the House of Lords in *Gregg*, by a 3-2 majority, did reject the claim; and inexplicably, all the Law Lords, with the exception of Baroness Hale, completely ignored *Chester*.

KUMARALINGAM AMIRTHALINGAM

SUBROGATION, RECOUPMENT AND CONTRIBUTION: PRINCIPLES NOT INCLUDED

DESPITE the complexity of the facts in *Niru Battery Manufacturing Co.* v. *Milestone Trading Ltd. (No. 2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm.) 289, the issue before the Court of Appeal was straightforward: could one party which had discharged the liability of another claim restitution from that other party? This would seem to raise an issue of contribution. However, the Court of Appeal treated the case as primarily involving issues of subrogation and "recoupment" and, whilst the judges sought to achieve a result which was just and equitable, their decision was both unjust and fatally flawed by virtue of confusion as to the operation of the underlying principles.

In *Niru Battery (No. 1)* [2003] EWCA Civ 1446, [2004] Q.B. 985 (noted [2004] C.L.J. 276) two parties were found to be jointly and severally liable to the claimant. One was SGS, which was liable for the tort of negligence; the other was CAI, which was liable to make restitution of a mistaken payment by virtue of the unjust enrichment principle. SGS then discharged this liability and sought restitution from CAI on three different bases.

Subrogation

The Court held that the equitable remedy of subrogation was available to enable SGS to recover the whole amount it had paid to discharge CAI's liability, by enabling SGS to rely on the claimant's restitutionary claim against CAI. But it is unclear both why this remedy was sought and whether it was actually available. The Court was aware that subrogation operates to reverse or prevent unjust enrichment, as had been recognised by the House of Lords in *Banque Financière de la Cité* v. *Parc (Battersea) Ltd.* [1999] 1 A.C. 221, but failed to identify clearly whether the key elements of that principle were satisfied. The starting point is the identification of an enrichment. Sedley L.J. asserted that CAI had not been enriched at all (at [88]), whereas Clarke L.J. apparently assumed that the enrichment constituted the initial mistaken payment made to CAI. But this was not obtained at the expense of SGS. The restitutionary claim of SGS turned on the discharge of

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CAI's liability. This was an incontrovertible benefit, since it constituted the saving of an inevitable expense, and was clearly obtained at the expense of SGS. So what was the ground of restitution? Again, it appears to have been assumed that it was the claimant's initial mistake of fact in paying CAI, but this could not have been of any significance to a claim brought by SGS. The only mistake which could have been relevant was if SGS had mistakenly thought it was discharging its own liability; but that is exactly what it was doing. So, at this stage at least, the unjust enrichment principle does not appear to be engaged and so there was no justification for awarding a subrogation remedy.

But even if it was possible to establish that CAI had been unjustly enriched at the expense of SGS, why was subrogation the appropriate remedy? In a simple case of unjust enrichment the typical remedy is that the defendant is required to restore the value of the benefit received, which would be the value of the debt discharged. This would be a personal remedy of money paid for the use of the defendant and there is no need to have recourse to subrogation. The true function of the subrogation remedy has been analysed elegantly and comprehensively by the Court of Appeal in *Cheltenham and Gloucester plc* v. *Appleyard* [2004] EWCA Civ 291, where it was recognised that the classic form of the remedy was proprietary, in that it enables a lender who expects to obtain a security to claim subrogation to another security. Exceptionally subrogation can also operate as a personal remedy, as occurred in *Banque Financière de la Cité* v. *Parc (Battersea) Ltd.* [1999] 1 A.C. 221, where subrogation enabled the claimant to benefit from a contractual undertaking rather than a proprietary security. But, whether in its proprietary or personal form, the usual function of the remedy is to enable a claimant to receive the benefit of a security which was not in fact available to it, by allowing the claimant to stand in the shoes of another party and rely on their security. But that was not the case in *Niru Battery (No. 2)*. There was no security involved. In addition, there was no need to argue that SGS could stand in the shoes of the claimant to bring the claim for, if it could be established that CAI had been unjustly enriched at SGS's expense, then SGS would have a direct personal claim against CAI for the value of the benefit. The facts of *Banque Financière* were fundamentally different. Indeed, in *Appleyard* it was recognised that reference to that case is unlikely to be of assistance in a conventional case. It was certainly a source of confusion in *Niru Battery (No. 2)*.

