

UPDATE

Mourant successful in Privy Council: *HEB Enterprises Ltd v Richards* and the consequences of repudiation

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The Judicial Committee of the Privy Council (the **Board**) recently released its decision *HEB Enterprises Ltd v Richards* [2023] UKPC 7. The decision is the first to be released following the Board's historic sitting in the Cayman Islands in November 2022 and provides a welcome elucidation of the law of restitution and unjust enrichment as a flexible remedy following repudiation of commercial contracts. Hector Robinson KC and James Anson-Holland appeared for the successful Respondents.

Background

The decision concerned two commercial properties, each subject to agreements to purchase by way of monthly instalments over 20-year periods together with interest. Initial deposits were paid, and it was agreed that the monthly instalments of principal and interest would begin once the buyer had taken possession of the respective properties. The buyer struggled to meet his obligations over the years and the seller eventually rescinded the agreements, which the buyer argued entitled him to recover all monies paid save for the deposits (together with any interest that had accrued on those deposits).

The Grand Court of the Cayman Islands agreed with the buyer and held that he was entitled to recover all monies paid, inclusive of principal and interest, as the termination of the contracts amounted to a total failure of consideration (also known as a 'failure of basis'). The Court of Appeal of the Cayman Islands agreed that there had been a total failure of basis but considered that a full recovery of all monies in restitution was incompatible with the fact that the buyer had enjoyed possession of the properties for many years under the agreements. It was held that the law of unjust enrichment prevented the buyer from leaving the seller without compensation for possession. The Court of Appeal assessed the value of that possession by reference to mesne profits (or occupation rent), which is the equivalent of the rent the buyer would have paid for his occupation of the properties, with the amount capped by reference to the interest payments received by the seller. For a more fulsome discussion of the Court of Appeal's analysis see our summary [here](#).

The Board was tasked with determining whether the buyer was entitled to recover the interest paid by the buyer to the seller. It did so by considering the following questions: (a) what was the entire agreement between the parties to the transactions; (b) what were the consequences of the repudiation of that agreement; and (c) whether there was a total failure of basis, such as would entitle the buyer to recover the interest payments together with the principal. We briefly discuss each issue separately below.

The entire agreement

The two separate written agreements to purchase the properties included clauses with the following effect:

- Clause 4: Titles to the two properties would pass on payment of the final instalment of principal and all outstanding interest (this was referred to as 'closing').
- Clause 5: Vacant possession would be granted to the buyer on closing unless the seller gave express written consent to earlier possession.
- Clause 6: If the buyer failed to complete the agreement and the seller 'rescinded' the agreements, the buyer would forfeit the deposit (together with any interest that had accrued on those deposits) and any

compensation for work the seller had done to the properties at the request of the buyer, with neither party having any further claims for damages one against the other, but with the seller having the right to resell the property and retain the proceeds received on such resale.

The buyer argued that clause 6 operated as a contractual allocation of risk and required the seller to return the principal and interest without deduction, save as expressly provided for in the clause itself. However, the seller argued, and the Board agreed, that the written agreements did not represent the entire agreement between the parties. This was because the written agreements only made sense if the buyer took possession of the properties once he has paid the deposit and agreed to pay the relevant strata fees. The Board held that this was supported by the fact that it was separately agreed that the monthly instalments of principal and interest would begin with possession, which resulted in the seller receiving the equivalent of the full payment of the price as at the time of that possession (ie by being able to earn interest on the monthly instalments of principal paid and interest on the instalments of principal not yet paid). It is also relevant that the buyer would have the right to take possession of the properties and enjoy their value over a significant period of time without paying rent.

As will be seen below, a finding that the entire agreement includes the right to enter into possession and occupation of the properties whilst the instalments of principal and interest were being paid was critical in determining the consequences of the repudiation and whether there had been a total failure of consideration.

Repudiation

The general rule is that if repudiation of a contract by one party is accepted by the other party, the repudiator must compensate the innocent party for the losses suffered as a result of that repudiation, subject to any terms of agreement between the parties. As there was no express term requiring forfeiture of any instalment of principal or interest in the written agreements, the buyer argued that the seller was precluded from retaining those amounts, subject to any valid crossclaim by the seller for breach, any such cross claim being however barred by the terms of clause 6.

The Board rejected this argument on the basis that the buyer had the benefit of possession for many years. It was held (at [50]) that '*... it would have made no sense for the parties to agree that [the buyer] would have that benefit and yet, on his default, towards the end of the instalment period and as the date for closure drew close, have the right to recover all the payments of interest that he had made*'. As such, the general rule applied and the payments made by the buyer under the agreements were not recoverable.

Failure of basis (consideration)¹

The buyer argued that there was a total failure of basis because the monthly instalments of principal and interest were provided in exchange for the transfer of titles to the two properties, something that never occurred. This, the buyer argued, was on the basis that: (a) there was nothing in the terms of the written agreements that allowed interest to be treated as occupational rent; (b) interest would still be payable if the buyer did not occupy the properties, so possession was not the basis for the payment of interest; and (c) the amount of interest payable was in no way related to rent in the sense that it was a feature of the overall price.

The Board held that these arguments must ultimately fail. In doing so, it helpfully clarified that to succeed on a failure of basis argument what is important is whether the party seeking recovery has received any part of the benefit that forms the basis of the agreement governing the payment sought to be recovered. The Board effectively accepted that in the circumstances of the case it was justifiable to treat the basis for the payment of the instalments of principal as being divisible from the basis for the payment of interest. In the case of the former, the basis would be the transfer of title to the buyer. It therefore followed (although the Board did not expressly decide this issue, since it was conceded by the seller) that upon the seller's refusal to transfer title, the buyer would be entitled to recover the payments towards principal. With respect to the interest payments however, the Board held that at least one part of the basis for the interest payments was the buyer's right to possession of the properties for the duration of each agreement. As such, there cannot have been a total failure of basis in these circumstances because the buyer enjoyed the

¹ The Court of Appeal of the Cayman Islands and the Judicial Committee of the Privy Council adopted the term '*failure of basis*' as opposed to '*failure of consideration*', which is often confused with the doctrine of consideration in contract. See, for example, Charles Mitchell, Paul Mitchell, Stephen Watterson *Goff & Jones The Law of Unjust Enrichment* (10th ed, Sweet & Maxwell, London, 2022) at [12-10] et seq.

right to possession of each property until he repudiated the agreements. The seller was therefore entitled to retain the interest payments as consideration for the buyer's possession.

Conclusion

The decision reaffirms the flexibility of the law of restitution and unjust enrichment to prevent either party to a contract from receiving an unjust windfall upon the termination of the contract. It is a recognition of the principle that restitution as a remedy is not strictly defined by the written terms of the contract between the parties and a court in determining whether one party is being unjustly enriched by retaining a benefit conferred by the other party to the contract, may have regard to the entire dealings between the parties to determine the real basis on which the benefit was conferred, and in turn whether the basis of the transfer of benefit has wholly failed.

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