"To be fair or to be principled? That is the question."

The decision of the Supreme Court in Lowick Rose LLP v. Swynson Limited [2017] UKSC 32

In one of six judgments handed down on 11 April 2017, the Supreme Court (Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge) has unanimously allowed the appeal of Lowick Rose LLP from the decision of the Court of Appeal (reported at [2016] 1 WLR 1045). The Court of Appeal had previously dismissed Lowick Rose LLP's appeal against the decision of Rose J (reported at [2014] PNLR 27) by which damages of £15M had been awarded.

In an important and wide-ranging decision the Supreme Court addressed the scope of the doctrine of collateral benefit (otherwise known as *res inter alios acta*) alongside the concepts of transferred loss and equitable subrogation based on unjust enrichment.

In this article the Supreme Court's decision is considered by Ben Patten QC and Michael Bowmer of 4 New Square.[1]

THE FACTS

The case concerned the management buy out of a US company known as Medical Industries America Inc, trading as Evo ("Evo"). Evo's owners had handed over executive control to a management team and wanted to sell up. The management team wanted to buy but needed funding. Mr Morrison, a partner in the accountancy firm Lowick Rose LLP, then known as Hurst Morrison Thomson ("HMT"), approached Mr Michael Hunt, a wealthy businessman and investor with whom Mr Morrison had worked on a range of deals.

Having met Evo's management team Mr Hunt agreed in principle to an investment proposal whereby Mr Hunt would lend £15M towards the purchase of the owner's shares and towards

[1] David Turner QC and Nicole Sandells, both of 4 New Square, were instructed by RPC to act for Lowick Rose LLP in the Court of Appeal (but not below) and, led by Mark Howard QC of Brick Court Chambers, in the Supreme Court.

working capital and whereby he would take, in addition to the interest and arrangement fee in respect of the loan, a 25% stake in Evo. Mr Hunt duly instructed HMT to carry out financial due diligence.

Mr Hunt decided that he wished to finance the transaction through his wholly owned company Swynson Limited ("Swynson"). A due diligence report on Evo was duly provided to the company and the deal concluded on 31 October 2006. The structure of the deal involved (1) Swynson lending £15M to an English company called Evo Medical Solutions Limited ("EMSL"); (2) EMSL becoming the owner of the entire share capital of Evo; (3) EMSL being owned as to 25% by Mr Hunt and as to 71.4% by the management buy out team (with the remaining 3.6% held by an associate of Mr Hunt). Swynson took charges over the assets of EMSL and Evo together with personal guarantees from the management buy out team. The loan of £15M by Swynson to EMSL ("the 2006 Loan") carried interest at 6% above base rate payable monthly and was repayable in full on 31 October 2007. It was also subject to an arrangement fee of £750,000 payable in monthly instalments.

By the first quarter of 2007 it was clear that Evo was not enjoying the increase in business that the management team had predicted. Although EMSL made the monthly interest payments for the first few months it failed to make the payments due in June and in July. Mr Morrison told Mr Hunt that Evo was at risk of financial collapse without further investment. As a result, on 13 August 2007, Mr Hunt caused Swynson to grant a further facility of £1.75M to EMSL ("the 2007 Loan"). Interest was set at 5.5% above base rate with a facility fee of £2,400 per month. The loan was repayable, like the 2006 Loan, on 31 October 2007.

By the end of October 2007, EMSL should have repaid both the 2006 Loan and the 2007 Loan. It failed to do so. Arrears of interest and arrangement fees continued to mount. Management accounts showed that Evo remained loss making. By May 2008 EMSL had failed to make any interest payments for six months. Believing that there was no choice but to support Evo until such time as it could be floated on a stock exchange or financed by a private equity investor, Mr Hunt agreed, on 4 June 2008, to provide a further loan to EMSL through Swynson of £3M ("the 2008 Loan"). The 2008 Loan was repayable by 31 May 2010 and carried interest at 1.5% over LIBOR in addition to an exit fee of 2% per annum from drawdown to repayment.

