAS, who was also concurrently the Permanent Secretary of the Ministry of Communications, went on part of the roadshow for SingTel's IPO. SingTel was listed on the Singapore Stock Exchange on 1 November 1993. It had about $1.5 million shareholders from all over the world. After the IPO, the Government was, and remains today, the largest shareholder in SingTel.

20 New telecommunications services entered the market after 1 April 1992. SingTel and one other licensee were licensed with effect from 1 June 1994 to provide Public Data and Location Tracking Services. Internet Access Services were granted to SingTel and one other licensee from 5 September 1995.

Government's review of industry and liberalisation

21 The telecommunications industry worldwide was in a state of flux. Competition was necessary to increase efficiency. TAS monitored closely the competitiveness of SingTel and steadily introduced competition in many areas by interpreting SingTel's Licence narrowly, including internet, VSAT etc. It also benchmarked SingTel's rates against other countries. In the years 1994-5, SingTel had cut its IDD rates to 37 countries by up to 47%. Government embarked on a review of the telecommunications industry with a view towards liberalisation.

22 On 8 January 1996 representatives from SingTel attended a meeting with officers from various government agencies. These included TAS, the Ministry of Technology and Information, the Trade Development Board, the Ministry of Foreign Affairs and the Ministry of Communications. Those present were told that TAS might consider reviewing the period of exclusivity granted to SingTel under the Licence. Mr Lim Chuan Poh, then Director-General of TAS, was talking in terms of reviewing the exclusivity period. SingTel did not think that TAS could unilaterally introduce competition on the terms of the Licence, as it stood. However, both Government and TAS asserted that they had a number of options. First, they could accelerate the introduction of competition in basic telecommunication services by modifying SingTel's Licence to reduce the period of monopoly over the provision of basic telecommunication services. One proposal was to modify SingTel's Licence by shortening the duration of SingTel's monopoly over basic telecommunication services from 15 years to 8 years, i.e. to end on

31 March 2000, instead of 31 March 2007. Alternatively, they could introduce competition under the "A&I clause" which had been inserted into SingTel's Licence via the 1993 Modification.

23 The TAS Act which was then in force conferred on TAS the power to modify SingTel's Licence. Section 28 of the TAS Act provided:

> "28.-(1) Subject to this section, the Authority may modify the conditions of a licence granted under section 26.
>
> (2) Before making modifications to the conditions of a licence of a public telecommunication licensee under this section, the Authority shall give notice to the licensee -
>
> (a) stating that it proposes to make the modifications in the manner as specified in the notice and the compensation payable for any damage caused thereby; and
>
> (b) specifying the time (not being less than 28 days from the date of service of notice on such licensee) within which written representations with respect to the proposed modifications may be made.
>
> (3) Upon receipt of any written representation referred to in subsection (2), the Authority shall consider such representation and may –
>
> (a) reject the representation; or
>
> (b) amend the proposed modification or compensation payable in accordance with the representation or otherwise,
>
> and in either event, it shall thereupon issue a direction in writing to such licensee requiring that effect be given to the proposed modifications specified in the notice or to such modifications as subsequently amended by the Authority within a reasonable time.
>
> (4) Any public telecommunication licensee aggrieved by the decision of the Authority under subsection (3) may, within 14 days of the receipt by it of the direction, appeal to the Minister whose decision shall be final.
>
> (5) The Authority shall not enforce its direction-
>
> (a) during the period referred to in subsection (4); and

(b) whilst the appeal of the public telecommunication licensee is under consideration by the Minister.

(6) If no written representation is received by the Authority within the time specified in subsection (2) or if any written representation made under subsection (2) is subsequently withdrawn, the Authority may forthwith carry out the modifications as specified in the notice given under subsection (2)."

24 In early 1996 Government formed the view that existing measures to introduce progressive competition were not the optimal way to maintain Singapore's competitiveness. Minister Mah announced in Parliament in early March 1996 that it was better to "modify (SingTel's) Licence explicity and to end its monopoly earlier than 2007". On 16 March 1996 Cabinet approved the proposal to modify SingTel's Licence to bring forward the introduction of competition in basic telecommunication services from 2007 to 2000 and to compensate SingTel for the modification of its Licence from the Consolidated Fund. Cabinet, it was envisaged, would then approve the amount of compensation, which MINCOM would refer to Cabinet: see 1AB49. After Cabinet approval, Deloitte & Touche Consulting ("D&T") was appointed by TAS to evolve an economic model to compute the damage caused to SingTel by the modification of its Licence. A Review Team comprising the Director-General, TAS, the Deputy Secretary, Ministry of Finance, and the Accountant-General was formed to assist the TAS team working with D&T on the review.

25 On 18 March 1996 BG Lee Hsien Yang, SingTel's President and CEO and Ms Chua Sock Koong, then a Senior Vice President, SingTel's Corporate Affairs and Finance, attended a meeting with the Permanent Secretary, MINCOM, Mr Teo Ming Kian, who was at all material times the Chairman of TAS, as well as Mr Lim Chuan Poh, then 2nd Deputy Secretary of MINCOM and concurrently Director-General of TAS. SingTel's representatives were told generally that liberalisation was beginning in earnest.

26 The next day, Minister Mah and his top officials met Mr Koh Boon Hwee, then Chairman of SingTel, BG Lee and Ms Chua. He told them that TAS would be making changes to the Licence to allow for the entry of competition before the expiry of SingTel's monopoly in March 2007. TAS was appointing independent consultants to advise on the financial impact of such changes and SingTel would be paid compensation for the damage that it would suffer. The management of SingTel later found out that TAS had engaged D&T, working out of Hong Kong. Minister Mah also indicated that he intended to make a public announcement that the Government was looking at allowing more competition in the telecommunication sector. He further informed SingTel's representatives of Government's desire to keep the period of uncertainty in the liberalisation process short and for that purpose SingTel should be involved in the details of the review and the issue of compensation. SingTel was advised in the interchanges to settle as a matter of priority the appropriate methodology to compute the compensation rather than the amount. Minister Mah of course did not take part in the subsequent interchanges. These were conducted by TAS represented by its Director-General Mr Lim Chuan Poh and its Deputy Director (Industrial Policy), Ms Ng Cher Keng.

27 SingTel's representatives told Minister Mah that SingTel would review its position and would be appointing external independent consultants to advise it. They told Minister Mah that SingTel would look carefully at, and act in accordance with, the best interest of SingTel's shareholders. According to the evidence of BG Lee almost every Singaporean adult was a SingTel shareholder and that many of them were small shareholders. He said his Board and he had a fiduciary duty to ensure that they obtained the best possible compensation for the reduction in the monopoly period.

28 SingTel was concerned with the possible need for disclosure under SES regulations and Mr Teo Ming Kian met separately with the CEO of SingTel and Ms Chua Sock Koong to discuss this matter. As parties were not negotiating about the amount of the compensation as such, but focussing on the methodology and the necessary data which only SingTel could provide, Mr Teo Ming Kian expressed the view that there was no need for disclosure. It was recorded in the Minutes of the meeting that both TAS and SingTel would not use these sessions as negotiation meetings but would use them to understand the factors to consider their respective compensation computations. Mr Teo Ming Kian hoped that the consultative process would "narrow the gap between the 'correct' compensation figures worked out by SingTel and the amount which (would) be specified in the Notification and shorten the process of Notification of Appeal, and hence the period of uncertainty". SingTel was agreeable with the proposed way forward.

29 After the meetings on 18 and 19 March, 1996 SingTel appointed Goldman Sachs to look at some general scenarios, involving greater competition, so that its management could get a better understanding of the damage that might arise from the greater competition.

30 The Review Committee first met on 27 March 1996 and they set out the terms of the appointment of D&T. According to the minutes, the committee recognised that under the A&I clause, other operators/licensees could only provide basic telecommunications services (which overlapped with SingTel's Exclusive Rights) to the extent that these telecommunication services were ancillary and incidental to the principal businesses of these third party licensees. By their terms of reference, they tasked their consultants to recommend the most appropriate methodology and undertake a quantification of the compensation payable to SingTel in the event that Government decided to modify SingTel's Licence by reducing the period of exclusivity for basic domestic and international telecommunication services. The consultants were required to identify and analyse all possible approaches and methodologies for assessing any damage caused to SingTel. The consultants were also mandated to outline in detail all possible problems, outcomes and issues arising from each methodology.

31 TAS in my view initially recognized that under the A&I clause it could license other operators/licensees to provide telecommunication services which overlapped with SingTel's Exclusive Rights provided that those telecommunication services were ancillary and incidental to the principal businesses of such third party operators/licensees: see para 7 of the draft press statement approved by Cabinet on 3 May 1996 and the cross-examination of Minister Mah pp 164 line 7 to 166 line 25 of the transcript. However, in TAS's terms of reference to its external consultants it was revealed that several options were considered by Government. The possible options being considered by Government included "maintaining the status quo; ***widely interpreting*** the proviso in (SingTel's) licence that TAS may, from 2002, license broadcasting operator(s) and other public telecommunication licensee(s) to provide basic telecommunication services in competition with (SingTel) to their principal businesses; or modifying (SingTel's) exclusive licence" (emphasis added). This was an approach TAS as the regulator would like to reserve to itself, although there was always the potential risk that any manifestly unreasonable interpretation could ultimately be challenged in a judicial review if a licensee were forced to a tight corner.

Negotiations between SingTel and TAS

32 The consultants of both parties used a discounted cash flow methodology ("the DCF method") to compute the net present value of the damage to SingTel in financial terms. To work out the damage to SingTel, they both used an earnings-based model. This would determine SingTel's financial performance under the base-line ("status quo") situation, where compensation is introduced in 2002 under the A&I clause. The result was compared against SingTel's performance if the expiry of SingTel

exclusive Licence were brought to 2000. The difference was considered the damage likely to be suffered by SingTel and hence the sum of compensation due. Both consultants simulated different competition scenarios to determine their effects on SingTel's financial performances. The scenarios were based on SingTel's historical data, taking into consideration Singapore's own operating environment and the impact of competition experienced by overseas telecommunication operators. The model also took into consideration such factors as tariff erosion trends, market share losses, traffic volume and usage stimuli, efficiency gains and several other revenue and cost drivers.

33 It was obvious that both consultants needed to clarify the basic data and assumptions which had to be made. D&T had to obtain the necessary data from SingTel. Goldman Sachs could clarify with TAS or D&T on any matter related to the assumptions used in the models to compute the damage. Towards that end, SingTel provided all the data.

34 But Goldman Sachs needed in particular to understand SingTel's legal position under the terms of the Licence. SingTel was of the view that it had exclusive rights for the services listed under Part II(A) of the Licence until 1 April 2007. The A&I clause did not have the effect of allowing direct competition from 1 April 2002. As required by Goldman Sachs, SingTel sought the opinion of their solicitors, Allen & Gledhill, and Mr Lucien Wong of Allen & Gledhill advised that the A&I clause only permitted TAS to license other operators to provide telecommunication services under Part II(A) of the Licence where such services fell within the description of "ancillary and incidental", with references to the services already being provided by the operator: 2AB465-468.

