CMC Holdings Ltd v Martin Henry Forster

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	09 November 2017
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Text

[2017] JRC 190

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
CMC Holdings Limited
First Plaintiff
CMC Motors Group Limited
Second Plaintiff
and
Martin Henry Forster
First Defendant
RBC trust Company (International) Limited
Second Defendant

The Regent Trust Company Limited
Third Defendant

and

Martin Henry Forster
Jeremiah Kiereini
Charles Mugane Njonjo
The Estate of Jack Mordejay Benzimra
The Estate of Prahlad Kalyani Jani
RBC Trust Company (International) Limited
The Regent Trust Company Limited
Third Parties

Advocate N. G. A. Pearmain **for Jeremiah Kieereini**.

Advocate J. P. Speck **for the Second and Third Defendants**.

Authorities

CMC Holdings Ltd v Forster and Others [2017] JRC 014A .

CMC and Others v Forster and Others [2017] JRC 141 .

MacFirbhisigh and Ching v CI Trustees and Ors [2017] JRC 130A .

Holmes v Lingard and Anor [2017] JRC 113 .

Civil Liability (Contribution) Act 1978.

Law Reform (Miscellaneous Provisions)(Jersey) Law 1960.

Pothier Traite des Obligations (1821 Edition).

Maçon v Quérée [2001] JLR 80 .

Royal Brunei Airlines v Tan [1995] 2 AC 378 .

Nolan v Minerva Trust and Ors [2014] (2) JLR 117 .

Re Esteem Settlement [2002] JLR 53 .

Flynn v Reid [2012] (1) JLR 370 .

Classic Herd Limited v Jersey Milk Marketing Board [2014] (2) JLR 487 .

Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2) [2004] EWCA Civ 487 .

Dubai v Aluminium Co Ltd v Salaam [2003] 2 A.C. 366 .

Peterson Pontiac Buick GMC Ltd v Campbell and Isfeld [2013] ABCA 251 .

Patel v Mirza [2016] UKSC 42 .

K. and Another v P and Others v J [1993] Ch. 140 .

Goff & Jones: The Law of Unjust Enrichment.

Companies — reasons relating to refusal to strike out or grant summary judgment of the third party claim against Mr Kiereini.

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons for refusing either to strike out or grant summary judgment of the third party claim brought by the second and third defendants against Mr Jeremiah Kiereini ("Mr Kiereini").

Background

2 The background to the third party proceedings is set out in my two earlier judgments in this matter reported at *CMC Holdings Ltd v Forster and Others* [2017] JRC 014A (the "January judgment") and *CMC and Others v Forster and Others* [2017] JRC 141 (the "September judgment"). I therefore adopt paragraphs 3 to 8 of the January judgment and paragraphs 2 to 8 of the September judgment.

Applicable legal principles

3 There was no dispute between the parties on the applicable legal principles on a strike out application where it is argued that there is no reasonable cause of action and on a summary judgment application. These have been considered by the Royal Court in *MacFirbhisigh and Ching v CI Trustees and Ors* [2017] JRC 130A and by me in *Holmes v Lingard and Anor* [2017] JRC 113.

The contentions

4 Advocate Pearmain for Mr Kiereini argued as follows:-

(i) As the decision to join Mr Kiereini had been made at a hearing at which he was not present, he was entitled to challenge that decision without having to appeal to the

Royal Court.

(ii) Mr Kiereini did not understand the case against him.

(iii) By reference to Mr Kiereini's affidavit sworn on 6 th October, 2017, Mr Kiereini disputed the allegations against him, contended they had caused significant damage to his reputation in Kenya, and stated that there were practical difficulties for him in defending the proceedings in view of his age, the distance from Kenya to Jersey and the expense of litigation in Jersey.

(iv) The doctrine of unjust enrichment could not be used to permit someone who was found to have acted dishonestly to recover a contribution from anyone else because the dishonest assistor could not invoke a remedy in equity.

