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CANADA / JUDGMENT

## Stevested Machinery & Equipment Ltd. v. Metso Paper Ltd.

2014 BCCA 91

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COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 91 Stevested Machinery & Engineering Ltd. v. Metso Paper Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Stevested Machinery & Engineering Ltd. v. Metso Paper Ltd.,

2014 BCCA 91

Date: 20140310

Docket: CA041116

Between:

Stevested Machinery & Engineering Ltd.

Appellant

(Plaintiff)

And

Metso Paper Ltd.

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia dated  
July 12, 2013 (Stevested Machinery & Engineering Ltd. v.

Metso Paper Ltd., 2013 BCSC 1236, Vancouver Docket S117573)

Counsel for the Appellant:

M.A. Feder

A. Cocks

Counsel for the Respondent:

G.B. Gomery, Q.C.

P. R. Senkpiel

Place and Date of Hearing:

Vancouver, British Columbia

January 30, 2014

Place and Date of Judgment:

Vancouver, British Columbia

March 10, 2014

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

Summary:

The plaintiff sued the defendant in contract and unjust enrichment in respect of work it had performed on ten parts for a pulp mill that the defendant had contracted to supply to the owner of the pulp mill. Four of the parts were finished and delivered, but the owner of the pulp mill cancelled its contract with the defendant prior to delivery of any of the remaining six parts. The defendant made a claim to the owner of the pulp mill in respect of the work done by the plaintiff on the six undelivered parts, and they agreed to settle the claim for \$250,000 and the transfer of title to the parts from the owner of the pulp mill to the defendant. The owner of the pulp mill subsequently made a plan of arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, and it was estimated that the defendant would be paid only \$9,000 on account of the \$250,000 receivable.

The trial judge found there was no contract between the plaintiff and the defendant with respect to the plaintiff's work on the six undelivered parts. He also dismissed the claim of unjust enrichment on the bases that the defendant was not enriched and that there was a juristic reason for any enrichment. The plaintiff appealed the dismissal of the unjust enrichment claim.

Held: appeal allowed. The defendant had received incontrovertible benefits in the form of the account receivable from the owner of the pulp mill and title to the undelivered parts. The plaintiff is not entitled to have the defendant's enrichment valued at the \$250,000 settlement amount or in any other amount other than the benefit actually received by the defendant or its value at the date of the trial. The appropriate remedy in the circumstances is the declaration of a constructive trust in favour of the plaintiff over both the account receivable and the undelivered parts.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

## Introduction

- [1] The appellant, Stevested Machinery & Engineering Ltd., sued the respondent, Metso Paper Ltd., for approximately \$1 million, alleging breach of contract or, alternatively, unjust enrichment in respect of machining work it performed on certain castings intended to be supplied as parts to Catalyst Paper's pulp mill at Elk Falls. In these reasons, I will refer to Stevested as the plaintiff, Metso as the defendant and Catalyst Paper as Catalyst.
- [2] The trial judge found that there was not a contract between the plaintiff and the defendant in respect of the work done by the plaintiff on these castings and that the defendant had not been unjustly enriched as a result of the plaintiff's work. He dismissed the plaintiff's action.
- [3] The plaintiff appeals from the dismissal of its action. It does not challenge the trial judge's finding with respect to the contractual claim, and the appeal is limited to the issue of unjust enrichment.

## Background

- [4] The parts in question are called segment holders (they are also known as segment keepers and stator holders). They are components of mechanical pulp grinders. The process of manufacturing the segment holders consists of pouring rough castings at a foundry, rough machining of the castings, heat treatment, stress relief (which is letting the castings sit for three months) and final finish machining.
- [5] The defendant is in the business of supplying products and services to the pulp and paper industry. It was contacted in 2000 by Catalyst because the segment holders at Catalyst's Elk Falls pulp mill were not functioning well. In 2001, the defendant produced a prototype segment holder for Catalyst. The machining for the prototype was done by the plaintiff, which has been in the business of precision machining since the 1970s.

