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Case No: LM-2023-000309

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 12 June 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

TERNA ENERGY TRADING doo	**Claimant/ Respondent**
- and -	
REVOLUT LTD	**Defendant/ Applicant**

- -
- -

Anthony Pavlovich (instructed by **DLA Piper UK LLP**) for the **Applicant**
Daniel Burgess (instructed by **Payne Hicks Beach LLP**) for the **Respondent**

Hearing dates: 27 February 2024

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10;30 am on 12 June 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application brought by the defendant against the claimant, by notice dated 8 December 2023, for reverse summary judgment, alternatively for an order to strike out the claim. The claim itself is for unjust enrichment, to recover the sum of €700,000 from the defendant. The defendant however says that the claim must fail for either or both of two reasons, both points of law essential to the claim. One is that the defendant has not been "enriched" for the purposes of the doctrine of unjust enrichment. The other is that, even if it has, the enrichment was not "at the expense of the claimant", again for the purposes of that doctrine. In order to obtain reverse summary judgment, or an order striking out the claim, the defendant needs to be right on only one of these. It is not necessary to show that it is right on both.

2. The claim form was dated 21 April 2023, and sealed on 24 April 2023. The claim is, as mentioned above, for the restitution of €700,000, which was approximately £618,590 at the date of issue. The particulars of claim are also dated 21 April 2023. The defence is dated 22 June 2023, and the reply 25 August 2023. As I have said, the notice for the application with which I am dealing was issued on 8 December 2023. It is supported by the witness statement of Benjamin Fellows, who is the applicant's solicitor. It is opposed by the witness statement of Lucas Moore, who is the respondent's solicitor. Because this is a summary application, there is in fact very little factual dispute between the parties for the limited purposes of my decision.

Jurisdiction

Summary judgment

3. The court's jurisdiction to give summary judgment (either against the defendant in favour of the claimant, or vice versa) arises under CPR rule 24.3, which since October 2023 relevantly provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> > (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
> >
> > (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

In this connection, it is well established that, on an application for summary judgment, the burden of proof rests on the applicant: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [9]; *Daniels v Lloyds Bank plc* [2018] EWHC 660 (Comm), [49]. That is so, even though at the trial of the claim the burden of proving that claim would rest on the respondents as claimants.

4. So far as concerns summary judgment, I was referred to the well-known decision of Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) 16, endorsed by the Court of Appeal on a number of occasions, most

recently in *British Telecommunications plc v HMRC* [2023] EWCA Civ 1412, [25]. In *Easyair*, the judge said:

> "15. … the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
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> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at

trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

5. In *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204, a case where permission to amend a statement of case was in issue, Asplin LJ (with whom Hamblen LJ and Nugee J agreed) said:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction … A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences …
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

Although that was said of the phrase "real prospect of success" in the context of an application for permission to amend a statement of case, the same applies to the same phrase in the context of an application for summary judgment: see *King v Stiefel* [2021] EWHC 1045 (Comm), [21].

6. Complex claims, cases relying on complex inferences of fact, and cases with issues involving mixed questions of law and fact where the law is complex are likely to be inappropriate for summary judgment: see *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 (HL) at [95] *per* Lord Hope. And, in relation to the possibility of future disclosure, the relevant question to ask is whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success: *Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294, [128], SC.

7. As for questions of law, it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: see *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, [84], PC, Lord Collins. This approach was taken by Teare J, refusing summary judgment in an unjust enrichment claim, *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm), [1], [35].

Striking out

8. The statutory test on an application to strike out a claim is set out in CPR 3.4(2). This provides:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

9. In addition, CPR Practice Direction 3A relevantly provides:

> "1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
> > (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5,000',
> >
> > (2) those which are incoherent and make no sense,
> >
> > (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
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> 1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

10. The court's approach to a strike-out application is in many respects the same as in a summary judgment application: both are summary procedures for bringing a claim to an end. But, as Falk LJ (with whom Nugee and Warby LJJ agreed) said in *British Telecommunications plc v HMRC* [2023] EWCA Civ 1412,

> "25. … it is worth bearing in mind that there are some differences between the summary judgment procedure under CPR Part 24 and applications for striking out for lack of reasonable grounds to bring or defend a claim under rule 3.4(2)(a). In particular, questions of striking out are generally determined by reference to the pleaded case and are not apt for the determination of any factual dispute, whereas applications under Part 24 are more likely to involve the scrutiny of evidence."

11. Accordingly, an application to strike out a statement of case on the basis that there are no reasonable grounds to bring or defend the claim is usually decided on the assumption that the respondent will be able to prove the truth of the factual case it alleges: see *eg HRH The Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch), [33](2). Although an application for summary judgment does (as Falk LJ said) take into account the strength of the evidence available to the parties, that matters very much less in a case like the present, where the application is based on points of law, and the evidence filed on the application (including for this purpose the statements of case supported by statements of truth) gives credible colour to the

factual allegations. In such a case, as Cockerill J said in *Daniels v Lloyds Bank* [2018] EWHC 660 (Comm), [49] (vi), disputed facts should generally be assumed in favour of the respondent to the summary judgment application. It is therefore necessary for me to set out relevant parts of the statements of case.

Statements of case

Particulars of claim

12. In the present case the respondent (the claimant in the claim) pleads in part as follows in the particulars of claim:

> "33. By reason of the receipt of the Payment into the Revolut Account, the Defendant was enriched by the amount of the funds thereby received. Following such receipt, the Defendant obtained legal and beneficial title to the funds, and had the benefit of being entitled to use the funds for its own purposes subject to the rights of its customer and/or its regulatory obligations.
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> 34. As to such regulatory obligations:
>
> > a. As an EMI, the Defendant was required pursuant to regulation 20(2) of the Electronic Money Regulations 2011 ("EMR 2011") to 'safeguard' all funds received in exchange for electronic money issued in accordance with one of the two safeguarding methods in regulation 21 and 22 of the EMR 2011 respectively.
> >
> > b. Pursuant to clause 11 of the Defendant's standard 'Business Terms' (which governed the operation of the Revolut Account at all material times), the Defendant purported to safeguard all monies it received in accordance with regulation 21.
> >
> > c. Specifically, the Business Terms stated that the Defendant would 'either: place the money into our ring-fenced accounts that we hold with large global banks (ringfenced accounts are separate from our own money); or invest the payment in low-risk assets held in a separate account with financial institutions'.
> >
> > d. In both scenarios, the Defendant was entitled to (and, pending disclosure, it is to be inferred did) obtain a return on funds safeguarded in this manner, either by way of interest on the 'ring-fenced account' or by way of return from its investment in the 'low-risk assets'.
>
> 35. The Defendant's enrichment was at the expense of the Claimant. The transactions by which the Payment was made constituted, as a matter of substance, the direct transfer of value from the Claimant to the Defendant, notwithstanding that the funds were transferred by electronic means via correspondent banks.
>
> 36. Without prejudice to the generality of the foregoing, the transfer via correspondent banks constituted:
>
> > a. A direct transfer via agents; and/or

b. A set of coordinated transactions which should be treated as forming a single scheme or transaction."

Defence

13. The applicant (defendant in the claim) pleads to this in its defence as follows:

"32. Paragraph 33 is denied. The Defendant was not enriched by the Payment as alleged or at all:

(1) The funds that the Defendant received were exactly offset by an increased liability to Zdena Fashions represented by the electronic money credited to the Revolut Account. The net benefit to the Defendant was therefore nil.

(2) While the Defendant legally and beneficially owns any funds it receives, it receives the funds ministerially, as agent for its customers. It had a duty to account to its customer (in this case Zdena Fashions), which alone was enriched. The Defendant accordingly has a defence of ministerial receipt.

(3) The funds were segregated for the benefit of the Defendant's customer in accordance with the provisions cited at paragraph 8 above, such that the Defendant could not lawfully access the funds for its own use or lend them to others. The position was therefore different to the position where funds are received by a bank, are not segregated and can be used for the bank's benefit (for example, by making loans to other customers within the limits of the bank's capital adequacy requirements).

33. Paragraphs 34a to c are admitted. Paragraph 8 above is repeated. As to paragraph 34d:

(1) Any interest or other return received on safeguarded funds is irrelevant since, as a matter of law, the use value of money is not obtained at a claimant's expense.

(2) In any event, the funds were substantially all dissipated within a day. The interest accruing in that period, if any, is *de minimis*. The Defendant also received fees in the total sums of £2,098.12, €946.17 and $0.06 in respect of currency conversions and outbound payments. If (which is denied) the return on safeguarded funds is relevant, any enrichment was limited to these sums.

34. Paragraphs 35 and 36 are denied. If (which is denied) the Defendant was enriched by the Payment, that enrichment was not at the Claimant's expense:

(1) There was no direct transfer of value from the Claimant to the Defendant:

(a) There was no direct flow of funds from the Claimant to the Defendant. Further, the funds representing the Payment were mixed with other funds in the international payment process. Paragraph 7 above is repeated.

(b) Moreover, the proceeds of the Payment, when received by the Defendant, were mixed with funds held for the Defendant's other customers. Paragraphs 8(3) and (4) above are repeated.

(2) Nor was there an indirect transfer of value of the sort required by the law of unjust enrichment:

(a) The Claimant and the Defendant did not deal with each other through agents. Paragraph 36a does not identify the alleged agents and the Defendant is accordingly unable to respond further.

(b) There was no single scheme of coordinated transactions. The payment mechanism described at paragraph 7 above amounted to a multilateral scheme by which the funds provided to the Defendant came from multiple sources.

(c) The proceeds of the Payment were not traceable at common law because they passed through mixed accounts in the international payment process and in the Defendant's safeguarding account(s). It is noted that the claim is brought only at common law and not in equity.

(3) Further, the Defendant was only an agent for Zdena Fashions and is to be disregarded in favour of its principal.

