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RESTITUTION AND *RES JUDICATA* IN THE IRISH SUPREME COURT

THE celebrated decision of Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr. 1005 has occasioned much controversy for more than two centuries, for at least two reasons. First, it is the *fons et origo* of the principle against unjust enrichment in the common law world, a principle which has only comparatively recently attained judicial respectability. Second, the decision on the facts is difficult; Lord Mansfield allowed a party, who had been compelled in earlier proceedings in another court to pay over a sum of money, to recover that money, a conclusion which seems to sit ill with the principle of *res judicata*. Both aspects of *Moses v. Macferlan* recently fell for consideration in the Irish Supreme Court. In the *Bricklayers' Hall* case (*Dublin Corporation v. Building and Allied Trade Union* [1996] 2 I.L.R.M. 547 (S.C.)) Keane J., for the court, acknowledged that *Moses v. Macferlan* was the basis of the principle against unjust enrichment at Irish law, but declined to treat it as authority for an exception the *res judicata* principle.

For road-widening purposes, Dublin Corporation needed part of the site of the Bricklayers' Hall, the headquarters of the Bricklayers' Guild. It would have cost the Corporation £87,857 simply compulsorily to purchase

it. However, the Hall, appropriately, possessed a fine cut stone facade, and the Guild were reluctant to lose it. To purchase only the portion of the site necessary for road-widening, and to remove, store and reinstate the facade on the remainder of the Hall once the road had been widened, would have cost £224,414. To determine which of these two courses ought to be adopted, the matter was referred by the parties to an arbitrator. During the negotiations, and again before the arbitrator, it was the *bona fide* intention of the Guild to retain the Hall and reinstate the facade; consequently, on May 27, 1985, he made an award on the second (reinstatement) basis. Some time thereafter, the Guild demolished the entire of the Hall; later still, on December 30, 1985, they conveyed to the Corporation the relevant portion of the site and received the £224,414. It being impossible to reinstate the facade, there being no building upon which to construct it, the Guild simply retained the entire sum.

The Corporation claimed that to retain the entire sum without seeking to reinstate the facade unjustly enriched the Guild in the amount of £136,557 (the reinstatement cost, calculated as the difference between the two agreed sums) and sought restitution of that amount. The Corporation succeeded before Budd J. in the High Court, but failed in the Supreme Court. In both courts, it was acknowledged that the principle against unjust enrichment forms part of Irish law (see, *e.g.* O'Dell (1993) 15 D.U.L.J. (*n.s.*) 27), but Keane J. held that even if the Guild had been unjustly enriched at the expense of the Corporation, the doctrine of *res judicata* provided the Guild with a complete defence.

Moses v. Macferlan has always fared rather well in Irish courts; very soon after it had been decided, Lord Lifford L.C. was of the view that it contained "a great deal of learning, and a good resolution concerning the recovery at law out of personal estate, of money by receipt whereof that estate was increased; and if that resolution were understood and followed, it would prevent many equity suits" (*Rochfort v. Earl of Belvidere* (1770) Wall.L. 45, 50). It is unsurprising, then, that Keane J. saw in it the genesis of the principle of unjust enrichment, by which "a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property" ([1996] 2 I.L.R.M. 547 at p. 557). Consequently, in his view, "unjust enrichment exists as a distinctive legal concept, separate from both contract and tort" (at p. 558), a concept which, approving the decision of Deane J. in the High Court of Australia in *Pavey & Matthews PTY Ltd v. Paul* (1987) 162 C.L.R. 221 at p. 256

> "explains why the law recognises, in a variety of distinct categories of cases, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary process of legal reasoning, of the question of whether the law should, in justice,

> recognise the obligation in a new and developing category of case".

Much academic ink has been spilt arguing that the acceptance of such a principle mandates a fourfold enquiry: whether there was (i) an enrichment to the defendant (ii) at the expense of the plaintiff, (iii) in circumstances in which the law will require restitution (*i.e.* the "unjust" phase of the enquiry), (iv) where there is no reason why restitution will be withheld. Keane J. seems to have adopted precisely this rubric. For him (at p. 558), the authorities demonstrate that

> "while there is seldom any problem in ascertaining whether two essential preconditions for the application of the doctrine have been met—*i.e.* an enrichment of the defendant the expense of the plaintiff —considerably more difficulty has been experienced in determining when the enrichment should be regarded as 'unjust' and whether there are any reasons why, even where it can be regarded as 'unjust', restitution should nevertheless be denied to the plaintiff".

In that passage, all four elements of the enquiry are clearly identifiable. In this respect, Keane J.'s judgment represents a significant advance on recent important Australian and English decisions which embrace the principle but fail clearly to separate out these elements.

On the facts, payment by the Corporation to the Guild represents an enrichment to the defendants at the expense of the plaintiff, satisfying the first two enquiries. As to the third, because he had already held that *res judicata* provided a complete defence, Keane J. declined to determine whether the facts disclosed an "unjust" factor. The Corporation had paid the Guild in the belief that the money would be applied to the reinstatement of the facade of the Hall, when its prior demolition made it impossible; for Budd J. in the High Court, not only could it be said that the Corporation's belief was mistaken, but also that the reinstatement basis upon which the payment was made had failed. Assuming that not every mistaken transfer is an example of failure of basis, then, in principle the better view is that the relevant unjust factor is failure of basis (Birks, *Introduction to the Law of Restitution* (rev. ed., 1989), pp. 451–452).

