Trusts & Equity
Fall Term 2022

Lecture Notes – No. 11

X. INTRODUCTION TO CONSTRUCTIVE TRUSTS AND UNJUST ENRICHMENT

Chase Manhattan Bank v. Israel-British Bank
[1981] Ch 105

This was a mistaken payment case between two banks, with the issue being whether the mistaken payment could be made subject of a constructive trust in favour of the trustee in bankruptcy of the insolvent payor. It was held that that a person who paid money to another under a factual mistake retained an equitable property in it, and, the conscience of that recipient was subjected to a fiduciary duty to respect his proprietary right; that the plaintiff had a right to trace the money was founded on a persistent equitable proprietary interest. Goulding J reviewed the American law on point in some detail (both banks were in New York) and held that a constructive trust arose on institutional grounds in such a case – automatically and not remedially – and on the day of the mistaken payment.

The case highlights the need for a principled approach to recovery and the limitations of relying on 'conscience'.

'***Unjust Enrichment'*: A Guide for the Perplexed**

Restitution and *Unjust Enrichment* are concepts that often occur together and are often confused; indeed, at the level of theory, there is much that is contentious in the area of law, even taxonomy. In the past, substantive grounds for a remedy and the remedy itself have often been conflated, especially in respect of proprietary remedies in equity. We now try to draw distinctions. *Restitution* is the response which consists in causing one person to give up to another an enrichment received at his expense (the property itself) or its value in money. We use the term to describe the remedies which have that common function. The prototypical example is a constructive trust over profits taken by a trustee in breach of fiduciary duty. *Unjust enrichment* is not the same as restitution, but is a reason for making restitution or compensation; other reasons might be that there is an enforceable contract or the defendant has committed a wrong.

If our understanding is that unjust enrichment is somehow as foundational to the law as contract or wrongs, and is different from each, then the principle must be prescriptive and capable of being stated with some degree of precision. On the other hand, perhaps the principle is still developing such that it is premature to expect a precise statement at this stage of its evolution and a descriptive approach is sufficient.

The Canadian Supreme Court has dealt with principles of unjust enrichment and restitution as such since ***Degleman v Guaranty Trust Co. of Canada*, [1954] SCR 725** a case featuring a disappointed nephew who was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the oral contract. The Supreme Court of Canada held that the *quantum meruit* claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This is, of course, sounds like very familiar territory – *Equity Will Not Allow a Statute to be Used as an Instrument of Fraud* and the law doesn't allow for the benefits to be retained upon the traditional equitable standard of conscience. Given that the contract was unenforceable, however, what is the ultimate rationale for liability in *Degleman*? It can't be the contract and thus 'implied contract' or 'quasi contact' was rejected by both the majority and the concurring minority. Unjust enrichment (the retention of a benefit without valid reason) best rationalized liability in the Court's view. One instantly appreciates the potential for an elegant solution rather than some soft standard like conscience or fairness, but then it becomes necessary to develop how the standard is more intellectually coherent than the traditional devices by which equity achieves a more fair result in the circumstances.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. **There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action.** We can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
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> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.

The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations. All of this is set out in the *Garland* case.

Garland v Consumers Gas Co.
2004 S.C.C. 25

Here the Court set out a more detailed method for the application and development of the action for unjust enrichment. This was a class action against a utility company for charging late payment penalties at a rate contrary to the Criminal Code notwithstanding that the penalties were authorized by the Ontario Energy Board. The action for unjust enrichment was successful and the defendant was ordered to repay the amounts received. At issue in *Garland v Consumers Gas Co.* was less the presence of benefit and deprivation (which was clear) and more the nature and method of analysis of the juristic reason that might justify retention. Iacobucci J. held:

> 40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment" while English courts require "that the enrichment be unjust"… It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" …
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> …
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> 43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable… But, at the same time, there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.
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> 44 … the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery… The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
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> 45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
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> 46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration

> of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

This is both a significant and a substantial development in the Canadian law of unjust enrichment, and the action as an autonomous non-parasitic claim is now undeniable. If we proceed from the understanding that what a court will not countenance is a view of '*unjust* enrichment' as an idiosyncratic weighing of the equities of an individual case on subjective criteria ('palm-tree justice' to use the familiar phrase), then *Garland v Consumer's Gas Co.* identifies a principle that is both pragmatic (existing categories that would not interfere with the defendant's retention of the benefit are preserved despite their own inherent frailties) and dynamic (new categories can be created, but on a principled basis). The interim state – 'there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category' – does pose a concern but also clarifies the still developing normative core of the action. That is, unjust enrichment is bound up with a treatment of subjective expectations that are objectively reasonable and where no public policy bars recovery.

Alberta v Elder Advocates of Alberta Society
2011 SCC 24

This was a class action brought against the Crown in right of Alberta by a class of 12,500 long-term care residents, half of whom were over age 85 and all of whom were disabled or mentally incapable and had extensive physical needs. A variety of claims were brought to challenge the level of 'accommodation charges' levied by the provincial government for housing and meals arguing, in essence, that the charges were so excessive that they represented a subsidy of medical services in contravention of the regime established under the Canada Health Act.

While the class action claim was held to be unsustainable as a matter of law on three of the claims, the litigation was allowed to go forward based on the claim of unjust enrichment. The claim is interesting as the plaintiffs argued that the level of accommodation charges were in excess to the cost to the Crown of providing the services in question or reasonable charges representing the necessary equivalencies of enrichment and deprivation. Given that the level of charges were fixed through a legislative act (which was important in the Court holding that no fiduciary duty arose), one might anticipate that no unjust enrichment claim could succeed as a matter of law. Moreover, in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, the Court had held that public law principles rather than a private law action for restitution was to be the preferred mode of redress whether taxes were collected pursuant to *ultra vires* legislation. Enter the Charter, s.15.

McLachlin C.J.C. held at para. 91-92, 97-98:

> In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes

paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.

With respect to whether or not a juristic reason exists, Alberta argues that the regulation setting the maximum allowable accommodation charge is a complete answer to any claim in restitution. However, the claim that the regulation is itself invalid is a *Charter* claim, subject to *Charter* remedies.

…

The plaintiffs plead that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter*. They say the charges were imposed solely on the basis of the class members' age, mental disability, physical disability, or some combination thereof, and the consequent infringement of their equality rights is not demonstrably justified under s. 1 of the *Charter*. They seek restoration of the accommodation charges and damages under s. 24(1) of the *Charter*, and a declaration that the listed provisions are of no force or effect to the extent of their inconsistency with s. 15(1).

My understanding is that the plea for relief under s. 15(1) is not directly challenged by the Province. Although the Province argues that a class action is not the preferable procedure for the *Charter* claim or its remedy, the Crown does not seek to strike the plea of discrimination itself; instead, it asks that we order it to proceed in another form. In light of my other conclusions, especially the survival of the plea of unjust enrichment, and without commenting on its merits, I would permit the s. 15 claim to proceed as part of the class action.

Moore v. Sweet
2018 SCC 52 (S.C.C.)

Background

In *Richardson Estate v. Mew*, 2009 ONCA 403 (Ont. C.A.), a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the premiums that she paid; 'theoretical' because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other's estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

Richardson Estate v. Mew must now be read in the context of *Moore v. Sweet*.

The Case:

Here a man made an oral agreement with his ex-wife; if she maintained the policy of insurance that he owned on his own life, she would be entitled to the proceeds of the insurance policy at his death. The ex-wife held up her end of the bargain and paid the premiums for 7 years. The man did not; he designated his second wife irrevocably. Côté J. for the majority held that an action in unjust enrichment should be successful:

> [46] Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her

out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.

[47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the full value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).