- [6] In 2006, Catalyst decided to go forward with a program of replacing ten of its segment holders over a number of years. It arranged to have ten rough castings poured at a foundry. As it was anticipated that Catalyst and the defendant would enter into a contract for the supply of the finished segment holders, Catalyst arranged to have the castings delivered to warehouse space rented by the defendant from the plaintiff.
- [7] Discussions began in late 2006 between the plaintiff and the defendant about the plaintiff doing the machining work for the ten segment holders. The trial judge found that the oral discussions between the parties did not give rise to a contract in respect of the machining work for all ten segment holders and that the parties entered into two contracts when the plaintiff accepted purchase orders issued by the defendant in September 2007 with respect to segment holders #1 and #2 and in May 2008 with respect to segment holders #3 and #4. No purchase orders were issued by the defendant in respect of segment holders #5 to #10.
- [8] The plaintiff purchased equipment for the machining of the segment holders but did not ultimately use it. It did, however, upgrade its existing 5-axis machine centre in order to do the machining.
- [9] The plaintiff began the rough machining of the segment holders in early 2007, when the defendant was still negotiating its contract with Catalyst. The defendant and Catalyst entered into their contract effective August 30, 2007, although it was not signed until January 2008. I will refer to it as the Catalyst contract or the contract.
- [10] The Catalyst contract provided for the delivery of segment holder #1 in December 2007 and the delivery of segment holder #2 in January 2008. For segment holders #3 through #10, two additional segment holders were to be delivered in each of the years 2008 through 2011. The price for each of the first two segment holders was set out in the contract and the price for the remaining segment holders was to be determined in November of the year preceding the year of delivery.
- [11] The Catalyst contract gave Catalyst the right to defer the performance of the work and the right to cancel the contract. In the event Catalyst cancelled the contract, s. 16.1 of the contract required Catalyst to pay the following to the defendant:
- (a) costs for materials and labour which the [defendant] has actually expended or is irrevocably committed to pay; and
  - (b) actual direct costs reasonably incurred by the [defendant] in stopping its performance under this Agreement;
- together with profit of 12.5% on these amounts and interest.

- [12] All of the work on the first four segment holders was completed, and they were delivered to Catalyst in 2007 and 2008. Catalyst paid the defendant the amounts due it under the Catalyst contract, and the defendant paid the plaintiff the amounts due it under the purchase orders issued by the defendant. There have been no issues in the litigation about these segment holders.
- [13] In 2008, the plaintiff completed the rough machining of segment holders #5 and #6, and it did some rough machining of segment holders #7 through #10. It did not have a purchase order from the defendant for this work.
- [14] In early 2009, Catalyst announced a curtailment of production at its Elk Falls mill, and it then shut the mill down indefinitely. Although denied by the plaintiff, it appears the trial judge accepted the testimony of the defendant's representative that he told the plaintiff to stop work at this time.
- [15] The plaintiff continued to do work on the segment holders. In either May or June 2009, the plaintiff took the position it needed a written notice to stop the work. The defendant's representative initially indicated that such notice would be given but, when the plaintiff claimed that the giving of notice would amount to confirmation of a contract between the parties, the defendant declined to give written notice.
- [16] The plaintiff continued with the final finish machining of segment holders #5 and #6 and the rough machining of segment holders #7 through #10 until September 2009. The plaintiff said it finished the machining of segment holders #5 and #6 because, if they were taken off the machining equipment without being finished, they would likely have had to be scrapped.
- [17] In January 2010, counsel for the plaintiff made demand on the defendant for payment of \$376,265.40 in respect of its work on segment holders #5 and #6. The letter also stated that the defendant had an unconditional obligation to pay the amounts in respect of segment holders #7 through #10. The defendant's vice-president and legal counsel replied that the only contracts between the parties in respect of the segment holders were the purchase orders issued by the defendant. In July 2010, the plaintiff's counsel reiterated the demand for payment.
- [18] Catalyst's Elk Falls mill remained closed. By letter dated July 30, 2010 to the defendant, Catalyst cancelled the Catalyst contract in accordance with its provisions.
- [19] In August and September, 2010, the plaintiff provided information to the defendant for submission of a claim to Catalyst under s. 16.1 of the Catalyst contract. It included the full cost in respect of segment holders #5 and #6, and for component costs, machining charges and a claim for overhead and profit in relation to all 10 segment holders. The defendant submitted a claim to Catalyst on October 6, 2010 in the amount of \$384,256.
- [20] The defendant and Catalyst reached a settlement of the defendant's claim in January 2012, shortly after the plaintiff's action was commenced. The settlement contemplated a payment of \$250,000 to the defendant and the conveyance to the defendant of title to segment holders

#5 through #10. However, the \$250,000 payment was not made because Catalyst filed for protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, in late January 2012, and subsequently made an arrangement with its creditors (also commonly referred to as a reorganization plan) pursuant to that statute.

- [21] Although the trial judge stated in his reasons for judgment that the defendant received \$9,000 of the \$250,000 settlement amount, the evidence at trial was not that the defendant had received payment but that it anticipated receiving 3.6 cents on the dollar (or \$9,000) on a distribution to Catalyst's unsecured creditors under its arrangement.
- [22] The evidence at trial with respect to the value of segment holders #5 to #10 was that there was no demand for them as finished parts at the time. The defendant estimated their value to be their scrap value, which was approximately \$10,000 to \$11,000.