As part of those arrangements in June 2008 it was also agreed that Mr Hunt's 25% shareholding in EMSL should be converted into a majority 85% holding thereby giving Mr Hunt majority control. Because Mr Hunt was already the owner of Swynson, the effect of becoming the majority owner of EMSL meant that the debt between the two companies became a debt between two interconnected parties. This in turn meant that Swynson would have to pay tax as if it were receiving the interest payments from EMSL even though EMSL continued to default on those payments. Mr Hunt also took the view that it was disadvantageous for Swynson to have a large non-performing loan on its books. As a result, on 31 December 2008, EMSL and Mr Hunt entered into a loan agreement whereby Mr Hunt personally loaned £18.663M to EMSL which EMSL was required to use to pay off the 2006 and 2007 loans in full. EMSL duly did so leaving just the 2008 Loan outstanding.

Despite hopes of a recovery in its fortunes Evo continued to encounter severe financial difficulties. Eventually, in May 2011, Mr Hunt enforced the security against Evo's property and, in October 2011, the business of Evo was transferred to another company owned and controlled by Mr Hunt. Apart from the sale of the property for £1.355M and a recovery of £265,798 under the personal guarantees, no other recoveries were made.

The trial

At trial Swynson and Mr Hunt claimed as damages the full amount of the 2006 Loan, the 2007 Loan and the 2008 Loan (£19.75M) giving credit for the recoveries which had been made and the monthly repayments of the 2006 Loan before the default started. The claim was brought on the footing that HMT owed a duty of care to Swynson (which HMT naturally accepted) as well as to Mr Hunt (which HMT denied). During the course of the trial HMT conceded liability and admitted that it had been in breach of contract and negligent as regards Swynson. HMT should have discovered and advised that there was a discrepancy of US$3M to US$4M between Evo's actual and forecast working capital, which discrepancy led to its failure to meet the forecasts, and that its actual performance in October 2006 was significantly below the performance forecast by the management team. HMT also accepted that, if it had advised Mr Hunt properly, the transaction would not have completed.

Crucially, however, in her judgment Rose J held that HMT was not retained by and did not owe a duty of care to Mr Hunt. Mr Hunt could not therefore make any claim himself for damages for breach of contract or negligence. As Swynson had received repayment from EMSL of the 2006 Loan and the 2007 Loan in full, the remaining issues for decision were therefore the following:-

(1) So far as Swynson was concerned could the repayment of the 2006 and 2007 loans by EMSL, as funded by Mr Hunt, be ignored as a collateral benefit or *res inter alia acta* so that Swynson itself could recover damages in respect of those loans?
(2) If the repayment could not be ignored, could Mr Hunt himself claim that HMT had been unjustly enriched as a result of the repayment of the 2006 and 2007 loans and seek a remedy by way of equitable subrogation to the rights of Swynson?
(3) Alternatively, if the repayment could not be ignored, could Swynson recover damages in respect of those loans to be held for the benefit of Mr Hunt under the doctrine of transferred loss?

Rose J described the repayment of the 2006 and 2007 loans as a "refinancing" exercise and that there was no intention on Mr Hunt's part to relieve HMT from any liability which might arise from that exercise. She held that the repayment was not something that Swynson brought about in the ordinary course of its business in order to mitigate the consequences of HMT's negligence, relying on the test of mitigation enunciated by Viscount Haldane in *British Westinghouse Electric & Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689. The repayment did not as a result affect Swynson's entitlement to sue for compensation in full. Having so decided Rose J did not address the

alternative grounds of subrogation or transferred loss. She awarded damages of £15M (the level of a contractual cap) plus statutory interest.

The appeal to the Court of Appeal

HMT appealed against the decision of Rose J on the collateral benefit point. Swynson and Mr Hunt cross-appealed on the subrogation and transferred loss points. No appeal was pursued against Rose J's decision that no duty of care was owed to Mr Hunt. The Court of Appeal by a majority (Longmore LJ and Sales LJ, Davis LJ dissenting) dismissed HMT's appeal agreeing with Rose J that the repayment of the 2006 Loan and the 2007 Loan by EMSL could be ignored. It was as a result not strictly necessary to deal with the subrogation or transferred loss points. The subrogation point was nonetheless briefly addressed - the argument on the point having been relatively short - but there was further division; Longmore LJ and Davis LJ both agreed that Mr Hunt's claim on that alternative basis should be dismissed whereas Sales LJ would have allowed Mr Hunt's claim. None of the Lord Justices addressed the transferred loss point in any detail, but Longmore LJ and Davis LJ intimated that they regarded it as unsustainable. Sales LJ expressed no view.

