

CANADA / JUDGMENT

Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership

2015 BCCA 421

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 421 Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership,

2015 BCCA 421

Date: 20151007

Docket: CA41943

Between:

Barafield Realty Ltd. and Bristol Investments Ltd.

Respondents

(Plaintiffs)

And

Just Energy (B.C.) Limited Partnership [formerly ES (BC) Limited Partnership], dba Energy Savings B.C. and in its capacity as successor to CEG Energy Options Inc., and the same Just Energy (B.C.) Limited Partnership

Appellant

(Defendant)

Corrected Judgment: The text of the judgment was corrected at paragraph 57 where changes were made on October 14, 2015.

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated
May 29, 2014 (Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership,
2014 BCSC 945, Vancouver Docket S117898).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2015

Place and Date of Judgment:

Vancouver, British Columbia

October 7, 2015

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Willcock

Table of Contents

I. Introduction. 3

II. Background. 3

III. Issues on Appeal. 5

IV. New Issue on Appeal. 5

V. Privity of Contract. 6

VI. Vesting Order and Novation. 7

VII. Money Had and Received. 13

VIII. Order. 17

Summary:

The trial judge awarded damages for breach of contract in circumstances where the findings of fact precluded there being privity of contract. The matter arose ancillary to CCAA proceedings which approved the purchase of gas supply contracts by the appellant. The appellant also argued that it was entitled to succeed on the ground that the CCAA proceeding had created a novation. The respondent argued that the privity argument was not made below, and therefore should not be heard. In the alternative, the respondent said it was entitled to succeed on the doctrine of money had and received, as there was practical compulsion. Held: Appeal allowed. It was appropriate to hear the argument based on privity as it arose directly from the findings of the court below. As there was no privity of contract, there could be no breach of contract. The judge was correct in his interpretation of the orders and contracts, that there was no novation. The issues arising from the respondent's position, that it was entitled to succeed based on the doctrine of money had and received, and that there was no practical compulsion, require factual findings on matters not considered and decided in the first instance. The matter is remitted back to the trial judge.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] At trial the appellant companies Just Energy (B.C.) Limited Partnership [formerly ES (BC) Limited Partnership], dba Energy Savings B.C. and in its capacity as successor to CEG Energy Options Inc. and the same Just Energy (B.C.) Limited Partnership ("Just Energy") were found to be in breach of a contract to supply natural gas. The respondent companies Barafield Realty Ltd. and Bristol Investments Ltd. ("Barafield") were awarded \$824,888.13 in damages. Just Energy appeals the trial judge's order, finding them in breach of contract and awarding damages.

II. Background

[2] Barafield owns residential apartment buildings in the Greater Vancouver area. Prior to April 2006, Barafield had purchased natural gas for its apartments from Terasen. The rates paid for natural gas fluctuated based on market price. In January 2006 Barafield entered into contracts with CEG Energy Options Inc. ("CEG") to provide natural gas at a fixed rate for 5 years (the "Contracts"), from May 1, 2006, up to and including April 30, 2011. Since the Contracts were at a fixed rate, Barafield would benefit if the market rates for natural gas increased above \$9.29 per gigajoule.