### Decision of the Trial Judge

- [23] After concluding that no contract was made between the parties for any work on segment holders #5 to #10, the trial judge turned to the plaintiff's alternate claim of unjust enrichment. The judge reviewed principles of the doctrine of unjust enrichment set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Kerr v. Baranow*, 2011 SCC 10; *McDonald v. Coys of Kensington (sub. nom. Cressman v. Coys of Kensington (Sales) Ltd.)*, [2004] EWCA Civ 47; *Skibinski v. Community Living British Columbia*, 2012 BCCA 17, leave to appeal to SCC refused, 2012 CanLII 41194; and *Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248, leave to appeal to SCC refused, 2006 CanLII 35606.
- [24] The judge accepted the defendant's position that the plaintiff's work on segment holders #5 to #10 had no value to the defendant, with the result that the defendant was not enriched by the work. The judge rejected the plaintiff's position that the defendant did not pursue the claim against Catalyst assiduously.
- [25] The judge also found there was a juristic reason for any detriment to the plaintiff and referred to *Skibinski* for the proposition that the courts did not develop the law of unjust enrichment to create a remedy for a participant in failed contract negotiations when that participant was free to walk away without suffering a loss, and chose not to walk away.

### Issues on Appeal

- [26] In its factum, the plaintiff asserts the trial judge made five specific errors. However, the overarching question on this appeal is whether, on the facts properly found by the judge, the plaintiff established a claim of unjust enrichment. I will deal with this overarching question before discussing the specific errors alleged by the plaintiff.

- [27] The test for unjust enrichment is well known. It has three elements: (a) an enrichment of the defendant; (b) a corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment: see, for example, *Pacific National Investments* at para. 14 and *Kerr* at para. 32.
- [28] It is clear the plaintiff suffered a detriment because it was not paid for its work on segment holders #5 to #10. Therefore, the issues to be determined on the appeal are whether there was a corresponding enrichment of the defendant and whether there was an absence of a juristic reason for the enrichment. If there was an unjust enrichment, there will also be issues with respect to the value of the benefit and the appropriate remedy.

## Discussion

### (a) Enrichment of the Defendant

- [29] *Kerr* contains an excellent discussion by the Supreme Court of Canada of the doctrine of unjust enrichment. Mr. Justice Cromwell, for the Court, said the following about the element of enrichment:
- [38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
- [30] In *Peel*, Madam Justice McLachlin (as she then was) explained that the benefit must be incontrovertible, which she described as a "gain of 'a demonstrable financial benefit' or the saving of an 'inevitable expense'" (p. 794). She went on to say the following at p. 795:

An "incontrovertible benefit" is an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture. Where the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice.

- [31] With respect, it is my opinion that the trial judge erred when he accepted the defendant's position that the plaintiff's work had no value to it. In my view, the defendant did receive two tangible and incontrovertible financial benefits as a result of the plaintiff's work.
- [32] When Catalyst terminated the Catalyst contract, the defendant had the right under s. 16.1 of the contract to be paid "costs for materials and labour which the [defendant] has actually expended or is irrevocably committed to pay". The defendant consulted with the plaintiff and put forward a claim to Catalyst under s. 16.1. At the time, the plaintiff was taking the position that it had a contract with the defendant in respect of segment holders #5 to #10, while the defendant was taking the position that it was not contractually committed to pay

for the work on those segment holders. Although the trial judge subsequently held that there was no contract, it was the work done by the plaintiff (and uncertainty with respect to the parties' legal positions) that permitted the defendant to put the claim forward.

- [33] Catalyst did not accept the claim as presented, and negotiations ensued. A settlement agreement between the defendant and Catalyst was reached as a result of those negotiations. The defendant received two tangible and incontrovertible benefits under the settlement agreement: an account receivable payable by Catalyst and title to segment holders #5 to #10 (which had been owned by Catalyst). The defendant received two assets as a result of the plaintiff's work and, in my view, this was sufficient benefit to found a claim in unjust enrichment.
- [34] The defendant did not receive payment of the full amount of the account receivable as a result of Catalyst's filing under the Companies' Creditors Arrangement Act, and had not received any payment from Catalyst by the time of the trial. The trial judge mistakenly believed that the defendant had already received the \$9,000 payment from Catalyst, but he never explained why it did not constitute a benefit to the defendant. In my view, any payment to the defendant under the settlement agreement with respect to the s. 16.1 claim would be an incontrovertible benefit to the defendant. At the time of the trial, it was an account receivable due to the defendant and represented a realizable benefit to the defendant.
- [35] The judge noted there was no reasonable prospect that the segment holders would be ordered by Catalyst in view of its insolvency, and there was no other market in the world for them. He concluded there was no reasonable prospect the value of the segment holders could be realized by the defendant and their \$11,000 value as scrap metal did not arise from any of the work done by the plaintiff.
- [36] While it is true that the scrap value of the castings was not enhanced by the plaintiff's work, it does not follow that the defendant did not receive a realizable benefit as a result of title to the castings being transferred to it by Catalyst. The defendant received title to the castings as part of the settlement of its claim under s. 16.1 of the Catalyst contract. The only reason it could make the claim under s. 16.1 was because the plaintiff had done work on the castings (and there was uncertainty as to whether the defendant was irrevocably committed to pay for that work). If the plaintiff had not done the work on the castings and the s. 16.1 claim had not been made, there would have been no reason for Catalyst to transfer title to the castings to the defendant.
- [37] I conclude the defendant was enriched as a result of the plaintiff's work on segment holders #5 to #10.