35 As discussions were in progress in April and May 1996 about the figures both consultants were putting forward, TAS adopted the tough official line that it could from 1 April 2002 license other operators to compete head-on with SingTel, despite SingTel's exclusive rights. I should now refer to the minutes of TAS of the meeting between TAS and SingTel on 20 April 1996. DG TAS Mr Lim Chuan Poh, Ms Ng Cher Keng, Deputy Director and Ms Valeri D'Costa, Assistant Director (Legal) represented TAS. BG Lee Hsien Yang, CEO and Ms Chua Sock Koong, Senior Vice-President (Corporate Affairs & Finance) represented SingTel. Ms Chua reported that most of the outstanding issues and areas of differences had been clarified during separate meetings she had held with Ms Ng. The two outstanding issues were to settle the discount rate to be applied and the interpretation of the A&I clause. The former issue was susceptible of easy resolution. As for the latter issue, TAS's wide interpretation would have the effect of cutting off 5 years of SingTel's monopoly. Adopting TAS's interpretation which was described internally as Framework I, Goldman Sachs had computed the compensation at between $1.4 billion to $2.4 billion. Based on SingTel's interpretation, which was internally described as Framework II, Goldman Sachs had assessed the compensation at $5.4 billion to $6.4 billion: see 3AB 1155. It was quite clear that TAS was uncompromising and insisted on its wide interpretation.

36 The filenote in the minutes clearly confirmed that DG TAS Mr Lim Chuan Poh had "informed" SingTel that "if the differences (could) not be resolved, TAS (might) have no choice but to recommend to the Cabinet to abort the review of (SingTel's) Licence. Instead TAS would expedite liberalisation in grey areas which it had put on hold - for services such as resale of leased circuits and callback services - in the run-up to 2002. Come 2002, TAS would unreservedly introduce competition as defined in the A&I. This way, Government would *avoid the issue of compensation and still be able to introduce competition (then) and from 2002*" (emphasis added): see 2AB783-5. The chilling effect of those threats or warnings, was indeed noticed by TAS's officers as the Minutes had noted that SingTel's "conciliatory approach came immediately" after those threats were uttered.

37 After the meeting, TAS issued a press statement on 24 April 1996 which asserted that "competition in basic telecommunication services (would) be introduced 5 years ahead of the expiry of Singapore Telecom's exclusive rights to these services." SingTel's Board decided to seek clarification

from TAS on its interpretation of the A&I clause, to which TAS replied in the following terms:-

> "TAS will license on a case by case basis, existing broadcasters and other Public Telecommunication Licensees (as from 1 April 2002) to provide the aforementioned six services [being the first six services listed in Part II(A) of the Appendix to the licence]. TAS considers any of these operators or licensees to which these services are ancillary and incidental to them **at the point of their licensing by TAS to be eligible for the licenses**. Henceforth, these new licensees will be free to compete against Singapore Telecommunication Limited." (emphasis added): see 2AB 801-2.

38 On TAS's wide interpretation, it would mean that under this temporal limitation, other licensees could a short time after the grant of their licences provide the (ancillary) services as their **primary** services and compete head on with SingTel. TAS was then taking the position that it could fully liberalise the market without modifying the Licence.

39 TAS stuck to its interpretation of the A&I clause officially. However, it did agree to be more generous in the compensation. SingTel and TAS took part in a series of discussions and meetings between 10 April 1996 and 11 May 1996 on the computation of damages payable to SingTel which would be caused by the proposed modification of the Licence. The parties' respective assumptions and financial models were discussed. At these meetings, SingTel tried to nudge TAS to bring its figure closer to the figures that Goldman Sachs was putting forward. At the initial stage, TAS was looking at figures in the region of $900 million. SingTel on the other hand was looking at figures in the range of $5 billion.

40 I turn to the meeting held on 24 April 1996. At that meeting TAS gave SingTel some of its valuations. Using a discount rate of 6.5%, the compensation amount was said to be $1.57 billion, with a terminal value of $0.11 billion, as explained by Ms Chua and BG Lee. Although SingTel was not given the breakdown of the final figure, SingTel could infer that TAS was coming round to its point of view on the discount rate and the terminal value. SingTel did not know and was not told all the assumptions that TAS was making (save those discussed previously) nor the weightage that TAS was giving to various assumptions. It should also be noted that before the meeting on 24 April 1996 Goldman Sachs had put forward a figure of $6.51 billion on SingTel's interpretation of the A&I clause. TAS, for its part, had checked the figure out by getting Ms Casey Lan of Deloitte & Touche to calculate her own assessment on the basis of SingTel's interpretation. *She came up with a figure of $5.443 billion: see 2AB780*.

41 TAS informed SingTel that it would state the figure of $1.48 billion in a Notice to be issued under section 28 of the TAS Act. SingTel's representatives tried to get those figures increased. BG Lee said in evidence, and I accept, that it was mentioned to him at the meeting that if SingTel saw Minister Mah there was a possibility that SingTel could get more. There was nothing improper in the suggestion. There was evidence that TAS was looking at the range of $1.57 billion to $1.68 billion. Ms Chua sent a contemporaneous note to her Chairman, Mr Koh Boon Hwee, dated 24 April 1996. She reported in writing that TAS had shared valuation numbers with her and BG Lee. At the discount rate of 6.5% the compensation was stated as $1.57 billion; the terminal value was $0.11 billion, throwing up the total of $1.68 billion. At the discount rate of 8% the compensation would be $1.48 billion and the terminal value would be $0.08 billion, for which the total is $1.56 billion. Ms Chua also recorded that from SingTel's valuation model, the compensation for damage from 2008 to 2000 was $8.24 billion calculated at the discount rate of 6.5%. Compensation for damage for the period from 2002 to 2000 was computed at $1.61 billion calculated at the discount rate of 6.5%. Ms Chua informed Mr Koh of arrangements for a meeting with Minister Mah the following afternoon. She also noted in the memo

that the notification would carry the compensation amount of $1.48 billion, but would probably be increased to between $1.57 billion and $1.68 billion on SingTel's representations. But on the same day, after the meeting, SingTel was told that the figure of $1.48 billion was reduced to $1.27 billion.

42 According to BG Lee, and I find, that TAS's DG TAS Mr Lim Chuan Poh told them that TAS wanted SingTel to accept the compensation offered without making formal representations to TAS under section 28 of the TAS Act and without making a formal appeal to the Minister under the TAS Act. I also find on the evidence that Mr Lim of TAS made it very clear during this period of time that TAS wanted SingTel to give up its rights and close the matter. I had heard the evidence of BG Lee and Ms Chua on these factual issues. Despite Ms Ng's denials, which did not impress me, it was clear in my mind that the evidentiary burden was on TAS to have called Mr Lim Chuan Poh to contradict these pieces of evidence. The fact that Mr Lim was the employee of SingTel was no reason why TAS could not call him to tell the truth, nor could that fact of employment alone throw the evidentiary burden back to SingTel. Mr David Chong, the representative of the Attorney-General, made it very clear in a written statement to the court that Government had no objection to Mr Lim giving evidence on what he had said or not said to BG Lee and other SingTel representatives. TAS was therefore under no impediment and could have called Mr Lim if in fact he did not make those wishes of TAS known to BG Lee.

43 On 25 April 1996 Minister Mah met Mr Koh Boon Hwee, BG Lee and Ms Chua. According to Mr Koh and BG Lee their recollection was that Minister Mah expressed his preference that SingTel did not invoke the formal procedure of appeal under section 28 of the TAS Act. Ms Chua's recollection was that Minister Mah did tell SingTel's representatives that the decision to appeal was nevertheless for SingTel to make. Up to that stage everything said at the meeting was quite proper. However, TAS's advisers somehow formed the view that it was alleged by SingTel that Minister Mah did "some kind of deal with SingTel" at the meeting. Plainly on the evidence that was NOT SingTel's position. It did not make any assertion of the kind. The fact of the matter was that a public appeal and contest between SingTel and TAS would not be benefit anybody, not least SingTel's shareholders. The Joint Memorandum to Cabinet which Minister Mah jointly sponsored with DPM Lee Hsien Loong stated that the discount rate of 6.5% was chosen so that SingTel would "see less reason to appeal".

44 After discovery of documents, it became known that Minister Mah and DPM Lee Hsien Loong, who exercised supervision over MINCOM, had presented a Cabinet memo on 30 April 1996. In para 3 of the Summary of D&T's findings and conclusions, the range of computations grossed up for tax at 26% was spelt out. The figures ranged from $1.18 billion to $1.493 billion. MINCOM recommended that the compensation of $1.5 billion (inclusive of tax provision) be offered outright at the time of notification so that SingTel would see less reason to appeal against the amount. Even if SingTel were to appeal against that amount because it considered it insufficient, the gap would not be significant.

45 In the morning of 2 May 1996, Mr Teo Ming Kian informed the office of DPM Lee Hsien Loong that SingTel had indicated that the figure coming out of their consultants was $1.61 billion, which was slightly higher than MINCOM's figure of $1.5 billion. On the following day, a supplementary note was submitted to Cabinet seeking Cabinet's approval for a contingency of 10% on the amount of $1.5 billion in the event that SingTel made representation against the amount. It was to cater for "sensitivities" in the assumptions of the economic modeling in the computation of the compensation amount. As a strategy TAS would offer SingTel the compensation amount of $1.5 billion. Subject to SingTel's representation and TAS's assessment that the representation is reasonable and justifiable, TAS would then consider whether to increase the compensation to SingTel, subject to the cap of $1.65 billion. A preference for no appeal is not inconsistent with readiness for such an appeal under the TAS Act.

46 On 3 May 1996 Cabinet considered the Cabinet Paper and the supplementary note and decided to cap the compensation amount to SingTel at $1.5 billion plus 10% contingency provision, i.e. $1.65 billion (inclusive of tax provision).

47 I should return to the important question as to how the tax was grossed up. It is a remarkable feature of this case that it was grossed up for tax with an informality that was quite astonishing, if not baffling. Ms Ng Cher Keng was the only meaningful point of contact with D&T. Her evidence was that it was at the end of the computational exercises carried out by TAS's consultants that Mr Muntaz Ahmed grossed up for tax the range of figures at the rate of 26%. She remembered speaking to him about taxability. If TAS had led the evidence of Mr Muntaz Ahmed, many questions surrounding the grossing up for tax would have been answered. The reason she raised the question was quite remarkable; she raised it because SingTel was "a tax paying entity". She therefore did not consider the nature of the computed sum as damage to SingTel for the impending loss of the monopoly. She simply did not think about it any further. As could be seen from her email of 24 April 1996 to DG TAS Mr Lim that grossing up for tax was a mechanical exercise. However, in para 68 Ms Ng asserted that D&T and TAS "took it" that since SingTel would have to pay tax on the compensation sum it would receive, the compensation sum payable to SingTel would have to include a tax element. "That was how the tax component came to be included", she said in her affidavit evidence.

48 During her cross-examination, Ms Ng said that she and Mr Muntaz Ahmed "wondered" whether there was a need to gross up for tax. This conversation took place before D&T's report of 30 April 1996. In that report, D&T dealt with the entire question of grossing up for tax in one cryptic sentence. "To provide for tax payable by (SingTel) on the compensation, the calculated amount would need to be grossed up by 26%, the current corporate tax rate": see 2AB838. It was suggested to Ms Ng by counsel for SingTel that this sentence was innocuous and that nothing had happened which altered the doubt in her mind as to whether the compensation as computed was taxable or not. She maintained that "we" were certain when D&T's report came out, although, in my view it was very clear from the sentence quoted and the context that D&T did not express a professional view that the sum computed was taxable.