Reply

14. The claimant's (respondent's) reply relevantly pleads:

"6. The second sentence of paragraph 32(3) is denied. Notwithstanding that the Defendant was an EMI, the Defendant was enriched from the receipt of its customer's funds in materially the same way as a bank is so enriched. Specifically:

6.1. The Defendant was able to, and did, use the funds it received (including the Payment) for its own benefit by either investing those funds in low risk investments or by holding the funds in interest bearing accounts. The Defendant further had recourse to part of the segregated funds in order to extract fees in the sums alleged at paragraph 33(2).

6.2. The Defendant retained for its own use those fees, the return on any such low risk investments and any interest received (as applicable).

6.3. Regulation 20 of the EMR 2011 merely placed limits on the *type* and *extent* of the benefit that the Defendant (as an EMI) was permitted to obtain from use of the funds, as compared to a bank.

6.4. The averments in Responses 17 to 19 of the RFI Response (which are not admitted) to the effect that the Defendant did not as a matter of fact obtain any return on the Payment by these means are not determinative of this issue. The Defendant was able to use the Payment for its own benefit in at least the ways set out in paragraph 6.1 above and was thus enriched by its receipt.

7. As to paragraph 33, paragraph 5 above is repeated.

"8. Paragraph 34 is denied. The Defendant's enrichment was at the expense of the Claimant for the reasons set out in paragraphs 35 and 36 of the PoC. Further:

8.1. As is clear from paragraphs 35 and 36 of the PoC, the relevant agents were UniCredit Serbia, UniCredit S.p.A and Barclays. Specifically:

8.1.1. UniCredit Serbia acted as agent of the Claimant in executing the Payment on its behalf;

8.1.2. UniCredit S.p.A acted as agent of UniCredit Serbia (and sub-agent of the Claimant) in effecting the Payment to Barclays; and

8.1.3. Barclays acted as agent of the Defendant in receiving the Payment and passing it on to the Defendant.

8.2. The Defendant does not, and does not need to, rely on common law tracing to establish that the enrichment was at the expense of the Claimant. The repeated references to the Payment passing through mixed funds are thus inapposite."

Background

The parties

15. The respondent is a Serbian company which sells energy on both domestic and foreign markets. The applicant is a financial services company, authorised by the Financial Conduct Authority as an "electronic money institution" or EMI, governed by the Electronic Money Regulations 2011 (SI 2011/99). These regulations were made in order to transpose Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 into domestic UK law. An EMI can provide some services similar to those provided by banks, but not all of them. In return for money paid by a third party to the applicant for the account of one of its customers, the applicant provides "electronic money" to the customer, which can be used by the customer to make payments or purchase services.

The payment

16. On 4 February 2022, the respondent instructed its own bank, UniCredit Serbia, to pay €700,000 to an account with the applicant held by Zdena Fashions Ltd, an English company. Although initially frozen by anti-money laundering software, the credit was subsequently released to the account with Zdena Fashions Ltd, and entirely dissipated by a series of payments made over a number of hours. The respondent has brought no claim against its own bank, or against Zdena Fashions Ltd.

17. It is common ground that the respondent's instruction to its bank to pay was induced by a so-called "authorised push payment fraud" by third parties. It appears that on 3 February 2022 at 1334 GMT an email was sent to the respondent by the head of trade at one of its energy suppliers, attaching an invoice for an advance payment of €1 million for energy supplies for that month, and containing the supplier's bank details. However, at 1535 GMT the same day, the respondent received a further email

purportedly from the supplier, stating that the bank details were wrong, and attaching a further invoice with new bank details. These details were for an e-money account with the applicant, as the IBAN for the account suggests ("GB09 REVO…"). At 1611 GMT the same day, a third email was sent to the respondent, this time from the (genuine) email address of the chief financial officer of the supplier, confirming the amended invoice and apologising for the "mistake". The respondent says that unauthorised persons gained access to that email account and used it to send the confirmatory email. The applicant admits the descriptions of the emails, but not the particulars of the fraud and the nature of the mistake which the respondent made in giving the instruction. The applicant also denies that the mistake was a qualifying mistake entitling the respondent to make a claim in unjust enrichment.

Payment mechanism

18. It is necessary to describe briefly the payment mechanisms involved. This is not a case where A makes a payment to B using banknotes or coins, or even bank drafts. In modern commercial banking transactions, no such chattels change hands. Instead, accounts of customers with the same or, more likely, different banks are debited and credited to produce the impression that money has moved. But no *money* in fact moves at all. It is just a series of reciprocal credits and debits. As lawyers, at least, know, bank accounts do not actually hold *money*, or *funds*. Such accounts instead amount to a claim on the bank by the customer, a chose in action. At any one time, there is a single sum due from the bank to the customer (assuming that the account is in credit). The bank will discharge its debt to its customer, in whole or in part, by honouring the instructions of its customer to "transfer" all or part of its customer's credit to the account of a third party with another bank.

19. It does this by agreeing with that other bank to a debit in its own account with that other bank (or a third bank – *eg* the Bank of England – at which both have accounts) and a corresponding credit to the third party's account with that other bank (or the third bank, as the case may be): see Brindle and Cox (eds), *Law of Bank Payments*, 5th ed 2017, paras 3-002 – 3.006. A bank ("A") which has a corresponding relationship with another ("B") will have an account with that bank. Bank B will refer to this as a *vostro* account (what is owed by it to the other: a liability). Bank A will maintain a mirror image record of the same account, known as a *nostro* account (what is owed to it by the other: an asset). (Any retail banking customer who notes credits and debits to, and keeps a running balance of the state of, his or her bank account is unknowingly maintaining a *nostro* account.) So the latter is simply a suspense account, used for reconciliation. The position is not in principle different for international transfers, though it is more complicated, because there are often more correspondent banks involved, and more than one possible applicable law: *ibid*, paras 3-014 – 3-017. Most such transfers are instituted, verified and recorded by the SWIFT messaging system: *ibid*, paras 3-008 – 3-012. That was used in the present case. (However, SWIFT is not itself a payment system.)

20. In the present case, the respondent instructed its bank, UniCredit Serbia, to make the payment to Zdena Fashions Ltd. What UniCredit Serbia appears to have done was (i) to debit the respondent's account with it for the required sum, and (ii) to instruct UniCredit SpA (its Italian parent company) to debit UniCredit Serbia's account with UniCredit SpA and credit an appropriate correspondent bank for the same sum with a view to an onward credit to the applicant, with whom Zdena Fashions Ltd had an

account. UniCredit SpA in turn appears to have instructed Barclays (i) to debit UniCredit SpA's account with Barclays and (ii) to credit the applicant's account with Barclays. Barclays in its turn credited the applicant's account with it, and the applicant credited Zdena Fashions Ltd's account with the applicant, by issuing "electronic money" to Zdena Fashions Ltd. (In fact, the transactions involving Barclays were carried out by different companies in the Barclays Group, but nothing turns on that.)

"Safeguarding"

21. As an EMI, the applicant was obliged under the Electronic Money Regulations 2011, regulation 20, to safeguard ("ringfence") the credit which it received from Barclays. It did so by segregating the credit in its euro bank account at Barclays Frankfurt. Here it was protected against set-off by Barclays, and could not be mixed with other funds held by the applicant. However, the applicant's euro account with Barclays Frankfurt did not hold only this one credit destined for Zdena Fashions Ltd. It held oter euro credits destined for the applicant's customers. It was therefore what is commonly called a "mixed" account (though that is a misleading term, because there was only ever a single chose in action at any time, namely of the whole balance owing by Barclays to the applicant).

22. There is a further complication. The credit was denominated in euros, but Zdena Fashions Ltd's outgoing payments were denominated in sterling. From time to time, therefore, the applicant's safeguarded euro account with Barclays Frankfurt was debited, and its safeguarded sterling account was credited with the equivalent in the latter currency. But this did not happen transaction by transaction. It was done at times to suit the applicant's treasury operations, that is, in batches. So it appears to be impossible directly to link (i) credits into the euro safeguarding account with (ii) specific transactions carried out by Zdena Fashions Ltd and the associated debits on its sterling account with the applicant. Instead, and pending the next debit/credit between the two safeguarding accounts, the sterling transactions by Zdena Fashions Ltd will have been temporarily covered by other "funds" in the sterling safeguarded account.

Unjust enrichment

23. The development of the law of unjust enrichment in England and Wales in the last half-century or so owes much to a small number of lawyers, mostly academic, who wrote about, taught and debated the subject in the last third of the twentieth century. The first edition of the first textbook, *The Law of Restitution*, by Robert Goff (later Lord Goff) and Gareth Jones, was published in 1966 (although, since the eighth edition of 2011, it has been called *The Law of Unjust Enrichment*). It opened with the words:

> "The law of restitution is the law of all claims … which are founded on the principle of unjust enrichment."

In 1985, it was followed by *An Introduction to the Law of Restitution* by Peter Birks, a much more theoretical work. Since then there have been a number of other works published, including textbooks by Andrew Burrows (now Lord Burrows) (1993),

Graham Virgo (1999), and Steve Hedley (2001), and a great many scholarly essays and conference papers.

24. In a preface to Roberts Stevens' recent book *The Laws of Restitution* (2022), Lord Reed said that:

> "The creation of the legal category of unjust enrichment … is arguably the most remarkable development in English law in recent times. It was effectively the work of a single legal scholar, Professor Peter Birks, who succeeded in having his ideas accepted by the Law Lords of the day, and whose pupils (and their pupils in turn) have subsequently reinforced his influence through their dominance of scholarship in this area of the law."

(I should perhaps make clear that I, too, studied the law of restitution, as it was then called, under Professor Birks. I am not however sure that anything I have done since has reinforced his influence. But he was certainly a brilliant teacher and scholar.)

25. All this academic work proved influential, and judges began, perhaps hesitantly at first, to speak the language of restitution and unjust enrichment. In *Lipkin Gorman v Karpnale Ltd* [1991] AC 548, 578 C-E, Lord Goff said:

> " … the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors. The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."