(b) Absence of Juristic Reason

- [38] In *Garland*, the Supreme Court of Canada developed a two-stage approach to the juristic reason analysis. Mr. Justice Iacobucci, for the Court, described it as follows:

- [44] First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (Pettkus [Pettkus v. Becker, [1980] 2 S.C.R. 834]), a disposition of law (Pettkus, supra), a donative intent (Peter [Peter v. Beblow, [1993] 1 S.C.R. 980]), and other valid common law, equitable or statutory obligations (Peter, supra). If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis.
- [45] The prima facie case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
- [46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.
- The above passage was quoted with approval by Cromwell J. in Kerr (at para. 43).
- [39] In the present case, there is no juristic reason from an established category, and it is necessary to move to the second stage of the analysis involving the reasonable expectations of the parties and policy considerations.
- [40] The trial judge's reasoning that there was a juristic reason for any enrichment the defendant may have obtained was contained in the following paragraph:
- [169] Last, I find the expenditure on upgrading of equipment was undertaken with a view toward a profitable venture and work was started on segment holders before a purchase order was issued in expectation that one would be forthcoming. It cannot be said those [sic] expenditure conferred a benefit upon Metso or caused a detriment to Stevested without juristic reason. As the Court noted in Skibinski, the courts did not develop the law of unjust enrichment to create a remedy for a participant in failed contract negotiations when that participant is free to walk away from the subject matter of the intended contract without suffering a loss or detriment, and chooses not to walk away.

- [41] In *Skibinski*, the plaintiff was an adult care provider who entered into contracts with Community Living British Columbia ("CLBC") to pay for her services in respect of approved patients. The plaintiff took a patient into care but CLBC took the position that she should not have taken the patient into care because she already had the maximum of two full-time patients. The plaintiff ceased taking care of one of these patients, and the plaintiff began contract negotiations with CLBC for the care of the new patient. The contract negotiations did not conclude, and CLBC wrote a letter to the plaintiff rescinding its offer to contract for her services. The plaintiff continued providing care for the patient, and sued CLBC for payment for her services. The trial judge gave judgment for the full amount claimed by the plaintiff on the basis of unjust enrichment.
- [42] On appeal, this Court allowed the appeal to the extent of setting aside the award of compensation for the period after CLBC wrote its letter of rescission. It did not, however, set aside the award of compensation for the period of the contract negotiations.
- [43] In my opinion, *Skibinski* does not support a finding that a juristic reason exists for the defendant's enrichment because it is distinguishable from the present case in two respects. First, in *Skibinski*, it was clear there was never a contract between the parties, and the holding of this Court was to the effect that the plaintiff did not have a legitimate expectation of being paid for her services after CLBC brought the contract negotiations to an end. In the present case, there was a disagreement between the parties as to whether they had entered into a contract, and there was an expectation that Catalyst would want further segment holders. For example, if the plaintiff had provided segment holder #5 to the defendant without having a contract and if the defendant received payment from Catalyst for the segment holder, it cannot be suggested that there would be a juristic reason for the defendant being entitled to retain the payment without paying for the work done by the plaintiff.
- [44] The second distinguishing feature is that, in *Skibinski*, CLBC did not receive payment from a third party in respect of the services provided by the plaintiff. Here, the defendant made a claim under s. 16.1 of the Catalyst contract in respect of costs it was "committed" to pay the plaintiff. It received benefits on account of the claim.
- [45] In my opinion, it must be inferred that the reasonable expectations of the parties were that if the defendant received payment or other tangible benefits on its s. 16.1 claim, it would pass the payment or other benefits on to the plaintiff. There are no policy reasons for allowing the defendant to retain the benefits it received. The claim was made by the defendant to recover costs it was committed to pay the plaintiff. Although the defendant took the position that it had no contract with the plaintiff, it presumably submitted the s. 16.1 claim in order to protect itself in case it did have contractual liability to the plaintiff. The fact it was ultimately determined that the defendant did not have contractual liability to the plaintiff is not, in my view, a juristic reason to entitle the defendant to retain the benefits it received in settlement of its claim.