49 Mr Teo Ming Kian, who did not speak to Ms Ng Cher Keng at all on the question of taxability, said in evidence that D&T's report stated that SingTel had to pay tax on the compensation. He took the report to mean that SingTel would have to pay tax. He said he thought it fair, for otherwise SingTel would get less on a nett basis than what was intended. No further question was asked as to the appropriateness and the extent of the tax provision. The flat rate of 26% was accepted without any reservation. No provisional ruling was obtained from IRAS. It would have been obvious that SingTel more likely than not would tax plan, say by amortising the 'income receipt' over 7 years corresponding to the 'lost 7 years', and significantly reduce the tax payable. If the intention was punctiliously to keep the tax element as separate, one would expect some 'counter-provision' for this difference of over $100 million, which otherwise might be a windfall for SingTel. Why? Evidence from D&T on the question whether they had advised on a blanket provision for tax at a flat rate would have assisted the court. In my judgment, the answer was that the mind and management of TAS was at that stage looking at a figure which would be ultimately put in the proposed notification under the TAS Act. It had in mind a range of figures from D&T, which ranged higher and lower than $1.5 billion. TAS and its management were also aware of the range of figures which SingTel's consultants had thrown up. They were higher than $1.5 billion. TAS's objective was to carry out the modification and pay a fair and correct consideration. TAS and its mind and management were quite content to offer the global figure to SingTel for acceptance, with just a passing mention to SingTel that the figure had been grossed up for tax.

50 *In my judgment and on the totality of the evidence I further find that TAS and its mind and*

management did not advert to the question of tax liability in any or any meaningful way and therefore ran the risk that SingTel could tax plan its liability to a zero sum. For the same reasons and in my assessment of the evidence, I further find that TAS ran the risk that IRAS could rule that the compensation to be inserted in the notification would be a receipt of a capital nature in the hands of SingTel.

The Notification

51 On 11 May 1996 TAS served a Notification on SingTel in accordance with section 28 of the TAS Act. I reproduce the Notification:-

> "**MODIFICATION OF LICENCE GRANTED TO SINGAPORE TELECOMMUNICATIONS LTD UNDER SECTION 28 OF THE TELECOMMUNICATION AUTHORITY OF SINGAPORE (TAS) ACT 1992**
>
> We hereby notify Singapore Telecommunications Ltd in accordance with Section 28 of the TAS Act (Chapter 323), that we intend to modify condition 1.2 of the above licence in the manner shown in the underlined text attached Annex.
>
> 2 TAS has assessed the compensation payable for any damage caused by this modification to be $1.5 billion. This amount will be paid on 31 March 97.
>
> 3 You are hereby given 28 days' notice from the date of service of this notice on you to make representations on the proposed modification, failing which you are deemed to have accepted the said modification without qualification or reserve on the expiration of this notice."

52 The Annex of the Notification stated thus: "1.2 The Public Telecommunication Licensee (i.e. SingTel) shall have the exclusive right for eight (8) years, till 31 March 2000, from the date of this Licence… to operate and provide the telecommunication services set out in Part II(A) of the Appendix so long as the Public Telecommunication Licensee continues to provide the services."

53 The text of the notification repays attention. It should be noted that it did not refer to any tax element. The offer of compensation is one lump sum, which was not differentiated as to any tax element. It should also be noted that SingTel's Board of Directors held a meeting by way of Telephone Conference Call on 12 May 1996 at 10.20 pm. Ms Chua Sock Koong at the request of Mr Koh Boon Hwee informed the Board of the notification of TAS of its intention to modify the Licence by shortening SingTel's exclusive rights in respect of national and international telephone services to 2000. In the notice, TAS had offered to pay SingTel compensation in the $1.5 billion. She also informed Board members present that Minister Mah at the press conference held in connection with the proposed modification had stated that the compensation to be paid to SingTel would be taxable. Goldman Sachs was instructed to revert in around 2 weeks' time with its recommendations on the basis that SingTel's exclusive rights would end in 2000.

54 In mid May 1996 SingTel's management considered the accounting treatment of the compensation when received. It was proposed that management amortise the compensation amount in the books over 7 financial years from 2000/2001 to 2006/2007. This was done as a perusal of the relevant annual balance sheets and profit and loss accounts would confirm. To maintain consistency with the proposed accounting treatment SingTel in its letter of acceptance stated that it was accepting "the compensation for $1.5 billion for the damage to Singapore Telecom, *being Singapore Telecom's loss of profits in each of the years from 2000 to 2007*, caused by the proposed modification." (The italicized

phrase is referred to as "the phrase"). Internally, DG TAS Mr Lim Chuan Poh and Mr Teo Ming Kian had considered the scenario of ensuring that SingTel could not re-open the issue of compensation and that on closure of the statutory process there would be no comeback by SingTel. TAS had in view internally that it would use the phrase "full and final" to preclude any re-opening of the issue of compensation. Accordingly, DG TAS Mr Lim rang both Ms Chua Sock Koong and BG Lee. It was agreed that the phrase would be deleted. To make it clear, TAS sent a final letter to SingTel confirming that the $1.5 billion was for damage caused by the modification and that the amount "would be full and final payment". The point was made on behalf of TAS that the word used was "payment" and this suggested that it closed all attempts to re-open on the quantum of the compensation and no more. In other words, only SingTel was precluded from re-opening the issue of the quantum of compensation. It was submitted that this closure did not apply to and did not preclude TAS from re-opening the issue of the compensation or part thereof.

SingTel's Board Meeting

55 SingTel's Board of Directors met again on 23 May 1996 to consider and decide on its response to the notification. Goldman Sachs presented its views at the Board meeting on the compensation offer. Goldman Sachs advised that the most difficult issue in analyzing the appropriate compensation for SingTel was determining the appropriate framework for measurement. The question was to what should it compare the Base Case 2000? Different assumptions regarding the starting position (prior to the notification) would have yielded substantially different answers as to the justifiable level of compensation due to SingTel.

56 Framework I was presented under the rubric "Base Case 2000 vs Base Case 2002." This framework assumed that SingTel had fully conceded that TAS had the right to unilaterally introduce full competition in basic services in 2002, despite the A&I clause and assurances received at the time of licence modification in 1993 without any compensation to SingTel. Under such a scenario, the only damage to SingTel that would require compensation was the introduction of full competition in 2000 instead of 2002. On these assumptions, a compensation of approximately $1.6 billion was due to SingTel, a figure roughly in line with TAS's announced offer. In the opinion of Goldman Sachs, the rationale for the position would be this. Taking such a position might result in a significant under-compensation of SingTel shareholders for the possible damage to SingTel's value. It was further observed that "(t)he only compelling rationale for taking such a position was to minimize friction in discussions with TAS and rapidly bring the issue to a conclusion."

57 In the report of Goldman Sachs Framework II was presented under the rubric "Base Case 2000 vs. Upside Case 2002". I would describe the "measurement framework". This assumed that SingTel had conceded TAS's right to bring forward the introduction of competition to 2002, within the parameters of the A&I clause (as announced by the Government when announcing their WTO offer). It was postulated that while this position would concede that TAS was likely to have taken a liberal interpretation of the A&I clause, competition would nevertheless have been less severe and slower to take hold (i.e. Upside Competition Case 2002) than under the assumption of full competition in 2002. Under this scenario, it was Goldman Sachs' assessment that the loss to SingTel and the level of pre-tax compensation would be in the range of $4 to $6 billion, significantly greater than under Framework I. The justification for this assessment was, in my view, based on the reasonably tenable interpretation of the A&I clause, given the opinion of SingTel's solicitors and the reasons in support thereof. It is not necessary, for present purposes, for me to rule if that interpretation was correct in law. Suffice it to say that the SingTel's interpretation was not unreasonable at all.

58 There followed a vigorous debate at the Board meeting. Several Board members took the view that despite the risks SingTel should make the representations under the TAS Act, to be followed with an

appeal to the Minister of MINCOM. The Board felt that SingTel was on strong grounds in relation to the A&I clause. The extent of the fiduciary duties of the Board in relation to the exercise of the appeal mechanism under the TAS Act was also discussed. In the end, it was decided that it was in the best interests of shareholders not to appeal. The Board took into account that TAS had made some concessions, that TAS wanted finality, and that TAS did not want SingTel to invoke the appeal mechanism or make representations. Mr Koh Boon Hwee said in evidence, and I find, that the Board felt that by giving in the matter would be closed. I accept Mr Koh's evidence that if SingTel's acceptance did not finally dispose of the matter, they would not have accepted the offer contained in the notification. However, the Board instructed management to obtain some non-monetary benefits from TAS, if possible.

59 I now deal with the state of mind of SingTel's directors on tax. BG Lee told the court that whether the compensation was to be considered capital (and not taxable) or income (taxable) was an open issue. When the time came to decide on accepting the compensation, BG Lee had been told by Ms Chua Sock Koong in May 1996 that Ernst & Young, SingTel's tax advisers, had advised that the compensation was not taxable. Nevertheless BG Lee thought that IRAS would probably tax the sum, in exercise of its discretion. Mr Koh thought that the compensation was probably capital in nature and was therefore not taxable. He knew that Mr Keith Tay, a director and chairman of SingTel's Audit Committee, shared those views. SingTel's Deputy Chairman, Mr Wong Hung Khim, who gave evidence by video-conference, did not think it was taxable. Mr Lim Ho Kee, a Board member, told me that he did not think about the taxability of the compensation. Two other directors of SingTel, Mr Quek Tong Boon and Mr Liew Heng Sun, did not think it was taxable. Having regard to the evidence and the fact that the gulf between the computations of SingTel and those of TAS was so wide, I find that the concern of SingTel's Board was with the global figure and whether SingTel could get more.

60 The fact of the matter was that whilst BG Lee was aware that TAS had grossed up the compensation for tax, he did not know how TAS had grossed it up. It was only after these proceedings had commenced and upon disclosure of the relevant documents by TAS that SingTel found out that TAS had grossed upon at 26% on $1.105 billion, and the figure of $1.493 billion was rounded up to $1.5 billion as suggested by the Joint Cabinet Memo.

61 On the evidence, it is my finding that there was no discussion by the Board whether the compensation was taxable. SingTel chose to give TAS the finality it wanted and close the matter in its own interest and on the basis that there would be no re-visiting on any issue in relation to the compensation as offered.

The Compromise

62 BG Lee gave evidence of the crucial conversation with DG TAS Mr Lim Chuan Poh on 30 May 1996. In the light of what had transpired between TAS and SingTel in which both parties had made concessions, they talked about closure in general and in particular about the deletion of the phrase from SingTel's letter of acceptance. That little matter was agreed. Mr Lim Chuan Poh wanted "full closure" on all issues with SingTel. BG Lee agreed. He said that the closure of the matter between SingTel and TAS was in respect of all issues and differences of both parties. He would not have agreed if it was only one way in TAS's favour, as was put to him. I refer to his evidence, including the evidence recorded in the 'real-time' transcript on pp776, 780, 900-901, 902-904 and the viva voce evidence which BG Lee gave when he was recalled by me to clarify paras 120, 121 and 123 of his affidavit. Two pieces of evidence are also relevant. Minister Mah in his press conference mentioned that the compensation was a clean break for SingTel. Secondly, Mr Teo Ming Kian, Chairman of TAS, agreed in cross-examination (see pp 384-386 of transcript) that he wanted to shut SingTel out from re-opening the compensation and that it would work both ways; i.e. to say, Mr Teo Ming Kian agreed

that TAS would be shut out and could not re-open the compensation. *In all the circumstances, including the fact that Mr Lim Chuan Poh was not called to contradict him on this vital issue, I had no hesitation and I accept the evidence of BG Lee in relation to the compromise*.