- [3] During the term of the Contracts, CEG entered into bankruptcy and Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA], proceedings. Just Energy purchased a portion of CEG's contracts including the Contracts. The purchase of the Contracts was approved by the Alberta CCAA court on August 18, 2008 (the "Vesting Order"), although Barafield did not receive notice of the proceeding. The Contracts included a clause that gave Barafield the right to terminate the Contracts in the event of default, which acts of default included the insolvency of CEG.
- [4] Following notice of the purchase of the Contracts by Just Energy, Barafield terminated the Contracts based on the contractual terms, of which, it says, Just Energy was aware, and had made a calculated risk. There was ample evidence to support the assertion that Just Energy made a calculated risk, which was a finding in the court below. On the other hand, Barafield saw the insolvency of CEG as an opportunity to rid itself of what it saw as an unfavourable fixed-price contract for natural gas, as the market rates for natural gas had fallen.
- [5] The termination of the Contracts was not accepted by Just Energy on the basis that the assignment of the Contracts, approved by the Vesting Order, was an acquisition permitted without the consent of Barafield. Barafield continued to assert its right to terminate the Contracts but paid for the natural gas based on invoicing from Terasen. At the end of the Contracts' term Barafield sued.
- [6] The trial judge, in reasons indexed as Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership, 2014 BCSC 945, found that Just Energy was in breach of contract when it failed to get Barafield's consent to the assignment of the Contracts. Barafield was awarded \$824,888.13 in damages for breach of contract, being the difference between the amount Barafield paid Just Energy for natural gas less the amount it would have had to pay a third party.

III. Issues on Appeal

- [7] Just Energy says that the trial judge committed two errors.
- [8] First, Just Energy says the trial judge erred in concluding that Just Energy was liable to Barafield for breach of contract. The findings below precluded any privity of contract between Just Energy and Barafield, and therefore Just Energy could not be liable for breach of contract.
- [9] Barafield says that the order below was correct. Just Energy's argument that there was no privity of contract between the parties is a new argument raised for the first time on appeal. The court should exercise its discretion not to entertain this argument. The acquisition of the Contracts was by assignment. In the alternative, the judge's order is justified by the doctrine of money had and received, which was also pleaded and argued.

- [10] Second, Just Energy says that the trial judge erred in failing to find that the Vesting Order provided for novation of the Contracts without the consent of Barafield. Thus there was no breach of the Contracts that would allow Barafield to terminate the Contracts.
- [11] On this argument Barafield says that the trial judge did not err in interpreting the Vesting Order, and applied the leading cases correctly. Absent explicit language, a vesting order should not be interpreted to abrogate a third party's rights to terminate a contract based on insolvency, or to make an agreement where consent or notice is required.

IV. New Issue on Appeal

- [12] Barafield says that the question of privity should not be considered as this raises a new issue on appeal.
- [13] In *Suen v. Suen*, 2013 BCCA 313, this Court discussed the circumstances in which it would entertain argument on a new issue on appeal:
- [67] The circumstances in which a new issue may be raised on appeal were addressed in *Athey v. Leonati*, [1996] 3 S.C.R. 458. There, the Supreme Court of Canada found that this Court erred in refusing to consider certain of the appellant's arguments on the grounds that they were not raised at trial. The Supreme Court set out a two-fold test to be met for an appellate court to entertain a new argument on appeal (at paras. 51 and 52): (i) all the relevant evidence to the submission must be found in the record (para. 51), and (ii) the respondent must not suffer prejudice by the failure of the appellant to raise the new argument at trial (para. 52).
- [14] Thus, this Court may consider the privity of contract issue if: (1) all evidence relevant to the issue is in the record before the court, and (2) there is no prejudice by failing to raise the issue at trial.
- [15] In my view this test is met. The argument of Just Energy is not a new theory or defence that would have required additional evidence at trial. It raises a question of law that arises directly from the findings of the court below. Nor do I see any prejudice to Barafield from this matter not being argued below. As the issue arises from the findings of the court below (as a result of the court's rejection of other arguments) it cannot prejudice Barafield.

V. Privity of Contract

- [16] The trial judge's reasoning in finding Just Energy liable for breach of contract can be summarized as follows: (1) the Contracts were assigned to Just Energy in the CCAA proceedings; (2) the provisions of the Contracts required that Barafield consent to any assignment; (3) Barafield refused consent to the assignment of the Contracts; (4) there was no novation through the CCAA proceedings such that Just Energy stood in the place of CEG; (5) as consent to the assignment was refused, Just Energy was in breach of the Contracts; therefore (6) Just Energy is liable to Barafield for breach of the Contracts.