- [46] As there was an enrichment to the defendant with a corresponding deprivation to the plaintiff and as there was no juristic reason for the plaintiff to retain the enrichment, it is my opinion that the plaintiff made out its alternate claim of unjust enrichment.
- (c) Valuation of the Benefit
- [47] In my view, this issue is the most important one of the appeal, both in terms of principle and quantum. It is the position of the plaintiff that it should receive the realizable value of the benefits received by the defendant at the time of their receipt, not the actual benefits it obtained or the realizable value of the benefits at the date of the trial. It submits the question of value or quantum should be referred back to the trial court but, as I understand its submissions, the plaintiff says the realizable value of the benefit is at least the \$250,000 settlement amount plus a sum that properly reflects the value of segment holders #5 to #10, and may be as high as the full amount of the claim that could have been made by the defendant under s. 16.1 of the Catalyst contract.
- [48] The plaintiff begins its submission in this regard by citing statements of the Supreme Court of Canada in *Kerr* (at para. 38) and *Garland* (at para. 37) that the benefit need not be retained permanently by the defendant. However, in my view, this proposition does not assist the plaintiff because the issue here is not whether the defendant retained the benefits it received, but whether the defendant could have realized greater value for the benefits than their value at the date of the trial.
- [49] The plaintiff then refers to the decision of this Court in *Malik (Representative Ad Litem of) v. State Petroleum Corp.*, 2009 BCCA 505, as an example of a case where the benefit was valued at the time it was first received. In that case, the plaintiff was entitled to a finder's fee as a result of assisting the defendant in acquiring oil concessions in Sudan. The parties never finalized the terms of a finder's fee agreement, and it was common ground that the plaintiff was entitled to a quantum meruit award in order to redress an unjust enrichment. The trial judge determined the amount of the award with reference to an \$18 million value of the concessions based on the market price of shares given in exchange for the concessions in an arm's length transaction.
- [50] On appeal, the plaintiff asserted that the fee should be based on the present value of the oil reserves or, alternatively, the price of the shares two years after the arm's length transaction. In holding the trial judge did not err in valuing the opportunity at \$18 million, Mr. Justice Lowry said the following:
- [52] The best evidence of the value of an asset is usually the amount a willing purchaser will pay. Here, the amount was \$18.0 million. In terms of assessing value, whether State agreed to sell the oil concessions (if it acquired them) to Arakis for \$18.0 million or Arakis agreed to acquire State, which had only one potential asset, is of no consequence. What may have happened to the value of the shares of Arakis after the bargain was struck - whether they were trading higher or lower - is of no real consequence. Arakis agreed to a share exchange valued at \$18.0 million contingent upon the concessions being acquired. That is the best

measure of the value of the acquisition.

- [51] The Malik case is clearly distinguishable from the present circumstances, and I do not regard it as standing for the general proposition that in an unjust enrichment claim the benefit is to be valued at the time when it is first agreed the defendant is to receive the benefit, as opposed to the time the benefit is actually received by the defendant or its value at the date of the trial. In Malik, the plaintiff was to be paid a finder's fee expressed as a percentage of value of the concessions obtained, and this Court simply held that the trial judge had not erred in his valuation based on an arm's length transaction which was entered into shortly before the concessions were acquired.
- [52] The plaintiff next says there is authority for the proposition that market value should be ascribed to a benefit when it is realizable, not when it is actually realized, and refers to McDonald v. Coys of Kensington (cited by the trial judge for the point that a remedy exists if the benefit is conferred by mistake); Marston Construction Co. Ltd. v. Kigass Ltd. (1989), 46 Build. L.R. 109, 15 Con. L.R. 116 (Q.B.); and Salna v. Awad, 2011 ABCA 20. In my view, these authorities address the issue of whether the defendant received an incontrovertible benefit and not the time at which the benefit should be valued.
- [53] In McDonald, the owner of a car sold it through auctioneers. The car had the equivalent of a personalized licence plate ("TAC 1") known as a registration mark. The mark was supposed to have been retained for the benefit of the seller but the auctioneers submitted a defective retention form. Title to the mark passed to the purchaser, who refused to return it and who subsequently gave the car and the mark to his partner.
- [54] In dismissing an appeal from a judgment against the purchaser in the sum of £15,000, the Court of Appeal discussed three academic approaches to addressing the requirement that the benefit be incontrovertible. Two of the competing approaches were that (a) "no reasonable man would say that the defendant was not enriched" (para. 33), and (b) the defendant "gained a financial benefit readily realisable without detriment to himself" (para. 34). An intermediate approach was "whether it is reasonably certain that the defendant will realise the positive benefit in the future" (para. 35). The Court found the first approach too restrictive and the intermediate approach susceptible to tactical stances or manoeuvring. The Court held that the purchaser was liable because he could have easily returned the mark but opted to keep it and pass it on to his partner.
- [55] The "readily realisable" approach was adopted in the earlier English decision in Marston Construction, where the plaintiff was impliedly requested to do work with respect to replacement of a factory, which had burned down, in anticipation of a contract being awarded when insurance money was forthcoming. The court held the defendant received a realizable benefit to be valued at a subsequent trial.
- [56] In Salna, one of the plaintiffs paid the defendant's share of drilling costs in a concession in which they both held a share. The Alberta Court of Appeal held that this payment constituted an incontrovertible benefit to the defendant because although the hole in

