‘Avoided loss’ in the Supreme Court: *Lowick Rose v. Swynson*

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THE *LOWICK ROSE LLP V. SWYNSON LTD* DECISION.

1. In Lowick Rose LLP (in liquidation) v. Swynson Ltd [2017] UKSC 32, the Supreme Court (**“SC”**) considered the circumstances in which one party is owed a duty, but the loss arising from a breach is suffered by another. The SC provided guidance on arguments of *res inter alios acta* (hereafter, “**collateral benefits**”),[1] transferred loss and unjust enrichment, concluding that none of these arguments succeeded to subvert the normal rule that a party can only claim losses that they (not anyone else) have suffered.

3PB'S ANALYSIS.

2. **The proceedings.** Swynson Ltd was a high value lending company owned by Mr Hunt. They both brought a claim for negligence against accountants, Lowick Rose LLP (**“the Accountants”**), who were instructed to advise Swynson in relation to a loan to Evo Medical Solutions Ltd (**“the Borrower”**) for the buyout of another company, **“Evo”**.

3. The Accountants conceded at trial that, negligently, their report to Swynson had failed to draw attention to fundamental problems about Evo’s finances, notably that it had a lack of working capital. The issues on the appeal related to whether Swynson had suffered any loss because of that breach.

4. **The critical facts.** Those issues arose because of the unusual facts:

   4.1. 2006: Relying on the Accountants’ advice, Swynson loaned £15m to the Borrower.

   4.2. 2007/2008: Evo’s finances deteriorated. In an effort to sustain it, Swynson made two further loans to the Borrower, as a cash injection for Evo.

   4.3. In late 2008 the loans were refinanced. Mr Hunt *personally* loaned the Borrower sums, expressly for the purpose of repaying Swynson’s loans. All except £3m of Swynson’s loans were repaid using Mr Hunt’s money.

5. There were two explanations for that unusual refinancing. Under the original loans Mr Hunt had acquired shares in the Borrower, which had become a majority interest when the second loan was made. His controlling interest attracted liabilities to tax, which Mr Hunt wished to avoid. Mr Hunt also wished to reduce Swynson’s own borrowing exposure to its bank.

6. **The issue.** Mr Hunt’s loan was never paid back because of Evo’s collapse, and he had no direct claim in contract or tort against the Accountants. In Swynson’s claim, did the fact that Mr Hunt’s money had repaid the Borrower’s loan mean that Swynson had avoided suffering any loss?

7. Rose J held that the 2008 refinancing was a collateral benefit (*i.e.* a matter between Mr Hunt and Swynson) and did not therefore reduce Swynson’s losses. The Court of Appeal rejected the Accountants’ appeal, although there was no unanimity between the 3 Lords Justice as to the route. The majority upheld Rose J.’s reasons. Swynson’s claim against the Accountants therefore succeeded.

8. **The Supreme Court.** The SC allowed the Accountants’ appeal, but again provided slightly different analyses in 3 separate judgments. The SC considered 3 points:

   8.1. whether Mr Hunt’s loan, which had discharged Swynson’s loans, was a collateral benefit that the Accountants could not bring into account;

   8.2. transferred loss (whether Swynson could claim on behalf of Mr Hunt, for *his* loss); and

   8.3. whether Mr Hunt had an independent claim in unjust enrichment (by subrogation to Swynson’s claim for damages).

9. **The collateral benefits analysis.** Losses that have been avoided are not generally recoverable. The ‘collateral benefits’ doctrine is an exception to this rule: a benefit treated as collateral (*i.e.* a benefit received by the claimant from something that arises in circumstances independent of the loss) can be ignored. So in this case, if the Borrower’s repayment in 2008 using Mr Hunt’s monies was a collateral payment, then Swynson could still

[1] “*A matter between others is not our business*”.

recover its losses even though its loan had been fully discharged.

10. Distilling a principle as to when a benefit will be collateral is not easy. The benefit must be received in circumstances that are *sufficiently unconnected* to the circumstances that caused the loss. Moreover, it is not the source of the benefit that is critical, but its *character* (at [11], [47], [99]). Ultimately, the fact that Mr Hunt's loan was *for the purpose* of discharging Swynson's loan, meant that it could not be treated as collateral.

