Case and Comment

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU.[1]

Contracts — Restitution — Unjust Enrichment — Recovery for Services Performed under Unenforceable Oral Contract

In the Deglman case, the Supreme Court had to decide whether to recognize a doctrine of unjust enrichment in Canada. The facts briefly stated were these: The deceased, the aunt of the respondent, was alleged to have agreed that if the respondent would be good to her and do such services for her as she might from time to time request during her life-time she would make adequate provision for him in her will, and in particular that she would leave to him certain premises in the city of Ottawa. The alleged performance consisted of taking his aunt in her own or in his automobile on trips to Montreal and elsewhere, and on other pleasure drives, of doing odd jobs about two houses owned by the aunt including the one which was to pass to the respondent on her death, and of various services such as errands for her personal needs.

One question was whether the acts done constituted part performance of an oral contract relating to land so as to take the case out of section 4 of the Ontario Statute of Frauds.[2] Both the trial judge and the Court of Appeal held that they did, but were reversed on this point by the Supreme Court. However, this note is not concerned with the doctrine of part performance, but with unjust enrichment or restitution.

The respondent could not recover on the express oral contract because of the Statute of Frauds. The Supreme Court was also of the opinion that logically he should not be permitted to recover on an inconsistent implied contract,[3] and disagreed with the rationale of **Scott v. Pattison**[4] where the plaintiff served the defendant under a contract for service not to be performed within one year, but was held entitled, notwithstanding the Statute of Frauds, to sue on an implied contract to pay him according to his deserts. The soundness of the principle of this decision had previously been doubted.

The only remaining basis for granting the plaintiff a remedy was an obligation imposed directly by law on the administrator of the de-

1. [1954] 3 D.L.R. 785.
2. R.S.O., 1950, c. 371.
3. In **Cutter v. Powell**, 101 ER 573, Lord Kenyon said: "That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom of law"; and in **Britain v. Rossiter**, 11 Q.B.D. 123, Brett L.J. said at p. 127: "It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing."
4. [1923] 2 K.B. 723.

ceased to prevent unjust enrichment. In England there is division of opinion on the availability of such a remedy.

Some English judges have supported the view of Lord Mansfield in **Moses v. Macferlan**[5] where his lordship based the action for money had and received on natural justice.[6] Thus in **Brook's Wharf** and **Bull Wharf Ltd. v. Goodman Bros.,**[7] A had been compelled to pay to B money which C was legally bound to pay B, and A claimed repayment from C. This had long been a well-recognized quasi-contractual obligation and Lord Wright, M.R., based it on the 'unjust benefit' which would accrue to C if he did not repay, and denied that the duty is founded on an implied contract.[8] Again in the **Fibrosa case,**[9] Lord Wright thought that "any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit." In his lordship's opinion, the basis of quasi-contractual liability was not to be found in contract or in tort but within a third category of the common law.[10]

In **Nelson v. Larholt,**[11] Denning J. (as he then was) supported Lord Mansfield's view in somewhat the same language as Lord Wright.[12] His Lordship's opinion was that the principle of unjust enrichment had been evolved by the courts of law and equity side by side. "In equity," he said, "it took the form of an action to follow money impressed with an express trust or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque."[13] He went on to say, "It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effects." And in **Reading v. Att. Gen.,**[14] where a soldier derived benefit from wearing his uniform to assist another in illegal activity, he was held answerable to the Crown for the money he received for this service. At the trial Denning J. said that "the master's claim in these cases does not rest in contract or in tort, but in the third category known as restitution."[15] Again in **Larner v. London County**

5. 97 E.R. 681
6. "If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action (**sc. indebitatus assumpsit**) founded in the equity of the plaintiff's case, as it were, upon a contract (**quasi ex contractu** as the Roman law expresses it) . . . 'In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'." **Ibid,** p. 681.
7. [1937] 1 K.B. 534.
8. "These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract." **Ibid,** p. 545.
9. [1943] A.C. 32.
10. "Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution." **Ibid,** p. 61.
11. [1948] 1 K.B. 339.
12. **Ibid,** p. 343: "The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."
13. **Ibid,** p. 343.
14. [1948] 2 K.B. 268.
15. **Ibid,** p. 275.

Council,[16] where the council owing to a mistake of fact paid one of the men more than he was entitled to under the promise, Lord Justice Denning recognized that there was no contractual claim, but thought that the Council should be entitled to recover and that the plaintiff was 'bound' to repay the excess. This was termed by Cheshire and Fifoot, "an attempt to introduce a hybrid obligation, half-way between law and morality."[17]

The Sale of Goods Act[18] has provided that where the claim is for necessaries supplied to an infant, lunuatic or drunkard he must pay a reasonable price. Cotton L.J. said in **Re Rhodes**[19] that the term implied contract was an unfortunate expression in cases under this section[20]. The term implied contract, he said had been used to denote "not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it has a contractual origin." To the same effect, Fletcher Moulton L.J. in **Nash v. Inman,** a case relating to infants, said that "an infant, like a lunuatic, is incapable of making a contract of purchase . . . The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises **'re'** and not **'consensu'**."[21]

