Unjust Enrichment in the Commercial Court
A webinar contribution by Simon Salzedo KC on 20 June 2023

1. A few days ago, Mr Justice Foxton (who has organised this webinar on behalf of the Commercial Court) suggested that I should speak first, and on the title "**Unjust Enrichment in the Commercial Court**". What a title! As a mere jobbing practitioner amongst a pantheon of eminent Judges and Academics here in Court 18 of the Rolls Building, I am tempted to admit that "*Unjust Enrichment in the Commercial Court*" is a good working definition of the fares of taxi-cabs in this building and leave it at that. But if I don't use at least some of my 20 minutes, then Lord Burrows might be tempted to fill them by asking me difficult questions, which I'd prefer not to encourage.

2. So I had better revert to the advertised title of "*The Commercial Court's contribution to the law of unjust enrichment: themes and landmarks*." I should mention for the avoidance of doubt - or for any shipping lawyers, for the sake of good order, that this will be a selective – not comprehensive – survey.

3. The flier for this webinar has at the top, in the centre, a photograph of Lord Goff. That is of course appropriate in so many ways. As an academic in the early 1950s Robert Goff discovered quasi-contract; and you will all know that by writing the first edition of Goff & Jones on Restitution, which was published in 1966, Lord Goff established the field of unjust enrichment as one that existed in its own right in English law, rather than merely as an uncertainly bounded adjunct of the law of contract. Lord Goff was also famously a Judge who appreciated the contributions to the judicial process made by both academic lawyers and other systems of law, especially German law.

4. The fact that unjust enrichment began its intellectual journey under the name "*quasi-contract*" gives a clue to the links between the Commercial Court and the law of restitution. While contractual issues can arise in any court, they are the meat and drink of the Commercial Court, since commercial business is almost always regulated by contract.

5. I will not try to trace pre-history, but I will first mention the three most important unjust enrichment cases decided at first instance by Mr Justice Robert Goff sitting in the Commercial Court.

(a) *BP Exploration Libya v Hunt (No 2)* [1979] 1 WLR 783 (16.3.1979)

i. Mr Hunt owned an oil concession in Libya. He contracted with BP for them to finance exploration and development in return for a share in the proceeds. When the concession turned out to be very valuable, the Libyan government expropriated it, making further performance of the contracts between Hunt and BP impossible. This was therefore a classic Commercial Court case – at least in the modern era - involving an energy contract gone wrong.

ii. Mr Justice Robert Goff held that the contract had been frustrated and that the consequences were governed by the *Law Reform (Frustrated Contracts) Act 1943*, famously stating

> I therefore consider it better to state the principle underlying the Act as being the principle of unjust enrichment, which underlies the right of recovery in very many cases in English law, and indeed is the basic principle of the English law of restitution, of which the Act forms part.

iii. He went on to state, more controversially, that the Act contained statutory recognition of the defence of change of position. Mr Justice Robert Goff then applied those principles to the adjustment of the position as between Mr Hunt and BP, discussing and deciding numerous difficult issues in ways that remain regularly cited today.

iv. The Court of Appeal dismissed both appeal and cross-appeal in short order without referring to restitution by name. A further appeal by Mr Hunt was similarly dismissed with only brief reasoning, in a single speech of Lord Brandon, who had been the Admiralty Judge in the 1970s and therefore a Judge of the Commercial Court. Lord Brandon ended his speech by acknowledging that his reasons were "*in substance … the same as the reasons relied on by Mr Justice Robert Goff …*."