26. In *Portman Building Society v. Hamlyn Taylor Neck (A Firm)* [1998] 4 All ER 202, Millett LJ (with whom Morritt and Brooke LJJ agreed) said:

> " … any claim to restitution raises the questions: (1) has the defendant been enriched? (2) If so, is his enrichment unjust? (3) Is his enrichment at the expense of the plaintiff? There are several factors which make it unjust for a defendant to retain the benefit of his enrichment; mistake is one of them. But a person cannot be unjustly enriched if he has not been enriched at all. That is why it is necessary to ask all three questions and why the fact that a payment may have been made, *eg*. by mistake, is not by itself sufficient to justify a restitutionary remedy."

27. Some twenty years later, in *Investment Trust Companies v HMRC* [2018] AC 275, SC, the question again arose whether the claimants had a claim in unjust enrichment against the defendants. Lord Reed (with whom all the other judges agreed) said:

> "24. In answering the question, both parties followed the approach adopted by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC

221, 227, and asked: (a) Has the defendant been benefited, in the sense of being enriched? (b) Was the enrichment at the claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences?"

If this matter goes to trial, it is anticipated that that trial will largely be concerned with the matters at (c) and (d). This application, however, is concerned with the matters at (a) and (b). I will deal with each of these in turn.

28. It is however important to note that Lord Reed went on later in his judgment to add these comments:

> "40. … the adoption of the concept of unjust enrichment in the modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities pre-dating *Lipkin Gorman* [*v Karpnale Ltd* [1991] 2 AC 548]. … Although judicial reasoning based on modern theories of unjust enrichment is in some respects relatively novel, there are centuries' worth of relevant authorities, whose value should not be underestimated. The wisdom of our predecessors is a valuable resource, and the doctrine of precedent continues to apply. The courts should not be reinventing the wheel.
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> 41. … Lord Steyn's four questions [in *Banque Financière de la Cité*] are no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are 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. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words 'at the expense of' do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute.
>
> 42. The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases. In carrying out that analysis, it is important to have at the forefront of one's mind the purpose of the law of unjust enrichment. As was recognised in *Menelaou* [*v Bank of Cyprus UK Ltd* [2016] AC 176] (para 23), it is designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted. That is why restitution is usually the appropriate remedy."

29. I note in particular the references to the "wisdom of our predecessors" and the doctrine of precedent, as well as the continued "necessity for a careful legal analysis of individual cases". These references seem to me to be particularly important in the present case.

Enrichment

30. The first question is whether the payee (the applicant) has been "enriched" for the purposes of the claim in unjust enrichment. 'Enriched' and 'enrichment' as cognate concepts are however not just ordinary English words but instead terms of art, or technical legal terms: *Crown Prosecution Service v Eastenders Ltd* [2015] AC 1, [100].

31. The applicant's account with Barclays was credited with the value of the payment. At the same time the applicant credited Zdena Fashions Ltd's account, issuing electronic money to its customer, so that it could make payments as it wished, backed by the credit in the applicant's account with Barclays. On the face of it, the incoming credit to the applicant is balanced by the obligation undertaken to its customer, Zdena Fashions Ltd. The applicant says that this is sufficient to prevent enrichment for the purposes of the claim in unjust enrichment. The respondent denies it. As a fall-back, the respondent also says that the applicant nevertheless profited, because it would have the use of the money before it was used, and, if the credit had been safeguarded in low risk investments (as was permitted under the regulations, but in fact was not done) the applicant could have earned a return on them. In this context it is to be noted that the applicant's obligation to redeem the electronic money spent was a call obligation, operating 24/7, and not a term obligation, requiring repayment only at a known future date.

32. It is common ground that the funds were dissipated within a day of receipt. So any interest that might have been earned (by a bank) by lending to third parties would have been tiny. The unchallenged evidence is that the applicant earned fees of about £3,000, largely on currency conversions.

33. There is a further point, arising from the fact that the applicant is an EMI and not a bank. Funds paid to a bank for the account of its customer pass, and beneficially belong, to the bank. They are not held on trust for the customer: *Foley v Hill* (1848) 2 HLC 28. The bank instead owes a debt to its customer. However, it is free (subject to capital control rules) to use the funds which have passed to it beneficially for its own purposes and benefit, *eg* by lending them to other customers, or investing in other companies. On the other hand, an EMI is required by regulation 20 of the 2011 Regulations to do one of three things to safeguard the customer's "money". One (reg 21(2)(a)) is to keep the funds paid to the account of its customer in a segregated account with an authorised credit institution, which it cannot access except to pay on the instructions of its customer (which it obtains by issuing "electronic money" to the customer, which is then used in the customer's transactions with third parties). A second (reg 21(2)(b)) is to invest the funds in secure, liquid, low-risk investments, again held segregated with an authorised custodian. A third (reg 22) is to obtain a guarantee or insurance cover for the risk of the EMI's insolvency. If it does the first or second, it can profit by any return it can make on the deposit or the investments. If it does the third, it can also lend the customer's funds out or invest them just like a bank.

34. The applicant's business terms referred only to the first two methods. But, as I have already said above, the payment in the present case was covered by the first method only. No low-risk investments were purchased with the funds received. The applicant says its position is distinguishable from a bank, because the funds are not available for its general use. In this respect, it says, the position is analogous to that of a trust account. Just as money paid into a trust account (*eg* a solicitor's client account) does

not belong in equity to the solicitor, so money in the segregated account held by an EMI is not available to it for its own use. I will return to this point later, after dealing with the position of recipient banks generally.

Respondent's authorities

35. I was referred to a number of authorities bearing on the question of enrichment. The respondent relied in particular on the decision of Marcus Smith J in *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2020] Ch 421, which referred to earlier authorities of long standing, dating back to the eighteenth century. That was a case where a claim was brought against a bank in respect of a payment made to it earlier, on a number of bases. One of those bases was unjust enrichment. The bank argued that it had not been enriched, because the value of the payment to the bank was balanced by the value of the obligation to its customer.

36. Marcus Smith J said (words in square brackets taken from footnotes to the judgment):

> "286. The long-accepted rule – established by Lord Mansfield in *Buller v. Harrison* [(1777) 2 Cowp 565] – is that where an enrichment is received by an agent, the agent will be liable to repay the claimant, unless the agent has accounted to his principal for the enrichment so received without notice of the claimant's claim. Where there is notice, the agent must interplead and will be liable if the monies are paid away. It is quite clear that where the agent has simply credited his principal with the enrichment, without actually transferring it to the principal, the agent remains liable to the claimant.* Millett LJ stated the position in *Portman Building Society v. Hamlyn Taylor Neck (A Firm)* [[1998] 4 All ER 202, 207]:
>
> > '[W]here the plaintiff has paid money under (for example) a mistake to the agent of a third party…[and] the agent still retains the money…the plaintiff may elect to sue either the principal or the agent, and the agent remains liable if he pays the money over to his principal after notice of the claim. If he wishes to protect himself, he should interplead. But once the agent has paid the money to his principal or to his order without notice of the claim, the plaintiff must sue the principal'."

37. In expressing the view that an agent who merely credited, but did not pay, his principal remained liable to the payer, the judge added this by way of footnote (at the point in his judgment which I have marked by an asterisk):

> "The law has been stated thus many times. In addition to the authorities cited in this paragraph, see also: *Pollard v. Bank of England*, (1871) LR 6 QB 623 at 630 (*per* Blackburn J); *Continental Caoutchouc and Gutta Percha Co v. Kleinwort, Sons & Co*, (1904) 90 LT 474; *Kleinwort, Sons & Co v Dunlop Rubber Co*, (1907) 97 LT 263; *Kerrison v. Glyn, Mills, Currie & Co*, (1911) 81 LJKB 465; *Transvaal and Delagoa Bay Investment Co Ltd v. Atkinson*, [1944] 1 All ER 579; *Australia and New Zealand Banking Group Ltd v. Westpac Banking Corp*, (1988) 164 CLR 662; *Agip (Africa) Ltd v. Jackson*, [1990] Ch. 265 at 288–289 (*per* Millett J); *Jones v. Churcher*, [2009] EWHC 722 (QB) at [41] and [66] to [78] (*per* His Honour Judge Havelock Allen, QC); Burrows, *A Restatement of the*

English Law of Unjust Enrichment, 1st ed (2012) at Proposition 25; Watts & Reynolds, *Bowstead & Reynolds on Agency*, 21st ed (2018) (*Bowstead & Reynolds*) at Article 111 and [9-106].”

38. I will not take time in this judgment to go through all the authorities referred to by Marcus Smith J. However, it is pertinent to notice that of these authorities one (*Continental Caoutchouc and Gutta Percha Co v. Kleinwort, Sons & Co*) is a decision of the Court of Appeal, and two (*Kleinwort, Sons & Co v Dunlop Rubber Co*, and *Kerrison v Glyn, Mills, Currie & Co*) are decisions of the House of Lords. These decisions were binding on Marcus Smith J, as they are binding on me, for whatever they decide. In each of them funds were credited to a third person’s bank account by mistake, and the payer sued *the bank* to recover the mistaken payment. In each case the bank had not yet paid away any funds to its customer or on the customer’s instructions. In each case the claim against the bank succeeded. Had there been no enrichment of the banks in question, because of the liabilities said to be incurred towards the banks’ own customers, the claims would all have failed.

39. This point is clearly stated in *Kerrison v Glyn, Mills, Currie & Co*, where Lord Mersey (who, as Bigham J, had given the first instance judgment affirmed on appeal in *Continental Caoutchouc*) said (at 472):

> “The facts bring the case directly within the terms of the judgment of Lord Loreburn in *Kleinwort Sons and Co v Dunlop Rubber Co*, where he says, ‘it is indisputable that, if money is paid under a mistake of fact and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received’. An attempt was made to take the case out of this plain and simple rule of law by saying that the defendants, being Kessler & Co’s bankers, had, by the receipt of the money, become debtors of Kessler & Co, and could not, therefore, be called upon to repay the plaintiff. This, in my opinion, is a fallacy. No doubt when a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer’s debtor for the amount so received. But this does not entitle the banker to retain money which in common honesty ought not to be kept. If, indeed, the banker has paid over the money to his customer, or has altered his position in relation to his customer to his detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer. But the circumstances here are that Messes Glyn Mills Currie & Co had in no way altered their position when they were asked to refund the money. They held money which they ought not to retain because it had been paid to them under a mistake of fact, and, in the words of the Lord Chancellor, it does not matter in what character it was received by them.”