(v) The doctrine of unjust enrichment did not allow for an allocation of responsibility between wrongdoers. This was both as a matter of Jersey law and because the Jersey courts could not use general notions of fairness to make such an allocation. Only legislation equivalent to the Civil Liability (Contribution) Act 1978 in England ("the 1978 Act") could provide for contributions between joint wrongdoers outside Article 3 of the Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 ("the 1960 Law").

5 Advocate Speck in response in summary contended as follows:-

(i) Although his skeleton argument suggested that Mr Kiereini was not entitled to issue the present application and he would have had to appeal the January judgment, he did not pursue this argument orally. I consider he was correct not to do so.

(ii) The claim against Mr Kiereini was clear. It was the same claim as was made against Mr Njonjo (and the other third parties convened by the second and third defendants) as set out in the September judgment at paragraph 28. Advocate Speck's skeleton argument at paragraphs 76 (a) and (b) in addition repeated its explanation of its case as recorded at paragraph 28 of the September judgment, but inserted appropriate references to Mr Kiereini.

(iii) The writings of *Pothier* (Pothier Traité des Obligations (1821 Edition)) recognised that a debtor could recover from co-debtors part of a debt paid by that debtor based on *équité*. The law of unjust enrichment could therefore be used to apportion liability between wrongdoers who were jointly liable to a plaintiff even if the basis of their liability was different and was not tortious.

(iv) Whether any wrongdoer would be entitled to recover a contribution was a matter for trial, was a question of degree and also depended on whether the misconduct was sufficiently serious to preclude a party from invoking the court's equitable jurisdiction (see *Maçon v Quérée* [2001] JLR 80 at paragraph 65). Dishonesty was not an absolute bar at this stage to a possible recovery by the second and third defendants from any of the third parties they had convened.

(v) Care should be taken as to what was meant by dishonesty. In *Royal Brunei Airlines v Tan* [1995] 2 AC 378, cited in *Nolan v Minerva Trust and Ors* [2014] 2 JLR 117, Lord Nicholls stated:-

> ***"In the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances….*** Carelessness is not dishonesty .
>
> ***Thus for the most part dishonesty is to be equated with conscious impropriety.*** However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective."

6 Subsequent cases both in England and Jersey have made it clear that the standard of dishonesty is an objective standard.

Decision

7 Firstly, Advocate Speck was right not to contend orally that Mr Kiereini was not entitled to a re-hearing and that his only remedy was a right of appeal. I addressed this position at paragraph 44 of the September judgment where I stated:-

> ***"44. In relation to Advocate Steenson's criticism that I should have convened the prospective third parties to allow them to address me at the hearing which led to the January judgment, I am not persuaded by this submission. Firstly, all the second and third defendants had to do was establish a prima facie case. Any third party convened was always entitled to argue that in fact no prima facie case existed, whether as a matter of law or fact. Secondly, to require a third party to appear at a hearing before they had been convened in my judgment as a matter of general practice is likely to cause delay and complexity. While there may be exceptions to this general approach, in most cases, I consider the right course to be for a party seeking to convene a third party to make the application to see whether there is a prima facie case and, if there is a prima facie case, the third party convened can then decide whether it wishes to challenge the order made. That might be on jurisdiction grounds, on the grounds of forum or on the merits using a strike out or summary judgment application (as is now permitted in the case of a summary judgment under Rule 7 of the Royal Court Rules)."***

8 I therefore make no criticism of Mr Kiereini for issuing the application. Indeed, the application was beneficial in the sense that the consideration of the third party proceedings brought by the second and third defendants against the various third parties (including Mr

Kiereini) went further than the arguments canvassed for the January and September judgments.