11. Lord Neuberger gave a little more guidance. He analysed Parry v. Cleaver [1970] AC 1, which considered benefits such as insurance payouts and charitable and pension benefits. His Lordship highlighted two areas that should likely be considered as collateral payments:

    11.1. "*those which are effectively paid out of [the Claimant's] own pocket (such as insurance which he has taken out, whether through his employer, an insurance company or the government), or*

    11.2. *the result of benevolence (whether from the government, a charity, or family and friends)*".

12. **Swynson claiming for Mr Hunt's transferred loss.** The general rule is that a party can only recover a loss that he himself has suffered. As their Lordships reiterated, the transferred loss principle is exceptional.

13. Their Lordships restated some established limits of the principle: (i) it applies were the parties *intend to benefit* a third party and contemplate that a breach of duty will cause loss to him; (ii) in its traditional form, it arises where the third party suffers loss as the intended transferee *of property*; and (iii) because the claimant will be accountable to the third party for losses recovered, it will generally be unavailable where the third party has his own right of action.

14. Lord Mance articulated the principle as, "*where it was in the contemplation of the parties when the contract was made that the property, the subject of the contract and the breach, would be transferred to or occupied by a third party, who would in consequence suffer the loss arising from its breach*".

15. Swynson could not rely on the principle because it had not contracted with the Accountants on behalf of, or for the benefit of, Mr Hunt.

16. **Unjust Enrichment.** The SC's analysis adopted a conventional restitutionary framework,[2] and emphasised that English law still does not have a universal theory of unjust enrichment. Such a claim must be brought within one of the recognised categories in which the enrichment is vitiated by some unjust factor. It "*is not a matter of judicial discretion*".

17. Mr Hunt argued that because he had discharged Swynson's loss, he should be subrogated to its claim. Subrogation would thus preserve Swynson's otherwise discharged claim against the Accountants, for the benefit of Mr Hunt. The SC firmly rejected this argument.

18. For Lord Sumption, the essence of the 'unjust factor' that leads to subrogation is an expected benefit from a particular transaction, which has been defeated. Subrogation is a remedy provided by equity "*to replicate some element of the transaction which was expected but failed*" (at [31]-[32]). The corollary is that equity will not confer a *greater* benefit that than the claimant was expecting. Lords Mance (at [70],[85]-[87]) and Neuberger adopted similar analyses (at [118]).[3]

19. The claim failed because, when making his loan, Mr Hunt never expected any to obtain right to pursue a claim against the Accountants. He had received from the Borrower everything that he had expected (a covenant for repayment).

IMPACT OF THE DECISION

20. Across the 3 judgments and the 3 arguments considered, the SC considered it impossible to look behind the legal form of Mr Hunt's refinancing in 2008. It highlights the need for careful consideration of restructuring and/or refinancing, particularly if a legal claim is contemplated. Alternatives, such as M Hunt taking an assignment of Swynson's claim against the Accountants, may have provided a better solution. An assignee of a cause of action may sue in respect of his own loss, even where that loss is suffered before the assignment takes place Offer-Hoar v. Larkstone Ltd [2006] 1 WLR 2926 (CA).

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[2] Has the defendant been enriched? Was the enrichment at the claimant's expense? Was the enrichment unjust?

[3] Lords Mance and Neuberger also saw difficulty in the enrichment being at the expense of Mr Hunt, and would have concluded that that test could not be met where the benefit to the Accountants was "*incidental to work done or expenditure incurred in pursuit of [Mr Hunt's own interests*" (at [67] and [117]).

21. It further highlights the need to correctly identify the basic but fundamental point of which legal entity has suffered a loss and therefore which is going to be able to recover if a claim is pursued.

22. Of interest, the majority in the SC expressed lukewarm willingness to expand the application of the 'transferred loss' principle outside its traditional situation concerning transfers of property. That would endorse the 'broader ground' of recovery suggested by Lord Griffiths in an earlier case.[4] The analysis of the transferred loss principle is likely to be important in particular to construction claims, in which it is more commonly relied upon. Unjust enrichment is often used as a fail-safe in consumer contracts but clearly should only succeed as an exception. Furthermore, the analysis of Parry provides an important general consideration of the assessment of damages, relevant to losses suffered by Claimant's across a broad range of claims.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

[4] In Linden Gardens Trust v. Lenesta Sludge Disposals Ltd [1994] 1 AC 85 (HL) Lord Griffiths had suggested that the contracting party (in that case a property developer) would *himself* have suffered a loss represented by his own contractual interest of receiving the performance of the contract.

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