(b) *Barclays Bank v WJ Simms* [1980] QB 677

i. The Bank wrongly paid out on a cheque that the customer had given an order to countermand. The question was whether the Bank could recover the payment from the recipient, as a payment made under a mistake of fact. To borrow a phrase from our Chair, this was a case on "*beautifully simple facts*". If it arose today, it would probably be decided on summary judgment argued in half a day before a deputy Judge. But in 1979, Mr Justice Robert Goff heard argument on the basis of agreed facts for 8 days before reserving what turned out to be a magisterial judgment.

ii. He said this:

> Nearly 40 years ago, Asquith J. stated that "*it is notoriously difficult to harmonise all the cases dealing with payment of money under a mistake of fact*," … . This is indeed true, and it does not make easy the task of the trial judge, whose duty it is, both to search for guiding principles among the authorities, and to pay due regard to those authorities by which he is bound. I have however come to the conclusion that it is possible for me, even in this field, to achieve both these apparently irreconcilable objectives. The key to the problem lies, [in my judgment], in a careful reading of the earliest and most fundamental authorities, and in giving full effect to certain decisions of the House of Lords.

iii. A model self-direction perhaps for Judges in many different types of case.

iv. A key aspect of the judgment was to distinguish between the case at bar, where the payment was made <u>against</u> the customer's instruction, and therefore not made on behalf of the customer and therefore not so as to discharge the customer's debt to the payee, with the result that no consideration was given <u>by</u> the payee; and <u>on the other</u> hand, the situation where the bank pays <u>in accordance with</u> its mandate, but under a mistake such as a false belief that the account was in credit. In that second kind of case, the payee <u>would</u> have given consideration, because the customer's debt would be discharged, and the bank could <u>not</u> recover. But in the case where the payment was

made without mandate, the recipient was a volunteer and required to make restitution.

v. We see here that banking, a Commercial Court speciality, provides a commercial backdrop for some of the most fundamental issues in the analysis of unjust enrichment.

(c) *British Steel Corp v Cleveland Bridge & Engineering Co* (1981) [1984] 1 All ER 504.

i. The relevant facts of that case were not so beautifully simple, but we can cut to the chase by saying that the plaintiff, BSC, produced cast-steel nodes which it supplied to the defendant, CBE. BSC sued for the value of the nodes. CBE said that they had been delivered late and out of sequence and counterclaimed for a sum far exceeding their value.

ii. The majority of the judgment is concerned with showing that the parties never did agree a contract of any sort. Having made that finding of fact, Mr Justice Robert Goff said this:

> In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution.

6. In *BP v Hunt*, the parties had a contract, which turned out not to apply to the situation which arose, because it was frustrated. In *British Steel v Cleveland Bridge*, the parties thought they would have a contract, but they failed to agree it before acting.

7. During the 1990s, Lord Goff was sitting in the House of Lords and decided landmark restitution cases like *Lipkin Gorman v Karpnale* [1991] 2 AC 548. Although that case is best known as the case in which the House of Lords accepted the general availability of the defence of change of position, we can notice that it was another one where the underlying problems included the relationship between contract and restitution, in circumstances where the Gaming Act rendered the gambling contract void.

8. In *The Trident Beauty* [1994] 1 WLR 161, the boundary between contract and restitution arose in a particularly acute form. The time charterer had paid hire in advance; the shipowner had repudiated the contract and the charterer had a right under the charterparty to be repaid the advance hire. The shipowner was not worth suing, but the charterer thought it had a way through, because it had actually made payment to a finance company as assignee of the owner's right to receive the hire.

9. The charterer argued that the basis for the overpaid hire had failed and the finance company should repay it. Quite an attractive argument, one might think, and it succeeded before HH Judge Diamond QC - technically a mere Deputy in the High Court, but in those days a very experienced Judge of the Commercial Court. However, the Court of Appeal and then the House of Lords unanimously rejected the claim. Lord Goff explained:

> as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.

10. As far as concerned the finance company, the assignment transferred to it the benefit of the hire payments, but not the burden of providing the vessel. The assignment was a commercial transaction for value, not a gratuitous windfall. In those circumstances, the governing principle was stated by Lord Goff thus:

> … it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.

11. In doing so, Lord Goff said that he was not taking up suggestions from certain writers, including Goff & Jones on Restitution and Burrows on Restitution.