question was dry, it allowed the defendant to participate in a second phase that led to a farm-out agreement. The plaintiff in the present case relies on the acceptance by the court, at paras. 33 and 34 of Salna, of the following passage from Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, loose-leaf edition (Toronto: Canada Law Book, 2004 -) vol. 1 at 3-17 to 3-19:

In our view, the most useful analytical device for distinguishing cases in which recovery is appropriate from those in which it is not is to ask, in each instance, whether the defendant has been genuinely or, as others have said, "incontrovertibly" benefited by the conferral in question. The defendant will be incontrovertibly benefited, of course, by the receipt of a money payment. As well, however, incontrovertible benefit can be established, in our view, by the

conferral of a benefit which represents an expenditure the defendant would otherwise have sustained or, alternatively, even where this is not so, the conferral has created an asset in the defendant's hands which has a value that the defendant has realized, or perhaps has a value that is readily realizable by the defendant.

The first branch of this test - an expenditure that would otherwise have been made - is most obviously met in a case where the plaintiff has made a payment or conferred another form of benefit on a third party which has the effect of discharging an obligation of the defendant to the third party to provide such a benefit. ...

The second branch of the test - realized or realizable value - rests on an assumption that, where the benefit conferred has been or can be turned to account without significant prejudice to the benefit holder, the granting of relief may be appropriate. Where a benefit has been conferred that might give rise to the subjective devaluation argument, but where the recipient has subsequently turned the item to account either through its sale or by putting it to profitable use, the defendant's position becomes analogous to one who has received a money payment or who has been saved a necessary expense.

[Emphasis added.]

[57] As I indicated above, these authorities dealt with the issue of whether a defendant can be said to have received an incontrovertible benefit if the defendant has received something that has not been realized upon but could easily have been realized upon by the defendant. They did not address the issue of when the benefit should be valued. In the context of the present case, the defendant received an incontrovertible benefit when it received title to the castings because, although the defendant had no present use for them, it could have easily sold them for scrap value. Similarly, the account receivable due from Catalyst was an incontrovertible benefit because the defendant would realize a monetary sum when it was paid.

[58] In Canada, there has not been the need to discuss the "readily realisable" approach to benefits. Primarily as a result of the cases involving parties in marriage-like relationships, it has been widely accepted that if there is a causal connection between a plaintiff's

contributions and the acquisition of property by the defendant, there will have been a benefit received by the defendant (even if it has not yet been realized upon), and the plaintiff may be entitled to a declaration of a constructive trust over all or part of the property: see Kerr at para. 50.

- [59] Indeed, the last paragraph of the above passage from *The Law of Restitution* runs counter to the plaintiff's position. The term "subjective devaluation" refers to the situation where the services provided have value in the marketplace but hold no value for the defendant and do not constitute a benefit in the defendant's hands (3-13 of *The Law of Restitution*). The authors are submitting that if a defendant receives something of no value to it but subsequently turns "the item to account" by sale or putting it to use, the defendant will then have received a benefit. Hence, the item is not to be valued when first received, and one looks to the actual benefit received by the defendant. If the benefit could have been easily realized but had not been realized by the time of the trial, one would look to its value at the time of the trial (or, as I will discuss when dealing with the remedy, it may be appropriate to grant a proprietary remedy instead of ordering compensation based on the value at the time of the trial).
- [60] The doctrine of unjust enrichment is premised on the view that it is unjust for a person to benefit at another's expense if no juristic reason exists to justify the retention of the benefit. As stated by McLachlin J. in *Peel*, the "concept of restoration of a benefit retained without juristic reason lies at the heart of the doctrine of unjust enrichment" and "it is not material that the plaintiff has suffered a loss if the defendant has gained no benefit" (at 790, 789). It seems to me to be inconsistent with the concept of restoration for a defendant to be required to give the plaintiff more than the benefit that has actually been received or more than its value at the date of the trial.
- [61] In any event, on the facts of this case, there was insufficient evidence to conclude that the benefits received by the defendant ever had a realizable value greater than their value at the date of the trial. The benefits could not be valued in the amount claimed by the plaintiff in August and September 2010 or in the amount of the claim submitted to Catalyst in October 2010 because, in the absence of a contract between the defendant and the plaintiff, the defendant was not irrevocably committed to pay any costs to the plaintiff, and nothing was therefore payable to the defendant under s. 16.1 of the Catalyst contract. The earliest time the defendant was entitled to receive anything from Catalyst as a result of the plaintiff's work on segment holders #5 to #10 was in January 2012 when the defendant and Catalyst reached their settlement. Although the defendant obtained an account receivable in the face amount of \$250,000 at that time (as well as title to the castings), the account receivable had a value of far less as a result of Catalyst's financial difficulties that caused it to file for protection under the Companies' Creditors Arrangement Act less than a month later and obtain a stay of proceedings preventing its creditors from taking legal proceedings against it. It is not realistic in the circumstances to suggest that the defendant would have been able to compel payment of the \$250,000 from Catalyst through legal proceedings in less than a month.