40. This opinion was followed by Sargant J in *Admiralty Commissioners v National Provincial and Union Bank* (1922) 127 LT 452. This case was not cited to me in argument, but I came across it subsequently, and asked the parties for their comments, which both counsel kindly supplied. In that case, the plaintiffs had paid salary into the bank account of an airman who, unknown to them, had been killed in action during the Great War. When they eventually discovered their mistake, they claimed to recover the overpayments. The bank argued that the representative of the deceased’s estate needed to be joined in order properly to constitute the action.

41. Sargant J disagreed. He said (at 127 LT 453):

> "It is argued that moneys placed to the credit of a customer's account are sacred and cannot be dealt with under the order of the court, even when it is shown that the money has been paid into the account by someone in mistake of fact, except in the presence of the customer or his legal personal representative. The plaintiffs have cited *Cary v. Webster* [(1721) 1 Str 480], and in view of that case it is admitted on behalf of the bank that if a person made payment to an agent and the principal was informed of it, yet if the person making the payment could show that it was made in mistake of fact, he can recover it from the agent without making the principal a party. But it is said that the position is different in the case of a bank. *Kerrison v. Glyn, Mills, Currie, and Co*. (sup.) contains observations which clearly lay it down that banks are in no different position from other agents, and there is no apparent reason why they should be. In my opinion, any contract by which a bank agrees to honour cheques of the customer on his current account does not extend to amounts standing to the credit of that account in so far as they are swollen by inadvertent payments made in mistake of fact. As a result of an order for repayment of the amount claimed, the customer's current account will be deflated by that amount. Any subsequent action by the customer's legal personal representative to recover that amount from the bank would have no reasonable chance of success."

42. Mr Pavlovich for the applicant seeks to distinguish that case. He says that the only question for the court was whether the deceased customer's personal representative needed to be a party to the claim. The court's conclusion was that he did not. He also says that there was no attempt to recover any money paid out of the account before the claim was made. In this respect he refers to the report of the same case in volume 3 of Legal Decisions Affecting Bankers at page 260. However, here, he says, the claim *includes* money paid out of the account before the claim was made. Finally, he says that the bank conceded that a mistaken payment to an agent was recoverable provided "the principal was informed of it". No such concession is made here.

43. The first point is correct, but does not assist the applicant. The question here is simply whether the respondent payer can recover from the applicant bank. The bank's customer is not a party here, just as he was not in the *Admiralty Commissioners* case. As to the second point, there is no statement in the Law Times report that there was any payment out of the account before the claim was made. On the other hand, the report in Legal Decisions Affecting Bankers says that £440 was paid in by mistake, but the plaintiffs claimed only the £417 10s and 3d remaining to the credit of the account. But, in any event, this is not a tracing claim, but one in unjust enrichment. It is personal, not proprietary. The claim was to the balance of the account, meaning (at best) that the plaintiffs accepted that the bank had a defence if it had paid out without notice. The third point is correct, but in my opinion the concession was rightly made, and hence the point is irrelevant.

Applicant's authorities

44. On the other side, the applicant relied on more recent statements of the law. In *Jeremy D Stone Consultants Ltd v National Westminster Bank plc* [2013] EWHC 208 (Ch), [241]-[243], Sales J said:

"240. The Claimants undoubtedly did pay money into SEWL's NatWest accounts (principally the No. 2 account) on the basis of their mistaken belief that the hotel business was genuine. The Claimants therefore have a cause of action against SEWL in unjust enrichment to reclaim the payments made, but SEWL has no money to meet such claims. The issue, therefore, is whether the Claimants also have claims in unjust enrichment against NatWest, which received the Claimants' payments into SEWL's accounts.

241. In my judgment, the Claimants have no good claim in unjust enrichment against NatWest, either because NatWest was not enriched by the payments or because (even if on proper analysis it was enriched) it has a good defence.

242. As to the issue of enrichment, it is true that when the Claimants paid sums to NatWest for the account of SEWL, NatWest received those sums and added them to its stock of assets as monies to which it was beneficially entitled. However, the increase in its assets was matched by an immediate balancing liability, in the form of the debt which NatWest owed SEWL reflected in the increase in SEWL's bank balance as a result of the payments. This is how the relationship between bank and customer works. There was no basis - at any rate none known to NatWest at the relevant time as the receipts came in, credit entries were made on the accounts and payments were made out against those credit entries – on which NatWest had any entitlement to withhold payment of sums representing credit balances on the accounts when instructed by SEWL to pay.

243. Therefore, in my judgment, NatWest was not enriched by the payments made by the Claimants into SEWL's bank accounts (in that regard see *Box v Barclays Bank Plc* [1998] Lloyd's Rep. Bank. 185 and *Compagnie Commercial Andre SA v Artibell Shipping Co. Ltd* 2001 SC 653, Court of Session, Outer House, at [16] per Lord Macfadyn). The Claimants' proper unjust enrichment claim is against SEWL, whose assets were increased upon the making of the payments to its bank accounts by the increases in its balances on those accounts (representing the debt owed to it by NatWest).

244. Even if I am wrong about that, and NatWest was enriched in a relevant sense by the Claimants' payments, I consider that it would have a good defence to the claim based on the fact that it had a contractual obligation to pay out the sums in SEWL's account in accordance with the instructions of its customer, and did so. Mr Wardell submitted that this gave rise to a defence of good faith change of position and/or to a distinct defence of ministerial receipt (see *Portman Building Society v Hamlyn Taylor Neck (A firm)* [1998] 4 All ER 202, 207-208)."

45. Three things will be noted from this extract, which is in fact *obiter* rather than part of the decision. The first is that Sales J has two separate points to make. One is the lack of enrichment (at [242]). The other is the availability of the defence of payment to (or on the instructions of) the principal (at [244]). In the older authorities, the two points are run together. I will return to this aspect of the matter later. The second is that, in dealing with the defence, Sales J refers to an *obiter* statement in the decision of the Court of Appeal in *Portman Building Society v Hamlyn Taylor Neck (A firm)*. Curiously, however, this decision was also relied upon by Marcus Smith J in the *Pakistan* case. The third is that none of the further authorities relied on by Marcus Smith J in the footnote to his judgment in the *Pakistan* case was referred to by Sales J.

We are not told whether any of them were cited to him in argument, but I cannot think that they were. If they had been, he would have dealt with them. This must weaken the force of the judge's opinion, because I do not know how he would have reacted to these authorities.

46. In passing, I note that it has been suggested that the view of Sales J was one expressed *per incuriam*. Although it is rather technical, I will just mention here that that is not what I understand the doctrine of *per incuriam* to be about. In *Broome v Cassell & Co Ltd* [1972] AC 1027, Lord Diplock said, at 1131D:

> "the label per incuriam … is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal."

So, whether or not the first instance decision in *Jeremy D Stone* offends the rules of precedent, in my view it is not in fact one made *per incuriam*. A first instance decision that does not follow binding precedent is simply wrong. Here the statement is *obiter* anyway.

47. To return to the decision in question, Sales J refers to two other modern decisions in support of his view, one English and one Scottish. These are *Box v Barclays Bank Plc* [1998] Lloyd's Rep Bank. 185 and *Compagnie Commercial Andre SA v Artibell Shipping Co Ltd* 2001 SC 653. I will deal with each of them briefly. In *Box v Barclays Bank plc* [1998] Lloyd's Rep Bank 185, a company (Sylcon) carried on an unlawful deposit-taking business, pooling funds from investors in an account held by the company with Barclays Bank. That account was in overdraft at all material times. The company became insolvent. The investors claimed the return of their funds from the bank. The main part of the investors' case was that there was a trust of their funds. However, there was a subsidiary argument in unjust enrichment.

48. As to this latter argument, Ferris J said:

> "Mr Malek also made a number of submissions all of which, as it seemed to me, were supportive of a general proposition that, even if the Bank had received what was in law the plaintiffs' money, it was not thereby unjustly enriched. Thus Mr Malek again made the point that in all cases except perhaps that of Mrs Brown, who paid her money to Sylcon before the Mortimer Street property was sold and thus at a time when Sylcon may have been an overall debtor to the Bank, the receipt of money into the No.1 account increased the total sum which the Bank owed to Sylcon. The Bank was not therefore enriched. If it was then Mr Malek argued that such enrichment was not unjust because the plaintiffs had received consideration in the form of Sylcon's contractual obligations. Further the Bank had itself given consideration, albeit to Sylcon rather than to the plaintiffs, because of the reduction in the overdraft on the No.1 account which resulted from the payment of new money into that account.
>
> I think that these arguments have considerable substance, but it is not altogether easy to appraise them in the light of my earlier conclusion that what reached the Bank was Sylcon's money, not the plaintiffs'. It is on the basis of that conclusion

> that I reject the plaintiffs' claim that they are entitled to succeed against the Bank in a common law claim for money had and received."

49. What the judge says is that the arguments have "considerable substance", but not that he so decides. This is because his decision is founded on a different point, referred to in the second paragraph above: "what reached the Bank was Sylcon's money, not the plaintiffs'." Accordingly, his comments on enrichment are at best *obiter dicta*. More importantly, it also appears that, once again, none of the earlier authorities on the point was cited to the judge.