- [17] I agree with Just Energy that the flaw in this reasoning is that the logical consequence of steps (2), (3) and (4) is that there was no privity of contract between Just Energy and Barafield such that Just Energy could be liable for breach of contract. Barafield says that the court's decision below was a factual finding or finding of mixed law and fact entitled to deference. Further, Barafield says that the award of damages is supportable on the basis of the doctrine of money had and received.
- [18] With respect to the first point, in my view, the argument of Just Energy on the privity issue is a pure question of law. It says that on the findings made below there was no privity of contract; there was no contract and therefore, as a matter of law damages for breach of contract are not available: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.
- [19] I agree that the court below erred in finding Just Energy in breach of the Contracts based on the reasons above. There was no privity of contract between Just Energy and Barafield. That said, Just Energy also argues that the court below erred in failing to find novation, and coupled with the terms of the Vesting Order, Barafield was precluded from refusing the assignment, and thus there was no breach.
- [20] The second matter raised by Barafield, that the trial judge's conclusion is supportable on the doctrine of money had and received, is a matter that was pleaded but not dealt with by the trial judge. I will deal with the consequences of that below.

VI. Vesting Order and Novation

- [21] In order to understand Just Energy's arguments it is necessary to refer to the Contracts assignment provision, the terms of the Asset Purchase Agreement and the terms of the Vesting Order.
- [22] The Contracts contain the following provision:
9. Assignment - The parties may only assign their respective rights and obligations under this Agreement with the written consent of the other party, which consent shall not be unreasonably withheld. Any company that acquires substantially all of the properties of either party, whether by purchase or merger, will assume the rights and obligations created by this Agreement. In the event that the Customer attempts to assign this Agreement or any part hereof without the consent of CEG, at CEG's option, this Agreement may be terminated with 2 days notice and CEG may make a claim for damages for breach of this Agreement as per Section 3 (Liquidated Damages). [Emphasis added.]
- [23] The relevant paragraphs in Madam Justice Romaine's Vesting Order are:
2. The purchase and sale agreement for the sale of all of the customer contracts ("CCs") (including customer lists, books and records, and accounts receivable associated therewith) of CEG located in British Columbia (the "B.C. Assets") dated August 11, 2008, between ESBC and CEG (hereinafter referred to as the "Purchase Agreement"), attached as Exhibit "A" to the

Affidavit of Kelly Blanch sworn August 12, 2008, and the transaction contemplated therein pursuant to which ESBC has agreed to purchase CEG's right to title and interest in the B.C. Assets, be and it is hereby approved.

3. Approval is hereby granted to CEG and CEG is hereby authorized and directed to proceed with the transaction(s) contemplated by the Purchase Agreement and in particular, the sale by CEG to ESBC of all of CEG's right, title and interest in and to the B.C. Assets, and to take all steps necessary to complete the transaction(s) contemplated therein (the "Transaction") and, for greater certainty the sale of the B.C. Assets is also approved pursuant to paragraph 15(a) of the Amended and Restated Initial Order dated July 30, 2008 (the "Amended and Restated Initial Order"), granted by Madam Justice B.E.C. Romaine in these CCAA proceedings.
4. Upon closing of the Purchase Agreement, all of the right, title, and interest of CEG, and any parties claiming through it in and to the B.C. Assets will be extinguished and all of CEG's right, title and interest in and to the B.C. Assets shall vest absolutely and forever in ESBC, free and clear of and from any and all estate, right, title, interest, claims, hypothecs, mortgages, charges, liens (whether contractual, statutory or otherwise), options, agreements, disputes, debts, encumbrances, or other rights, limitations or restrictions of any nature whatsoever, or any other contractual, financial or monetary claims of any nature whatsoever, whether or not any of the foregoing have attached or been perfected, registered or filed, and whether secured, unsecured or otherwise (collectively, the "Encumbrances") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to CEG's right, title and interest in the B.C. Assets are hereby expunged and discharged as against the B.C. Assets.