- [62] The plaintiff says the defendant could have easily realized a greater benefit without detriment to itself if it had pressed Catalyst for payment. In my view, this is pure speculation on the part of the plaintiff, and it was rejected by the trial judge. The judge found it was not made out on the evidence that the defendant squandered an opportunity to present a better claim to Catalyst (para. 168) or that the defendant did not vigorously advance its case with Catalyst (para. 103). It has not been demonstrated that either of these findings constitutes a palpable and overriding error, and this Court is obliged to give deference to the judge with respect to these findings.
- [63] The plaintiff also argues that s. 16.1 of the Catalyst contract does not make a distinction between contractual claims and equitable claims. It says that although the defendant may not have been contractually committed to pay the costs of the work done by it, the plaintiff had an equitable right to recover those costs on the basis of its unjust enrichment claim. With respect, this requires circular reasoning that does not withstand scrutiny. It is circular to argue that if Catalyst paid the full amount of the plaintiff's claim to the defendant, then the defendant would have been required to pay those funds to the plaintiff, and that means the defendant was irrevocably committed to pay all of the plaintiff's costs. The defendant's obligation under the doctrine of unjust enrichment was contingent on its receipt of funds or other tangible benefits from Catalyst and was limited to the amount of the funds or value of the benefits received by it. If Catalyst had not paid or given anything to the defendant on the s. 16.1 claim, the plaintiff would not have had a claim in unjust enrichment. In the absence of a contract between the defendant and the plaintiff, the defendant was not irrevocably committed to pay the plaintiff's costs. The plaintiff's claim in unjust enrichment is limited to the amount of funds or value of the benefits received by the defendant in settlement of the s. 16.1 claim.
- [64] I do not accept the plaintiff's submission that it is entitled to receive anything more than the benefits actually received by the defendant or their realizable value at the date of the trial.
- (d) Specifically Alleged Errors
- [65] The five specific errors the plaintiff alleges in its factum were made by the trial judge are as follows:
- (a) he stated that the "value of the [plaintiff's] work was not realisable until completed segment holders were ordered by Catalyst" (para. 165) and thereby misinterpreted the Catalyst contract;
  - (b) he stated that the plaintiff's position presumed the defendant could have realized payment for the work on the segment holders "despite Catalyst's impending bankruptcy" (para. 167) when Catalyst never became bankrupt;
  - (c) he stated that the plaintiff's work on segment holders #5 to #10 had "no value" (para. 165) when the defendant conceded at trial that it had received some value;