The appeal to the Supreme Court

All three issues were fully argued over four days before the Supreme Court. In allowing HMT's appeal the Supreme Court held that the decisions below on collateral benefit had been wrong, but agreed that the Court of Appeal had been right to reject the subrogation and transferred loss arguments. Lord Sumption gave the lead judgment with which Lord Neuberger, Lord Clark and Lord Hodge agreed. Lord Neuberger and Lord Mance gave concurring judgments.

COLLATERAL BENEFIT

(1) The Court of Appeal

The majority in the Court of Appeal favoured the conclusion of Rose J., although for slightly different reasons. Longmore LJ thought that the Judge was right to apply the principles of mitigation to situations where loss is (prima facie) avoided notwithstanding that no step is taken to mitigate: "*the principles governing the assessment of damages are (or, at any rate, should be) similar in both categories of cases*". The test to be applied - by extension from cases such as *British Westinghouse* and as demonstrated in the insurance and pension cases such as *Bradburn v Great Western Railway Co* [1874] LR 10 Ex 1 and *Parry v Cleaver* [1970] AC 1 – is whether the transaction giving rise to the avoided loss arises out of the consequences of the breach and in the ordinary course of business. The loan by Mr Hunt certainly arose out of the consequence of HTM's breach of duty, but it could not be said to have arisen in the ordinary course of business. Longmore LJ rejected the contention that *London and South of England Building Society v Stone* [1983] 1 WLR 1242 laid down a principle that *any* repayment of a loan had to be taken into account because there was no "*inflexible rule*" to that effect. He noted: "*If in these circumstances Mr Hunt had given the*

amounts of the 2006 and 2007 loans to Swynson (so that Swynson could balance its books) from Swynson's point of view that would be an act of benevolence and no one could sensibly suggest that any such payment should enure to the benefit of the negligent adviser…. To hold that a different result should occur merely because the payment is made thorough EMSL would be a triumph of form over substance."

By contrast, although he agreed with Longmore LJ, Sales LJ upheld the result below because the policy applicable to the ascertainment of collateral benefits was one of very broad discretion: "*the principles governing whether some matter which reduces loss is to be regarded as collateral ….are intended to reflect practical reality and basic justice between the three persons involved: the person who has suffered the loss, the person who in law is responsible for causing the loss and the third party who has made a payment which reduces that loss. As Lord Reid said* [in *Parry*] *"The common law has treated this matter as one depending on justice, reasonableness and public policy*"" That broad approach enabled the court to look at the substance of the transaction. The loan from Mr Hunt was not analogous to EMSL winning the lottery; it arose because the negligence of HMT put Mr Hunt in an invidious position. Although he did not act purely benevolently, his making of an uncommercial loan was akin to the cases of benevolence which featured in *Parry*.

For Davis LJ, however, it was evident that Swynson had suffered no loss. The full loan from Swynson to EMSL had been paid off. This was not a case about mitigation, it was a case about avoided loss and the entire loss had been avoided: "*That this is not to be regarded as res inter alios acta or some kind or collateral transaction is, in my view, demonstrated by the structure of the repayment. Swynson was not repaid by some third party, whether or not acting "benevolently". Swynson was repaid by EMSL itself – the counterparty to the loan agreements – pursuant to the covenants contained in the loan agreements procured by the negligence of HMT … the avoidance of loss to Swynson has been achieved by the very party who was otherwise in breach of contract*." Far from being distracted by the form of the transaction, the form here was the substance.

(2) The Supreme Court

Notwithstanding that this issue dominated the proceedings in the Court of Appeal, it received relatively scant attention in the speeches in the Supreme Court. Lord Sumption pointed out that the critical factor in deciding whether a benefit is res inter alios acta is not its source but its character: "*broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss*." Classic examples are insurance payments and disability pensions. "*In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work.*" A different result might obtain if the benefit is derived from a contract made for the benefit of the wrongdoer or from steps taken by the claimant in consequence of the breach. This was a principled approach. The fact that the principles were underlain by "justice, reasonableness and public policy" was not a justification for departing from the principles and looking at each case on its broader commercial merits. Once it was

accepted that HMT had owed no duty to Mr Hunt it did not matter that EMSL obtained the monies to pay Swynson from Mr Hunt. The fact that he was the source of the funding did not change the nature of the payment. The transaction discharged the very liability whose existence represented Swynson's loss. That was a distinct transaction from the agreement between Mr Hunt and EMSL.