50. *Compagnie Commercial Andre SA v. Artibell Shipping Co Ltd*, 2001 SC 653 is a decision of the Outer House of the Court of Session in Scotland (functionally equivalent to the High Court in England). In that case, a ship charterer paid sums to the credit of the ship owner's bank account. When the voyage was abandoned, the charterer sought to recover advance freight from the bank. One part of the claim made was in unjust enrichment (the *condictio causa data causa non secuta*, similar to our claim for money paid on a total failure of consideration), and the question arose as to whether the bank had been "enriched". The charterer argued that the owner had assigned its right to freight to the bank, and hence the bank received the payment as principal. The bank said the assignment was by way of security only, and that the bank received the payment as agent for the owner.

51. Lord Macfadyn said:

> "[16] There is, no doubt, a sense in which money paid to a bank to the credit of the account of one of its customers becomes, on receipt, the bank's money - as Lord Mackay said in *Royal Bank of Scotland* v *Skinner* [1931 SLT 382], it is 'simply consumed by the banker'. But in that simple situation, the bank is not thereby enriched, because it grants an immediate obligation of corresponding amount to its customer. Receipt by the bank in that way would not, in my opinion afford the necessary foundation for an argument that in the event of the money becoming repayable by the customer to the payer, the bank had been unjustly enriched. I did not understand Mr Glennie [for the charterer] to argue otherwise. The essential foundation for the case of unjust enrichment that the pursuers seek to make is the contention that the second defenders received the advance freight 'as assignees and for their own account'. It is not enough, in my opinion, that they received the advance freight 'as assignees'. The pursuers need to go a step further, and demonstrate that the assignation was absolute, rather than in security, and that for that reason they received the advance freight 'for their own account'. In my view, they are unable to take that further step. For the reasons which I have discussed in the preceding paragraph, I am of opinion that the General Assignment, properly construed as part of the Loan Documentation, effected only an assignation in security. … "

52. Accordingly that part of the claim as against the bank failed. Undoubtedly, the lack of enrichment of the bank is part of the reasoning of the decision of the court. But it is the decision at first instance of a Scottish court, in relation to the Scottish doctrine of unjustified enrichment, and hence, although worthy of respect, not binding upon me. In addition, the judge (understandably) does not deal with any of the older English authorities, though, as I understand the modern Scottish practice, the emphasis today is in any event more on principle rather than on the discussion of authorities. What all

this does mean is that I cannot treat this decision as of any great weight in reaching my own decision here in England.

53. In *Sixteenth Ocean GmbH v Société Genérale* [2018] EWHC 1731 (Comm) the defendant was one of a syndicate of banks financing the construction of container ships for subsidiaries (including the claimant) of an Iranian state enterprise, by the Korean company Hyundai. The defendant was also the agent bank for the syndicate. In 2008 US sanctions against Iran meant that the defendant could not continue to finance the construction. That in turn meant that the claimant could not pay Hyundai, and so Hyundai terminated the contract. The defendant bank claimed accelerated repayment of large sums of outstanding loans. In September 2010 certain of the ships built by Hyundai for other subsidiaries of the Iranian state enterprise were arrested in Singapore at the behest of the lending banks.

54. On 14 December 2010, the subsidiary companies somehow managed to pay sufficient money to the defendant as agent bank for the release of the ships. The claimant argued that the accelerated payment was not due, but paid sufficient to cover it nonetheless, under protest that it was obtained by economic duress. Because of the European Union's sanctions regime, the payment was made into a special suspense account belonging legally and beneficially to the defendant. It was not (nor could lawfully have been) then appropriated to the discharge of any of the claimant's possible liabilities. The funds were eventually paid out by the defendant in January 2011 to the various banks (including itself) once authorisations had been obtained from the relevant European authority, without which the payments would have been unlawful. The arrested ships were then released.

55. In January 2017 the claimant started proceedings in London to recover the accelerated payment on the basis of unjust enrichment. The defendant bank applied to strike out the claim, or alternatively for summary judgment, on the grounds that the claims were time-barred. If the claim accrued before 10 January 2011, it was potentially time-barred (subject to the operation of section 32(1) of the Limitation Act 1980). The question was whether any enrichment of the defendant had occurred on 14 December 2010, or only once payments out were made to the syndicate banks (including itself) in January 2011.

56. The deputy judge, Peter MacDonald Eggers QC, said:

> "109. Whether there was an enrichment is a question of fact. An enrichment is constituted by the receipt of a benefit, which can be money or a non-monetary benefit. The benefit must be a real one. Thus, if the receipt of a benefit is matched by a corresponding liability, the net gain to the defendant is zero, and the defendant will not have been enriched (*Jeremy D Stone Consultants Limited v National Westminster Bank plc* [2013] EWHC 208 (Ch), paragraph 242)."

57. However, the judge in that case went on to hold that:

> "113. … The Suspense Account was SocGen's account and funds standing in that account were legally and beneficially owned by SocGen. The moneys were not received to the order or on behalf of 16th Ocean. In fact, if any part of the moneys were frozen in accordance with the EU sanctions regime, the funds would not have been returned to the subsidiaries in any event … There was therefore an

> immediate and tangible benefit to SocGen in the receipt of this sum. An impediment to that benefit might have arisen if the funds were inaccessible to SocGen by reason of the sanctions regime, but this was not the case as SocGen had received its authorisation beforehand."

Accordingly, the court held that the defendant had been enriched *immediately* on the payment's being made, *before* any release of funds to the syndicate banks or itself. So the statement made by the judge in para 109 of his judgment (quoted above) as to matching liabilities was not part of the *ratio* of the decision, but instead *obiter*. And, once again, none of the earlier authorities on the point appears to have been cited to the judge.

58. The applicant also relied on a summary statement of the law given in *FII Group Test Claimants v HMRC* [2021] 1 WLR 4534, SC, [170]-[172]. This was a case where taxpayers claimed the repayment of tax paid under the advance corporation tax ("ACT") regime as applied to non-resident companies, but held subsequently to be contrary to EU law. The question in this part of the case was whether the Revenue had been enriched for the purposes of the claim in unjust enrichment. The Revenue said not, on the basis that tax credits had been made available to the shareholders of the taxpayer companies, which netted off the incoming tax.

59. Lord Reed and Lord Hodge (with whom Lords Briggs, Sales and Hamblen agreed) said this:

> "169. … it is not in dispute that unjust enrichment is designed to correct normatively defective transfers of value and that it usually does so by restoring the parties to their pre-transfer positions. The recipient of the value transferred must have benefited, or in other words have been enriched, by the transfer of value. The transfer of value must have been at the expense of the claimant. In other words, the claimant must have suffered a loss, in the sense that he or she has given up something of value by providing the benefit to the claimant in the normatively defective transfer …
>
> "170. There is no dispute but that the claimants suffered loss in this sense in paying the sums that have been held to be unlawfully levied ACT. The question on this appeal is the measure of restitution: what was the Revenue's enrichment? Where the transfer involves the provision of services, difficult questions can arise as to the valuation of those services in order to correct the injustice which has arisen by the defendant's receipt of the claimant's services on a basis which was not fulfilled. … Where, as here, the transfer of value is the payment of money, such complex questions do not arise. But the court in ascertaining the defendant's enrichment cannot always conclude its enquiry by saying that because the claimant transferred £X to the defendant, the defendant's enrichment is £X. The court may, as the Revenue argues, have to have regard to liabilities which the defendant incurs as a consequence of the receipt of the money.
>
> 171. This point is recognised in academic commentaries. Thus, Professor Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015), p 73 states:
>
>> 'In assessing whether the defendant has been enriched by the receipt of money it is necessary to have regard to the net transfer of value. So, where

> there have been payments between the claimant and the defendant, the net amount will constitute the enrichment. Further, *any consequent liabilities which might negate the enrichment also need to be taken into account*.' (Emphasis added)

Similarly, Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016), observe that a defendant is not inevitably benefited by the receipt of money, giving as an example:

> 'a circumstance where a defendant has assets amounting to $95,000 in value. The defendant receives $15,000 annually in government income support. One condition of the annual income support is that the defendant's assets are valued at less than $100,000. The defendant subsequently receives a mistaken payment of £6,000. This mistaken payment has the effect of removing the $15,000 annual benefit. … There is no enrichment of the defendant from the mistaken payment.'

Lord Burrows in *The Law of Restitution*, 3rd ed (2011), p 50 makes the same point citing other examples.

172. The point is also recognised in judicial authority. In *Jeremy Stone Consultants Ltd v NatWest Bank plc* [2013] EWHC 208 (Ch) Sales J addressed a claim to recover from the defendant bank money which it was induced by a third party to pay into a company's bank accounts when the company, unbeknown to the claimants, was part of the third party's fraudulent Ponzi scheme. One of the claims against the bank was for restitution of the moneys in those accounts on the basis of NatWest's unjust enrichment as a result of the moneys having been paid on the basis of a mistake. Sales J rejected the claim based on unjust enrichment on two grounds. First, he held that the defendant bank had not been enriched. He stated (para 242):

> 'it is true that when the Claimants paid sums to NatWest for the account of SEWL, NatWest received those sums and added them to its stock of assets as moneys to which it was beneficially entitled. However, the increase in its assets was matched by an immediate balancing liability, in the form of the debt which NatWest owed SEWL reflected in the increase in SEWL's bank balance as a result of the payments.'

He held that the claimants' unjust enrichment claim properly lay against the company, whose assets were increased by the payments into its bank accounts. Secondly, even if there had been enrichment, he held that the bank had a defence of good faith change of position and a defence of ministerial receipt, because it had a contractual obligation to pay out the sums in SEWL's account in accordance with its customer's instructions and had done so.

173. On this appeal the Revenue do not assert any defence of change of position. Their case is premised on the submission that their obligation to allow tax credits under section 231 of ICTA was a consequence of the payment of ACT by the companies which made the relevant distributions or at least of the liability of those companies to pay ACT in those sums. It is a central component of the

> Revenue's argument that the tax credit under section 231 is triggered by the liability of the company making the distribution to pay ACT."