63 *On the totality of the evidence I find as a fact that TAS and SingTel had concluded a compromise on 30 May 1996. The basic terms are as follows: (1) that TAS would pay SingTel $1.5 billion on 31 March 1997; (2) that neither TAS nor SingTel would be able to re-open that sum (whether by way of representation or appeal under section 28 of the TAS Act; and (3) that the said payment of $1.5 billion would be in full and final settlement of SingTel's entitlement to compensation in respect of the modification of its Licence as proposed in the said notification of 11 May 1996. To amplify, my findings of fact in more details are as follows. Under the compromise, SingTel was to receive $1.5 billion for the modification of the Licence. There were several and serious differences of opinion between the parties as to how the compensation was to be calculated. Under Framework II SingTel's consultants opined that the damage to SingTel was estimated in the order of $4 to $6 billion. TAS was given the finality it wanted on all issues within its desired time frame, without public challenge. TAS wanted to pay much less. TAS gave up its threat to abort the compensation exercise, which remained a live threat to SingTel (however unlikely) up until the matter was closed on 30 May 1996. The dispute on the A&I clause and all the numerous other assumptions and their "sensitivities" were settled by SingTel's acceptance of the compensation. SingTel gave up its legal right of representation and appeal and a chance to get more, based on its interpretation of the A&I clause. TAS committed itself to pay the $1.5 billion on 31 March 1997. The payment was a final lump sum payment. Neither TAS nor SingTel knew fully all the assumptions that each had made, or the weightage given to those assumptions by the other party. It was in my view agreed between TAS and SingTel that neither party could re-open the matter on any issue whatsoever. The scope of the compromise, in my view, included the question of taxability: it was left to SingTel to plan its tax exposure, as any corporation of comparable size would. In my view, that compromise was concluded in the light of the statutory framework for the implementation of the modification which TAS had decided and the payment of compensation as set out in section 28 of the TAS Act.*

Events after the Compromise

64 On 14 September 2000 Mr Mumtaz Ahmed, a partner of D&T, who had advised TAS on the compensation, admitted publicly that SingTel had been under-compensated: 4AB 1512. He acknowledged that D&T had not predicted the explosive growth in the demand for data services. Neither had Goldman Sachs.

65 On 4 October 2000 TAS effected another modification to SingTel's Licence and the offer of $859 million net. But SingTel was to be given the benefit of tax credits relating to the second compensation. On that occasion StarHub, another licensee to be compensated, might not have to pay tax on the compensation, seeing that StarHub was a start-up company and its initial expenditure could be written off against the compensation and meant that it did not make taxable profits in the relevant year. Ms Ng Cher Keng in cross-examination admitted that TAS could not gross up for one licensee and not for the other. So TAS withheld the tax and SingTel complained that it would lose its section 44 tax credit. A meeting was arranged with officials from the Ministry of Finance and IRAS.

66 In connection with the section 44 tax credit Ms Jeann Low Ngiap Jong, the Group Financial Controller of SingTel, explained as follows. I will adopt her description. When a company pays tax on its profits, an amount equal to the value of the tax is notionally transferred to an account with the IRAS and this is known as a 'Section 44 Credit Account'. If a company wishes to declare a dividend, it is required to 'frank' it, namely ensure there is enough credit in its Section 44 Credit Account and to treat the dividend as gross dividends in the hands of the shareholders. The shareholders are then

deemed to have received the dividend gross. They are required to pay tax only where they are personally subject to a rate of tax higher than that levied on the company or are entitled to a refund if their income tax rate is lower. This process ensures that IRAS does not tax the same sum of money twice. If a company has insufficient credits in its Section 44 Credit Account, it is required to pay a "Section 44 Charge" to the IRAS instead to ensure that such charge is imputed to the shareholders so that the dividend can be treated as gross in the hands of the taxpayer.

67 Ms Low went on to explain that the significance of tax credits to SingTel, in this context, was that if SingTel received the full amount of the second compensation and had to pay tax on it, it would get a section 44 tax credit equivalent to the amount of the tax paid. This tax credit would be valuable to SingTel as and when it declared dividends. If, however, SingTel received the second compensation net of tax (and an amount equivalent to the tax had been deducted), then SingTel by itself not paying the tax would not get the benefit of the tax credits. In such a situation, SingTel would be worse off than it would have been had it received the full amount and paid tax on it.

68 A meeting was arranged on 4 October 2000. Ms Jeann Low thought it was to clarify the way in which IDA would given SingTel the benefit of the tax credits relating to the second compensation. The meeting was attended by Ms Ng Cher Keng representing IDA and officials from Ministry of Communications and Information Technology, Ministry of Finance and IRAS attended. Ms Low was surprised to learn that IRAS had ruled that both the first compensation paid by TAS and the second compensation by IDA were not subject to tax. Accordingly, there would be no section 44 tax credit in respect of the second compensation.

69 On 6 November 2000 IDA wrote to SingTel claiming a sum of $395 million being the alleged tax component, with interest, on the compensation of $1.5 billion. On the following day, IDA informed SingTel that their letter of 6 November 2000 had been sent out in error and should be disregarded. On 28 November 2000, IDA wrote to SingTel reserving its rights in respect of the compensation payment and that it would be writing further. On 14 March 2001 IDA wrote to ask for repayment of the sum of $388 million, interest and costs. SingTel rejected the claim. These proceedings were commenced on 26 July 2001. I now turn to the submissions in law.

The Law

70 The principle of unjust enrichment is that on which the law of restitution is hinged. The principle of unjust enrichment requires a plaintiff to establish three elements:

(a) that the defendant has obtained an enrichment or gain;

(b) that there is an 'unjust' factor indicating that the enrichment is unjustified and ought to be reversed; and

(c) that the gain was made at the plaintiff's expense.

71 Mr Davinder Singh SC for IDA argued that SingTel has been unjustly enriched in the sum of $388 million at TAS's expense. It was urged on its behalf that it is unconscionable or unfair for SingTel to retain this sum as it was paid to SingTel under a mistake of law, but for which TAS would not have paid this sum. In simple terms, it says in effect, "TAS did not mean to include the tax element". The following ingredients for a successful action were identified:

(a) SingTel was enriched by or gained a sum of $388 million;

(b) That there was an unjust factor indicating that there is no justification for SingTel to keep the $388 million; and

(c) The $388 million was at TAS's expense.

72 Mr Davinder Singh submitted that clearly (a) and (c) are satisfied on the facts. My findings do not support either (a) or (c). On the contrary, it would be wholly unjust to SingTel to reduce the compensation as SingTel had given up **in exchange**, among others, their claim of $4-$6 billion under Framework II as explained by Goldman Sachs. As for (b), IDA argued that the one factor which renders it unjust for a defendant to retain a benefit conferred at the expense of another is that the benefit was not voluntarily conferred, because it was conferred under a unilateral mistake. It relies on *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 399D (Lord Hoffmann):

> "It is the mistake by the payer which, as in the case of failure of consideration and compulsion, renders the enrichment of the payee unjust."

73 IDA has also argued that it is sufficient for it, the payer to show that a unilateral mistake was made (by TAS). It argued that SingTel's state of mind is, for the purpose of establishing a restitutionary cause of action, irrelevant.

74 In framing its claim based on mistake, IDA first sought to establish whether TAS had made a mistake: See *De Beers* case and *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 963. Secondly, whether the mistake was causative: see the De Beers case. I now turn to the battery of defences raised by SingTel.

Payment under Section 28 TAS Act precludes recovery

75 I have already set out Section 28 of the TAS Act. Under the TAS Act, TAS as the regulator, having decided to modify SingTel's Licence, had to determine the amount of the compensation to be paid to SingTel. The compensation is the amount of damage caused by the modification to SingTel in financial terms. Having estimated the amount of compensation, TAS had to seek Cabinet approval before making the offer to SingTel as the money comes out of the Consolidated Fund. In a submission to Cabinet, and referred to in the Joint Cabinet Memo dated 30 April 1996, TAS using a "broad brush" approach estimated a compensation amount of $1.35 billion (**net of tax**) or about $1.7 billion (**inclusive of** tax). Following Cabinet approval, D&T were appointed to advise on the appropriate methodology. I have explained the DCF method and the various figures and models put forward by both consultants of SingTel and TAS and the operative assumptions to arrive at a compensation amount which was acceptable to both parties. The process was to determine the loss of revenue which SingTel would suffer as a result of the loss of market share due to the earlier introduction of competition. One feature of such assessment is that the ultimate figure thrown up depends on a number of assumptions, some of which are tolerably subjective. It is a valuation of the loss of a source of income or a loss of income over the number of years affected.

76 The TAS Act sets out the procedure of TAS giving notice of the proposed modification to a licensee and for representations to be made by a licensee. It caters for the real prospects of the regulator and a licensee arriving at a compensation amount which is acceptable to both parties, with the process comprising the following being substantially analogous to the formation of an ordinary contract:

(a) an offer made by TAS in the form of the Notification;

(b) SingTel may thereafter make a counter-offer through representations within 28 days;

(c) TAS may thereafter provide a response to the counter-offer;

(d) If parties fail to reach an agreed figure, there is a further provision for appeal to the Minister within 14 days.

77 On a plain reading of the section, it is within the contemplation of Parliament that the regulator and the licensee concerned would negotiate and agree on an amount. Both parties would naturally be interested in the ultimate amount. TAS would never agree to any amount which exceeded the amount approved by Cabinet. On the other hand, a licensee such SingTel would require Board approval for the acceptance of the offer. If an agreement is reached, the amount is payable under the agreement. But once the avenues of offer and counter-offer, and their respective responses thereto are exhausted under section 28, and a single amount has been determined by the Minister, that amount is the statutory compensation which is due from the regulator. SingTel has argued at length that this figure, the amount of $1.5 billion, is statutorily inviolate. I now consider the legal basis for this submission.

78 At the outset I should indicate my reluctance to go so far as to classify the procedure as producing a 'statutory contract', as contended by Mr Sher QC for SingTel. As a matter of statutory procedure, what is clear is that the $1.5 billion was a payment that was due and owing from the regulator on 31 March 1997, under the TAS Act. The material question is whether a regulator can then recover a part of this statutory payment based on a mistake as to the calculation of $1.5 billion to include the computation of a tax provision when in fact this proved not the case.

79 IDA argued that notwithstanding the statutory obligation to make the payment, it can still recover on the basis of a mistake as to the calculation of the payment, when so obvious a mistake had been made. Mr Davinder Singh, SC for TAS pointed out that as a matter of construction the compensation must be "the compensation payable for any damage caused" by the modification. Any mistake made in the inclusion a tax element in the compensation would not be the "compensation" within the meaning of section 28(2)(a) of the TAS Act. But attention should be drawn to section 28(3)(b) which contemplates that TAS may amend the proposed compensation payable in accordance with the representation and that compensation may include a number of elements, including a tax element if that is regarded by TAS as 'compensation payable for any damage caused' by the modification. Due weight must be given for finality of such a decision, so long as TAS had decided on an amount within the amount approved by Cabinet. How the elements are made up in a compensation exercise under section 28 is best left to the regulator. Equally, the regulator must be bound by the unambiguous offer stated in the notification. It will be very undesirable if the regulator can re-open a sum of compensation arrived at under section 28 if a licensee had acted and accepted the offer in good faith and entirely on the basis of the offer as stated clearly and unambiguously on the face of the notice given under section 28.

