Recent Developments in the Law of Unjust Enrichment

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Over the summer, two interesting judgments have been handed down by the Court of Appeal concerning the law of unjust enrichment. In this Article, we briefly consider ***Dargamo Holdings Ltd v Avonwick Holdings Limited*** [2021] EWCA Civ 1149 and ***School Facility Management Ltd v Governing Body of Christ the King College*** [2021] EWCA Civ 1053.

Dargamo Holdings v Avonwick - Facts

In the context of "*bitter litigation*" surrounding the division of shared business interests of three wealthy businessmen, the "Taruta Parties" claimed against the "Gaiduk Parties" for US$82.5 million, being part of the purchase price paid by the former under a share purchase agreement for the sale and purchase of Castlerose Limited.

The Taruta Parties sought to argue that that portion of the purchase price had been transferred in consideration for the Parties entering into legally binding contracts at a later date obliging the Gaiduk Parties to transfer further assets to the Taruta Parties, including 50% of their interest in two Ukrainian companies, NET and Agro Holding. Indeed, it was common ground that the total purchase price was intended to include the interests in these companies but that the Parties deliberately omitted any of the additional assets from the share purchase agreement hence there was no available claim for rectification. These interests were never transferred and consequently the Taruta Parties brought a claim for the sum of US$82.5 million in, *inter alia*, unjust enrichment.

At first instance, Picken J found that was there was no unjust factor so as to permit a claim in restitution.

Judgment of the Court of Appeal

The Court of Appeal upheld the first instance decision.

The appeal concerned the relationship between contract and unjust enrichment. Specifically, it addressed the following question: in circumstances where the contract was valid and subsisting and the consideration for the payment in question was expressly specified by the contract's terms, what scope was there for unjust enrichment to operate on the grounds of a total failure of basis or consideration for the payment?

Carr LJ gave the leading judgment in the Court of Appeal. She began by defining what she called the "Obligation Rule" namely that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer a benefit on the defendant.

She noted that there were exceptions to this principle although she remarked that "*the rationale behind these exceptions is difficult to pinpoint*" [72]. The appeal centred on the scope of these exceptions, including the cases of ***Roxborough v Rothmans of Pall Mall Australia Ltd*** [2001] HCA 68 and ***Barnes v Eastenders Cash & Carry plc*** [2014] UKSC 26.

However, the present case was held not to fall under any of the exceptions for a simple reason: clause 2.4 of the contract defined the consideration for the purchase price paid by the Taruta Parties, which did not include the transfer of interests in NET and Agro Holdings. Clause 2.4 was, therefore, the express basis for the payment of the purchase price agreed in the relevant contract and Carr LJ held that there can be "*no scope for the law of unjust enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms. None of the authorities begin to go that far*" [117].

In both Roxborough and Barnes, the claim in unjust enrichment cut did not across the basic allocation of risk the parties agreed to, nor was the failure of basis something that was within the parties' contemplation at the time of the relevant contract (e.g. by way of negotiation). In the present case the "unjust enrichment claim can be seen to interfere impermissibly with the parties' contractual allocation of risk. It seeks not to complement but rather override the Castlerose SPA" [126].

Carr LJ did accept that there would be circumstances where it would be legitimate for a court to look beyond the terms of the contract for a "*wider understanding of the unjust enrichment claim, even if there is a valid and subsisting contract*"

[132]. However, where the basis of consideration was expressly and unconditionally spelt out in the contract, there was no scope for looking for an alternative basis on which the payment was made.

In the light of this finding, the Court did not need to consider whether the claim would also fail on the basis that there had been no total failure of basis since there was a single indivisible sum that was paid such that there could be no apportionment of a severable portion of that sum by reference to authorities such as G***iedo van der Garde BV v Force India Formula One Team Ltd*** [2010] EWHC 2373 (QB).