[Emphasis added.]

[24] The purchase agreement (the "Asset Purchase Agreement") contains the following provisions:

Article 2 - Purchase and Sale

2.1 Purchased Contracts - On and subject to the terms and conditions of this Agreement, Vendor agrees to sell, assign and transfer to the Purchaser, and the Purchaser agrees to purchase and accept from the Vendor, all of the Vendor's right, title and interest in and to the Purchased Contracts as of and with the effect as of the Effective Time.

2.5 Benefits and Obligations. Subject to the Closing having occurred:

- (b) the Purchaser shall be entitled to all benefits and responsible for all obligations of any kind and nature accrued or accruing, paid or payable, received or receivable with respect to the Purchased Contracts to the extent such benefits and obligations relate to a time after the Effective Time or to natural gas consumed by the Customer under such Purchased Contract after the Effective Time ...

3.1 Assumption of Liabilities by Purchaser. Subject to the provisions of this Agreement and to the Closing having occurred, the Purchaser agrees to assume, pay, satisfy, discharge, perform and fulfil, from and after the Time of Closing, those obligations and liabilities of the Vendor, and each of them, in relation to the Purchased Contracts which arise or accrue and are to be paid, satisfied, discharged, performed and fulfilled after the Effective Time (the "Assumed Liabilities")

7.2 Conduct Prior to Closing Date. Without in any way limiting any other obligations of the Vendor hereunder, during the period from the date hereof to the Closing Date:

- (b) Contractual Consents - The Vendor shall use its commercially reasonable efforts to obtain, at or prior to the Time of Closing, the consents, approvals and release of information required to transfer the Purchased Contracts to the Purchasers, including with respect to the Utility, and Purchasers shall co-operate reasonably with Vendor in obtaining such consents, approvals and release of information, including providing financial information concerning the Purchasers if such information is required to obtain a consent or approval.

Article 9 - Conditions of Closing

9.1 Conditions of Closing in Favour of Purchaser

- (a) The purchase of the Purchased Contracts is subject to the following terms and conditions for the exclusive benefit of the Purchaser, to be performed or fulfilled at or prior to the Time of Closing:
 - (ii) Covenants. All of the obligations, covenants and agreements contained in this Agreement to be complied with or performed by each of the Vendor at or prior to the Time of Closing shall have been complied with or performed in all material respects.
- (b) If any of the conditions contained in Section 9.1(a) for the benefit of the Purchaser shall not have been satisfied at the Closing, the Purchaser may, without limiting any other right that the Purchaser may have at law or in equity, at its sole option, waive compliance with any such term, covenant or condition in whole or in part on such terms as may be agreed upon without prejudice to any of its rights of rescission in the event of non-performance of any other terms, covenant or condition in whole or in part.

Article 10 - Closing, Transfer of Possession and Post Closing Matters

10.4 Vendor's Closing Deliveries. At the Closing, the Vendor shall deliver or shall cause to be delivered to the Purchaser the following documents:

- (b) copies of such consents and approvals (regulatory or otherwise) in respect of the Purchased Contracts which the Vendor has obtained pursuant to the terms hereof as of the Closing Date.

[Emphasis added.]