12. Thus, the principal unifier of unjust enrichment in English law, also identified the boundary beyond which his creature should not be permitted to extend. The correct way to draw that boundary has been at the heart of several recent decisions, including the Court of Appeal on appeal from the Commercial Court in *Dargamo v Avonwick* [2021] EWCA Civ 1149 and also at the heart of the issue that divided the majority in the Supreme Court in *Barton v Morris* [2023] UKSC 3 from Lord Burrows.

13. In the interest rate swaps cases of the 1990s, tried naturally in the Commercial Court, the parties had what they thought was a contract, but it turned out to be void *ab initio* because it was *ultra vires* one of them. These involved discussion of the applicability of the change of position defence and consideration of the netting of different payments in both directions. They culminated in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 in which Lord Goff gave the leading judgment for the majority in House of Lords, abolishing the long established rule of common law that a mistake of law could not amount to an unjust factor upon which there could be based a restitutionary claim.

14. Swaps cases continue to occupy the Commercial Court, these days often involving overseas parties who have contracted for English jurisdiction.

15. There have been numerous swaps cases in the last 20 years, including *Haugesund Kommune v Depfa* [2010] EWCA Civ 579, [2012] QB 549. The leading judgment in the Court of Appeal was given by Lord Justice Aikens, formerly of the Commercial Court, upholding the decision of Mr Justice Tomlinson sitting in that Court. The decision was a significant one. The Court of Appeal laid to rest the view derived from the House of Lords' decision in *Sinclair v Brougham* [1914] AC 398 that restitutionary claims were barred if their effect would be to permit recovery of monies lent under a void borrowing contract. The Court also held that a borrower under such a void contract cannot normally rely on the defence of

change of position, because if the contract of loan had been valid, as the parties thought it was, then the loan would still have had to be repaid.

16. One of the most recent swaps decisions is *Banca Intesa Saopaolo v Comune di Venezia* [2022] EWHC 2586 (Comm), [2023] Bus LR 384. Among numerous points decided by Mr Justice Foxton, was the rather important one – that a bank could rely on back to back swaps taken out by way of hedging as change of position in defence to a customer's restitutionary claim after the front swap was found to be void. That involved departing from two first instance decisions in the first round of swaps litigation in the mid-1990s. Casetracker suggests that what Mr Justice Foxton described in the judgment as the "*inevitable appeal*" is indeed pending, so this is a space to be watched.

17. In deciding that case, among other things Mr Justice Foxton had regard to academic criticism of his own earlier decision in *School Facility Management v Christ the King College* [2020] EWHC 1118 (Comm), [2020] PTSR 1913, which was upheld by the Court of Appeal [2021] EWCA Civ 1053, with the leading judgment given by Lord Justice Popplewell, formerly a judge of the Commercial Court.

18. I am not going to say much about that case, because Prof Haecker will do it much better than I could, in just a moment. However, I will say that the judgment involves a fascinating discussion of counter-restitution against the background of a leasing agreement which turned out to be void as an *ultra vires* borrowing transaction. Lord Justice Popplewell identified support in the authorities for counter-restitution to apply at no fewer than four different stages of the analysis of a claim in unjust enrichment. The acute difficulty arises where there is a choice about the order in which to apply the defence of change of position and the principle of counter-restitution. The Court of Appeal said that there was no single answer to that question: it fell to be decided on a case by case basis.

19. Having mentioned some landmarks, I will much more briefly venture to propose themes to complete my brief.

20. In that regard, it may be observed that the results in *Haugesund, Christ the King* and *Banca Intesa* (so far), are all to the effect that while the contract was void, costs reasonably incurred, or benefits conferred, in the good faith understanding that the contract was valid, will be something for which the relevant party can take credit. This is of course consistent with the principle established in *British Steel v Cleveland Bridge*.

21. While, therefore, the law of restitution steps in where a contract or an intended contract fails, and replaces the failed contract with other legal rules, even so the policy objective behind the rules is to vindicate, rather than confound, the reasonable expectations of commercial parties. That policy objective has been the special concern of the Commercial Court ever since it was created - and indeed of English commercial law even before that - and I venture to suggest that is the underlying theme that motivates and unites this Court's great contributions to the law of unjust enrichment.

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