

UPDATE

Restitution and unjust enrichment – a flexible tool in aid of justice

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The Cayman Islands Court of Appeal recently applied the law of restitution to adjust a claim for the recovery of instalments paid under two long-term contracts for the purchase of land in circumstances where the contracts were terminated as a result of the repudiatory breaches by the buyer who had been in possession and had full use and enjoyment of the properties. This is a non-conventional application of the law of restitution which is traditionally applied to provide a remedy to a claimant against a defendant unjustly enriched at the claimant's expense.

The decision in *H.E.B Enterprises Ltd & Another v Anthony Richards*¹ considered the development of the law of restitution and unjust enrichment in the modern era, as a flexible remedy to provide a solution in a commercial context.

First Instance Ruling

At first instance, the Honourable Justice Williams of the Cayman Islands Grand Court found that the termination of the contracts amounted to a total failure of consideration which entitled the buyer to the return of all monies paid to the sellers, except, in each case, for a small deposit paid on the date of each contract. The judge made no distinction between instalments of principal and interest for the purposes of the buyer's recovery.

Appeal to the Cayman Islands Court of Appeal

The sellers appealed the decision to the Cayman Islands Court of Appeal (the CICA), emphasising the "remarkable result" where the defaulting buyer was entitled to a full recovery despite having enjoyed possession of the properties for over 19 years. The sellers submitted that the claim should be dealt with under common law and a distinction should be made between the return of principal (to reflect the failure of passing of title) and the non-return of interest (to reflect the use of the property enjoyed by the buyer).

An alternative solution, raised by the court on the appeal, was for the application of restitutionary principles in terms of which the buyer had to give credit for the enrichment he received in the form of the possession of the properties.

Principal and Interest –Whole or Distinct?

The CICA considered the relevant authorities relating to circumstances where a vendor elects to rescind an instalment contract on the purchaser's default, in circumstances where no provision is made for forfeiture and where the purchaser is in possession of the property. The CICA noted the difference between what it labelled as the "academic view" vs. the "judicial view": the academic view being that both the principal amount and interest are irrecoverable as the agreement was an entire contract, providing for both use and occupation for a specified period, with the transfer of title at the end of that period and upon full payment

¹ Unreported, 14 November 2019.

of the principal sum and interest. The basis of the entire contract, including possession, is as such not gone. The judicial view, on the other hand, is that a distinction should be drawn between the principal, which represents the purchase price, and the interest, which represents the value of possession. Under the judicial view, the basis for paying the principal has gone but the basis for paying the interest remains, and therefore, the interest amount should be set-off against the principal in computing the purchaser's recovery.

The CICA concluded that neither view achieved absolute fairness and that a contract of this nature could not be divided between a purchase price for the property and interest for possession. Interest is a factor of the purchase price and is not a way of pricing possession. Instalment sales usually provide for instalment payments to go to interest first, and then to the principal, with the result that most of the interest is paid in the earlier period, and less in the later period. Conversely, rent is priced more evenly.

Justice in Restitution

The CICA held that considerations of justice pushed the court to find a solution which would reflect the commercial situation, and turned to the modern law of restitution to provide a flexible resolution. The CICA noted that a purchaser of property who makes an advance payment for a title which is never transferred is entitled to recover the price paid (other than a deposit), however if the purchaser has enjoyed possession of the property, the purchaser should not be entitled to recover more than would eliminate unjust enrichment on the part of the seller. It would otherwise result in the buyer being unjustly enriched by his possession. In other words, title and possession should be distinguished, providing for the restitution of the purchase price but accounting for a debit to set-off the value of the possession enjoyed by the purchaser.

The CICA instead regarded *mesne profits* as a more reliable means of valuing possession in the absence of an agreed rent. The principle of mesne profits was developed to compensate a landlord when a former tenant retains possession of a premises after termination of the tenancy.

Conclusion

The CICA allowed the sellers' appeal in so far as making a finding that mesne profits should be deducted from the buyer's claim to account for the buyer's possession of the properties. Since, however, mesne profits had not been proved at the trial, the CICA adjusted the buyer's claim by reference to the interest payments which would, in any event, have been lower than the mesne profits.

The CICA's distinction between title and possession, accounting for restitution of the price on the one hand, and the adjustment of mesne profits on the other hand, reflects the principles and functional justice of the law of unjust enrichment, which can be used as a flexible tool to ensure a just outcome in a particular commercial relationship.

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