9 Secondly, in my judgment, the case of the second and third defendants as recorded in the September judgment and repeated in the second and third defendants' skeleton argument for this application is sufficiently clear for Mr Kiereini and his advisors to know why he may be required to make a contribution. I accept that more detail may emerge on discovery about the extent of his role and this may lead to amendments to plead that detail. The essential hook on which the second and third defendants hang their claim is, however, pleaded and can only be resolved at trial.

10 What may have caused confusion are the references in previous skeleton arguments to primary and secondary liability. In future, it might be helpful if this terminology could be avoided. Saying this, I accept that the second and third defendants can only be found liable for dishonest assistance to the plaintiffs if there is a finding of breach of duty by one or more of the directors. Without such a finding, there would be nothing for the second and third defendants to have assisted dishonestly. In that sense, any liability of the second and third defendants to the plaintiffs is contingent upon breaches of duty being established against others. It is only on that contingency being established that a contribution can be sought.

11 The other complication in this case that may have caused confusion is that the plaintiffs have only chosen to pursue one director, Mr Forster, the first defendant. However, the effect of the third party notice is that the Royal Court, absent any determination that there is no issue fit for trial, must determine whether or not the other directors also acted in breach of duty. The fact that the plaintiffs have not asked for such a finding does not matter. The second and third defendants have required the Royal Court to make such a finding. This has two consequences.

(i) Firstly, such a finding is relevant to whether or not the second and third defendants are liable to the plaintiffs at all. If neither the first defendant nor any of the other third parties are found to have acted in breach of duty, then there can be no finding of dishonest assistance.

(ii) Secondly, a finding of breach of duty by one of the third parties is necessary for the Royal Court to be invited to require that third party to make a contribution to any liability for dishonest assistance falling upon the second and third defendants. Without a finding of breach of duty by a third party, that third party could not be required to contribute because that third party would not have been found to have been a wrongdoer. More specifically, in the context of the principles of unjust enrichment, without a finding of breach of duty against a director, that director could not be said to have been enriched or enriched unjustly.

12 I next comment on the affidavit of Mr Kiereini. While I have read his affidavit with care, ultimately the central argument that I had to determine concerned a legal question; namely,

whether or not as a matter of law it is possible for the second and third defendants to seek a contribution from Mr Kiereini relying on the doctrine of unjust enrichment. While I do not underestimate the difficulties Mr Kiereini might face in contesting a complex matter in Jersey for the reasons he sets out, those matters are not relevant to the question of law his application requires me to determine. This is not an application for a stay of these proceedings to have them determined in Kenya where such concerns would be relevant.

13 In relation to the scope of the law of unjust enrichment, the development of this doctrine was recorded by me in the January judgment at paragraphs 66 to 71 where I referred to *Re Esteem Settlement* [2002] JLR 53 and *Flynn v Reid* [2012] 1 JLR 370. In addition to the extracts from *Flynn v Reid* cited in the January judgment, I refer also to parts of paragraph 100 as follows:-

> ***"However, the fact that unjust enrichment could not have been contemplated until recently in the type of circumstance facing the court in this case does not mean that the court is unable to declare new limits on a cause of action for unjust enrichment today.*** Indeed, we think that we would be failing the community in Jersey if we did not attempt to do so, recognizing that the circumstances which apply here might similarly apply in a good many other cases which might not necessarily be expected to come to court."

14 While the context of *Flynn v Reid* related to the division of equity in a property, in my judgment the observations of W. J. Bailhache, Deputy Bailiff (as he then was) are of wider application. The final four lines of paragraph 100 support this view where the judgment stated:-

> ***"So the context for the claim in unjust enrichment may change.*** However, the doctrine of unjust enrichment is a vibrant doctrine. What we need to do is analyse its component parts because there seems no doubt that the ***principles can be applied across a wider basis than merely a cohabitation case of the kind presently under consideration."***

15 Paragraph 101 of the *Flynn v Reid* judgment then referred to extracts from *Pothier* and *Domat*. As Advocate Speck pointed out, *Pothier* recognises five different bases for whether one party might be under some form of legal obligation to compensate another. As part 1, chapter 1 of Pothier (1821 edition) states, "Les causes des obligations sont les contrats, les quasi-contrats, les délits, les quasi-délits; quelquefois la loi ou **l'équité seule**." (underlining added).

