WHEN CAN A DEFRAUDED CLAIMANT SEEK RESTITUTION FROM THE FRAUDSTER'S BANK?

Richard Mott, One Essex Court

A. Restitution of mistaken payments

1. Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, 407 *per* Lord Hope:

> "Subject to any defences that may arise from the circumstances, a claim for restitution of money paid under a mistake raises three questions. (1) Was there a mistake? (2) Did the mistake cause the payment? And (3) did the payee have a right to receive the sum which was paid to him?"

B. A bank's defences to an unjust enrichment claim

2. Niru Battery Manufacturing Co v Milestone Trading Ltd [2002] EWHC 1425 (Comm), paragraph 135 *per* Moore-Bick J:

> "...I do not think that dishonesty in the sense identified in Twinsectra Ltd v Yardley is the sole criterion of the right to invoke the defence of change of position. I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have to be worked out through the cases. **In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.** The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made. **Where he knows that the payment he has received was made by mistake, the position is straightforward: he must return it. This applies as much to a banker who receives a payment for the account of his customer as to any other person**: see, for example, the comment of Lord Mersey in Kerrison v Glyn Mills Currie & Co (1912) 81 LJKB 465, 472. **Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an inquiry be made of the payer. The**

> **nature and extent of the inquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making inquiries of the person from whom he received it.**" (emphasis added)

3. Jones v Churcher [2009] EWHC 722 (QB), paragraph 78 *per* HHJ Havelock-Allan QC:

> "This is the scope of the defence of ministerial receipt. In my judgment the defence fails at the point at which Abbey National could be said not to have acted in good faith in allowing the money to be drawn down by Miss Churcher. On the facts of the present case I do not believe that it adds anything to the defence of change of position."

4. On the subject of what will constitute notice, see also Armstrong DLW GmbH v Winnington Networks Ltd [2013] Ch 156 (insufficient KYC checks meant that the defendant was on notice), and recently in a slightly different legal context Credit Agricole Corporation and Investment Bank v Papadimitriou [2015] UKPC 13.

C. The issue of enrichment

5. It was held by Sales J in Jeremy D Stone Consultants Ltd v National Westminster Bank plc [2013] EWHC 208 (Ch), at paragraphs 242-243, that NatWest was not enriched by any payments made to it in its capacity as the fraudster's bank. That conclusion was sufficient to dispose of the unjust enrichment claim.

6. However, earlier authorities appear to contradict this:

   a. Buller v Harrison (1777) 2 Cowp 565

   b. Cox v Prentice (1815) 3 M & S 344

   c. Kleinwort Sons & Co v Dunlop Rubber Co [1907] 97 LT 263, 265 *per* Lord Atkinson:

> "[I]n an action brought to recover money paid to him under a mistake of fact, [the defendant] will be liable to refund it if it be

established that he dealt as a principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

d. British American Continental Bank v British Bank for Foreign Trade [1926] 1 KB 328, 337 *per* Bankes LJ:

> "It is, I think, clear law that if money is paid to an agent on behalf of a principal under a mistake of fact the agent must return it to the person from whom he received it, unless before the mistake was discovered he had paid over the money he had received to his principal, or settled such an account with his principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund: see Lord Atkinson in [Kleinwort Sons & Co v Dunlop Rubber Co]"

e. In Jones v Churcher (supra) the Court considered an argument that where the payment is made by CHAPS and funds are made immediately available to the account holder by the bank, this by itself constitutes sufficient payment over to the customer by the bank. The Court rejected that argument.

f. See also the High Court of Australia's comments on, and apparent approval of, the concession by the defendant bank in Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 78 ALR 157, 163.

7. The decision in Jeremy Stone is criticised in Bowstead & Reynolds (20th ed.) at paragraph 9-106. Goff & Jones (8th ed.) advocates in principle a wider application of the doctrine of ministerial receipt (which would be consistent with the later decision in Jeremy Stone), but also appears to recognise (at paragraph 28-15) that on the current state of the authorities the law is as suggested above.

Richard Mott

One Essex Court

2 June 2015