Comment

The Court of Appeal in ***Dargamo Holdings*** has, in essence, re-stated the orthodox understanding of the relationship between a claim in unjust enrichment and the express terms of the contract. However, it did so in a factually unusual case where there was a clear additional basis for the payment which – for whatever reason – the parties deliberately did not reflect in the contractual wording. Absent ratification, or perhaps estoppel by convention, express provision in the contract of what the consideration for the payment or other benefit to be transferred is will almost always be fatal to a claim in unjust enrichment where the claim rests upon an allegation that some other basis or consideration for the payment has failed.

School Facility Management Ltd v Governing Body of Christ the King College - Facts

The College entered into a lease with SFM (after a series of assignments) for the hire of a building. Under the contract, the College was to make annual hire payments for a minimum period of 15 years. During the course of the contract, there were discussions of an option for the College to purchase the building at the end of its minimum term which led Foxton J to hold that the College had a strong expectation of purchasing the building at the end of the 15 year period.

Between 2014 –2017 ("the First Period"), the College made annual payments under the contract and used the building. After 2017 until the date of trial (7 May 2020), the College made no further payments but continued to use the building ("the Second Period"). This further use was in the context of the College first articulating the position on 9 April 2018 that the contract was void and on 11 April 2018 SFM sending a letter terminating the contract and informing the College that they were no longer entitled to use the building.

Foxton J held at first instance that the contract was void under the Education Act 2002. In the light of that finding, various claims and counterclaims arose. In particular, SFM brought a claim in unjust enrichment seeking restitution of the benefit rendered under the contract, that is to say the use of the building in the Second Period. The College counterclaimed in unjust enrichment for return of the payments made in the First Period but agreeing to make counter-restitution by giving credit for the benefits that it had received in both periods.

Foxton J held as follows:

(1) The value of the benefit received by the College during the First Period by reference to the objective market rate for use of the building was £1,024,000, as compared with the sum paid by the College of £3,205,606.

(2) The value of the benefit received by the College during the Second Period was £711,323.88. As set out above, no payments had been made in the second period.

(3) Whilst the College was entitled, in principle and subject to the requirement to make counter-restitution, to re-payment of the sum of £3,205,606 in unjust enrichment for the First Period, he held that there had been a total change of position on the part of SFM.

Arising out of the findings above, the key issue between the parties was as follows: could the entire value of the benefit received by the College over the 7 years (£1,735,323) be netted off against the benefit received by SFM over this period (£3,205,606), at which point the change of position defence would operate against the net sum *prima facie* owing to the College to reduce the College's claim to £0? Or were the claims in respect of the two periods to be considered separately so that SFM had a total defence to the claim in the First Period on account of its change of position defence and the College had no defence to the claim in the Second Period given that it had made no payment of any hire during that

period? If this was the correct analysis, SFM would be entitled to payment of the sum of £711,323 despite the fact that – looking at the position in the round – the College had "overpaid" by about £1.5 million.

Foxton J opted for the latter option, with the result that SFM was entitled to claim the sum of £711,323 in restitution.

The Appeal

On appeal, the Court of Appeal upheld the decision. The principal points of dispute between the party were:

(1) Whether the change of position defence should only apply once the net enrichment had been established having regard to the counter-restitution principle. The College submitted that the relevant enquiry in all unjust enrichment cases should follow the sequence: unjust factor, enrichment, counter-restitution (i.e. what is the value of the benefit received by the claimant which it must give back in order to obtain restitution of the sums (or other benefit) transferred by it to the defendant), and change of position.

(2) Whether the counter-restitution principle was engaged at all and, in particular, whether the payments for the First Period were in exchange for the use of the building in the Second Period.

Popplewell LJ identified at [34] four ways in which the counter-restitution principle might conceptually be justified although in the end he felt it was unnecessary to identify which was the correct justification because he accepted SFM's contention that the counter-restitution principle was not engaged on the facts of the case.