16 Where useful analysis is found in *Pothier* is in respect of joint debtors. At paragraph 280 of the 1821 edition, the text states as follows:-

> ***"280. Le débiteur solidaire qui paye le total, peut n'éteindre absolument la dette que pour la part qu'il est tenu de payer pour soi et sans recours. Il a le droit de se faire céder les actions du créancier pour le surplus contre***

ses débiteurs; et au moyen de cette cession d'actions, il est censé, en quelque façon plutôt acheter la créance du créancier pour le surplus contre ses codébiteurs, que l'avoir acquitée .

Le créancier ne peut refuser cette subrogation ou cession de ses actions au débiteur solidaire qui paye le total lorsqu'il a lui demandé: et meme s'il étoit mis hors d'état de pouvoir les céder contre quelqu'un, il donneroit atteinte à son droit de solidité, comme il a été dit supra .

Il y a plus: lorsque le debiteur a, par l'acte de paiement, requis la subrogation, quand meme le créancier la lui auroit expressement refusée, le débiteur, selon nos usages, ne laisse pas de jouir de cette subrogation, sans été obligé de poursuivre le créancier pour le contraindre à la lui accorder. La loi supplée, en ce cas, à ce que le créancier auroit dû faire, et subroge elle-méme le débiteur qui a requis la subrogation, en tous les droits et actions du créancier."

17 In other words, a debtor who pays the total of a debt due by various debtors jointly is, as long as he seeks to exercise a right of subrogation, entitled to step into the shoes of the creditor to recover sums he has paid out (apart from those sums for which he is solely responsible).

18 *Pothier* also specifically recognises that in the case of a joint and several liability arising from a delit, French law allows the debtor who has paid the entire debt to recover a contribution from his co-debtors. At page 250 of volume 1 of the 1821 addition, the text states as follows:-

"Lorsque la dette solidaire procéde d'un délit, lorsque plusieurs ont été condamnés solidairement envers quelqu'un au paiement d'une certaine somme pour la réparation civile d'un délit qu'ils ont commis ensemble; celui qui a payé le total ne peut avoir contre ses codébiteurs, ni l'action pro socio, ni l'action mandati: Selon les principes scrupuleux des jurisconsultes ro-mains, le debiteur qui a payé le total n'a en ce cas aucun recours contre ses codébiteurs .

Notre pratique francoise, plus indulgente, accorde en ce cas une action à celui qui a payé le total, ·contre chacun de ses codébiteurs, pour répéter de lui sa part. Cette action ne naît pas du délit qu'ils ont commis ensemble; elle naît du paiement qu'il a fait d'une dette qui lui étoit commune avec ses codébiteurs, et de l'équité, qui ne permet pas que ses codébiteurs profitent à ses depens de la libération d'une dette dont ils étoient tenus comme lui. C'est une espéçe d'action utilis negotiorum gestorum, fondee sur les mêmes raisons d'équité sur lesquelles est fondée l'action que nous donnons dans notre jurisprudence au fidéjusseur ·qui a payé contre ses co-fidéjusseurs…"

19 *Pothier* therefore recognises that a joint *tortfeasor* can recover from other joint *tortfeasors* a

debt that he has paid. No statute was needed to justify this approach. Rather, the rationale was *équité*, which did not allow co-debtors to profit at the expense of the judgment debtor who discharged the debt (for which they were also responsible), because the remaining joint *tortfeasors* would then profit from the debt being discharged.

20 *Pothier* also clearly recognises that parties who are jointly liable under a contract are able to seek contributions from each other. Again, what is significant is that the basis of one debtor being able to seek contribution from another is *équité*.

