RESTITUTION AND CAR CRASHES: A SIMPLE CASE OF MISTAKE

HAS the law of restitution and unjust enrichment become too elaborate and technical, too complicated to be useful in the general run of cases? Perhaps it has. For the past 40 years, the dynamo of doctrinal development has been the big public law disputes: first the "swaps" cases, then a succession of issues over taxes wrongly paid. In those mega-cases, with millions at stake on every claim, technicality ruled the roost: no legal point was too small to be taken, every doctrinal avenue could be explored, complexity was what all expected and (to their horror or fascination) all found. Unsurprisingly, the doctrine which has emerged is full of uncertainties, gaps, unresolved questions. Worse: no point emerging from that litigious orgy can be regarded as *absolutely* settled, as in that febrile atmosphere it was always possible to argue that earlier precedents were wrongly decided or at least call for reconsideration – as we have now seen in the overruling of the *Deutsche Morgan Grenfell* case [2006] UKHL 49 in *Franked Investment* ([2020] UKSC 47). So the current law of unjust enrichment, to those fully aware of its complexities, is a labyrinth of multi-layered and doubtful issues.

But this heady stuff is fearfully impractical when a quick and authoritative decision is needed; and most litigation runs on too tight a budget for such intricacies to be fully explored. In *Samsoondar v Capital Insurance Co.* [2020] UKPC 33 we see a clash of legal cultures, with the Privy Council applying the law of unjust enrichment in its full complexity to a case which, in the Trinidadian courts appealed from, seemed to merit a much more pragmatic, uncomplicated, justice – a justice which could readily be applied even though neither party could afford to explore every technicality, or take every point theoretically open. From that more straightforward point of view, *Samsoondar* was a simple case indeed; yet the law of unjust enrichment turned it into a maze of imponderables. What started as a straightforward contractual dispute became, as the Privy Council note ([2020] UKPC 33, at [1]), more akin to an exam question. The claim ultimately failed not on its merits (which were decidedly with the claimant), but simply because the lower courts did not explore the restitutionary maze to the Privy Council's satisfaction.

Samsoondar's truck was being driven on the highway by his employee Kooraja. One of its wheels fell off, careening onto the other carriageway and seriously damaging another vehicle. Kooraja immediately acknowledged that the fault was his, and put in a claim under Samsoondar's liability insurance. But the insurer, Capital, observed that Samsoondar's policy was "driver-owner only" – Samsoondar would only have been covered if he, rather than Kooraja, had been driving when the accident happened.

Nonetheless, Capital met the claim, settling directly with the other vehicle's insurer for TT$43,000 (roughly £4,500). Capital believed, correctly on the precedents as they then stood, that this was required of them by statute, which automatically extended the insurance cover to protect any authorised driver, regardless of the policy's express terms. Five years pass. Then the Privy Council (in an unrelated case) gave the statute a narrower reading: it did not override express policy terms. In retrospect, Capital need not have paid, but could have relied on the express limits of the insurance cover. Capital could not set aside the settlement, but sought reimbursement from Samsoondar directly.

Viewing this through a contractual lens, as the lower courts did, the case was straightforward. Samsoondar was not covered for the accident which happened and, as Narine J.A. explained in some detail (T.T.C.A., 5 May 2017, at [10]–[13]), he could not realistically have disputed his liability to the injured party. As between insurer and insured, clearly it was the insured who should bear this loss. "[Capital] ought not to be saddled with a burden for a liability which it had not agreed to undertake by way of the policy of insurance" (Rahim J. [2013] TTHC 66, at [27]).

The Privy Council, however, viewed the matter through the more searching unjust enrichment lens – as was perhaps inevitable given the presence on the bench of the newly-appointed Lord Burrows. From that more technical perspective, the pragmatic contractual approach seemed insufficient. Doubtless the accident fell outside the terms of the policy, but that did not in itself create a cause of action – Samsoondar had not broken his contract with Capital, but had merely made a claim which (on the law as we now understand it) Capital could properly have refused. So the issue was not contractual but restitutionary. Given that Capital, in retrospect, need not have settled, can they recover the payment from their insured? They can only do so if he was unjustly enriched – which could only be established by enquiries that were simply not made by the lower courts (because those courts had not realised they were necessary). Was Samsoondar's enrichment unjust? There was no injustice merely because Capital felt compelled to make the payment – properly understood, the law did *not* so compel them. Could Capital say that their payment was mistaken, and could that mistake constitute a sufficient injustice? That is far from clear, the circumstances of the payment not having been explored below. Capital's claim therefore failed, as they had not properly pleaded mistake, or established the pertinent facts ([2020] UKSC 47, at [26]).

