RESTITUTION REMEDIES

Westdeutsche Landesbank Girozentrale v Islington London Borough Council

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Westdeutsche Landesbank Girozentrale v Islington London Borough Council is not an easy case to understand. It is nevertheless easier to understand than a number of the commentaries on the case which have appeared in legal periodicals. From which criticism, of course, I completely exempt the exemplary analysis which John Lehane has presented to you this afternoon.

I propose to limit my own presentation to commenting on a few of the issues raised in that case, together with my response to some of the questions or comments made by John Lehane by way of the conclusion to his talk.

In the first case, it is quite clear that Hobhouse J could have decided the case solely on the grounds of the common law remedy of money had and received. It appears to me, as it appeared to Hobhouse J, that *Sinclair v Brougham* provides ample authority for the availability of this remedy in relation to payments made under a void contract.

It also seems to me that the references to the cases dealing with recovery in the case of a total failure of consideration, and the alleged distinction between "a total failure of consideration" and "absence of consideration", were merely a confusing digression. It seems obvious that if there is no contract, there can be no consideration, and talk of "absence of consideration" is no different from "absence of contract". And, as Hobhouse J pointed out, the concept of total failure of consideration is relevant only in circumstances where there was a binding contract in existence. This was not the case in *Westdeutsche*.

The court, however, chose to consider whether the equitable remedy of tracing was also available in the circumstances of the case. John Lehane has mentioned, quoting P Birks, that tracing is not a remedy. It is a process which, where it can be applied to identify property, may entitle a plaintiff to a remedy. That may well be true, but I think it is simpler, and it assists in a clearer understanding of the legal principles, to call the remedy itself "tracing".

Before I comment on the principal issues involved, I would just make an observation with respect to the so-called pre-condition of the availability of the remedy that there exists a fiduciary relationship between the payer and the payee. It seems to me, and John Lehane clearly agrees, that the courts have interpreted this out of existence. It is now clearly a self-fulfilling requirement, in that the fiduciary relationship has been held to be created by the

very payment whose recovery is being sought. It would indeed be preferable for this so-called requirement to be eliminated.

I will now revert to the main issues, as I see them, the first of which, I think, is whether it is correct in principle to extend the remedy of tracing from a specific remedy available only in relation to identifiable assets, to a general remedy available against the general assets of the defendant.

John has asked, "For what reason of policy, legal principle or authority should the law develop such a strange creature?" The answer clearly is, as John himself recognises, that the common law has not provided an adequate remedy in all circumstances. I am particularly thinking of *Sinclair v Brougham*.

In that case, a remedy was not available at common law because, as the court said, to have enforced a remedy *in personam* would have been tantamount to enforcing an *ultra vires* contract. The court therefore could give relief only by recognising rights of property retained by the plaintiff in the money paid by it to the defendant. However, in that case, "justice" could not be done if the right to trace was restricted to identifiable assets, and so the court developed the theory of a general right of tracing. Was the court right to do so?

John has asked, "If there is really a right to trace into general assets of a defendant, why, it may be asked, has no previous case recognised it? Why, for instance, did the Court of Appeal in *Diplock* agonise over the application of *Clayton's* case to a charity's bank account...if a charge over general assets would have done?"

I think that there is an answer to that question, which is that, in that case, there were specific identifiable assets. It seems to me that, if there are identifiable assets, the court has to apply the rules which have been developed in order to determine between competing claims to those assets.

The concepts of tracing into general assets can only apply if there are no specific identifiable assets. However, is it right that if should? In my view, it is not. The right to trace derives from there being rights in property. It was the fundamental distinction between rights in property and rights against the person which gave the remedy of tracing its origin. I do not see how it is possible that a right in specific property can spring over and apply to general assets.

Nevertheless, it was held in *Sinclair v Brougham* to have done so and, on the basis of the authority in that case, Hobhouse J was clearly correct in deciding that such right was available in the *Westdeutsche* case.

One commentator (Andrew Burrows in the *New Law Journal*) has suggested that it would have been preferable for Hobhouse J to have awarded the personal equitable remedy of accounting for money received rather than a proprietary remedy. However, Hobhouse J made it clear that he thought there was no such remedy. He said:

> "The distinction between purely personal remedies and equitable remedies which are categorised as proprietary...will cease to be material save for the fact that as the law at present stands the equitable remedy depends upon an ability to trace."

In other words, in order to claim in equity, it must be established that equitable property rights exist. There are, of course, circumstances in which equitable property rights have real importance, such as the *Sinclair v Brougham* situation and of course where the property remains identifiable.

To summarise then, I would suggest:

(1) In general circumstances, the right to restitution should be based on the common law right of recovery of money had and received.

(2) The equitable remedy of tracing should be available in cases like *Sinclair v Brougham* where no action *in personam* is available for legal or policy reasons.

(3) The right to trace should co-exist with the common law right where there are specific identifiable assets and where (for example, in the case of the defendant's insolvency) the plaintiff obtains a benefit by being able to trace into those specific assets.

(4) I do not see any justification in principle for extending the right of tracing to general assets, but I can certainly see the necessity for doing so in order to achieve "justice".

I have not discussed at all the defence of "change of position". I find this a very difficult issue and I am not convinced that it should be available as a defence to a claim *in rem*. On balance, I tend to consider this defence to be an example of the application by the court of "fuzzy logic" to achieve the result which it has decided that it wishes to achieve.