Lord Sumner on the other hand regarded implied contract as the true basis of quasi-contract. In **Sinclair v. Brougham**[22] he denied the existence of a principle of unjust enrichment. "There is now no ground left", he said,[23] "for suggesting as a recognizable 'equity' the right to recover money **in personam** merely because it would be the right and fair thing that it should be refunded to the payer."[24] Lord Russell in the **Fibrosa** case was also of opinion that the notion of implied contract as the basis of quasi-contract was firmly embedded in the law of England and was not to be replaced by a more flexible doctrine of unjust enrichment. His lordship said, that "in Scotland the consequence of frustration is not that loss lies where it falls. The Scots law derives from the Roman

16. [1949] 1 All E.R. 964.
17. Law of Contracts (3rd ed.) at p. 526.
18. R.S.N.B., 1952, c. 199, s3. (1): "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property; provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor."
19. [1890] 44 Ch. D. 94.
20. **Ibid,** p. 105: "It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries."
21. [1908] 2 K.B. 1, at p. 8.
22. [1914] A.C. 398.
23. **Ibid,** p. 456.
24. Lord Wright pointed out in the **Fibrosa** case at page 64 that Lord Sumner's observations in **Sinclair v. Brougham** were **obiter dicta** and added: "Serious legal writers have seemed to say that these words of the great judge in **Sinclair v. Brougham** closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a **'reductio ad absurdum"** of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity, which are also available as they were found to be in **Sinclair v. Brougham."**

law a different view, founded on the doctrine of **'restitutio'**, which has no place in English law."[25]

When the **Reading** case was appealed to the House of Lords,[26] Lord Porter disagreed with Denning J. on unjust enrichment. "The exact status of the law of unjust enrichment is not assured," he said, "it holds a predominant place in the law of Scotland and I think in the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated."[27]

It seems then that the implied contract theory is still prevalent in England,[28] subject to strong adverse **dicta.** However in the **Deglman** case the Supreme Court of Canada, recognizing that recovery on an implied contract was not possible, imposed on the defendant a direct legal obligation not sounding in contract but in restitution. Rand J. said:

> There remains the question of recovery for the services rendered on 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 promisor 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 matter is elaborated exhaustively in the *Restatement of the Law of Contract* issued by the American Law Institute and Professor Williston's monumental work on *Contracts,* 1936, vol. 2, s. 536 deals with the same topic. On the principles there laid down the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent.[29]

Cartwright J. shared this opinion:

> I agree with the conclusion of my brother Rand that the respondent is entitled to recover the value of these services from the respondent administrator. This right appears to me to be based, not on the contract, but on an obligation imposed by law.[30]

He also said:

> In the case at bar, all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer St. to him, and to infer from them a fresh contract to pay the value on the services in money would be, in the words of Brett L. J. in *Britain v. Rossiter* (1879) 11 Q.B.D. 123, to draw an inference contrary to the fact.[31]

25. [1943] A.C. 32, at p. 55.
26. [1951] A.C. 507.
27. **Ibid,** p. 513.
28. **In Re Diplock's Estate, Diplock V. Wintle,** [1948] Ch. 465, at p. 480, the Court of Appeal regarded it as clearly established that the right to recover money paid under a mistake of fact is founded on an implied promise to pay.
29. [1954] 3 D.L.R. 788.
30. **Ibid,** p. 794.
31. **Ibid,** p. 795.

Canadian Courts may now be at liberty to provide remedies in cases where actions in tort, contract, or trust would not be available. The **Deglman** case demonstrates a category of claims, the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of the recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. The essence of the remedy in other words is not compensation to the plaintiff, but the restitution by the defendant of what would be, if not restored, an unjust enrichment. Since the obligation is one for the refund of enrichment as distinguished from damages, the obligation ceases where the enrichment ceases.

—Joseph Bérubé, I Law, U.N.B.

PROVINCIAL BANK OF CANADA V. WETMORE[1]

Capias Practice

This decision affords an opportunity to examine the practice on issuance of a writ of **capias** and more particularly the requirements of the affidavit in support of an application for an order to hold to bail. The judgment turns on the lack of validity of the affidavit and the main concern here shall be with that.

The facts of this case are simple. Application was made for an order to be at liberty to issue a **capias** against the defendant. The affidavit in support of the application was made by the assistant manager of the plaintiff bank. The order was granted and a **capias** issued. The defendant was arrested and later released on bail bond. The defendant then made application to have the proceedings set aside because of certain irregularities.

The statutory authorization for **capias** proceedings is found in s. 1 (2) of the Arrest and Examinations Act[2] as follows:

> Any person, not having privilege, may be arrested and held to bail, or committed to prison on *mesne* process, under the following circumstances:
>
> Where in an action brought or to be brought in any court having jurisdiction, a person by affidavit of himself or some other person shows to the satisfaction of the judge or other official hereinafter mentioned, that he has a cause of action against another person to an amount exceeding twenty dollars, and also shows such facts and circumstances as satisfy the judge, or other official, that there is good cause for believing that the person against whom the application is made is about to quit the province, the judge or other official may order that the person against whom the application is made shall be arrested, in which event a writ of *capias* may be issued to arrest such person in such manner as has heretofore been the practice.

The following objections were made to the affidavit:

(1) The affidavit did not state the amount of the alleged cause of action.

1. Saint John County Court, Keirstead, Co. Ct. J., [1954] 3 D.L.R. 70; 35 M.P.R. 107.
2. R.S.N.B. 1952, C. 10.