80 Where there has been an obvious mistake on the face of the notice, it would have been apparent to a licensee and it is not allowed to take advantage of it. That is patently a different situation. The Court would be in a position to allow recovery if a mistake is obvious on the face of the notification. SingTel relied on the case of *Mannai Investment Co Ltd v Eagle Star Life Assurance* [1997] AC 749 for the proposition that in such a scenario, a Court may give full effect to a contractual notice, notwithstanding a glaring error on its face, where such notice is nevertheless sufficiently clear and unambiguous to leave a reasonable recipient in no doubt that it is intended to operate in terms. See also *Garston v Scottish Widows Fund* [1998] 1 WLR 1583. This principle does not apply in this case, where payment was made pursuant to an unambiguous statutory procedure and there was no mistake

on the face of the notice.

81 TAS operated on the basis of a mistaken assumption as to tax eligibility. What is clear is that the notice did not make any reference whatsoever to the incorporation of a tax component within the umbrella reference of 'compensation'. There is absolutely no latitude to construe the notice in such a manner as to assist IDA's recovery of $388 million on the basis of an obvious mistake which did not exist at the time of payment. To this extent I find myself unable to agree with Mr Davinder Singh that it could not have been the intention of Parliament to preclude recovery in these circumstances. The nature of the statutory procedure was such that even if, hypothetically, a Court had decided that the compensation was not taxable and TAS was aware of that decision, within the machinery of the legislation, TAS would still have been under a statutory obligation to make the payment of compensation to the amount of $1.5 billion by 31 March 1997. A mistake which operates in the formation of a pre-existing transaction pursuant to a statutory procedure has to be clearly distinguished from a mistake as to the payment itself (in other words, a mistaken payment). This is a cardinal distinction for the purposes of defining and establishing restitutionary recovery on the basis of an operative mistake, to which I now turn.

Different Kinds of Mistake

82 The evidence which I have heard leads me to the conclusion that there was, before 31 March 1997 (when payment of $1.5 billion was due), a pre-existing contractual relationship between the parties, which arose out of negotiations and payment pursuant to a statutory scheme (as outlined above) following the modification of SingTel's Licence.

83 As a fundamental proposition, the contract between the parties can only be set aside if it is void for mistake, or in the alternative that it is voidable in equity and can be rescinded in whole or in part by the Court. Rescission was never expressly pleaded by IDA. Its case was that there was never any contract (or compromise) in the first place. IDA has even gone so far as to plead their case on the basis that there were no negotiations between the parties, and therefore no dispute to be compromised. IDA's case is prominently and exclusively based on mistake of law.

84 The question for the Court is therefore whether there was an operative mistake. The complexity of this question is betrayed by its apparent simplicity.

85 As a starting premise, a restitutionary claim based on mistake divides into two auxiliary questions:

> (i) Did the 'mistake' relate to the formation of a pre-existing transaction; or did it relate to a mistaken payment simpliciter?
>
> (ii) Was there actually an operative mistake in the circumstances of the case?

86 The former question is relevant for the purposes of determining whether a pre-existing contractual relationship must first be rescinded, declared void, or set aside in equity as a necessary precursor to recovery under the law of restitution.

87 The law of restitution is only concerned with mistaken payment, not a mistake in the formation of the transaction by reference to which a payment is later made. An example of mistaken payment is set out in the case of *Kelly v Solari* (1841) 152 ER 24. This involved the mistaken payment under an insurance policy, where the insurance company had not realized that the policy had lapsed. In such a situation the mistake causes the payment and is operative *at the time of the payment*.

88 This is to be contrasted with a mistake made in the formation of a legal obligation, which leads to payment being made. With this category of mistake, it is first necessary to set aside the transaction in question either through seeking a declaration that the contract is void, or, alternatively, that it should be rescinded or set aside in equity. On this principle I was referred to a host of authorities. See for example, *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 208, where Millet LJ (as he then was) states as follows:

> "The continuing validity of the transaction under which the money was paid to the firm is, in my judgment, fatal to the Society's claim. The obligation to make restitution must flow from the ineffectiveness of the transaction under which the money was paid and not from a mistake or misrepresentation which induced it. It is fundamental that, where money is paid under a legally effective transaction, neither misrepresentation nor mistake vitiates consent or gives rise by itself to an obligation to make restitution. The recipient obtains a defeasible right to the money, which is divested if the payer rescinds or otherwise withdraws from the transaction. If the payer exercises his right of rescission in time and before the recipient deals with the money in accordance with his instructions, the obligation to make restitution may follow."

89 What should be highlighted from this category of mistake is that before restitution comes into play, and in order to avoid contradicting a valid contractual obligation to render the benefit, the plaintiff almost always has to establish, according to contractual rules, the invalidity of the contract. (See Andrew Burrows, The Law of Restitution (1993) at p.126). What is clearly contemplated is that with this category of mistake (going to the formation of a pre-existing contract) the law of restitution should not be allowed to disturb unrescinded contracts and transactions which have not been set aside at law or in equity.

90 Indeed IDA's claim for restitution in this case, when carefully examined, does not turn on a mistake that went to the formation of a contract. It was argued for IDA that there was no contract (resulting from the bilateral tension between the parties to arrive at a figure for compensation under the TAS Act) or any negotiations to begin with. I do find this to be an important omission which undermined its case. In the event, I turn to consider whether IDA could be entitled to recovery on the basis of a mistaken payment simpliciter, for which the law of restitution does appear ready to correct an unjust enrichment, without the need for invalidation of a pre-existing contract, whether in whole or in part.

Mistaken Payment

91 The question I wish to address, therefore, is whether there was a mistaken payment on the facts of the case. A useful illustration of this particular category of recovery is *Kelly v Solari* (1841) 152 ER 24. The case involved a mistaken payment under an insurance policy, where the insurer had not realized that the policy had lapsed. In such a situation the mistake causes the payment and is operative at the time of the payment. The *De Beers* case is another example.

92 I have described at length the conduct of the parties in the process leading up to and following the issue of Notification under the statutory scheme. The fact remains that $1.5 billion was payable by way of compensation on 31 March 1997. There was no mistake in the payment of that sum on that day. It was TAS's discharge of a statutory obligation. It is difficult to appreciate how the payment can be said to be a mistaken payment justifying a return of $388 million. On the evidence presented to the Court, I cannot make any other finding except that TAS had agreed on 30 May 1996 to make full and final payment of $1.5 billion in favour of SingTel. In the context of a fully negotiated sum constituting compensation for SingTel's loss of its monopoly in a newly liberalised telecommunications

sector, it would be wholly untenable to conclude that this was a mistaken payment.

93 Such a determination is also based on another substantial and entirely independent premise, that the tax component (the subject of recovery in this case) cannot be considered to be a mistake at law.

The Operative Mistake as pleaded by the Plaintiff

94 In paragraph 6 of the Statement of Claims, it is pleaded that TAS made an erroneous assumption that SingTel "would have to pay tax on the compensation sum." As I see it, this erroneous assumption is one which refers to a future contingency of a substantial tax determination by IRAS, which would be upheld on appeal. In the event, this contingency proved erroneous. This was not apparent to TAS at the time the payment of $1.5 billion was actually made to SingTel.

95 One returns at this juncture to a pertinent passage in *Kleinwort Benson v Lincoln County Council* [1999] 2 AC 349 at 409D-E:

> "The state of mind of the payer must be related to the time when the payment was made. So also must the state of the facts or the law. That is the time at which it must be determined whether payment was or was not legally justified."

96 In other words, the Court has to determine whether at the time of payment, such payment was legally justified, or not. I am of the view that a case for recovery of $388 million can only be made if the payment in a given case is not one pertaining to an existing legal justification (at the time of payment). In so far as the mistake, as pleaded by IDA, relates to the erroneous assumption that SingTel would have to pay tax to an amount to be determined in the future, I have grave doubts as to whether misjudgments as to the future can provide a basis for restitutionary relief. Such judgments as to the way a tribunal or authority would decide and act in the future necessarily entail errors and disappointments, as IDA must know.

Mispredictions are not Mistakes

97 In the law of restitution, a mistake (whether of law or fact) as to the future cannot ground recovery. I was referred to a recent unreported decision of the Privy Council in *Dextra Bank & Trust Company Limited v Bank of Jamaica* (October 2001) at para 29. I reproduce the relevant passage:

> "Their Lordships turn then to the second element, vis. that Dextra paid the money to the BOJ under a mistake of fact. It is the contention of Dextra that the money was paid under a mistake, in that Dextra had intended to make a loan. The difficulty with this proposition is that this does not appear to have been a mistake as to a specific fact, like for example a mistake as to the identity of the defendant, but rather a misprediction as to the nature of the transaction which would come into existence when the Dextra cheque was delivered to the BOJ, which is a very different matter: see Birks, Introduction to the Law of Restitution, pp147-148. In that passage, Professor Birks explains the rationale of this distinction in terms relevant to the present case, as follows:
>
> > 'The reason is that restitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant. A mistake as to the future, a misprediction, does not show that the

> plaintiff's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of *a risk knowingly run*...the safe course for one who does not want to bear the risk of disappointment which is inherent in predictions is to communicate with the recipient of the benefit in advance of finally committing it to him. He can then qualify his intent to give by imposing conditions, or sometimes making a trust.'" (my emphasis)

98 In this case Dextra Bank drew a cheque on its bankers the Royal Bank of Canada by way of a loan in favour of the Bank of Jamaica ("BOJ"), against a promissory note issued by the BOJ. The evidence showed that the BOJ intended to buy the specified sum of US dollars stated in the cheque in exchange for Jamaican dollars, which would thereafter have been paid to persons understood to be nominated on behalf of Dextra. Each party was deceived as to the intention of the other and in the event the monies paid for the loan fell into others' hands. The claimant thought his money was to be paid for a loan in the future and was held to have made a misprediction and not a mistake. Mr Davinder Singh for IDA argued that "a risk knowingly run" (highlighted in the above passage) is a crucial ingredient for the purposes of establishing a misprediction, and cites the Dextra case as authority. In the event, apart for the above reference to Professor Birks' work, the Privy Council did not consider or make further reference to "a risk knowingly run". There was no specific finding that Dextra drew the cheque in favour of BOJ, knowingly ran a risk that it was not a loan transaction but a purchase of foreign currency, as perceived by BOJ.

99. Further support for this principle, that 'mistakes' as to the future are irrelevant in the law of restitution, is found in *Strang Patrick Stevedoring Pty Ltd v The Owners of m.v. "Sletter"* (1992) 38 FCR 501 at paragraphs 89-90:

> "The contentions on behalf of the plaintiff that the division of labour on 28 June 1990 was an involuntary act caused by mistake of the type relied upon is with respect misconceived. Properly analysed the alleged mistakes are no more than mistaken expectations that the time charterer would in fact perform its contractual obligations by paying for the Stevedoring services at the agreed rate and would provide access to the vessel in order to enable the Stevedores to work the cargo. The existence of the expectations go to show that it was not intended that the services be provided by way of gratuitous gift, however, such mistaken expectations do not negative the voluntary nature of the provision of services by the plaintiff of the discharge of its contractual obligations to the time charterer.

