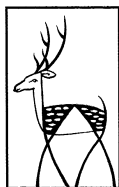


UNJUST ENRICHMENT AND CONTRACT

This book examines the role of unjust enrichment in the contractual context, defined as contracts which are (a) terminated for breach, or (b) subsisting, or (c) unenforceable. The book makes three claims in relation to the orthodox common law account of restitution (founded on unjust enrichment) in the contractual context. First, the orthodox account correctly proceeds on the basis that the restitutionary claim in the contractual context is founded on an independent cause of action in unjust enrichment, rather than some equitable notion of unconscientiousness or the law of contract. Secondly, the book departs from the orthodox account by rejecting the unjust factors approach and endorsing the absence of basis approach for the law of unjust enrichment. Finally, the book argues that the right to restitution in the contractual context should be determined by the conditionality of the transfer of the benefit rather than a requirement such as the termination of the contract, as the orthodox account dictates. To that end the book proposes the following model, under which the right to restitution in the contractual context is determined by the resolution of the following two questions: (1) Was the transfer of the benefit (eg of money or services) conditional? (2) Was there a qualifying failure of condition? A condition can be, and often is, the other contracting party's counter-performance, but it may also be an event not promised by either party. What qualifies as a failure of condition depends on the type of contract in question. This book identifies two types of contracts, namely those which are apportioned (eg instalment contracts) and those which are unapportioned. It is only in relation to the latter that termination is required. It is a particular strength of the book that it is underpinned by detailed and original historical analysis which makes a novel and distinct contribution to the history of the laws of unjust enrichment and contract.

Unjust Enrichment and Contract

Tariq A Baloch



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Foreword

This book, based on an Oxford doctoral thesis, is about the borderland between the law of contract and the law of restitution. That borderland raises important and difficult questions about the relationship between a predominantly consensual obligation and an obligation imposed by law. In particular, does recourse to the law of restitution and the principle of unjust enrichment subvert the contractual allocation of risks and allow an escape from a bad bargain and, if so, when? In the case of a valid contract, what role, if any, does the contractual allocation of risks have after the contract has been discharged?

Dr Baloch's work addresses these and other questions about the role of unjust enrichment in a contractual context. He considers valid and unenforceable contracts. His starting point is a detailed historical analysis of the position from the late seventeenth century to the nineteenth century, when the view that restitutionary obligations are based on an implied contract became influential. He argues the 'implied contract' view was not as deeply embedded as some thought. He also argues that the lesson from history is that modern attempts to re-integrate the innocent party's right to restitution after a breach of contract into the law of contract or to explain them as based on equitable notions of unconscionability are flawed on both historical and analytical grounds. But, while he argues that the basis of such obligations is the principle of unjust enrichment, it is not the traditional common law approach based on grounds for restitution, but the approach in the civilian jurisdictions of Continental Europe adopted by Peter Birks shortly before he died, which Dr Baloch refers to as the 'new Birksian approach'.

This is a valuable book, thoughtful and well researched. It is concerned to build a model that fits comfortably with the cases, and its focus is on the work of modern commentators. Those concerned with the relationship of contract and the law of restitution whether at a theoretical level or in practice will benefit by careful study of what Dr Baloch has to say, whether or not they agree with it.

Royal Courts of Justice, 14 February 2009

JACK BEATSON

Preface

It would be difficult to write this preface without mentioning the late Peter Birks, who was to be my supervisor for the doctorate upon which this book is substantially based. Suffice it to say that although I did not know him as well as many others who have written about, or in memory of, him, my interactions with Peter leading up to the commencement of my doctoral studies perfectly illustrated his passion, generosity, clarity of vision and loyalty. Whatever view one may take of his work (and I leave it to the reader to decide where I stand), Peter's standing as a great teacher cannot be denied. I can only wonder how he would have reacted to the thesis and book in its final form.

Some of the qualities I mentioned were evident in the way Peter, even in his last months, ensured that I would not be without a suitable supervisor when I entered the University of Oxford in 2004. It was my good fortune to have Andrew Burrows and, later, Mike Macnair, as joint supervisors for the doctorate. Their generous, careful and learned supervision has hugely benefitted the thesis. I am indebted to them and hope that I can follow their example as a teacher. I am also grateful to my thesis examiners, David Ibbetson and Jamie Edelman (and at the interim stage, Ewan McKendrick), for engaging with the thesis in a way that a doctoral student hopes for when toiling over their project for 3 years or so. Outside these formal relationships, I have also learnt a lot from Robert Stevens.