60. However, the court held (at [190]) that the Revenue's position was wrong. The tax credit was triggered, not by the liability to pay ACT, but instead by making the distribution. Thus,

> "190. … The unlawfulness of the levy of ACT has no bearing on the shareholder's entitlement to the tax credit. In our view, it follows that the tax credits paid to the ultimate shareholders should not as a matter of domestic law be taken into account in the calculation of the claimants' compensation."

Accordingly, the Revenue had on any view been 'enriched' by the payment of the tax. Despite the citation with approval of the statement of law in *Jeremy D Stone Consultants Ltd*, the court was not deciding that payment into a bank account did not enrich the bank merely because of an equal credit to the account of its customer. The statements made in paragraphs 169-173 do not amount to saying that liabilities engaged by reason of receipt on a mistaken payment *must* be taken into account, only that the court "*may* … have to have regard" to such liabilities (emphasis supplied). And the tax credit was in fact granted by statute independently of the payment made to HMRC. It was granted because of the dividend paid. So the statements made by the court were strictly *obiter* anyway.

61. Finally, in *Scenna v Persons Unknown* [2023] EWHC 799 (Ch), [61]-[62], deputy judge James Pickering KC in a claim alleging fraud made without notice orders against a series of defendants including freezing orders against the alleged fraudsters and disclosure orders against the foreign banks alleged to have received the fruits of the fraud. On the return date, *inter partes*, there were challenges by the banks, both to (i) the disclosure orders and to (ii) the jurisdiction of the English court. Within the jurisdiction challenge, the question arose as to the claimant's alleged cause of action against the banks in unjust enrichment. All that the banks concerned had done was to receive the funds sent for the account of their customers.

62. The deputy judge held that this part of the claim failed:

> "62. … It is well established that when a bank receives monies from a customer, although there is a notional increase in the bank's assets, there was an immediate corresponding liability assumed by the bank to the customer."

The deputy judge then referred for authority to para 172 of the decision in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2021] 1 WLR 4534, SC, already quoted above. However, once again the judge did not refer to any of the earlier authorities on the subject, mentioned in the footnote to the judgment of Marcus Smith J in the *Pakistan* case. However, he did mention the possible availability of a defence based on good faith change of position and/or ministerial receipt, referring to the same paragraph in the extract from the *FII Group Litigation* case. In my respectful opinion, this carries the matter no further.

Discussion

63. Most of the recent pronouncements on the matter are at first instance and in addition are *obiter*. Even where they represent part of the decision, they do not even mention, let alone deal with, the older English authorities on the point. It might be thought that the older authorities are dealing only with the question of defences, and not with that of enrichment. But that is not so. If there is no enrichment, then there is no need to consider any defence. Yet the earlier authorities, and in particular those in the Court of Appeal and the House of Lords (*Continental Caoutchouc and Gutta Percha Co v. Kleinwort, Sons & Co*, *Kleinwort, Sons & Co v Dunlop Rubber Co*, and *Kerrison v Glyn, Mills, Currie & Co*), proceed on the basis that there *is* an enrichment. Indeed, Lord Mersey in *Kerrison*, and Sargant J in *Admiralty Commissioners v National Provincial and Union Bank*, expressly says that the bank's becoming the debtor of the customer is *not* an answer to the claim, at least *unless and until* it is proved that the bank has paid away the money in accordance with the customer's instructions and without notice of the payer's claim.

64. As a matter of authority, I am in no doubt that, sitting at this level, I am bound by the decisions of the Court of Appeal and House of Lords already referred to. To the extent that there is a conflict between those decisions and the *obiter* statements in the recent first instance decisions and in the Supreme Court, I must decline to follow the latter. Even if I were wrong, and the earlier decisions were not actual decisions binding me, I nevertheless consider that they express the correct principle, and I prefer them.

65. The problem, as it seems to me, is this. The academic lawyers who fashioned the modern common law claim in what is now called "unjust enrichment" rather than restitution, divided it up into the several elements of (a) enrichment, (b) at the expense of the payer, (c) which is unjust, (d) without any applicable defences. As a former academic lawyer myself, I know how tempting it is to try to break down caselaw decisions into elements. But the English cases where a mistaken payment is made to an agent (including banker) of the principal, and the agent may, or may not, have accounted to or paid off the principal, may have been misanalysed along the way.

66. The binding English authorities referred to by Marcus Smith J make clear that, if by the time of the claim the agent has already accounted to or paid off the principal, without notice of the claim, the agent has a defence. *But not otherwise*. Where the agent has merely credited the principal, but not yet acted upon it, there is no reason why the agent should not repay (wiping out the credit to the principal), any more than there is any reason why the principal should not repay if it is sued instead of the agent. The Court of Appeal is particularly clear on this in *Portman Building Society v Hamlyn Taylor Neck (A Firm)*. By splitting up the cause of action into too many parts the illusion has been created that there is a *separate* question, in principal and agent cases, to be answered as to "enrichment", when that question is inherently tied up with the question whether the agent has a legal excuse for not obeying the instructions of the principal as to payment elsewhere. But, if the agent *has* such an excuse, there is no countervailing liability. And yet *that* is what the earlier English cases hold. The agent required to reverse a mistaken payment *is* released from any liability to account to its principal for the payment.

67. I referred above to the further point raised by the applicant, that its position as an EMI is distinguishable from that of an ordinary bank. A bank can make use of its customer's funds. An EMI can do so only subject to additional restrictions or conditions. The applicant drew an analogy with trust accounts. An EMI account is not

a trust account. The effect of the 2011 Regulations is not to create a trust for the benefit of customers holding electronic money: "mere segregation is insufficient to create a trust" (*Re Ipagoo LLP* [2022] Bus LR 311, [64], CA).

68. Nevertheless, the applicant submits that an EMI *cannot* be enriched by receipt of the segregated money. Just as solicitors are not enriched by receipt into the firm's client account of client money, because they do not receive it for their own use and benefit, so too an EMI is not enriched by receiving payments in its segregated account for the account of its customer, because it cannot use the money for its own use and benefit. I reject this submission, for the following reasons.

69. If the account is held on trust, it is obvious that the trustee receiving a payment into it is not "enriched", as Millett LJ said in the *Portman* case. It is a *trustee*, after all. But, if the account is not a trust account, where the funds are held on trust for the customer, the beneficial interest in those funds must be in the EMI. Indeed, the applicant accepted in its defence in this case that it was the beneficial owner, at [32](2). But the fact that the legal and beneficial owner of the money in the segregated account is required by law to safeguard it in one of three ways (but has the choice as to which to employ) does not mean that it ceases to be the EMI's own money, or that it is not thereby enriched. It has more beneficially owned assets after the payment than it had before. Moreover, an EMI *can* properly profit from holding the money in several ways, including keeping any interest paid on the segregated account (though in this case apparently there was none). If it insures the deposit it can do what it likes. Indeed, the applicant accepts that it did nevertheless manage to use and profit from the incoming payment. It received fees amounting to about £3,000.

70. In my judgment there is no sufficient distinction to be drawn in the context of this claim between an ordinary bank and an EMI.

Conclusion

71. So the position of the applicant is in this respect the same as for an ordinary bank. As to that, the question whether there is an enrichment, in principal and agent cases, can be answered only by answering a further question, which is part of the question whether the applicant has a defence. But in the present case that question is for later. What that means is that, since the question of defences is not to be dealt with as part of this summary application, I cannot at this stage hold that the applicant has not been enriched. That must await the trial, if there is to be one. Indeed, in terms of the first question, the answer on the authorities must be that the applicant has indeed been "enriched", in the special, technical sense in which the question is formulated. Accordingly, the applicant cannot succeed on this first ground.

"At the expense of the claimant"

Investment Trust Companies v HMRC

72. I turn therefore to the second question. In *Investment Trust Companies v HMRC* [2018] AC 275, SC, the claimant investment trust companies engaged investment managers, who charged for their services and in addition (and in accordance with the then UK legislation) charged VAT at the standard rate, which the claimants paid. The managers accounted for VAT to the defendants in the usual way, that is, by netting off

input tax against output tax and paying over the balance. Subsequently the Court of Justice of the European Union decided that such supplies should have been exempt from VAT. The investment managers claimed repayment of the VAT mistakenly paid under section 80 of the Value Added Tax Act 1994. Repayments were made, but only for the net amounts paid to the defendants by the managers and only for those periods which were not statute-barred. Those repayments were passed back to the claimants, but there was a shortfall, and the claimants brought the present claim for the balance.

73. An important aspect of the case relates to the netting off of input tax against output tax. So I reproduce here two extracts from the judgment of Lord Reed (with whom the other judges agreed) which makes the matter clear:

> "6. It therefore followed from the legislative treatment of the services supplied to the Lead Claimants as taxable, that the Managers were understood to be entitled to pay to the Commissioners only the surplus of their output tax over their input tax, and to retain the balance of the output tax in their own hands. If the input tax exceeded the output tax, they were entitled to a credit, which could be paid by the Commissioners or carried forward to later accounting periods. Thus, for example, if a Manager made taxable supplies to an ITC, and the VAT chargeable on those supplies was £100, then the Manager was bound to account to the Commissioners for £100. If the Manager had purchased taxable supplies during the relevant period on which the VAT was £25, the Manager was entitled to credit for that £25, and was required to pay the Commissioners only the balance of £75.

74. Thus, when it came to refunds by the defendants to the managers,

> "13. … the amounts repaid to the Managers were calculated on the basis that, under section 80(2A), it was necessary to set against the output tax for which they had accounted, the amount of the input tax which they had deducted. It is a matter of agreement that that was the correct approach to the application of section 80. In the illustrative example given in para 6 above, that means that the Managers were entitled to repayment of the £75 which they had paid to the Commissioners, but not of the £25 which they had retained in their own hands."

75. I have already quoted from the judgment of Lord Reed in this case, in dealing with the four questions posed by Lord Steyn in the *Banque Financière* case. In relation to the question which arose on the facts of the *Investment Trust Companies* case, as to whether a payment had been made to the defendant "at the expense of the claimant", Lord Reed said this:

> "43. The nature of the various legal requirements indicated by the 'at the expense of' question follows from [the] principle of corrective justice [referred to in paragraph 42: set out earlier]. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognised by the law of unjust enrichment (for example, because of a failure of the basis on which the benefit was conferred). The expression 'transfer of value' is, however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit.