In fact, the doctrinal abyss over which Lord Burrows' analysis skims is even deeper than this. Were Capital really mistaken at all? They understood their position precisely. Nonetheless, if they straightforwardly believed they had to pay, then they are by legal fiction *treated* as mistaken (even though they made no error); but if they knew that the effect of the statute was an open legal question, they might perhaps be regarded as taking on

themselves the risk that the law might be reinterpreted. Resolving this would have required minute and careful questioning of Capital's decision maker, which was never done (at [24]). If Capital are properly regarded as mistaken, was their mistake of the right sort to ground liability? Most of the learning on that issue is premised on a two-party claim: payer sues payee. But this was a three-party case: the payer was claiming their money not from the payee, but from their insured, who benefited from the payment. As Lord Burrows notes, it is an unresolved question precisely what constitutes an actionable mistake in that context, and whether it is different from two-party mistake; "the case law on this question is far from straightforward" ([2020] UKPC 33, at [25]).

It is interesting to imagine how the Trinidadian courts might have approached these issues, had they realised that they were expected to address them. To say that Capital were mistaken at all was regarded by Narine J.A. as "artificial" (T.T.C.A., 5 May 2017, at [9]); understandably so. It is a legal fiction, required by the *Kleinwort Benson* case ([1999] 2 A.C. 349), which demands that we view the decision to pay through the prism of the law as it was subsequently established to be. No doubt Capital were aware both of the requirements of the statute and of the risk that its interpretation might change – but whether they should be regarded as naively "mistaken" (simply *assuming* that the correct interpretation would not change) or as conscious risk-takers (deliberately *taking a chance* that nothing would change) might be difficult to answer. No doubt Capital were aware of the abstract possibility that, some years down the line, some aspects of the law might be reinterpreted – but retrospectively establishing their attitude to the precise reinterpretation which happened seems a hopeless endeavour. Not only is the law obscure, but ascertaining the relevant facts would involve relying on fallible memories of a decision made several years before. It is unsurprising that counsel for Capital did not wish to open up these issues before the Trinidadian courts, and took the contractual route; the enquiries that the Privy Council thought should have been made could hardly have seemed sensible ones to anyone at the lower levels.

In 1940, the judicial House of Lords acknowledged the weaknesses of the legal fiction of the implied contract as the solution to restitutionary issues: Lord Atkin riffed rhetorically around "these ghosts of the past … clanking their mediaeval chains" (*United Australia v Barclays Bank* [1941] A.C. 1, 28), and his colleague Lord Wright noted extrajudically that "[t]he plain man … might be forgiven for observing that the law was very complex in its operations even in a simple case" ((1941) 57 L.Q.R. 184, 187). Eight decades on, we do not seem to have progressed very far. The fictions are now different ones, but the law seems equally obscure and over-elaborate. Let us hope that the higher courts can be made to appreciate the need for practical solutions, and to realise that the elaborate judicial exercises conducted over tax payments by large financial

institutions are no model for the general run of disputes. Simpler solutions are needed.

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INDEBITATUS ASSUMPSIT IN 1447

IT might not have been foreseen that computer technology would revolutionise the study of legal history; but the ability to take digital photographs in libraries and record offices has begun to affect profoundly the work English legal historians. And the most useful publicly available mine of previously unpublished legal information is the enormous collection of photographs of all the plea rolls of the King's Bench and Common Pleas from the earliest times to the 1620s, assembled through the unflagging industry of Professor Robert Palmer and his colleagues on the "Anglo-American Legal Tradition" (AALT) website. The rolls are not indexed, but AALT has added a growing number of term-indexes based on the images, and also a calendar by Professor Palmer of all the error cases in the King's Bench rolls. These aids have recently enabled us to make a significant addition to the history of *assumpsit*.

It has long been well established from the year books and plea rolls that the King's Bench, after consulting all the judges of England, reached the landmark decision in *Doige's Case* (1442) that an action on the case would lie for failing to perform an undertaking or promise. The decision had seemingly been anticipated by a remark made in the Common Pleas in 1440 by Thomas Brown, the second prothonotary. This was discovered some time ago by Professor Simpson in a manuscript yearbook at Harvard (HLS MS 156, fo. 51); and one of the new AALT indexes revealed that the case was almost certainly brought between the same parties. It was *Doige's Case* (No. 1) (see Baker and Milsom, *Sources of English Legal History* (revised edition, Oxford, 2019), 432). It seems that Brown was all in favour of allowing the new action, with its promise of more court fees, but the court was against it, and therefore the plaintiff went to the other side of Westminster Hall. Perhaps a little more delving in the rolls will clarify the chronology; but it is only a detail in the longer story. A much larger historical question raised by *Doige's Case* is why it was another 60 years and more before the next step was taken of bringing actions on the case for failing to pay debts. If the basis of the decision of 1442 was that bargains were of their very nature reciprocal, why should not an unpaid Mrs. Dogge have been allowed to bring *assumpsit* against a purchaser who had undertaken to pay her?