I agree with the analysis of Professor Birks in "An Introduction to the Law of Restitution" (1985) at page 278 where the learned author says:-

> 'Suppose that the mistake that I make is not that Blackacre is already mine but that you will in the future give it to me. That kind of mistake will never negative voluntariness. It is a mere misprediction as to the future, exactly the kind of 'mistake' which you make when you clean my car believing wrongly that I will pay. A misprediction is nothing but the taking of risk, an exercise of judgment which turns out badly rather than a judgment vitiated.

> That is why the law requires mistakes to be of present or past fact. But both mispredictions and mistakes of present fact do serve to demonstrate (a) non-gratuitous intent.'"

100 What is clear from the passages which I have cited is that the 'voluntariness' of one party assuming a risk of a future determination should not form the basis of recovery for a mistake. This accords with the larger proposition in restitution that a risk-taking payer will be precluded from recovering his money. I look no further that Lord Hoffmann's speech in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 382 for support:

> "I should say in conclusion that your Lordships' decision leaves open what may be difficult evidential questions over whether a person making a payment has made a mistake or not. There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involved any legal risk. They may hope that if nothing is said, their counter-parties will honour their obligations and all will be well, whereas any suggestion of a legal risk attaching to the instruments they hold might affect their credit ratings. *There is room for a spectrum of states of mind between genuine belief in validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not.*" (my emphasis)

101 The highlighted words clearly refer to the acceptance of risk which precludes recovery in this context. The assumption of a risk of a future contingency, is a misprediction, which negatives an operative mistake.

102 Applying the above principles, I am of the view that TAS's erroneous assumption that SingTel was going to have to pay tax on the compensation sum at sum future time, does not constitute a relevant or operative mistake in restitution.

103 I turn to the calculation of compensation, which also struck me as a largely predictive exercise. SingTel's counsel took me through the calculation of loss revenue stream flowing from different assumptions which had to be made by Deloitte & Touche as to the impact of tax on forecasted revenues; culminating in the discounted cashflow estimate of $1.105 billion (their report of 30 April 1996). The tax rate for all the years within the relevant time frame was assumed at 26% throughout. In the event this assumption was erroneous, given that tax rates in the year of assessment of 2001 fell to 25.5%, and then further to 24.6% in 2002. It was correctly pointed out that if this downward tax trend was known at the time of payment of compensation, the amount of compensation would have been larger, taking into account the fact that deduction for tax in the corresponding period would have been commensurately less. The erroneous assumption was made as to future tax rates. It is difficult to ignore the fact that a judgment as to possible future tax liability was made at the point of calculating the compensation. The parties should accept that there is always a considerable risk inherent in such an exercise.

104 Another erroneous assumption on the part of TAS was the fact that tax would have to be paid on the compensation agreed to by the parties. This was always dependent upon an administrative decision on the part of IRAS, subject to the process of appeal within IRAS, an appeal to the Board of Review and to the Supreme Court. Other variable factors include fiscal decisions announced at future budgets. Based on the compensation which was paid under the statutory notice of 31 March 1997, if any tax was to be paid, it would only take place either between the fiscal years of 2000-2002 (following SingTel's accounting treatment), or in the fiscal year of 1998 (following a lump sum tax levied by IRAS). This follows the Singapore system of taxation on the basis of the preceding year's

income: section 35(1) Income Tax Act. The thrust of the cross-examination of the witness from IRAS was that different scenarios could have arisen in the future, from the change in tax rates, to an elimination of tax altogether on the said sum.

Is a mistake of law demonstrable in the face of different interpretations?

105 Under English common law, the law governing the recoverability of mistaken payments was once dominated by the distinction between mistakes of fact, which prima facie grounded recovery, and mistakes of law, which did not. The distinction was finally abrogated by the House of Lords in the landmark case of *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. This abrogation has also been robustly applied by the Singapore Court of Appeal in the *De Beers* case. The policy reasons for the old mistake of law bar were well set out by Gibbs CJ in *Brisbane v Dacres* (1830) 5 Taunt 143. They are three-fold. First, there were floodgate fears that such a claim would be urged in every case, and there are many doubtful questions of law (at p.152). Secondly, the principle of finality which applies where the party has the choice to litigate the question or to submit to the demand. Accordingly, any payment made in such circumstances operates to close the transaction between the parties. The third policy reason is the interest in security of receipts, and the need to protect defendants who have changed their position upon the faith of a payment.

106 Powerful as these arguments were, they were rejected by the House of Lords on the grounds of principle. First the principle of unjust enrichment required that where payment was made as a result of the payer's mistake, the money should be prima facie recoverable unless there were special circumstances to justify retention. Secondly, the distinction between fact and law was 'capricious'. Thirdly, this led to the development of numerous exceptions and qualifications which undermined the generality of the non-recovery rule. In *Kleinwort Benson*, Lord Goff observed that given the difficulty of stating the law and the heterogeneous exceptions, the area of law was ripe for judicial manipulation to achieve practical justice, which had resulted in uncertainty and unpredictability for the application of the old rule : [1999] 2 AC 349 at 370-2.

107 Given this abrogation, the crucial and often difficult question is to determine what amounts to a mistake of law to warrant recovery in favour of the recipient. In England following decision of the majority in *Kleinwort Benson*, much of the tension now lies in the extent to which the declaratory theory of the common law still applies to allow a claimant to obtain recovery in respect of a 'retrospective mistake' following a subsequent invalidation by a Court. Fortunately, the Singapore Court of Appeal does not endorse the declaratory theory, as was recognized in the *De Beers* case. The watchword to negotiating these uncharted waters in the future is one of practical certainty, and the need to safeguard the security of receipts.

108 In the case before me, there is the question of whether an operative mistake of law could be properly determined in the light of the different interpretations that can be applied to the question of whether $388 million constituted income or capital at a later date. One only has to look to the contrasting positions taken by Mr Keith Tay and Mr Koh Boon Hwee (who both said that they did not think the compensation to be taxable) and Mr Steven Yip (the former officer of IRAS who thought that it was). This area has been identified by Mr Sher to be a 'grey area'. At one end of the spectrum and classification, compensation for the sterilization of a capital asset is treated as capital and not taxable. On the other, compensation which is a surrogate for lost income is treated as income and exigible to tax. SingTel's experts, Mr Steven Yip and Mr Gandhi both gave evidence to the effect that it would be difficult to predict with certainty how IRAS approach the tax question, whether to treat the compensation as an income receipt or capital in 1996. There was evidently a clear divergence of views, which were not assisted by the fact that there were no prior rulings of IRAS on the issues before me.

109 The following passage from the minority speech of Lord Lloyd in *Kleinwort Benson* is instructive (at p 397):

> "The essential requirement is that the plaintiff should be able to prove that he made a mistake. At one extreme he will fail if he paid in accordance with what lawyers generally believed to be the law at the time of payment, whether he obtained legal advice or not. At the other extreme, he will fail if the law gave rise to serious doubts; for if lawyers differed among themselves it could not be said that one view, rather than another was mistaken."

110 Counsel for SingTel was hard-pressed to locate any authority in England or Singapore, in which the fiscal classification of compensation for modification of a statutory exclusive licence has been considered. I was referred to a range of authorities which can best be noted for their lack of coherence as to whether the sum under present consideration constitutes income or capital (see *Glenboig Union Fireclay Ltd v IRC* [1922] SC 112; *London and Thames Haven Oil Wharves Limited v Attwool* [1967] 1 Ch 772; *Burmah Steam Shipping Co Limited* 16 TC 67; *Van den Berghs Ltd v Clark* [1935] AC 431; *Bush Beach and Gent Limited v Road* [1939] 2 KB 524; *Sabine v Lookers* [1958] 38 TC 120; *White v G&M Davies* [1979] STC 415).

111 To settle the determination of a mistake of law at the point of payment, a definitive ruling from a court of law, following an exhausted process of appeal would have assisted IDA's cause substantially. Professor Peter Birks has remarked in one of his scholarly offerings (Mistakes of Law, Vol 53 (2000) Current Legal Problems 205 at 226):

> "A decision which can only be falsified by evidence which came into existence after it was made cannot be said to have been impaired. Even if the parties had constructed for themselves the very reasoning later used by the House of Lords in the Hammersmith and Fulham case, they would not have succeeded in falsifying their belief, because it was not the reasoning itself but the decision of the House of Lords upon that reasoning which falsified their belief. Suppose they had received counsel's opinion exactly anticipating the final outcome in the House of Lords. It might have caused them to abandon their belief in the scope of authority's powers. But if they honestly persisted in their belief it could not be said that the existence of the contrary opinion did or could render that belief false. It would have been a case of two competing predictions. The rule of recognition of use in our system means that, legislation aside, a belief as to the law can only be falsified by the utterance of a court."

112 IRAS has indicated that it is not going to tax the compensation in this case, but there has been no determination by a court of law on the issue of taxability in proceedings constituted between IRAS and the tax payer. This position was articulated in the Scottish decision of *BFS (Dundee) Limited v David Murphie* [1999] Scot SC 1. In this case the pursuers had made an ex gratia payment to their ex-finance director, the defender, on his departure on the basis that the ex gratia payment would not attract income tax. Income tax was adjudged payable on the sum and the pursuers also incurred some costs in the process, which they sought to recover against the defender. The court held that:

> "….not only must the mistaken belief be averred but that there is, in fact, a mistake must be averred. I am quite clear from the pleadings that the mistaken belief in the present case was that the severance payment could be paid to the defender without deduction of income tax. What does not seem to me to be averred is why that was a mistake. It is averred that advice was sought and

> given about setting up the payment in such a way that it ought not to attract income tax but nothing is averred to explain that arrangement's failure. All that is said is that the Inland Revenue adjudged the payment to be an ex gratia payment paid up without further argument. It seems to me, especially in the light of the extract from Lord Kinnear's opinion, that the defender should have noticed why the advice from the auditors was wrong, if it was wrong, for if the pursuers paid the Inland Revenue without any legal obligation to do so, then I do not see on what possible basis they could seek to recover from the defender. If one considers the backgrounds in two of the cases to which I was referred, *Morgan Guaranty*, to which I have already made reference and *Glasgow Corporation v Lord Advocate 1959 SC 203*, then it will be seen that in each of these cases, the starting point for actions based upon the *condictio indebiti* was a decision of a court that corrected a misunderstanding of a legal obligation, in the Morgan case, it being decided that a so-called "interest swap deal" was *ultra vires* a local authority and so the contract was void ab initio and thus payments made in implement of supposed obligations were recoverable, and in the *Glasgow Corporation* case, the issue of whether a local authority printing department had a liability to purchase tax was resolved in favour of the local authority who then sought repayment of tax historically paid, that claim at that time being defeated by the 'error of law' rule, the decision in that case being the high point, if that is the correct way to describe it, of that rule in Scots law. For these reasons, had the pursuers' case solely been that payment was made to the defender in the mistaken belief that income tax did not require to be deducted from the payment, then I would have sustained the defender's first plea-in-law in the absence of any relevant averment of the actual mistake."

113 In the absence of a settled legal position (falsified by a Court of law) as to taxability at the time when the payment of compensation was made in favour of SingTel, it would not be possible in principle to conclude that TAS was labouring under a mistake of law. I accept that in practical terms, the decision of IRAS would bind all parties concerned and that there is no dispute among all parties concerned over this question so as to found jurisdiction to raise this matter in a court of law. I must, however, stress that what is practice is in this context very different from what is the principle. I endorse the following passage from Mason & Carter, 'Restitution Law in Australia' at page 122:

> "In areas where the law is patently doubtful, the person who pays on a prediction which turns out to be wrong does not labour under mistake."