[…]

45. It should be emphasised that there need not be a loss in the same sense as in the law of damages: restitution is not a compensatory remedy. For that reason, some commentators have preferred to use different terms, referring for example to a subtraction from, or diminution in, the claimant's wealth, or simply to a transfer of value. But the word 'loss' is used in the authorities, and it is perfectly apposite, provided it is understood that it does not bear the same meaning as in the law of damages. The loss to the claimant may, for example, be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss.

46. Situations in which the defendant has received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit, usually arise where the parties have dealt directly with one another, or with one another's property. Common examples are the gratuitous payment of money, or provision of goods or services, by the claimant to the defendant, where there was no intention of donation. In such a situation, if the enrichment of the defendant is unjust – if, in other words, the transfer of value is defective in a sense recognised by the law of unjust enrichment – then the claimant is prima facie entitled to have the enrichment reversed.

47. There are, however, situations in which the parties have not dealt directly with one another, or with one another's property, but in which the defendant has nevertheless received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit. These are generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real.

48. One such situation is where the agent of one of the parties is interposed between them. In that situation, the agent is the proxy of his principal, by virtue of the law of agency. The series of transactions between the claimant and the agent, and between the agent and the defendant, is therefore legally equivalent to a transaction directly between the claimant and the defendant. … There have also been cases, discussed below, in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the purpose of the 'at the expense of' inquiry, on the basis that to consider each individual transaction separately would be unrealistic. …

[…]

52. As explained earlier, the 'at the expense of' requirement is not satisfied merely by the direct receipt of a benefit. The claimant must also incur a loss through the provision of the benefit. … That requirement will not normally be satisfied where the provision of the benefit was merely an incidental or collateral result of his expenditure. … In such a situation, the claimant may have received the consideration for which he bargained as the counterpart of his own expenditure, and in that event will not usually have suffered any loss. Even if he has incurred a loss, it will not normally have arisen through his provision of

something for the benefit of the defendant, since the benefit received by the defendant will have been merely incidental or collateral to the reason why the expenditure was incurred. A 'but for' causal connection between the claimant's being worse off and the defendant's being better off is not, therefore, sufficient in itself to constitute a transfer of value.

[…]

59. Nor is the 'at the expense of' requirement satisfied by a connection between the parties' respective benefit and loss merely as a matter of economic or commercial reality. Economic reality is not only a 'somewhat fuzzy concept', as Moses LJ described it in *Menelaou* [2014] 1 WLR 854, para 62, but one which is difficult to apply with any rigour or certainty in this context, or consistently with the purpose of restitution on the ground of unjust enrichment. … "

76. On the facts of that case, Lord Reed concluded:

"71. Returning, then, to the question whether the unjust enrichment of the Commissioners was at the expense of the Lead Claimants, and focusing on whether there was a transfer of value from the Lead Claimants to the Commissioners, the answer is in the negative. There was a transfer of value, comprising the notional £100, from the Lead Claimants to the Managers, under the contract between them. It was defective, because it was made in performance of a contractual obligation which was mistakenly believed to be owed. There was a subsequent transfer of value, comprising the notional £75, from the Managers to the Commissioners. It was also defective, because it was made in compliance with a statutory obligation which was inapplicable because it was incompatible with EU law. These two transfers cannot be collapsed into a single transfer of value from the Lead Claimants to the Commissioners.

72. That follows from a number of considerations. First, the Lead Claimants do not challenge the judge's rejection of a connection between the payments made by the Lead Claimants and the payments received by the Commissioners based on agency. The intervention of the Managers cannot therefore be disregarded on the basis that they were in law the proxy of one of the other parties. Secondly, since the payments made by the Lead Claimants formed part of the Managers' general assets, to do with as they pleased, it is impossible to trace those payments into the payments subsequently made by the Managers to the Commissioners, and so to regard the Commissioners as having benefited from the receipt of property in which the Lead Claimants had an interest. Thirdly, the fact that there were two separate transactions – first, between the Claimants and the Managers, and secondly between the Managers and the Commissioners – is not in this context something which can be disregarded. In particular, there is no question of the transactions being a sham or involving an artificial step, or of their comprising a single scheme. The first transfer did not even bring about the second transfer as a matter of causation: the judge's rejection of a 'but for' causal connection between the two transfers is not challenged. The Lead Claimants rely on a connection established by commercial or economic reality. But, for the reasons already explained, the fact that, as a matter of economic or commercial reality, the Lead Claimants bore the cost of the undue tax paid by the Managers to the

> Commissioners does not in itself entitle them to restitution from the Commissioners.
>
> 73. It follows that the Lead Claimants did not in principle have any right to restitution against the Commissioners. They did, on the other hand, have a right to restitution against the Managers. That right was to restitution of the entire amount paid in respect of VAT, ie the notional £100. The Managers did not in principle have a change of position defence in respect of the notional £75 which they paid to the Commissioners, since that change of position was reversible under section 80 of the 1994 Act, as I shall shortly explain. Nor did they have a change of position defence in respect of the notional £25 which they retained."

The decision in Tecnimont

77. The applicant in the case before me says that any enrichment it obtained from the payment was not "at the expense of" the respondent, as understood in the present law of unjust enrichment. It is common ground that there was no *direct* transfer of funds between the parties, within paragraph 46 of Lord Reed's judgment. The funds were transferred *indirectly*, as set out above (at [20]). The respondent therefore relies on both the agency and the "set of co-ordinated transactions" cases of indirect transfers that are to be treated as if they were direct transfers, referred to by Lord Reed at paragraph 48 of his judgment. The applicant says that neither of these applies. In support of this submission, it relies on the decision of HHJ Bird, sitting as a High Court judge, in *Tecnimont Arabia Ltd v National Westminster Bank plc* [2023] Bus LR 106, [2023] 1 All ER Comm 57. It is appropriate that I begin with a consideration of this decision.

78. The claimant was induced by an "authorised push payment" fraud to instruct its own bank in Saudi Arabia to pay US$5 million to an account held by a third party with the defendant bank in London. The transfer was effected on 30 October 2018 by a series of interbank transactions conducted by SWIFT messages. First, the claimant's own bank, Saudi British Bank SJSC, issued a payment order to Citibank in the USA, requiring it to pay the funds to the defendant bank in London for the specific account of its own customer. Saudi British Bank would debit the claimant's account with the same sum. Next, Citibank would pay the defendant, and would then debit the account of Saudi British Bank with itself. But no cash moved. Instead, accounts were credited and debited along the journey. The claimant's account with Saudi British Bank was debited, thus enabling Saudi British Bank's account with Citibank to be debited, thus enabling the account between Citibank and the defendant to be credited, and thus enabling the customer's account with the defendant to be credited. The payment mechanism was in principle the same as in the present case, as described earlier in this judgment (at [19]).

79. After discovering the fraud, the claimant brought a claim against the defendant bank. However, by then the funds had almost all been paid out from the customer's account. (There were some 29 payments out between 30 October and 1 November 2018.) The claim was made in both (i) unjust enrichment and (ii) knowing receipt of trust property. The judge tried the claim, hearing the witnesses, and eventually gave a reserved judgment dismissing it. It was not a summary hearing of the kind that took place in the present case, but a full trial. The judge held that the knowing receipt claim failed because the relevant property was not trust property at the time of receipt. The

judge further held that the unjust enrichment claim failed because the payment was not "at the expense of" the claimant.

80. As to the latter point, the judge referred to and set out paragraphs 41 and 42 of Lord Reed's judgment in *Investment Trust Companies v HMRC*. I reproduced these earlier in this judgment (at [28]). The judge then said this:

> "108. The Supreme Court's decision in ITC represents a watershed. Previously, when considering if a defendant's benefit had been obtained 'at the expense of' the claimant, the courts had been guided by perceptions of fairness rather than by ascertainable and fixed rules of law. … In [earlier] cases, the court answered the 'at the expense of question' by considering the closeness of the connection between the claimant's loss and the defendant's gain. In each case the court asked if the connection was 'sufficient' but laid down no principle to explain when the 'sufficiency' criterion was satisfied. The Supreme Court described this exercise as one that was '*too vague to provide certainty*'.
>
> 109. Given that unjust enrichment ranks next to contract and tort as part of the law of obligations, the Supreme Court recognised that rights arising from it should be '*determined by rules of law which are ascertainable and consistently applied*'. Resort '*to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability*' was impermissible.
>
> 110. In view of '*the uncertainty which has resulted from the use of vague and generalised language*' the Supreme Court noted that it had '*a responsibility to establish more precise criteria*'. … "

81. The judge then summarised paragraphs 43 onwards from Lord Reed's judgment, including the examples of indirect dealings leading to a transfer of value in paragraphs 48-49. He then considered the cases of *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176, as examples (as the judge put it at para 116) "of cases where a series of co-ordinated transactions is treated (as a matter of 'transactional reality') as a single scheme or transaction so there can be said to be a 'transfer of value' between the claimant and defendant". Next he considered the decision in *Investment Trust Companies v HMRC* itself as a case where there was no such series of co-ordinated transactions.

82. Then he summarised the decision of the Supreme Court, as follows:

> "121. The outcome of the ITC case provides a helpful application of the principles set out in that case. The relevant conclusion is expressed at paragraphs 71 and 72. The claim was dismissed. The following points appear from those paragraphs:
>
> > a. The key consideration was: had there been a transfer of value from the claimants to HMRC?
> >
> > b. There were in fact 2 transfers of value: from the claimant to the managers and subsequently from the managers to HMRC.

c. The 2 transactions could not be collapsed into one for a number of reasons:

i. The managers did not act as the claimant's agents when paying money to HMRC. Their involvement could not be ignored, and they could not be treated as proxies for the claimant when making payments to HMRC.

ii. Payments made to the managers by the claimant were mixed with the managers' funds and could be dealt with as the managers saw fit. The payments could not be traced into the payments made to HMRC.

iii. The fact that there were 2 separate transactions could not be ignored because (in particular) the transaction was not a sham, it did not involve an artificial step and it did not involve a single scheme."