Lord Mance also noted the significance of the absence of any duty owed by HMT to Mr Hunt. The loan to EMSL was made by him and was not made at the request of Swynson. The difference between these facts and the facts common to cases such as *Parry* is that in the latter a third party directly makes payment to (or provides a benefit to) the claimant:

> "*there is all the difference between a benevolent act which benefits a claimant (here Swynson) collaterally in an amount equivalent to a loss which it has incurred and satisfaction of the claimant Swynson's loss, by Mr Hunt funding EMSL to repay Swynson*."

Lord Neuberger agreed with Davis LJ that no assistance could be obtained from the authorities on mitigation; the issue was avoidance of loss. The facts could not be brought within the umbrella of *Parry*: "*the effect of the reasoning in Parry is that types of payment to a claimant which are not to be taken into account when assessing damages, are either those which are effectively paid out of his own pocket (such as insurance which he has taken out, whether through his employer, an insurance company or the government) or which are the result of benevolence (whether from the government, a charity, or family and friends), all of which can be characterised as essentially collateral in nature.*" Even if it was open to the Court to look to the source of the funds which EMSL used to repay the loan, it was obtained through a commercial transaction and the fact that Mr Hunt could have achieved the same result by providing money direct to Swynson was irrelevant.

The Supreme Court's decision is thus very much concerned with a special set of facts. The Court was careful not to embark upon a complete review of the law of collateral benefits. That said, the speeches are valuable in two respects. First, they correcting the Court of Appeal's erroneous approach that collateral benefit is purely a matter of doing justice by reference to the positions of the claimant, the defendant and the party making good the loss. Only payments or benefits of a particular kind will be collateral. Second the Court re-affirmed that, at least in commercial transactions, the form of a commercial arrangement matters. It should not lightly be overlooked. Often it is the substance.

TRANSFERRED LOSS

Transferred loss was argued in the Court of Appeal but formed no substantial part of the Judgments. It received rather more attention in the Supreme Court, albeit that, as with collateral benefits, the Court only found it necessary to restate the general principles in order to be able to dismiss the argument.

Lord Neuberger provided a particularly clear summary:

> "*The principle of transferred loss arises where there is a contract between A and B relating to A's property which is subsequently acquired by C, and the principle enables A to recover damages for B's breach of contract which injures the property, even though the loss flowing from that injury is suffered by C and not by A. Self-evidently, it is an anomalous principle bearing in mind the well-established conventional rules relating to recovery of damages for breach of contract, namely that, subject to the terms of the contract, scope of duty, foreseeability and mitigation, A can only recover damages in respect of loss which A suffers as a result of B's breach of contract. For that reason, the principle should only apply in defined and limited circumstances*".

The principle takes two forms. The "narrow" form, as classically expounded by Lord Browne-Wilkinson in *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, was explained by Lord Neuberger as follows: "*The ….principle can apply where (a) at the time of making the contract with A, B would have reasonably anticipated that A would transfer the property to a person such as C and that that person would suffer loss if B breached the contract, so that the contract can be seen as having been entered into by B partly for C's benefit, and (b) there is nothing in the contract or the surrounding circumstances which negatives the conclusion that the principle should apply.*" The "narrow" version is to be contrasted with the "broader" form outlined by Lord Griffiths also in *Lenesta Sludge*. In this version "*a contracting party might itself have an interest in performance enabling it to claim damages without proving actual loss*" (Lord Mance). That interest would be equivalent to the cost to the contracting party of providing the third party the benefit it would have provided but for the breach of duty. Whilst still the subject of considerable caveat, the broader principle received some support from Lord Sumption, but he added this warning against over-enthusiastic application of either version:

> "*It is, however, important to remember that the principle of transferred loss, whether in its broader or narrower form, is an exception to a fundamental principle of the law of obligations and not an alternative to that principle. All of the modern case law on the subject emphasises that it is driven by legal necessity. It is therefore an essential feature of the principle that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a "legal black hole", in which in the anticipated course of events the only party entitled to recover would be different to the only party which could be treated as suffering loss*."