For their personal and financial support I must also thank the two colleges that I have called home during my stay in Oxford: Lady Margaret Hall and, for the majority of my stay, Corpus Christi College. At Corpus, I really enjoyed the support and friendship of the law fellows, Lucia Zedner and Elizabeth Fisher. More generally, I am grateful to the fellows and staff of Corpus for welcoming me as a student and member of the Senior Common Room.

The journey towards a doctorate was made possible by many people but I would like to record my appreciation for four teachers in particular. As an undergraduate within the Law School of Queen Mary, University of London, Shelley Lane and Ian Yeats gave me the chance and space to believe that a career in law might actually be a possibility. Shelley's career switch deprived the Law School of one of its best teachers. And Ian Yeats' contribution to the Law School, from its inception no less, is truly difficult to measure. As a postgraduate it was Charles Mitchell who set in motion events which culminated in my commencing doctoral studies at Oxford. He has been a source of support throughout. It was during the brilliant restitution course, co-led by Charles and Sarah Worthington, on the inter-collegiate University of London LLM, that I was first exposed to, and became interested in,

Preface

the subject. Finally, the most crucial influence and contribution has come from Alison Firth. Without her, it would have been difficult to contemplate and then negotiate the transition from undergraduate to postgraduate law student. Under her guidance and support, I was able to secure funding for the LLM, see my name in print (probably too soon), enrol on the restitution course and teach my first university class.

A number of institutions have made important contributions to the thesis and this book. My former colleagues and students at the London School of Economics and Political Science provided the kind of stimulating environment in which it was easy to put the finishing touches on the thesis and then convert it into a book. The argument in the book is underpinned by detailed historical research. The interest in legal history was first stirred in the library of Lincoln's Inn, which houses some of the most important manuscripts on the common law. These sources provided invaluable information on the period this book covers. In using the library during the course of my legal education, I have learnt, and benefitted, a great deal from the librarian, Guy Holborn and his assistant, Catherine McArdle. The trustees of the Kennedy Memorial Trust provided the first opportunity to investigate the history of restitution in the place where the subject took on its modern form—Harvard Law School. I am grateful to Harvard for their financial assistance by way of the Mark DeWolfe Howe Fellowship, which provided the funds to complete my research in Boston. At Harvard I also encountered another set of first class librarians led by David Warrington, who looked after the Law School's special collection. Although the research I carried out at Harvard is not very visible in the book, it did provide a framework for the historical work that I pursued subsequently. The research also provided the first inkling that more work would have to be done on the eighteenth century. The germ of this idea came from some questions during a lecture based on my research, and delivered under the auspices of the Harvard European Law Centre, titled, *Of Dogs and Dingoes: The Intellectual History of Restitution*. I am grateful to the lecture participants and the centre for their invitation.

Chapter 3 is an expanded version of an article which was first published in the *Law Quarterly Review* ('Unjust Enrichment Pyramid' (2007) vol 123, p 636), and is reproduced here by kind permission of the editor, Francis Reynolds. I would also like to thank the Harrowby Manuscript Trust for allowing the reproduction of parts of Chief Justice Ryder's notebook. These notebooks provide a vital and unique insight into the workings of the common law in the mid-eighteenth century. It has also been a pleasure to work with Richard Hart and his team at Hart Publishing.

On a personal note, the writing of the thesis and book has been a lonely and consuming process, and I have therefore been very grateful for the moments of welcome distraction and support provided by friends and family. I am afraid that they may have come out badly from the bargain since for large periods I have been an absent son, brother, friend and, most recently, uncle. I hope to make it up to them, especially my siblings, Mahreen, Shahzeen and Bilal, and nephew, Aaryan.

Preface

Finally, I dedicate this book to my parents, Mohammed Bux and Hassina, whose sacrifices, love and support made all this possible.

Paris, 5 November 2008

TARIQ A BALOCH

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