RESTITUTION REMEDIES

Westdeutsche Landesbank Girozentrale v Islington London Borough Council and Other Cases

QUESTIONS AND ANSWERS

Question - Reg Barrett (Westpac Banking Corporation, Sydney)

Adopting an "unclad emperor" approach, could I ask a question of Jonathan Ross? What is the obvious answer to the question whether the common money account of money had and received lies, where the money paid was in fact in a foreign currency? Is it on the commodity theory, no, that the common law remedy is in reality in conversion or perhaps in detinue, or is it rather that in the aftermath of *Miliangos* and changing views of the nature of money, and given particularly that money had and received is based anyway on implied promise, that the foreignness of the money is besides the point?

Response - Jonathan Ross (Commentator):

That is obviously a very fair question and I set myself up for it. I think the answer to that is that there is some authority for the proposition that an action for money had and received will be available where the currency is in fact a foreign currency. I am not aware, having said that, whether the cases (although I cannot think of the case — it is in Mann's book) treated the foreign currency in question as a medium or an object of exchange. So I think on that basis, perhaps to fudge your question a bit, that maybe the answer now that I think about it is not as obvious as I thought it was. I did think when I suggested it that the answer was, yes, though it does not matter if there is in fact a foreign currency.

Response - John Lehane (Speaker):

Just on that point, can't you get a lot of comfort for the view that that is the right answer — that it is just money — from *Miliangos* itself? And I think, from the view as I remember it (it is a while since I read it), strongly preferred by Mann in his book. He is, after all, very influential in that area these days and now that he has unfortunately died, he is even authoritative, I suppose.

Question - John King (Chairman):

I might just seek a comment from James. When I read the case, I started to get nervous that what was now happening in the law was that the decision was first of all made on what was fair and reasonable and then you are forced to fit it into principle, whereas I started off in the law believing that principle was actually quite important and that was what was supposed to assist you to getting the right result. Are we going down a slippery slope James?

Response - James Watkins (Commentator):

This was the main thrust of John Doyle's paper that he delivered yesterday in relation to BCCI. I think the answer is yes, the court is applying policy considerations or seeking to obtain policy objectives in the decision that it is making, and then applying *post hoc* rationalisation to a lot of its decisions. But they are able to find authority for what they are doing, except on cases of interpretation where authority to some extent is being ignored and the questions of strict interpretation is being ignored — for example, in the *Bell Resources* case — in order that the court can achieve the result that it wants to achieve.

John asked a question which nobody commented on yesterday, asking why it was that the courts actually could not make their policy objectives a little bit clearer. If they were deciding cases on policy grounds, why couldn't they say what they thought the right policy was that they were seeking to apply. But I think that is probably asking too much, because the courts will strenuously deny that they are deciding cases on the basis of policy and they will always seek to find the right legal principle on which to base their decisions.

Comment - John King (Chairman):

There being no further questions it is now my task to thank our three speakers. I think we have been well served by our speakers. It was not an easy topic to handle and I think we have had some very clear analysis, and I trust that you have benefited accordingly. I would like you to show your appreciation to our speakers in the usual way.

That brings us to the end of our conference. It is very pleasing to see at our last session such a large turnout. We, as you are aware, used to have a session after this, which we abandoned because it was just a little too long and so it is comforting to see that this session has been well supported.

Once again, on behalf of you, our particular thanks to James who has worked hard throughout the conference. And I repeat again our thanks to Fay Stewart and all of the speakers. But I think also we should just thank all the speakers. There is a lot of time and effort that goes into these presentations and it is what makes The Banking Law Association successful. I look forward to seeing you at the next conference; I cannot tell you when that will be.