Their Lordships were clear that Swynson could not bring itself within either the narrow or the broader principle. As to the first, Swynson did not contract with EMSL anticipating the transfer of property to Mr Hunt and Mr Hunt did not suffer loss in his capacity as the owner of property provided to him by Swynson, nor was it foreseeable that he would. As to the second, Swynson had no "performance interest" in the original loan agreement other than receiving the sums due under its terms.

Whilst their Lordships did not take the opportunity to fully explore transferred loss, there are two features of the speeches which are likely to shape the development of this concept. The first is that both Lord Sumption and Lord Mance provide a substantial measure of support for the broader principle (Lord Neuberger was more guarded). Any suggestion that "performance interest" is a heretical approach to transferred loss is now doubtful. Second, they establish that the narrow principle requires that, at the time of the contract, the contract breaker must have in reasonable contemplation the possibility that its counterparty will transfer the property which is the subject of the contract to a particular third party. The mere fact of transfer (and the *appearance* of a legal black hole because neither the counterparty nor the third party has an effective remedy) is not sufficient.

UNJUST ENRICHMENT AND EQUITABLE SUBROGATION

(1) The Court of Appeal

In the Court of Appeal the issues of unjust enrichment and equitable subrogation were addressed only briefly in view of the decision of the majority on the collateral benefit point. It had been argued for Swynson and Mr Hunt that HMT would be unjustly enriched if it received the benefit of the repayment by EMSL of the 2006 and 2007 Loans. By reference to the four stage approach adopted by Lord Steyn in *Banque Financière de la Cité v. Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 (which involves asking the questions (1) was the defendant enriched; (2) was the enrichment at the expense of the claimant; (3) was the enrichment unjust; and (4) are there any defences) it was argued by Swynson and Mr Hunt that (1) HMT was enriched by being relieved of a substantial liability; (2) this enrichment was at the expense of Mr Hunt (or Swynson); (3) such enrichment was unjust; (4) there were no defences advanced by HMT.

In their short judgments on the point Longmore and Davis LJJ considered there were two fundamental problems. There was, firstly, no right belonging to Swynson to which Mr Hunt could be subrogated. The necessary hypothesis was that Swynson had no claim for damages in respect of the 2006 and 2007 Loans as it had suffered no loss with the loans having been repaid. Secondly, as to the quality of Mr Hunt's mistake, there was insufficient evidence of a positive mistaken belief that HMT's liability to Swynson would be unaffected. The evidence was merely to the effect that Mr Hunt did not intend to do anything to reduce HMT's liability. That being the case this was a case of causative ignorance as opposed to incorrect conscious belief, the distinction having been considered by Lord Walker in *Pitt v. Holt* [2013] 2 AC 108, and as such was insufficient to qualify so as to make any enrichment unjust. For his part Sales LJ, in his equally brief judgment, considered that the law of unjust enrichment operated to give Mr Hunt a remedy according to "straightforward and established principles". In his opinion what made the enrichment of HMT unjust was the mistake of Mr Hunt in thinking that he could safely structure the channelling of funds to Swynson as he did without affecting the liability of HMT to Swynson. This was a sufficient mistake. Moreover, he considered that the law would regard HMT's liability to Swynson (which would otherwise have been eliminated by the repayment of the 2006 and 2007 loans) as sufficiently extant for

the purposes of allowing Mr Hunt to be subrogated to Swynson's rights against HMT so as to reverse the unjust enrichment which occurred.

(2) The Supreme Court

The issues of unjust enrichment and subrogation received far greater attention in the Supreme Court and the majority of the three judgments discusses these issues. One of the reasons for this may have been that one of the other judgments handed down on the same day as, but immediately before, the Swynson judgment was the decision in *Commissioners for Her Majesty's Revenue & Customs v. The Investment Companies (in liquidation)* [2017] UKSC 29 ("the ITC case"). A central issue in that case was whether a common law restitutionary claim against HMRC was available to various investment trust companies for over-payment of VAT where the tax had been paid to management companies on the assumption (subsequently held to be mistaken) that the services being provided were subject to VAT and were not exempt. The claim was advanced on the basis that HMRC had been unjustly enriched at the expense of the companies.