The defence of compromise

114 Based on my factual finding of the compromise, it is now appropriate to address the effect of the compromise. It is not disputed that compromise, if established, is a complete defence to a restitutionary claim that is founded on mistake. However, IDA referred to the following passage from the *De Beers'* case (at p.16), which I reproduce in full:

> "41. To satisfy the defence of compromise, it must be shown that the payer was indifferent as to whether the payee's claim had a legal basis. The discussion above has concluded that, far from being indifferent, the respondent believed that the appellant's demands were legal (see 26). The payee's state of mind was irrelevant."

115 IDA submitted that SingTel must prove that the payer was indifferent as to whether the payee's

claim had a legal basis in order to establish the defence of compromise. On examination, this appears to be over and above the general elements which are stated in Foskett, 'The Law and Practice of Compromise' (Sweet & Maxwell, 1996) at p.14, that (i) consideration exists, (ii) an agreement can be identified which is complete and certain, and (iii) the parties intend to create legal relations.

116 Is there a separate requirement for SingTel to prove indifference on the part of TAS as to whether SingTel's claims to higher compensation had a legal basis? SingTel submitted in reply that a context to the above passage must be provided by the facts of De Beers itself. In the *De Beers* case, the Appellants (the management corporation of Peoples' Park Complex) imposed payments and various conditions upon the Respondent in return for its granting permission to the Respondent to subdivide the registered titles of four penthouse units within the development into 18 subsidiary strata titles in respect of the same number of maisonette units. When the Respondents defaulted on maintenance contributions, the Appellants commenced suit to recover them. The Respondent counterclaimed on the grounds that the conditions were ultra vires and that it had paid the money under a mistake of law. In the High Court the Respondent succeeded in its counterclaim, the learned judge finding that the conditions imposed by the Appellants were ultra vires the Land Titles (Strata) Act. It was also held that the Respondent could recover the money paid under a mistake of law, thereby abrogating the mistake of law bar which had hitherto existed. This was upheld on appeal. Turning to the above-cited passage in question, which IDA has sought to rely to full effect, the remarks made by the Court of Appeal can be better understood in the context of the relevant cross-examination of Mr Ow of the Respondents. It was found that Mr Ow had always been under the impression that the demands of the Appellants were lawful. I reproduce the relevant parts of the cross-examination (referred to in page 12 of the Court of Appeal judgment):

> "26. Secondly, the judge found that Mr Ow had always been under the impression that the appellant's demands were lawful. Mr Ow had been cross-examined in relation to the $200,000 payment:
>
> > Q: You said you had no choice. Did you protest at the meeting?
> >
> > A: No, because *I believed they had the power to do so* and I had no choice. [emphasis added]
>
> He had been further cross-examined in relation to the $170,000 payment:
>
> > Q: Aware of the EGM held on 29/9/92?
> >
> > A: Yes.
> >
> > Q: Agree you could have raised the issue of the payment of the sum of $200,000 [which was later reduced to $170,000] at the EGM?
> >
> > A: Yes.
> >
> > Q: You did not do so.
> >
> > A: Agree.
> >
> > Q: Why not?

A: Because at that time *we were of the opinion that the plaintiffs' action was lawful*...[emphasis added]

This had not been helped by the fact that the respondent did not consult a lawyer or an architect on the issue of whether it had a legal obligation to meet the appellant's conditions."

117 Mr Sher was quite right to observe that in the *De Beers* case, there was actually no dispute to be compromised, even though the defence was introduced by the Appellant only on appeal. The reproduced extract of the cross-examination would show that the Respondent had paid because it believed it had to pay. This was a crucial ingredient to establishing a successful claim for the return of the monies. The relevant passage of *De Beers* should be read in this context.

118 The nature of the compromise which I have found in this case arises out of different circumstances. It can be neatly summarized as follows:

(i) SingTel was entitled to compensation for losing its monopoly;

(ii) There were several differences between the parties as to how the compensation was to be calculated;

(iii) TAS knew that SingTel was asking for $5 billion or more;

(iv) TAS wanted to pay much less;

(v) SingTel had statutory rights of making representations and of appeal in respect of any compensation. TAS wanted SingTel to accept the compensation offered by TAS, without such representations and appeal;

(vi) SingTel in the end accepted $1.5 billion, and gave up its rights. TAS made it clear, both orally and in writing, that this was the only payment that would be made. TAS wanted to shut the door completely and did not want SingTel to re-open the compensation; and

(vii) On 30 May 1996 TAS through its Director-General Mr Lim Chuan Poh orally agreed with BG Lee that all issues and differences between them were settled.

119 This thumbnail sketch of the case and the conduct of the parties illustrates more than a situation where the payer has formed an impression that the recipient's demands are lawful, and is not indifferent to the recipient's demands.

120 A compromise is little more than a species of contract. What distinguishes it from other contracts is the requirement of a dispute or differences between parties which are eventually settled. In Foskett, 'The Law and Practice of Compromise' it is written (at page 5):

"Bearing in mind its essential nature, it is submitted that a compromise in the true sense of the term cannot arise until some dispute or difference of view exists between the parties which, by agreement, they resolve. It is not necessary for there to be pending litigation, but there must be some 'actual' or 'potential' dispute."

121 Fosket sets out the following definition of a 'compromise' (at page 3):

> "Compromise can be defined as the settlement of dispute by mutual concession, its essentially foundation being the ordinary law of contract…A more practical and, perhaps, more apt definition would be the complete or partial resolution by agreement of differences before final adjudication by a court or tribunal of competent jurisdiction."

122 IDA also relied on the following passage from Goff & Jones (at pp199-200) in support of their case:

> "A payment made under such a compromise cannot, in the absence of misrepresentation, duress, undue influence or lack of good faith, be recovered on grounds of mistake of fact…unless the agreement can be shown to have been entered into on the basis of a mistake shared by both parties as to some fact of fundamental importance; or the payment would not have been made but for that mistaken belief. It is only if he assumed the risk that he might be mistaken, and paid or agreed to pay to resolve the question, that his claim should be denied."

123 Again this passage has to be taken in context. Clearly the reference to 'mistaken belief' must refer to a mistaken belief as to 'some fact of fundamental importance [shared by both parties]' in the preceding phrase. The above passage fortifies a compromise as being a species of contract, and like any other agreement is subject to vitiating factors (for example on the basis of mutual mistake of a fundamental assumption of fact) if it is to be set aside.

124 In essence a compromise is a contract to settle disputes. If the elements of contractual formation are satisfied on the facts, then a compromise was entered into by the parties. I have made this finding on the facts of this case.

Assumption of risk

125 It was also canvassed on behalf of SingTel that if there is an obvious line of investigation which is not pursued, this implies an assumption of risk which excludes an operative mistake. The proposition is summarized in Goff & Jones 'The Law of Restitution' (5th ed ,1998) at 199:

> "Much depends on the circumstances in which the payment was made; for example, whether the payer has waived any or any further investigation of the facts. Whether a person has assumed the risk is a question of fact. If he had doubts and swallowed them, he should be denied recovery. Similarly, a restitutionary claim should fail if he paid, having taken the chance that his view of the facts may be mistaken, if he could not be bothered to investigate further whether he was mistaken."

126 In this case, a line of investigation would have been for TAS to obtain a ruling from IRAS. None was sought. Neither did TAS consult a tax adviser. TAS sought to rely on a single statement in Deloitte & Touche's report of 30 April 1996, which stated as follows:

> "To provide for tax payable by ST on the compensation, the calculated amount would need to be grossed up by 26%, the current corporation tax rate."

127 It is however equally clear that Deloitte & Touch never assumed the responsibility to give tax

advice. This was not apparent from their terms of reference (evidence of Mr Teo Ming Kian and Ms Ng Cher Keng in cross-examination).

128 I should at this juncture point out the assumption of TAS that the 'true' compensation for SingTel's loss of the monopoly was $1.105 billion as assessed by D&T. It was at best a unilateral assumption. SingTel did not know the figure. SingTel most certainly looked at the global figure when its Board of Directors considered the statutory offer. It knew that the offer was grossed up for tax. One is not overly cynical if one entertained the thought that the fact of grossing up for tax, at the flat rate of 26%, was mentioned in passing to SingTel to preclude any comeback should SingTel be taxed on the compensation. What must always be borne in mind is the evidence of BG Lee that he would not have agreed to a lesser compensation, in view of the claim of SingTel of $1.6 billion and the higher claim of $4-$6 billion claim under Framework II. All the arguments of IDA must be considered against the fact that its baseline figure of $1.105 billion was never agreed by SingTel. SingTel did not know about this figure, to which only TAS and Government officials were privy. It had in view the statutory offer of $1.5 billion and the real and substantial prospect of tax planning the compensation to a lower or even zero sum.

129 What was also overwhelming was the desire of both parties to reach closure and finality. With this objective TAS' failure to obtain a preliminary ruling from IRAS or seek advice is understandable, given the timelines. However, it also fortifies the extent of the risk which the regulator assumed in making the payment of substantial compensation. With an assumption of risk, there can be no operative mistake. The following cases substantiate this proposition: *Mason v New South Wales* [1959-1960] 102 CLR 108 at 123; *Wills Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992(4) 202 at 224. There is no need to reproduce the relevant passages *in extenso*.

130 I was also referred to the *Nepean* case in Canada, which is instructive [(1978) 92 DLR (3d) 481; (1980) 107 DLR (3d) 257; (1982) 132 DLR (3d) 193]. The claim arose as a result of a scheme developed by Ontario Hydro for charging municipalities for the cost of electric power which it supplied to them. In simple terms, the charges reflected both a capital cost element and an element reflecting other costs involved in the supply of power. The billing practice which proved to be controversial was Hydro's scheme, revised from time to time over the years, which required newer municipalities to contribute more heavily to the capital cost of the hydro system than older municipalities. Older municipalities were credited with a so-called 'return on equity' which had the effect of reducing the amount charged by Hydro for power supplied, whereas the newer municipalities were charged an offsetting 'cost of return' on equity i.e. the newer municipalities had to pay more. One of the newer municipalities, the Township of Nepean, successfully challenged the legal basis of this scheme.

131 At trial [(1978) 92 DLR (3d) 481], having determined that Ontario Hydro had no authority to structure its billings in this fashion, the court went on to consider the merits of Nepean's claim for return of the money already paid (this was decided before the abrogation of the non-recovery for mistake of law rule). Craig J was of the view that Ontario Hydro 'had the primary obligation and responsibility to observe the requirements of the Power Corporation Act; and particularly of knowing what charges can be imposed on municipalities and their utilities (at 502) and accordingly that Nepean should be entitled to succeed in the absence of any basis for holding that it would be inequitable to allow to recovery. However the Judge held that Ontario Hydro was not obliged to refund the money in this case. One of the reasons was that 'in balancing the equities between the parties', Craig J noted that Ontario Hydro was acting bona fide and that "Nepean had ample opportunity to investigate its legal rights and take legal advice in the first year or two of the system – rather than waiting eight years' (at 506).

132 This was upheld in the Ontario Court of Appeal [(1980) 107 DLR (3d) 257] on the basis that the

'trial judge was entitled in the instant case to consider the facts and factors which he did and the unusual circumstances and history of the involvement of two statutory public bodies as well as their relationship to other public bodies' (at 259).