- [25] The trial judge found that the Contracts required consent to their assignment and the Vesting Order did not create a novation. I substantially agree with that analysis.
- [26] The Contracts expressly required consent to their assignment. The terms of the Asset Purchase Agreement contain provisions by which CEG was required to obtain consents to the transfer of the Purchased Contracts (Art. 7.2(b)) and to provide those consents to Just Energy before closing (Art. 9.1(a)(ii)).
- [27] If CEG failed to provide the consents required under Article 9.1(b), then Just Energy was entitled to waive delivery of consents by CEG or Just Energy was entitled to rescind the Asset Purchase Agreement (Art. 10.4(b)). CEG did not provide consents to the assignments. Just Energy did not rescind the Asset Purchase Agreement as it was entitled to when CEG failed to provide the consents.
- [28] The question then arises, as argued by Just Energy, whether the Vesting Order created a novation such that Just Energy stood in the place of CEG and thus Barafield was not required to provide its consent.
- [29] Paragraph 2 of the Vesting Order includes approval of the purchase of the Contracts. There is no provision in the Vesting Order, or in the application for that order, that specifically dispensed with the need to obtain Barafield's consent to the assignment of the Contracts. The Vesting Order does not expressly or by necessary implication waive the provision requiring Barafield's consent to any assignment.
- [30] Paragraph 4 of the Vesting Order allows for the transfer, assignment and acquisition of the Contracts to Just Energy unfettered by "claims" of CEG's creditors against the Contracts. Barafield is not, however, a creditor of CEG. Nor does Barafield make claims through CEG. Paragraph 4 of the Vesting Order provides that on closing (1) the right, title and interest of CEG, or parties claiming through CEG, are extinguished in, inter alia, the Contracts, (2) the CEG assets are vested in Just Energy free and clear of all claims, and (3) all encumbrances against the Contracts are expunged and discharged. The Vesting Order says nothing about the rights of the counterparty to the Contracts. It does not by its terms dispense with Barafield's right to require its consent to any assignment.
- [31] I see nothing, then, in the express terms of the Vesting Order that entails that there was a novation. Is there something in the context of these proceedings that by necessary implication entails that a novation was intended, notwithstanding that the Asset Purchase Agreement provides that Just Energy could resile from completing the Asset Purchase Agreement if CEG did not provide the consents? I see nothing to that end.
- [32] Indeed, as Barafield notes, Just Energy was at all material times aware of the clause in the Contracts that assignment required consent, and both before and after the Vesting Order in its internal communications addressed that issue, and how it could be dealt with. It is apparent from those communications that Just Energy's actions were calculated assessing the risks to it of not obtaining consents to the assignments.

- [33] Just Energy was a party to the proceedings giving rise to the Vesting Order, was aware that there was a risk that third parties, such as Barafield, might not consent, and yet the Vesting Order does not expressly provide for novation. Barafield was not a party to the proceedings giving rise to the Vesting Order and, indeed, had no notice of the proceeding.
- [34] That raises the neat point of whether notice of the proceedings is necessary before a court in CCAA proceedings may make an order affecting the substantive rights of third parties. Of course invariably the initial order made in CCAA proceedings, staying proceedings, will affect third party rights. In this case, however, the position of Just Energy is that the CCAA court making the Vesting Order did and could make an order which abrogated Barafield's rights to terminate the Contracts arising from the insolvency of CEG or to refuse assignment of the Contracts. In other words, the Vesting Order assigned the benefits of the Contracts to Just Energy, but not the burdens, all without notice to Barafield.
- [35] In that regard I find instructive the decision of Madam Justice Fitzpatrick, in *Veris Gold Corp. (Re)*, 2015 BCSC 1204 [Veris], in which she discussed the current statutory authority to approve assignments found in s. 11.3 of the CCAA. Section 11.3 came into force in September 2009, after the Vesting Order made in these proceedings. Section 11.3 codified and clarified what had been the general approach to assignment issues. The court found that the best practice is to serve all counterparties to particular contracts that are sought to be assigned: *Veris* at paras. 56, 59-64.
- [36] The approach in earlier cases was to give "appropriate" relief that should result in "fair" treatment to all stakeholders: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70. The effect on assignment to the counterparty is relevant and third party rights should only be affected as is absolutely required to assist the reorganization and in a manner fair to the counterparty: *Nexient Learning Inc. (Re)*, [2009] O.J. No. 5507 at para 59.
- [37] In my view, these authorities are inconsistent with Just Energy's position that the Vesting Order should be read expansively to abrogate the right of the counterparty to the Contracts to exercise their right under the Contracts to terminate the Contracts upon defined acts of default.
- [38] The Asset Purchase Agreement expressly refers to CEG providing consents, and gives Just Energy the ability to resile from the agreement if the terms are not met. The Asset Purchase Agreement, referred to in the Vesting Order, and the Vesting Order must be read together. The only reasonable inference from that reading is that the Vesting Order did not provide for novation in the circumstances here, but contemplated the assignments requiring the consent of Barafield.
- [39] While this matter is ancillary to a CCAA proceeding, the matter we are considering is one where a third party purchases contracts of the debtor corporation, without notice to the counterparty of the contracts, knowing of and therefore assuming the risk of not obtaining consent to an assignment. There is no CCAA purpose that enures to the benefit of the interpretation of Just Energy in these circumstances. The terms of the Vesting Order and