Lord Reed, giving the judgment of the Supreme Court, endorsed the four stage approach adopted in the *Banque Financière* case stressing that the questions were intended to ensure a structured approach to the analysis of unjust enrichment by identifying the essential elements in broad terms. He warned that if the four questions were not separately considered and answered "*there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability*". In deciding the second of the four questions against the companies Lord Reed not only gave guidance as to the test which should be applied for the purposes of answering the question whether a benefit was "at the expense of the claimant" (a point on which Lord Reed recognised there was uncertainty in the authorities as to the correct approach) but also emphasised the fundamental purpose of the law of unjust enrichment. As to the latter, Lord Reed emphasised the need for legal principle to be applied:- "*... unjust enrichment ranks next to contract and tort as part of the law of obligations. A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness based on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied.*" He also explained that unjust enrichment is " *... designed to correct normatively defective transfers of value usually by restoring parties to their pre-transfer positions.*'

In the judgments in Swynson the Supreme Court cross-referred extensively to Lord Reed's judgment in the ITC case. Because equitable subrogation is a remedy designed to prevent or reverse unjust enrichment, as was recognised in the *Banque Financière* case, there was an obvious overlap between the two judgments and a concern to ensure a consistency of approach.

Giving the lead judgment Lord Sumption was prepared to assume that HMT had been enriched and been enriched at the expense of Mr Hunt. He did so, however, to focus attention on whether the enrichment could be said to be unjust and whether equitable subrogation was

an appropriate way of reversing it. Referring to Lord Reed's emphasis on the need for legal principle, Lord Sumption observed that the circumstances in which English law made available a remedy for unjust enrichment involved discrete factual situations which were not "*random illustrations of the Court's indulgence to litigants*". Equitable subrogation, as such a remedy, arose where the expectations of the claimant who incurred a loss (for example by paying money) were defeated because something "went wrong" with the transaction. Citing earlier cases such as *Chetwynd v. Allen* [1899] 1 Ch 353, *Butler v. Rice* [1910] 2 Ch 277, *Ghana Commercial Bank v. Chandiram* [1960] AC 732, *Boscawen v. Bajwa* [1966] 1 WLR 328, *Cheltenham & Gloucester plc v. Appleyard* [2004] EWCA Civ 291, as well as the recent decision of the Supreme Court in *Bank of Cyprus Ltd v. Menelaou* [2016] Ac 176, Lord Sumption observed that these were all cases of defective transactions. In one way or another they were all cases where a lender loaned money to a borrower expecting to obtain a charge where that expectation was frustrated because of some unanticipated event.

According to Lord Sumption this feature was fundamental to the legal principles to be applied. Two things were therefore clear. The first was as to the role of the law of unjust enrichment; its function is to characterise the enrichment of the defendant as unjust because the claimant's expectation about the transaction under which the money is paid is disrupted. The second was as to the role of equitable subrogation; its function is to replicate so far as possible the element of the transaction which made it defective.

Applying those principles Lord Sumption concluded that the facts of the case were entirely different from the kind of case with which equitable subrogation is properly concerned. Whilst it did not matter (as the Court of Appeal had thought) that the legal right to which Mr Hunt sought to be subrogated had been discharged – subrogation as an equitable remedy operates by treating that right *as if* it is alive and subsisting and treating it *as if* assigned to the claimant – the fundamental problem was that the loan agreement between Mr Hunt and EMSL was not defective. Mr Hunt intended to lend money to EMSL so that it could pay off its debt to Swynson. He achieved his objective of reducing Swynson's tax liability and cleaning up its balance sheet. He received the whole of the benefit from the transaction – EMSL's covenant to repay the loan - for which he had bargained. Although the loan was not repaid, that was a commercial risk he took. As such Mr Hunt was attempting to invoke subrogation for an improper purpose; not to replicate some element of the transaction which was expected but had failed, but to enable him to exercise for his own benefit the claims of Swynson in relation to an unconnected breach of duty under a different transaction between different parties which had taken place two years earlier.