21 While the concept of *enrichissement sans cause* only developed at the end of 19th Century in France (as noted in *Flynn v Reid* at paragraph 104), and *Pothier* therefore does not use the phrase *'enrichissement sans cause'* (or 'unjust enrichment'), the legal foundation for both Pothier's analysis and for *enrichissement sans cause* is the same; namely, *équité*. That is why in *Classic Herd Limited v Jersey Milk Marketing Board* [2014] 2 JLR 487, W. J. Bailhache, again as Deputy Bailiff, at paragraph 121 stated:-

> ***"In my judgment, however, the claim here cannot be regarded as a legitimate claim in quasi-contract.*** Such claims, like claims in unjust enrichment, are permitted because equité allows the court to remedy what would otherwise be injustice arising out of the lack of contractual obligation."

22 Advocate Pearmain suggested that quasi-contract and unjust enrichment are one and the same thing. While they have many similarities, and the legal basis underpinning them both is *équité*, the better view is that they overlap and are based on the same juridical foundation of *équité*.

23 The observations of *Pothier* are also consistent with the decision of the English Court of Appeal in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487, referred to at paragraphs 82 to 85 of the January judgment. Identical to the approach in *Pothier* and the extracts cited above, the reason why, in that case, SGS (the fifth defendant in the proceedings) was able to recover against CAI (the fourth defendant) was because SGS stepped into the shoes of the creditor (Niru). SGS was a *tortfeasor* and CAI was liable in equity. At paragraph 61 (as cited in the January judgment), Clarke L.J. stated:-

> ***"I can see no reason of public policy why the court should not afford SGS a remedy in equity in order to achieve what I regard as the just result.*** I would accept Miss Andrews' submission that, as the judge held in paragraph 54, if SGS is not subrogated to *Niru's* ***rights, CAI will remain unjustly enriched, the only difference between that position and the position before the judge's first judgment being that it will be unjustly enriched at SGS' expense instead of at the expense of*** *Niru* . ***In short, far from being contrary to public policy, it would, as I see it, be unconscionable for CAI to keep any of the money which it received by mistake and which it paid away otherwise than in good faith."***

24 I see no difference between the sentiments of the English Court of Appeal in *Niru* in 2004 and the words of *Pothier*, written nearly 200 years earlier.

25 I therefore do not agree with Advocate Pearmain that the doctrine of unjust enrichment should be restricted to claiming an interest in property, and/or that the doctrine cannot be used as the basis for ordering an allocation of responsibility between joint wrongdoers.

26 I should also deal with the authorities insofar as they relied on statute to allocate responsibility between wrongdoers. While I accept that *Dubai v Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366 (also referred to in the January judgment) was based on an English statute (the 1978 Act), the rationale for the liability being distributed between wrongdoers was still because it was just and equitable to do so. At paragraph 53 of *Dubai*, following the extract cited at paragraph 79 of the January judgment, Lord Nicholls continued as follows:-

> ***"53 In the present case a just and equitable distribution of the financial burden requires the court to take into account the net contributions each party made to the cost of compensating Dubai Aluminium.*** Regard should be had to the amounts payable by each party under the compromises and to the amounts of Dubai Aluminium's money each still has in hand. As Mr Sumption submitted, a contribution order will not properly reflect the parties' relative responsibilities if, for instance, two parties are equally responsible and are ordered to contribute equally, but the proceeds have all ended up in the hands of one of them so that he is left with a large undisgorged balance whereas the other is out of pocket .
>
> ***54 Rix J considered this was obvious.*** So did Ferris J, in *K v P* [1993] Ch 140, 149 . ***I agree with them."***

27 There was also no statute in the Canadian case *Peterson Pontiac Buick GMC Ltd v Campbell and Isfeld* [2013] ABCA 251 referred to at paragraphs 53 and 54 of the January judgment. One of the bases for apportioning liability in that case was the doctrine of unjust enrichment, notwithstanding the absence of any statute. I do not therefore accept that the law of unjust enrichment in Jersey should be restricted so as to prevent an allocation of wrongdoing as between joint wrongdoers, as contended by Advocate Pearmain.