83. Having considered the submissions in this case in more detail, HHJ Bird set out a number of factors which he considered that he should take into account, as follows:

"130. In considering whether the transaction should be treated as a direct transfer in my view the following factors derived from ITC (and from *Menelaou* and *Banque Financiere*) are of relevance:

a. The analysis must focus on the transactions and not the effect of the transaction. This reflects the need to avoid considering the 'economic reality' of the transaction.

b. The substance of the transaction is key rather than its form. This reflects 'transactional reality' and ensures that 'apparent' features of the transaction give way to 'real' features. The purpose and genuineness of each step must be considered.

c. The nature of the transactions may be important. The fact that charges and land purchases are 'indissolubly bound together' as a matter of law (see *Abbey National v Cann*) was an important feature in *Menelaou*.

d. The number of parties providing (in this case) funds should be considered."

84. Finally, HHJ Bird expressed his conclusions on the question of "at the expense of the claimant" as follows:

"139. Taking each of the factors set out above into account, and taking an overall view of the transactions, it is clear that it would be wrong to treat the international inter-bank transactions in the present case as forming a single scheme or transaction. On analysis it is necessary (and realistic) to treat individual transactions separately.

140. It is only by taking a broad (and impermissible) view of 'economic reality' that it could be said that the present case should be treated as a direct transaction case. Mr Anderson QC noted in closing submissions that 'only a lawyer' could describe the transfer of value as indirect. In my judgment this makes the point. A

pragmatic non-lawyer observer might conclude otherwise, but in doing so would be attempting (inappropriately) to apply an oversimplified version of 'economic reality'.

141. I have also considered if the agency exception might apply. In my view it does not. If A makes a payment to B and B makes a payment to C it would be appropriate to treat the co-ordinated transactions as a direct transfer from A to C if B is the agent of one party or the other (110a above and paragraph 48 of ITC). While the exception allows the agent's involvement to be ignored, it does not create a direct transfer where there is none.

142. In my judgment, the conclusion that the Bank was enriched 'at the expense of' the claimant would be contrary to the decision in ITC and would fail to recognise the established manner in which international bank transfers are made."

Analysis of Tecnimont

85. I was told that that decision has not been taken on appeal. So, I deal with it as it is. I begin with the last point, that a "conclusion that the Bank was enriched 'at the expense of' the claimant would be contrary to the decision in ITC". I regret to say that I cannot agree. The *Investment Trust Companies* case was one concerned with the operation of the statutory scheme for charging, collecting and accounting for VAT, as explained by Lord Reed in his judgment (especially at paras 6 and 8). It had nothing to do with international (or indeed domestic) bank transfers of funds. No doubt the principles applicable to the 'at the expense of' question in that case can and should be applied to other cases, including this one (and that was the purpose of Lord Reed in his judgment). Nevertheless, I cannot help thinking that the very different context in which the Supreme Court had to decide the question has been lost sight of in considering the case of a bank transfer carried out by account set-offs.

86. The first point is that Lord Reed in his judgment (at para 72) notes the first instance judge's rejection of any agency argument, *ie* that the investment managers by accounting to HMRC for their own liability for VAT were somehow acting as the companies' agents to pay *the companies'* VAT liability. Plainly such an argument would have been hopeless, and Lord Reed noted that the companies did not appeal against that dismissal. The companies paid VAT to the managers because they had *contracted* to do so (though under a mistake as to the lawfulness of the charge). Their liability was to the managers, and not at all to HMRC. The managers' liability to account to HMRC arose by statute, and depended on the nature of the business they did (not just with the companies), how much of it they did, and also (crucially) their own input tax paid to third parties. If the managers failed properly to account for VAT to HMRC, that failure could not be attributed to the companies. A decision that an international bank transfer effected through a correspondent bank was within Lord Reed's agency exception would not be inconsistent with the actual decision in that case.

87. Turning to the question of a series of co-ordinated transactions, it is relevant to notice that, in the *Investment Trust Companies* case, the way in which the managers accounted for VAT to HMRC meant that it could not be said that anything paid to the managers would cause a payment to HMRC in the future. Indeed, there might never be anything due from the managers to HMRC. All would depend, as I have said, on

factors outside the companies' control, including the amount of input tax paid by the managers for goods and services supplied to them by third parties. By contrast, with an international bank transfer, the whole point of the customer's initial instruction to its bank was that there should be a credit at the end of the line to a particular third party, which credit would be equal to the value of the debit at the start (save for the addition of any fees charged). That initial instruction can fairly be said to "cause" the credit at the end, at least in a "*sine qua non*" sense (and probably in others too). In my judgment, a decision that an international bank transfer effected through a correspondent bank was within Lord Reed's "series of co-ordinated transactions" exception also would not be inconsistent with the actual decision in that case either.

Discussion

88. So, I should consider afresh the principles laid down by the Supreme Court in the *Investment Trust Companies* case and apply them to the facts of this one. As I have said earlier, I proceed for the purposes of this summary application on the assumption that the respondent will be able to prove its pleaded case at trial. On that basis, I am, first of all, in no doubt that the applicant was "enriched" (in the relevant sense) by a benefit which it gained as a result of the instruction given by the respondent to its own bank, and which instruction caused the respondent a loss of the same value. This was discussed earlier (at [30]-[66])

89. Secondly, this was not a direct transfer of value from the respondent to the applicant. So, in order to decide whether any enrichment was at the expense of the respondent, I must consider whether either of the two exceptional cases of indirect transfer submitted by the respondent (agency and series of co-ordinated transactions) applies. First, there is agency. Here the respondent instructed its own bank to make the transfer to a specific account with the applicant. It did not care how the bank did this, even though it did not expect the bank to send a bullion van from Serbia to London containing gold or banknotes. If it had thought about it, it would no doubt have supposed that a correspondent bank or banks would be involved. But those were matters for the bank to organise. That was what it paid the bank to do. The end result desired was the credit to the specific account in London, and that was all. The bank then organised it, and the end credit was made.

90. To my mind, this is a classic case of agency. The fact that the same banknotes or other chattels are not passed from hand to hand along the way from Serbia to London, or swapped for gold at some point is irrelevant. This is not a tracing case. If A puts B in funds with a direction to pay C, intending no trust of the money, so that B is in the meantime entitled to use the specific payment for B's own purposes, and B then pays C out of B's own funds, no one can doubt that A has paid C by the agency of B. Commercial agents do this every day: see *eg* the well-known case of *Henry v Hammond* [1913] 2 KB 515. And it can make no difference how many agents are involved along the way.

91. The applicant says it might be different if this had been a domestic CHAPS ("Clearing House Automated Payments System") payment, where the payer's bank and the payee's bank (or in either case its clearing house settlement partner) both have accounts at the Bank of England, and settlement is effected by crediting and debiting their respective accounts with that bank. I disagree. The mechanism is in principle the same as for SWIFT transactions, *ie* debiting and crediting accounts, just with fewer

steps. So, the legal treatment should in principle be the same. This is not a case of "taking a broad view of economic reality", as the respondent submits. It is one of looking at the only transaction intended by the respondent, *ie* to transfer funds from its account with its bank in Serbia to that of Zdena Fashions with the applicant in the UK.

92. The respondent's alternative submission is that this constitutes a series of co-ordinated transactions. Again, the respondent instructed its own bank to make the transfer to a specific account with the applicant. The bank arranged for this to happen through its correspondent bank and indirectly through the correspondent's own correspondent. The transactions to achieve this end were co-ordinated and they formed a series. If any of them had failed, the end result would not have been produced. The applicant argues that "the funds at each stage came from multiple parties, not a single provider … depending on the other transactions processed by the banks on the same day". I do not see how that can be established without a trial, but, even were it so established, I do not think it matters, for the reason given above in relation to agency.

93. The applicant once more says that it would or might be different if this had been a domestic CHAPS payment. Once more, I disagree. The same idea of debiting and crediting accounts is being used in both cases. Inserting more steps in the chain does not make use of a different idea. And, once again, this is not about a "broad view" of economic reality. It is about connecting the intermediate steps that lie between the debit at one end of the chain and the credit at the other. In my view they were both connected and co-ordinated.

94. In my judgment, whether one looks at this case as one of agency or simply (if this is different in this case) a series of co-ordinated transactions, either way it involves an enrichment of the claimant at the expense of the respondent by indirect transfer sufficient in principle to satisfy the doctrine of unjust enrichment, subject to questions of "unjustness" and any possible defences, which can be determined only at trial.

The doctrine of precedent

95. That conclusion leaves me with the problem of the application of the rules of precedent. In *Police Authority for Yorkshire v Watson* [1947] KB 842, Lord Goddard CJ, sitting in the Queen's Bench Divisional Court (with whom Atkinson and Lewis JJ agreed), said that:

> "a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court."

96. That statement of the law has been followed ever since. And, in *Willers v Joyce (No 2)* [2018] AC 842, Lord Neuberger, with whom the other judges of a rare, nine-member Supreme Court, said:

> "9. So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. … "

To the same effect, most recently, is the judgment of Jacobs J in *Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm), [110]-[112]. I respectfully agree.

97. Accordingly, I am not strictly bound by the decision of HHJ Bird in *Tecnimont*. But I should (and would) follow it for reasons of judicial comity unless convinced it was wrong. Unfortunately, I *am* so convinced, and I do decline to follow it, preferring my own analysis set out above. On my analysis, looking simply at the elements of enrichment and "at the expense of", there is (at least) a real prospect of success within the meaning of CPR rule 24.3. In my judgment there ought to be a resolution of the claim only after a full trial and the complete facts are known.

Conclusion

98. In the result, therefore, I dismiss the application.