As such Lord Sumption did not consider it necessary to dwell on the nature of Mr Hunt's mistake. Mr Hunt may have been in error in thinking that one or other of him or Swynson could recover damages, but the consequences of that error did not constitute an injustice for the purposes of unjust enrichment such as to give rise to a remedy of equitable subrogation. Unless defeated in some expectation about some feature of the transaction for which he had bargained, Mr Hunt did not suffer an injustice for which that remedy was available. The

remedy could not be used to improve his position. The failure to observe such limitations would, in Lord Sumption's words:

> "*... transform the law of equitable subrogation into a general escape route from any principle of law which the claimant overlooked or misunderstood when he arranged his affairs as he did.*"

Lord Mance in his judgment accepted that HMT was indirectly enriched by the discharge by EMSL of the loan due to Swynson, but considered that the second "at the expense of the claimant" question could not be answered in Mr Hunt's favour. In the ITC case Lord Reed had regarded the general rule - that the claimant must provide a direct benefit to the defendant - as helpful, and also re-iterated that to answer the question in the claimant's favour requires more than pointing to something that is an incidental or collateral result of the claimant's expenditure. More than a "but for" causal connection was needed. An illuminating example referred to by Lord Reed was that given by Lord President Dunedin in *Edinburgh & District Tramways Co Ltd v. Courtenay* (1909) SC 99:-

> *"One man heats his house, and his neighbour gets a good deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say – 'Give me so much for my coal bill, because you have been warmed by what I have done, and I did not intend to give you a present of it.'"*

Lord Mance applied these considerations holding that any benefit which HMT may have derived from Mr Hunt's mistake – which (contrary to the Court of Appeal) he was prepared to accept was a mistake amounting to a conscious belief that funding repayment of the loan would have no effect on any claim against HMT – was no more than an indirect and incidental consequence of the refinancing upon Swynson's separate and pre-existing relationship with HMT. Lord Mance also agreed, however, that it was fatal to Mr Hunt's claim that he had received all that he had bargained for. Whilst the transaction may have had unintended consequences, there was (using Lord Reed's words) no normative defect in the arrangements he had made. He got what he bargained for.

For his part Lord Neuberger noted that Lord Reed had adopted the four stage approach and, like Lord Reed, emphasised that the questions constituted "*a useful, summarily expressed, and practical approach to be adopted to an unjust enrichment claim*". Also consistently with Lord Reed, Lord Neuberger emphasised the need to apply an approach that was principled and predictable, stating that "*... the question whether enrichment is "unjust" can often lead to the risk of unpredictable value judgments unless a relatively structured approach is adopted*" and that "*unjustness in the context of unjust enrichment is not, in my view, of the palm tree variety. It must be based on some principle.*" In the result, Lord Neuberger's opinion was that to hold that HMT was enriched at Mr Hunt's expense would be inconsistent with Lord Reed's reasoning in the ITC case. However, even if it was an exceptional case, Mr Hunt got precisely what he thought he was getting from the transaction, namely repayment to Swynson of the original loan and a right to recover the new loan from EMSL. There was therefore no "unjust" factor to justify a departure from the normal scope of such claims.

The decision in Swynson together with the decision in the ITC case is a strong affirmation of the need to apply a principled analytical approach to unjust enrichment claims and to avoid value judgments based on what is considered fair. This promotes predictability in the law. The alternative, as Lord Neuberger said, would be to risk throwing the law on unjust enrichment into serious uncertainty. The decision also affirms a narrower approach to the basis on which it can be said a defendant is enriched at the expense of a claimant and limits what might be considered unjust for the purposes of the remedy of equitable subrogation to the discrete factual situation canvassed in the earlier authorities, namely where there has been a defective transaction, the claimant has not received what he expected to receive and the law provides a remedy to confer in effect what the claimant should have received.

CONCLUSION

The fundamental problem for Mr Hunt was the finding that he was not owed a duty of care by HMT. He was unable to assert a direct claim for his loss. As a result, Swynson and Mr Hunt were forced to pray in aid various exceptions to the general rules of recovery of damages in contract. The Supreme Court was careful to emphasise the limits on the proper use of those exceptions and in particular to stress that established principles which expound fairness and equity should not be distorted under the guise of doing what might be considered fair and equitable in the round. The message is that the analysis of loss and damage is *always* a principled analysis. A principled analysis meant that it was impossible to ignore the way in which the repayment of the 2006 and 2007 loans took place, by EMSL paying off its debts to Swynson. As Lord Sumption said at the very beginning of his judgment, the distinct legal personality of companies is an essential feature of English commercial law, but that has never stopped businessmen from treating their companies as indistinguishable from themselves; Mr Hunt was not the first to make that mistake and doubtless will not be the last.

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