However, although he did not identify an "unjust" factor, Keane J. did observe that "the law, as it has been developed, has avoided the dangers of 'palm-tree justice' by identifying whether the case belongs in *a specific category* which justifies so describing the enrichment: possible instances are money paid under duress, or as a result of a mistake of fact or law or accompanied by a total failure of consideration" (at p. 558, emphasis added). By this express reference to specific categories, Keane J. clearly perceived the principle against unjust enrichment as one which simply unites and describes various categories of cases in which recovery has been allowed: the categories (the "unjust" factors) are the causes of action. An

alternative view of the principle sees it as sufficient in itself to constitute a cause of action. Australian law since *Pavey* has adopted the former, descriptive approach; whereas Canadian law since *Pettkus v. Becker* [1980] 2 S.C.R. 834 seems to have adopted the latter, prescriptive approach. Irish law is now firmly in the former camp.

As to the fourth enquiry, in *Murphy v. Att.-Gen.* [1982] I.R. 341, where the plaintiffs sought restitution of money paid pursuant to an unconstitutional taxing statute, Henchy J. had said that "over the centuries the law has come to realise, in one degree or another, that factors such as prescription . . . , waiver, estoppel, laches, a statute of limitation, *res judicata* or other matters . . . may debar a person from obtaining redress in courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened" (at p. 341) and held that change of position provided the Government with a partial defence. Pointing to this reference to *res judicata*, Keane J. concluded that it here provided a policy to preclude restitution. In the High Court, Budd J. had been of the view that the Guild's receipt was not *bona fide* (when it received the money, it was aware that reinstatement had been rendered impossible by the demolition of the Hall) and, as a consequence, it could not rely on *res judicata*. On appeal, Keane J. treated it—absent fraud—as absolute: it has "the consequence that the parties are estopped between themselves from litigating the issues determined by the aware again" (pp. 555–556). And although such finality is often secured at a cost, the "interest of the public in that finality is given precedence by the law over the injustices which inevitably sometimes result" (p. 556).

However, Spencer Bower and Turner almost immediately qualify a similarly absolute starting point for the doctrine, (*The Doctrine of Res Judicata* (2nd ed., 1969), pp. 11–13), so that in *Arnold v. National Westminster Bank* [1989] 1 Ch. 63, Browne-Wilkinson V.-C., who had also thought that "the doctrine of issue estoppel was an absolute one" (at p. 67), after hearing argument on the point, considered it "clearly established . . . that there can be exceptional circumstances which prevent an issue estoppel from arising . . . [such as] relevant new material, not available at the time of the first decision, [which] has since become available" (at p. 68; affd. [1991] 2 A.C. 93).

However, to accept that the doctrine is more flexible than Keane J. allowed does not lead inexorably to the conclusion that an exception should have been admitted on the facts of the *Bricklayers' Hall* case. That requires strong justification, which, for Keane J., was not to be found in *Moses v. Macferlan*. Moses had endorsed four bills to Macferlan, on foot of an agreement that Macferlan would not sue upon them. Macferlan nevertheless did, and succeeded, evidence of the agreement not being admissible. In a subsequent action, Lord Mansfield allowed restitution of that payment. On the face of it, this would seem to be "a blatant attack upon,

and a *de facto* reversal of, the judgment of a competent court" (Goff and Jones, *Law of Restitution* (4th ed., 1994), p. 764) but the matter is not so easy as it first appears, for at least three reasons.

First, as Keane J. recognised in the *Bricklayer's Hall* case, a plea of *res judicata* cannot be constructed upon a decision procured by fraud, and in *Moses v. Macferlan*, Lord Mansfield was clearly of the opinion that the first decision had been obtained by Macferlan's fraud: "the indorsement, which enabled the defendant to recover, was got by fraud and falsehood, for one purpose, and abused to another" (p. 1012).

Second, there would seem to be no cause of action estoppel, since the first decision did not deal with the cause of action in restitution. Third, there would seem to be no issue estoppel, since the restitution claim was not an issue which necessarily and fundamentally formed the very basis of the first decision. Nevertheless, if a party omits to raise an issue in proceedings, "the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with a particular adverse decision on the . . . issue . . . so omitted" (Spencer Bower and Turner, p. 160). But this assumes that such a litigant could have, or could reasonably have, raised the second plea in the earlier proceedings. If he could not, then he is not estopped in the second proceedings from raising it (*ibid.* p. 166). This rule applies to *Moses v. Macferlan*: the plaintiff in the second action could not rely on the cause of action in restitution as a defence in the first action: thus, for Lord Mansfield "the ground of this action is not 'that the judgment is wrong' but 'that (*for a reason which the now plaintiff could not avail himself of against that judgment*), the defendant ought not in justice to keep the money' " (emphasis added). And this same rule seems applicable to the *Bricklayers' Hall* case: the Corporation could not raise the restitution plea against the Guild before the arbitrator, because the facts which gave rise to the cause of action in restitution did not occur until *after* the date of the award.

Only as strong an understanding of the *res judicata* principle as that adopted by Keane J. could justify estopping the Corporation's cause of action on the basis of the arbitrator's award. But the fact that in other jurisdictions that principle is more flexible should not detract from the significant contribution made by the judgments in the *Bricklayers' Hall* case to the evolution in the common law world of the principles of the law of restitution.

Eoin O'Dell.*

* Trinity College, Dublin.