THE PASSING OF PASSING-ON IN CANADA

IN *Kingstreet Investments Ltd.* v. *New Brunswick (Department of Finance)* [2007] S.C.J. 1 the Supreme Court of Canada reconsidered the defence of "passing-on" to an action based on the recovery of money paid under a mistake of law, first discussed in Canada in *Air Canada* v. *British Columbia* [1989] 1 S.C.R. 1161. The Supreme Court held this defence was inapplicable not only in the instant case, which concerned the payment of an unconstitutional tax, but also to all claims based upon the law of unjust enrichment.

The province had introduced a user charge on liquor purchased from the N.B. Liquor Corporation, whence the plaintiffs, owners of licensed premises, were obliged to buy their liquor. Payment of this charge was made under protest and eventually it was held that the charge was not a fee for doing business but an indirect and therefore unconstitutional tax. When the plaintiffs sought recovery, the trial judge held against restitution. Two grounds were given. One was that the plaintiffs had passed on the charge to their patrons. The other was that to allow restitution would create fiscal turmoil. The majority of the Court of Appeal (in (2005) 254 D.L.R. (4th) 715) agreed that passing-on was a possible defence. However, the defence was not available where the tax money, as here, had been paid to the government under compulsion or protest. To allow the defence in such circumstances would mean that there would be no incentive for the taxpayer to challenge unconstitutional legislation.

The Supreme Court of Canada decided the case not on the basis of unjust enrichment but on constitutional principles. Chief among these was the principle that the Crown may not levy a tax except with the authority of the Parliament or the provincial legislature. To permit the Crown to retain an *ultra vires* tax would condone a breach of a fundamental constitutional principle. Hence a citizen making a payment pursuant to *ultra vires* legislation had a right to restitution. For that reason a legislature could not pass legislation purporting to bar recovery of *ultra vires* taxes: *Amax Potash Ltd.* v. *Government of Saskatchewan* [1977] 2 S.C.R. 576. Consistent with this approach the Supreme Court in *Kingstreet* rejected the idea that a government might be immune from recovery of such a tax for policy reasons, for example, the need to prevent fiscal inefficiency and fiscal chaos.

Unjust enrichment was inappropriate for dealing with the issue in cases involving payment of *ultra vires* taxes because such cases raised a notion of restitution that was separate from restitution for wrongdoing and restitution for unjust enrichment. The former was inapposite because, since the taxes, though *ultra vires*, were enacted in good faith, the government of New Brunswick was not a wrongdoer

(as the majority of the Court of Appeal had also held). Equally inapposite was restitution for unjust enrichment. The concepts of "benefit" and "loss" central to this category of unjust enrichment were hard to apply in tax recovery cases. The unjust enrichment framework added an unnecessary layer of complexity to the real legal issues. Bastarache J., giving judgment on behalf of the court, illustrated what he meant by reference to the exposition of "policy" in relation to unjust enrichment in the earlier decision in *Garland* v. *Consumers Gas Co.* [2004] 1 S.C.R. 629. Because of the important role played in the Canadian law of restitution or unjust enrichment by "policy" as a consequence of *Garland*, it was appropriate and necessary to recognise a third category of restitution, distinct from unjust enrichment, namely restitution based on constitutional grounds:

> The action for recovery of taxes is firmly grounded as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumvent government's power within the rule of law. Unjust enrichment, on the other hand, originally evolved from the common law action of *indebitatus assumpsit* as a means of granting plaintiffs relief for quasi-contractual damages.

The rejection of the passing-on defence was founded on three major criticisms. The first was the inconsistency between the defence and the basic premise of restitution law. As explained by the High Court of Australia in *Commissioner of State Revenue (Victoria)* v. *Royal Insurance Australia Ltd.* (1994) 182 C.L.R. 51, whether the taxpayer has been able to recoup its loss from some other source is irrelevant to the position between the taxpayer and the government to whom the tax is paid. The second was that the defence is economically misconceived. It cannot be shown how the payment of the tax has affected the commercial situation of the taxpayer: *British Columbia* v. *Canadian Forest Products Ltd* [2004] 2 S.C.R. 74, and if it were applied generally, would result in no recovery of damages in commercial litigation where the plaintiff was still solvent because the plaintiff had found a way to pass on the loss claimed: *Law Society of Upper Canada* v. *Ernst & Young* (2002) 59 O.R. (3d) 214. The third was that the task of determining the ultimate location of the burden of a tax is difficult and is an inappropriate basis for denying relief: contrast *Canadian Pacific Airlines Ltd.* v. *British Columbia* [1989] 1 S.C.R. 1133, where the defence applied to a claim for recovery of a beverage tax imposed on passengers, not the airline, with *Air Canada*, where it was inapplicable to the tax on fuel paid by the airlines.

On the basis of this reasoning "passing-on" would appear to have no future as a defence in England any more than it has in Australia and Canada. In all three jurisdictions this may result in more reliance

on estoppel or change of circumstances or position to defeat a claim founded on unjust enrichment or restitution. That outcome of this decision commentators will probably accept and approve. The proposition relating to restitution on constitutional principles may be more debatable. There is justification for treating the recovery of improperly imposed taxes as a distinct kind of claim. Whether that leads to the recognition of a ''new'' category of restitution is more questionable. As a Canadian judge once remarked, ''the categories of restitution, like those of negligence, are never closed'': *James More & Sons* v. *University of Ottawa* (1974) 49 D.L.R. (3d) 666 at 676. The Supreme Court of Canada has now recognised one extension of previously known and applied categories. Their attitude in this respect is consistent with how that Court, in *Garland*, significantly altered the criteria for recovery on the basis of unjust enrichment. Little by little the law of restitution in Canada continues to evolve. The question is: where will it end?

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RECIPIENT LIABILITY IN EQUITY

THE first defendant, Farah, sought planning permission for a redevelopment project as part of a joint venture between itself and the claimant, Say-Dee. As a result, Farah learned in a fiduciary capacity that such permission would be more likely if the application included two adjoining properties. Farah and the other defendants bought those two properties. Say-Dee claimed that the defendants held the two properties on constructive trust as they had knowingly received the properties following a breach of fiduciary duty by Farah. Say-Dee's success in the New South Wales Court of Appeal (noted [2007] C.L.J. 19) has now been reversed by the High Court of Australia: *Farah Constructions Pty. Ltd.* v. *Say-Dee Pty. Ltd.* [2007] HCA 22.

The High Court, giving a single judgment, accepted that if Farah proposed to purchase the properties itself, it had to disclose to Say-Dee the information it had learnt during the planning application process: otherwise it would be acting with a conflict between its duty to Say-Dee and its own interest (at [103]). The trial judge, Palmer J., had found as a matter of fact that Say-Dee had given its fully informed consent to the conflict, so as to render it unobjectionable. Surprisingly the Court of Appeal then reversed Palmer J.'s finding of fact. In an excoriating repudiation of this decision of the Court of Appeal, the High Court re-instated Palmer J.'s finding, accepting that Farah had revealed to Say-Dee why the joint venture's planning application had