28 I do not consider that to allow the doctrine of unjust enrichment to develop in this way, so as to allow an apportionment of responsibility between joint wrongdoers, is acting simply on the basis of some general notion of fairness. All the above authorities ultimately recognised that the basis for the applicability of the doctrine is that it would be contrary to justice to allow loss to fall on one party alone, thus allowing another party responsible for all or part of that loss to escape any liability for it. All regarded it as inequitable to allow liability to fall solely on the entity with the deepest pockets, or against whom it is easiest to enforce a judgment. This was the view I had formed in the January and September

judgments; the more detailed analysis undertaken in this application has confirmed that view.

29 While it would be desirable for the 1978 Act to be adopted in Jersey, I do not see why the development of Jersey law after its English equivalent was passed should await such a statute being passed. I observe it took 25 years to bring in the 1960 Law and that nearly 39 years have now passed since the 1978 Act was passed in England, without any sight of it being adopted in Jersey.

30 In *Patel v Mirza* [2016] UKSC 42, on the question of the issues of leaving law reform to the legislator, Lord Toulson at paragraph 114 stated as follows:-

> ***"In*** *Tinsley v Milligan* ***Lord Goff considered that if the law was to move in a more flexible direction, to which he was not opposed in principle, there should be a full investigation by the Law Commission (which has happened) and that any reform should be through legislation.*** Realistically, the prospect of legislation can be ignored. The government declined to take forward the Commission's bill on trusts because it was not seen to be "a pressing priority for government" (a phrase familiar to the Commission), and there is no reason for optimism that it would take a different view if presented with a wider bill. In *Clayton v The Queen* (2006) 231 ALR 500 , ***para 119, Kirby J said that waiting for a modern Parliament to grapple with issues of law reform is like "waiting for the Greek Kalends.*** It will not happen" and that "Eventually courts must accept this and shoulder their own responsibility for the state of the common law". The responsibility of the courts for dealing with defects in the common law was recently emphasised by this court in*R v Jogee* [2016] 2 WLR 681, ***para 85, and****Knauer v Ministry of Justice* [2016] 2 WLR 672, ***para 26.*** In each of those cases the court decided that it should depart from previous decisions of the House of Lords. That is never a step taken lightly. In departing from*Tinsley v Milligan****it is material that it has been widely criticised; that people cannot be said to have entered into lawful transactions in reliance on the law as then stated; and, most fundamentally, that the criticisms are well founded."***

31 *Patel v Mirza* also considered how far the common law doctrine that a party could not rely on an illegal agreement as a defence to a civil claim should continue to represent the law of England and Wales. The head note states as follows:-

> ***"Per Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Wilson, Lord Toulson and Lord Hodge JJSC.*** The two broad policy reasons for the common law doctrine of illegality as a defence to a civil claim are that (i) a person should not be allowed to profit from his own wrongdoing and (ii) the law should be coherent and not self-defeating. The essential rationale of the doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the

integrity of the legal system (or, possibly, certain aspects of public morality). The rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim does not satisfy the requirements of coherence and integrity of the legal system and should no longer be followed. Instead the court should assess whether the public interest would be harmed by *400 ***enforcement of the illegal agreement, which requires it to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.*** Within that framework various factors may be relevant, but the court is not free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of those considerations, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate (post, paras 99, 101, 107–110, 120, 122–124, 133, 142, 144, 173–175, 186)."

32 While *Patel* was about seeking a return from monies paid under an illegal contract on the basis of unjust enrichment, rather than an allocation of responsibility between wrongdoers, it is a decision that is not inconsistent with the authorities and texts referred to above for allowing unjust enrichment to be used as a basis to allocate liability between joint wrongdoers. To that extent, it is supportive of the conclusion I have reached; if a party to an illegal contract does not face an absolute bar to recover sums paid under that contract, why should one joint wrongdoer face such a bar?