Asset Purchase Agreement must be considered based on the meaning of the language employed. In my opinion, neither supports the proposition that a novation was intended or achieved.

VII. Money Had and Received

- [40] Barafield seeks to support the judgment below based on the doctrine of money had and received. This was pleaded in the court below but not addressed. Just Energy replies that the doctrine has no application in circumstances here where it is shown that there was no practical compulsion. These matters were not addressed by the judge below because of his finding that Just Energy breached the Contracts.
- [41] Under the doctrine of money had and received, a party that pays money which it is not bound to pay, "under the compulsion of urgent and pressing necessity", can recover the payment: *Maskell v. Horner*, [1915] 3 K.B. 106 [Maskell], approved by *Eadie v. Brantford (Township)*, [1967] S.C.R. 573 at 581 [Eadie].
- [42] Just Energy submits that where a payor, like Barafield, has a fair opportunity of contesting its liability through some form of administrative or adjudicative process, but instead elects to give way and pay, the payment is voluntary and there is no practical compulsion.
- [43] Justice Spence in *Eadie* rejected the suggestion that compulsion requires the payor to have been faced with a situation where there was no other alternative but to pay. He held that "a practical compulsion is alone necessary. In each of the three cases in this Court approving *Maskell v. Horner* there were other courses available to the plaintiffs but those other courses were time consuming and impractical.": *Eadie* at 582.
- [44] The case law cited by Just Energy does not establish a general proposition that the payor must either litigate or have his or her payment deemed voluntary. In *Maskell*, the plaintiff continually paid, under protest, tolls to the defendant for 12 years. The defendant threatened to seize, and indeed did seize on occasion, the plaintiff's goods if the tolls were not paid. Only after the tolls were found to be illegal in a separate action, not brought by the plaintiff, did the plaintiff litigate for the return of the money paid. Lord Buckley rejected the defendant's contention that by not seeking to litigate the plaintiff's payments were voluntary at 123:

Mr. Upjohn contended that that learned judge meant to lay down as a general proposition that under circumstances such as those in the present case the party called upon to make payment has an option either (1.) to litigate the question or (2.) to submit and pay, and that if he does the latter, the payment is by way of gift to the person to whom he pays and closes the transaction between them. In my opinion it is not the fact that there exist only those two alternatives of which the person called upon to make payment must elect one, and that if he elects to pay, his payment is by way of gift and is voluntary.