Nevertheless, the Court of Appeal unanimously concluded that subrogation was available, with the result that CAI was required to

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make full restitution to SGS, meaning that CAI bore full liability for the events which had happened and SGS escaped completely, even though SGS had been negligent. Clarke L.J. sought to justify this result by reference to CAI's fault, in that it should have repaid the money it had received to the claimant rather than paying it on to another party: at [33]–[34]. It had been recognised in *Niru Battery (No. 1)* that this had occurred in circumstances of bad faith, since CAI was aware of the mistake but still paid the money away, and this prevented CAI from relying on the change of position defence. Clarke L J. thought that this meant that CAI was more responsible than SGS for the claimant's loss and that it was just and equitable that CAI should bear the whole liability: at [37]. Sedley L.J. expressed some disquiet about this result and he was right to do so. The strict operation of the law of unjust enrichment, requiring full restitution to the party who has discharged the joint and several liability, is not appropriate where the parties are equally responsible for the harm. That is why the law of contribution can be used to apportion liability between the parties. It is different where one party bears primary liability. Although Clarke L.J. concluded that CAI was indeed primarily liable, this was doubted by Sedley L.J. and rightly so. Where one defendant is liable for negligence and the other for unjust enrichment, which is a strict liability claim, how can the latter be regarded as more responsible? Both defendants had contributed to the claimant's loss, as the trial judge had correctly concluded. From start to finish the analysis of the subrogation remedy was fundamentally confused.

Recoupment

As an alternative to subrogation, the Court also considered the so-called principle of "recoupment" and concluded that CAI would be liable to make full restitution on this basis as well. The Court assumed that "recoupment" constitutes both a cause of action and a remedy and is founded on the fact that the claimant is compelled by law to discharge the defendant's liability. But there is nothing unusual about "recoupment"; it forms part of the law of unjust enrichment. Where the claimant is compelled to discharge the defendant's liability, this constitutes a ground of restitution in its own right for which the appropriate remedy is payment of the value of the discharged debt.

But this type of claim is more complex than the Court of Appeal suggested. It was assumed that, because the defendant's liability was discharged completely, it was liable to make full restitution to the claimant. But that is only relevant where the defendant bears the whole liability or is primarily liable: *Exall* v.

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Partridge (1739) 8 Term Rep. 308, *Moule* v. *Garrett* (1872) L.R. 7 Exch. 101. That was not the case here and so the recoupment claim should have been rejected.

Contribution

Since the Court concluded that the defendant was liable to make full restitution by virtue of either subrogation or recoupment, it was not considered necessary to examine in any detail whether a remedy lay under the law of contribution, although Sedley L.J. would have preferred to focus on this claim. But since neither subrogation nor recoupment were actually available, this was the only appropriate basis for a claim. This too is a response to the defendant's unjust enrichment (as was recognised in *Dubai Aluminium Co. Ltd.* v. *Salaam* [2002] UKHL 48, [2003] 2 A.C. 366, 388 *per* Lord Hobhouse) but, since the statutory regime under the Civil Liability (Contribution) Act 1978 applies, there is a judicial discretion to apportion the liability between the parties: section 2(1). The application of this Act to unjust enrichment claims has proved difficult, primarily because it is not drafted to cater for such claims. According to section 1(1) contribution is available where parties are liable in respect of the "same damage". In *Friends' Provident Life Office* v. *Hillier Parker May and Rowden* [1997] Q.B. 85, a decision of the Court of Appeal, this was held to cover defendants who were liable in tort and unjust enrichment respectively. This was doubted by Lord Steyn in *Royal Brompton Hospital NHS Trust* v. *Hammond* [2002] UKHL 14, [2002] 1 W.L.R. 1397, on the ground that liability in unjust enrichment does not involve "damage". In *Niru Battery (No 2.)* the dictum of Lord Steyn was considered to be obiter and the Court was therefore bound by *Friends' Provident*. Whilst the interpretation of the 1978 Act in the latter case may not be technically correct, for the reason identified by Lord Steyn, it is at least consistent with the purpose of the statute and would enable a court to reach the just result in a case such as this, namely that the liability should be divided equally between the parties.

The confused and incoherent reasoning of the judges in this case is a warning to all: you ignore principles at your peril.

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