133 On appeal to the Supreme Court [(1982) 132 DLR (3d) 193], the Court was concerned with the mistake of fact and law distinction, and the exceptions to non-recovery for mistake of law. Dickson J dissented in the Supreme Court and held that the distinction between mistake of fact and law should be abrogated. Having held that there should be recovery for mistake of law, Dickson J disagreed with Craig J (at 281):

> "Ontario Hydro was responsible for the proper application and interpretation of its Act; Ontario Hydro had primary responsibility of knowing what charges could be imposed upon municipalities and their utilities, and Ontario Hydro had misled Nepean into thinking that the charges were properly authorized. The Judge found that Nepean did not support the proposed charges and had objected consistently thereto. Why then, and when, did an obligation fall upon Nepean to incur legal expenses in making an independent investigation as to the statutory powers of Ontario Hydro? What we are talking about is not some general rule of law which could be presumed to be a matter of common knowledge but rather a highly technical deduction from facts and law, both involving fields of special learning."

134 It should be mentioned that Dickson J's dissent on the fact/law distinction won the day in *Air Canada v British Columbia* (1989) 59 DLR (4^{th}) 161. For present purposes, the Ontario Hydro bore the responsibility for the failure to investigate inter-related with other factors, in particular, the responsibility of the recipient for the error made by the payer. It misled Nepean into thinking that the charges were legal.

135 Similarly I am prepared to accept Mr Sher's argument that SingTel bore no responsibility to TAS in respect of tax and did not mislead TAS in this respect. Its claim for compensation, which originally exceeded $1.5 billion by far, was founded on their interpretation of the A&I clause in their Licence. SingTel was not privy to how the final compensation was reached. It was not the party to initiate the line of inquiry in relation to tax. Moreover, there was no contractual stipulation for repayment and no statutory formula to provide for tax on compensation. IDA could have stipulated that the tax element was for the payment of income tax or for it to be held on an escrow account. Whether SingTel would have agreed is a speculation I need not enter into. It was clear beyond any peradventure that the evident desire for closure and elimination of the appeal procedure left both parties bearing the risks of the future.

No unjust enrichment

136 Any claim to restitution raises the following questions (1) has the defendant been enriched? (2) if so, is this enrichment unjust? (3) is his enrichment at the expense of the plaintiffs? SingTel also submitted that there was no injustice in enrichment.

137 IDA's case is that TAS thought that SingTel was going to pay $388 million in tax in respect of the $1.5 billion compensation. Had that assumption turned out to be true, such tax payment would have been credited to SingTel's section Credit Account and thus been available to frank dividend payments up to the amount of $1.5 billion. A tax credit enables a company to deliver a tax-free dividend into the hands of its shareholders. The net sum of the dividend is paid to the shareholders who then regress the same and include the gross amount in their total income. The tax deducted from the

dividend (which is available as a tax credit in the Section 44 account) would be available to the shareholders as a credit against tax payable by them. This was fully explained in the evidence of Ms Jeann Low. The short observation to be made is that if matters had been as IDA has contended TAS assumed them to be, the sum of $1.5 billion would have borne tax in SingTel's hands but the net amount would have been delivered tax free into the shareholders' hands, without using up any pre-existing tax credits. The tax credit utilized to achieve this would have been generated by the very receipt of the taxable sum of $1.5 billion. If IDA was to succeed in its recovery of $388 million, SingTel would be worse off than they would have been had the $1.5 billion been taxable in the first place. In order to frank the dividend in excess of $1.5 billion which has been paid out, they would have utilized and exhausted tax credits generated by other income. In other words, SingTel would lose for a tax credit in the sum of $388 million forever.

138 Whilst it is arguable as to whether SingTel can be said to have been unjustly enriched, I am reminded of Lord Hoffmann's judgment in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 399D, where his Lordship identifies the mistake by the payer establishes the unjust nature of the enrichment.

Estoppel/Change of Position Defence

139 SingTel raised two short defences of estoppel and change of position. As to the former, it was contended that it was led to believe as a result of the statutory notice and oral and written exchanges, that it was entitled to regard itself as secure in the receipt of $1.5 billion. On this basis they gave up their rights to make representations to TAS and appeal to the Minister. I am reluctant to hold that there was an estoppel operating on these facts, in the absence of identifying specific representations which would lead to the beginnings of an estoppel.

140 As to the change of position defence, there are four elements:

> (i) the payee has changed his position;
>
> (ii) the change is bona fide;
>
> (iii) it would be inequitable to require him to make restitution or to make restitution in full; and
>
> (iv) there must be a causal link between the receipt of the overpayment and the payee's change of position.

See *Management Corporation Strata Title No. 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 at 15; *Seagate Technology v Goh Han Kim* [1995] 1 SLR 17; *Scottish Equitable plc v Derby* [2001] 3 All ER 818.

141 It is clear that for such a defence to succeed, the change of position must occur after the receipt of the payment, which is not the case here. This general principle is well set out in *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545. Notwithstanding the criticisms of Goff & Jones (at 823), I see no need at this juncture to not to follow the general principle.

Attempt to introduce two new causes of action

142 On the eve of the resumed hearing of this case for written and oral submissions on Wednesday,

22 May 2002 Mr Davinder Singh on the basis that if there was a contract, raised the claim that there was a total failure of consideration in respect of a severable part of the consideration. That part was the tax element. There was accordingly no bar to recovery because the payee SingTel would be unjustly enriched if it retains the payment. In the circumstances, IDA is entitled to restitution pro tanto in the way shown in *David Securities Ltd v Commonwealth Bank of Australia* [1992] 66 ALJR 768. For the main submission, he relied on *Roxborough v Rothmans* [2001] HCA 68.

143 Mr Davinder Singh further raised another new contention. He referred to SingTel's argument that as $1.5 billion was paid under a statutory obligation, the entire sum is statutorily inviolable and that, as Mr Sher argued, no jurisdiction to set it aside either in whole or in part. Counsel for IDA contended that the constitutional principle enunciated in *Auckland Harbour Board v The King* [1924] AC 318 was to the effect that if money is paid out of the Consolidated Fund without authority e.g. by mistake it is recoverable. He also relied on *The Commonwealth v Grothall Hospital Services (Australia) Ltd* (1981) 36 ALR 567: I was supplied the Butterworth's text.

144 Mr Sher objected to the inclusion of these two new causes of action, which were not pleaded. This was not merely a pleading point. If they had appeared in the Statement of Claims, SingTel would have pleaded to it and issues would have been joined. Relevant evidence bearing on, among other things, the severability of the contract, necessary for the application of the *Roxborough* principle, would have been led. As it is, we do not have the evidence. Mr Davinder Singh submitted that these were merely 'responses' to the contentions of SingTel that the contractual and statutory obligations to pay $1.5 billion under section 28 of the TAS Act precluded IDA from seeking restitution. Mr Davinder Singh submitted that no new evidence need to be led; he was not introducing any new causes of action. He invited this court to deal with his submissions on that basis. I agree with Mr Sher, but in deference to Mr Davinder Singh, I will go on to deal with his reliance on the principles in the two sets of cases.

145 Having read *Roxborough* regarding total failure of consideration and the *Auckland* principle as applied in *Grothall Hospital Services* regarding recovery of unauthorized payments out of the Consolidated Fund, I am of the view that they do not assist IDA at all. Indeed, as Mr Sher submitted, they are of direct assistance to SingTel.

146 I refer to the *Roxborough* case. The respondents in that case sold cigarettes to the appellants who had paid tax on them. In the published wholesale price lists, the third column set out the wholesale list price 1000 cigarettes. Tax was stated in the list as 100% of the wholesale price. The appellants had paid respondents the tax collected from their retailers who down the chain had collected the tax from the smokers. After payment to the respondents, there was an intervening court decision which held that the tax, which was the State licence fee, was ultra vires. The appellant based their case, in part, upon the claim for money had and received by the respondents for the use of the appellants. Gleeson CJ and Gaudron and Hayne JJ, held at para 14 of their judgment that "(t)he failure of consideration must be complete in order to entitle the (appellants) to recover the money paid for it…; *but where the consideration is severable, complete failure of part may form a ground for recovering a proportionate part of the money paid for it*…;" (emphasis added). On the facts, the High Court held that there was a distinct and severable part. For the reasons stated above, the compensation was an undifferentiated amount offered in exchange for SingTel's acceptance of the modification as the consequential damages for which SingTel gave up a potential claim which ranged from $1.6 billion to $6 billion. A series of overlapping and substantial consideration had proceeded from SingTel. None of the constituent parts was severed.

147 I finally turn to *Auckland Harbour Board* principle. It established that where moneys are paid out of Consolidated Fund *without authority* they may be recovered in an action by the Government. A

minister had paid the sum of 7,500 pounds although the lease upon which payment was conditioned was not granted and for which the payment was authorized under a piece of legislation. It was held to be outwith the authority conferred on the Minister under that legislation. In *The Grothall Hospital Services (Aust.) Ltd* there was a written contract for hospital cleaning services. The contract provided for price variations. The company submitted claims for payment calculated otherwise than according to the written contract. The Commonwealth, without being misled, paid some claims. It was held that the contract was varied by the Commonwealth's acceptance (by means of unqualified payment) of claims for payment, which not being calculated in accordance with the contract, amounted to an offer to vary the contract. The Federal Court of Australia held that the *Auckland* principle did not apply because the payments were not made by mistake, nor were they unauthorized. At the heart of the principle is the authority. In this case, the statutory offer was made under section 28 which provides for the payment of compensation. The offer of a lump sum was what was apparent on the notice given on 11 May 1996. At that stage, parties were aware of their respective calculations and the level of tolerance. The offer of $1.5 billion was less than the maximum authorised by Cabinet, which was $150 million more. If SingTel had known about it (which was not at all possible) an appeal might have won it another $150 million as compensation. It was all within the authority of Cabinet. At any rate, in view of the issues as pleaded no relevant evidence was led on the basis that TAS had no authority to pay $1.5 billion as compensation. This new line of contention also fails.

Conclusion

148 In my judgment, IDA's claim in restitution must fail. TAS offered to SingTel an undifferentiated sum of $1.5 billion as the damage caused to it by the modification to SingTel's Licence under the statutory framework laid down in the TAS Act. Having spent more than 2 months in narrowing the gap, and seeking common methodologies, SingTel was advised by their consultants Goldman Sachs that its claims for the damage ranged from $1.6 billion to $6 billion. It gave up its right to a tenable interpretation of the A&I clause in its Licence and it obtained finality and a clean break. There in no question of appropriating any taxpayer's money as a gift to SingTel which gave up a claim 4 times the compensation paid. To allow IDA to reclaim on the alleged ground of mistake of law would not only insert uncertainty into the finality inherent in the statutory procedure for the payment of compensation for modification of a telecommunications licence but in all the circumstances it would be wholly unjust and contrary to fair play to order SingTel to return a part of the compensation for which SingTel gave more than adequate consideration. The sanctity of a concluded contract and the integrity of a receipt under it must be upheld: as is the common parlance in the world of business 'a deal is a deal'. In my view it must be sealed and held to be inviolate.

149 Accordingly, IDA's claims are dismissed with costs. I will hear parties on the question whether there should be a certificate for two counsel in due course.

Sgd:

Lai Kew Chai

Judge