- [45] The cases that Just Energy relies on in support of the general proposition involve situations where one party has sufficient time to seek an adjudicative decision and yet chooses not to do so.
- [46] In *Mady Development Corp. v. Sandwich West (Township)*, [1997] O.J. No. 1395 (C.A), the Ontario Court of Appeal found that there was no practical compulsion because the plaintiff had ample time, over three months, before entering into an agreement to apply to the court for an interpretation of a by-law. In *Brent v. Slegg Construction Materials Ltd.*, 2007 BCSC 661, the plaintiff was anxious to obtain a further mortgage so he paid the defendant's builders lien to obtain a discharge rather than resorting to his statutory remedies. In both of these cases, the plaintiff had no pressing, pre-existing, agreement that compelled the plaintiff to make a payment. The plaintiff chose to make the payment for the sake of commercial expediency.
- [47] These decisions, in my view, stand for the proposition that where a party seeks to enter into an agreement which is dependent on it making a payment for which the party disputes it must pay, and the party has time to seek a determination of the validity of the payment but chooses not to do so, then the party is not practically compelled to make the payment.
- [48] Barafield's choice to delay litigation does not necessarily mean its continued payments to Just Energy were not practically compelled. The question to be answered is whether Barafield was truly practically compelled to continue paying Just Energy for two years under urgent and pressing necessity rather than pursuing other options, including litigating against Just Energy or requesting Terasen return Barafield to their market natural gas supply.
- [49] Barafield argues that it was compelled to pay Just Energy because had it stopped paying, its gas supply would have been cut off, resulting in a breach of its obligation to supply heat to its tenants. In *Maskell*, continued payments over 12 years were found to be compelled under the threat that the defendant would seize the plaintiff's goods if the plaintiff failed to pay. Barafield submits that the present case is analogous to *Maskell* in that it was compelled to make continued payments for a long period of time at the risk of having its goods, gas supplied to heat its tenants' homes, withheld.
- [50] Barafield submits that it was unable to communicate with Terasen directly in regards to its natural gas supply because in 2006 it signed a "Notice of Appointment of Marketer" that gave CEG sole authority to deal with Terasen on Barafield's behalf:

Authorization -- I give my Marketer the authority to do what is required with respect to the supply of natural gas for the premises including entering into the necessary agreements with Terasen. I acknowledge that Terasen will be entitled to rely solely on communications from the Marketer with respect to my enrollment in the applicable Commodity Unbundling Service for the premises as well as the termination or expiry of my natural gas supply agreement for the Premises with the Marketer. I direct Terasen to release to my Marketer any and all historical and ongoing consumption information for the Premises.

- [51] Just Energy says that there is no evidence in the record as to what would have been done if Barafield did not make its payments to Terasen: Barafield did not raise this issue with Terasen at the time, gave no notice of protest to Terasen, and did not call someone from Terasen to give evidence related to this topic.
- [52] The trial judge's finding that Barafield had no choice but to pay was not made in the context of considering the alternative basis of liability, money had and received, and the issue of practical compulsion as discussed in the authorities, nor did it consider the evidence of Barafield's principal, Mr. Shrum, in that context.
- [53] With respect to remedy, Just Energy submits that if Barafield is entitled to a remedy for money had and received, the appropriate remedy should be limited to the disgorgement of the profits made by Just Energy and not the contractual damages as assessed by the trial judge.
- [54] The doctrine of money had and received is a restitutionary claim. In restitution it is generally not material that the plaintiff has suffered a loss if the defendant has gained no benefit. No recovery exists by a claim of restitution without a benefit which has "enriched" the defendant and which can be restored to the donor in specie or by money: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 789a-790b.
- [55] During the hearing, counsel presented the court with a formula for calculating the gross profits Just Energy made on the gas supplied to Barafield. In response to a request by the court, in submissions received after the hearing, counsel have agreed that the gross profit earned by Just Energy during the relevant period (August 2008 to April 2011) is \$218,704.90.
- [56] This Court is not in a position to determine if Barafield should recover on the alternative ground, money had and received, including the issue of whether the standard of practical compulsion was met, as that would require making factual findings on matters at issue which were not considered and decided in the first instance. Likewise, the appropriate remedy, if any, is a matter for the trial judge.

VIII. Order

- [57] In the result, I would allow the appeal and remit the matter to the trial judge to consider the alternative arguments which were not addressed.
- [58] The appellant is entitled to its costs in this Court.

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Willcock "

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