33 The *Patel* decision is also not inconsistent with my conclusion that a dishonest assistor could recover from a joint wrongdoer, notwithstanding a finding of dishonesty. From a Jersey law perspective the point is most clearly put in *Maçon v Quérée* at paragraph 65, which reads as follows:-

> ***"Finally, we have had to consider the impact on this exercise of the plaintiffs' conduct in relation to their inheritance from Mrs. Bessières as discussed earlier in this judgment.*** It is axiomatic that those who invoke the principles of equity in their favour are expected not to have behaved in an unconscionable way themselves-or, as it is sometimes more colourfully put, those who seek equity must come with "clean hands .
>
> ***Where, as here, that principle is violated, it becomes a question of degree whether the misconduct is sufficiently serious to preclude the plaintiff from invoking the court's equitable jurisdiction (see, for example*** , *Jones v. Watkins****(10), per Slade, L.J).*** The circumstances of the present case are not to be dismissed lightly by any means, and we have considered whether it would be right on this ground alone to dismiss the plaintiffs' case in its entirety. In***the context of the case as a whole, however, we think that this would be going***

beyond the requirements of justice."

34 This decision of the Royal Court, which I am bound to follow, means that there is no absolute rule that either illegality or a lack of clean hands or dishonesty operates as an absolute bar to a recovery between joint wrongdoers. Rather, the matter is a question of degree and whether a party's conduct precludes that party from invoking the court's equitable jurisdiction to seek a recovery from another.

35 Whether in this case the second and third defendants, if found liable for dishonest assistance, will be able to persuade the court to allow recovery of a contribution will very much depend on the circumstances found by the court at trial. As noted in previous judgments, Advocate Speck fairly accepted that the court may ultimately not be willing to allow such a recovery having heard all the evidence. That does not mean, however, that the possibility of such a recovery can be ruled out at this stage. Matters may turn on the view the court forms of the directors, because they will have to be found to have been in breach of duty in order for any contribution to be considered at all. The court's findings on whether and, if so, how, any relevant officers of the second or third defendants acted dishonestly will also be relevant; for example, why (if they did not) they had not asked questions which the court considers they should have asked.

36 I also note that the doctrine of having clean hands does not apply to claims under the 1978 Act – see *K. and Another v P and Others v J* [1993] Ch. 140. *K v P* was expressly approved in the *Dubai* case. If it does not apply to claims under statute, why should it automatically apply to prevent a claim in unjust enrichment being advanced at all?

37 Goff & Jones The Law of Unjust Enrichment, as cited at paragraph 88 of the January judgment, notes that the default position is an equal allocation, but that this rule could be departed from "…and an unequal apportionment made, where the causative potency of the parties' actions was unequal. Fourthly, the same result follows where the moral blameworthiness of the parties' actions was unequal. Fifthly, the same result follows where one party gains a larger benefit than the other from the transactions which gave rise to their respective liabilities." Again, these observations do not exclude an allocation of responsibility between individuals found to have caused a plaintiff loss, or suggest that the relative merits of the conduct of parties should prevent such an allocation or at least one being considered at a trial.

38 In conclusion, applying the strike out test, and assuming for that purpose a finding of dishonesty against the second and third defendants at trial, such a finding does not in my judgment mean that the second and third defendants are prevented at this stage from seeking a contribution from either their co-defendant, Mr Forster, or the other directors convened as third parties (including Mr Kiereini). Likewise, applying the summary judgment test, the arguments advanced by Advocate Speck for the second and third defendants are not fanciful or improbable so as to deny the second and third defendants a full exploration of those legal arguments and the relevant facts at a trial. Whether they will prevail is of

course as noted above an entirely different question.

39 For all these reasons both applications by Mr Kiereini were dismissed.