In making that latter finding, it was, however, necessary for him to express a conclusion on the content of the counter-restitution principle, namely to answer the following question: "*What is the nature of the connection that is required between the benefits provided by the claimant and those provided by the defendant?*" [79].

It was too simplistic, he stated, to say that all benefits provided in each direction under a void contract must generally be taken into account. He posited the following example: A engages B as a labourer at £200 a day, payable each week, but the objective value of the labour is £150; suppose the contract is void and that B works for the final 3 days in a week without payment from A; also suppose that B has a change of position defence in relation to A's claim for the return of the weekly payments of £200. Popplewell LJ observed that justice would seem to demand that B should be able to claim in unjust enrichment for £450 for the last three days work without A being able to extinguish the claim by setting off his larger over-payments for the previous work in the previous weeks. Why does justice dictate that? Popplewell LJ stated: '*The answer is not that the contract is severable into daily periods of hire, but rather that there is no relevant connection between the earlier weeks' payment and the labour provided in the last week. The earlier payments were exclusively referable to work in those earlier weeks. The fact that A has "overpaid" for the value of the services in those weeks is simply the result of his bargain. It does not affect the fact that the payments were for labour in those weeks"* [80].

Thus he concluded that counter-restitution should operate in essentially the same way that equitable set-off does: "*I would not state the counter-restitution principle any more narrowly than being that the benefits for which the claimant must give credit are those which are sufficiently closely connected with the benefits provided to the Defendant that justice requires him to do so"* [83].

He accepted that, just as with equitable set-off, there may need to be fact-specific exceptions [84].

On the facts, the Court of Appeal held that there was no sufficient connection between the payments made in the First Period and the benefit received by the College in the Second Period. Whilst the facts were not as simple as those of a basic operating lease, the result was the same. The "Capital acquisition cost" element of what was being obtained in exchange for payment by the College was said to be irrelevant to an unjust enrichment claim for use of an asset, since no part of that cost was in exchange for the use of an asset. As a result, there was no connection between the payments made for the first 3 years and the use over the next few years. Rather during the First Period, payment was made in respect of (a) use during that period and not, therefore, the Second Period and (b) a capital cost which was not connected at all with the College's use in the Second Periods [86] –[92]. Popplewell LJ's view was reinforced by the terms of the contract which stated that if the College failed to make an annual payment, SFM could require redelivery without giving any credit for payments previously made by the College.

Given the finding that the counter-restitution principle was not engaged, the Court of Appeal felt it unnecessary to consider whether the change of position defence or the counter-restitution defence should be applied first. Popplewell LJ held that: "*I am inclined to think that there can be no inflexible rule that one defence trumps the other, and that the defences can be applied on a case-by-case basis to produce a just outcome on particular facts, which may vary greatly*" [85].

Comment

School Facility Management purports to bring the principle of counter-restitution in line with the defence of equitable set-off. However, as Popplewell LJ recognised, his formulation of the counter-restitution principle was broad. Moreover, the application of the sufficiently close connection test may prove problematic in practice such that there may not be a degree of consistency and certainty of application. Indeed to take the example of the labourer, if the labourer was engaged to decorate a house but to be paid by a day rate on a weekly basis, would it be really correct to say that there was no sufficiently close connection between the work done in week 2 and the payment made in week 1? Careful analysis both of the terms of the contract in question and the facts will be required in all cases when applying the approach set down by the Court of Appeal.

Finally, we would also note that there has been an interesting, albeit obiter, recent discussion in the Chancery Division in ***Atkinson v Varma*** [2021] EWHC 2027 (Ch) at [72] – [78] of the change of position defence and, in particular, how far must a defendant who has been enriched go in proving the irreversibility of the enrichment for the purposes of the change of position defence. Whilst Michael Green J did not express any concluded view on the question, he did say this: "*I do not think that a defendant to an unjust enrichment claim is obliged to pursue litigation to prove irrecoverability*": [76].

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