- (d) he stated that there was "no basis upon which [the plaintiff] could advance a claim for unjust enrichment related to its initial investment in equipment or any other cost or expense that would not be reflected in the value of the finished product to [the defendant]" (para. 166), when there was no evidence to this effect; and
- (e) he found a juristic reason for any benefit to the defendant and the corresponding detriment to the plaintiff (para. 169).
- [66] I have already dealt with items (c) and (e) when discussing the claim for unjust enrichment generally. I will now briefly discuss the other three items.
- [67] The plaintiff says the judge misinterpreted the Catalyst contract when he stated that the value of the plaintiff's work was not realizable until Catalyst ordered segment holders. In my view, the judge was not purporting to interpret the Catalyst contract when he made this statement. He was simply acknowledging the practicality that Catalyst had rights of deferment and cancellation under the contract, and the defendant would not benefit from the plaintiff's work until the defendant and Catalyst agreed on a price and delivery schedule for segment holders #5 to #10. Even if Catalyst had been contractually required to take delivery of segment holders #5 to #10, it was open to the defendant to waive the contractual requirements.
- [68] The next specific error alleged by the plaintiff relates to the judge's rejection of its argument that if the defendant was not enriched by the plaintiff's labours, it was a result of the defendant's own failure to press Catalyst for payment. The judge rejected the argument because he believed it to be subject to two significant presumptions, one of which was that the defendant could have realized payment for the work on the segment holders "despite Catalyst's impending bankruptcy". It is true that Catalyst did not go bankrupt but, on my reading of the reasons, the judge was simply using the words "impending bankruptcy" as a shorthand to refer to Catalyst's filing under the Companies' Creditors Arrangement Act and the compromise of its creditors' claims pursuant to an arrangement under that statute. In any event, I have already dealt generally with the plaintiff's argument that the defendant could have realized a greater benefit if it had pressed Catalyst for payment.
- [69] The final specific error alleged by the plaintiff is that the evidence did not support the judge's statement that the plaintiff's expenditures on equipment and other up-front expenses were not reflected in the value received by the defendant. With respect, I do not believe that is what the judge meant. The relevant paragraph of his reasons reads as follows:
- [166] [The plaintiff's] considerable investment in equipment and machinery did not enrich [the defendant]. In the absence of a contractual obligation to do so, I can see no basis upon which [the plaintiff] could advance a claim for unjust enrichment related to its initial investment in equipment or any other cost or expense that would not be reflected in the value of the finished product to [the defendant]. As a claim for unjust enrichment must be founded upon a benefit accruing to [the defendant], it is not material that the plaintiff has suffered a loss if the defendant has not gained a corresponding benefit.

[70] I believe the judge was saying two things in this paragraph. First, he was saying that the plaintiff's investment in equipment did not, by itself, enrich the defendant. Of course, the investment in equipment did enable the plaintiff to do the work on the castings, and it indirectly benefited the defendant to the extent that it got paid by Catalyst for the enhanced segment holders. Second, the judge was saying the fact the plaintiff spent money on equipment was not relevant to a claim for unjust enrichment if there was no corresponding benefit to the defendant. This is a correct statement of the law (Peel at 790; Kerr at para. 39).

(e) Remedy

[71] In Kerr, Cromwell J. said the following about remedies for unjust enrichment:

[46] Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 669, per La Forest J.).

\* \* \*

[50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. Pettkus is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (Pettkus, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (Pettkus, at pp. 852-53; Sorochan [Sorochan v. Sorochan, [1986] 2 S.C.R. 38], at p. 50).

[51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (Peter, at pp. 988, 997 and 999; Pettkus at p. 852; Sorochan, at pp. 47-50; Rathwell [Rathwell v. Rathwell, [1978] 2 S.C.R. 436], at p. 454) .

[52] The plaintiff must also establish that a monetary award would be insufficient in the circumstances (Peter, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (Lac Minerals, at p. 678, per La Forest J.).

- [72] In its amended notice of civil claim, the plaintiff pleaded that it was entitled to restitution or compensation pursuant to the doctrine of unjust enrichment. At the hearing of the appeal, the plaintiff requested that it be given title to segment holders #5 to #10.
- [73] In my opinion, a monetary award for the scrap value of the castings would be insufficient in the circumstances. Although there was no demand for the segment holders at the date of the trial, the market could change and the value of the segment holders could increase significantly. It would not be just to compensate the plaintiff on the basis of their scrap value and allow the defendant to retain title to the segment holders and reap additional benefit if the market does change. It is my view that it is appropriate in the circumstances to grant the plaintiff a constructive trust over segment holders #5 to #10.
- [74] As the payment by Catalyst pursuant to its reorganization plan had not been made to the defendant by the time of the trial and as it is not known to us with certainty whether it has yet been made or what the amount of the payment was, it is also appropriate, in my view, to grant the plaintiff a constructive trust over that account receivable. If the payment has already been received by the defendant, it should remit a payment in like amount to the plaintiff.

## Conclusion

- [75] I would allow the appeal and set aside the order dismissing the plaintiff's action. I would declare that the plaintiff is entitled to a constructive trust over segment holders #5 to #10 and the account receivable due to the defendant by Catalyst pursuant to the settlement of the claim under s. 16.1 of the Catalyst contract and the arrangement made by Catalyst pursuant to the Companies' Creditors Arrangement Act.
- [76] Although I would allow the appeal, this is not necessarily a situation where costs should follow the outcome of the appeal pursuant to s. 23 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. In addition, it may be appropriate for the costs of the underlying action to be awarded pursuant to Rule 14-1(15) of the Supreme Court Civil Rules (B.C. Reg. 168/2009). If the parties are unable to reach agreement with respect to the costs of the underlying action and this appeal, they are at liberty to make written submissions to this Court. If they cannot agree on a schedule for the making of the submissions, the schedule shall be determined by the Registrar of this Court.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Goepel"

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