Michaelmas Term
[2020] UKPC 33
Privy Council Appeal No 0021 of 2018

JUDGMENT

Samsoondar (Appellant) *v* Capital Insurance Company Ltd (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Briggs
Lady Arden
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON

14 December 2020

Heard on 22 October 2020

Appellant	*Respondent*
Navindra Ramnanan	Reshard Khan

LORD BURROWS:

1. Introduction

1. Although the principal sum at stake in this motor insurance dispute is only $43,400, the case raises such interesting legal issues that, at times, the Board felt almost as if it was tackling an exam question. It involves the retrospectivity of a judicial interpretation of a statute, which overturned a previous judicial interpretation, and, in the light of that, there are questions on contractual interpretation and on the compulsory or mistaken discharge of another's legal liability in the law of unjust enrichment. As will become clear - and perhaps disappointingly for the development of the law - it will be unnecessary to answer all those questions in order to decide this appeal.

2. The facts

2. The essential facts can be stated very quickly. The claimant, and the respondent in this appeal, is Capital Insurance Ltd. The defendant, and the appellant in this appeal, is Rajendra Samsoondar. On 29 July 2005, when one of the defendant's trucks was being driven by one of his employees, it was involved in an accident when the wheel of the truck flew off and struck the vehicle of a third party travelling the other way on the other side of the dual carriageway. The employee in question filled out an insurance claim form on 4 August 2005, which was sent to the claimant. In his witness statement, Rajendra Samsoondar said that, at some time subsequent to 29 July 2005, he was informed by the claimant that it was settling the matter with the third party and that he would have to pay the excess which he duly did. The documents show that the excess under the policy was $2,000. However, by a letter to the defendant dated 10 April 2007 the claimant advised the defendant that, as the policy was "owner driver only" and as an employee had been driving at the relevant time, the claimant had no interest in the matter and that the defendant should deal directly with the third party's insurers. But then by a letter dated 21 June 2007, the claimant informed the defendant that it had paid $43,400 to the third party's insurers in settlement of the third party's claim. The claimant requested payment of the $43,400 from the defendant and when, after further written requests, that payment was not forthcoming, the claimant commenced the present legal proceedings in 2011 to recover that sum plus interest.

3. Clearing the ground: damages for breach of contract?

3. In the High Court of Trinidad and Tobago, Rahim J, in a judgment dated 8 May 2013, first of all dealt with the factual dispute as to whether the insurance was "owner

driver only" and decided that it was. That finding was upheld by the Court of Appeal of Trinidad and Tobago in its judgment of 5 May 2017 (Narine JA giving the judgment with Moosai JA and Rajkumar JA agreeing) and there is no appeal from the Court of Appeal's decision on this point.

4. The subsequent principal reasoning of Rahim J was that, given his finding that the insurance was "owner driver only", and in line with the main way in which the claim was pleaded, the defendant was in breach of the insurance contract in allowing his employee to drive the truck and that it was by reason of that breach that the claimant had paid out to the third party. That sum was therefore recoverable as damages for breach of contract. That reasoning was upheld by the Court of Appeal. Narine JA said at para 10:

> "[T]he appellant's breach of [the policy was] by permitting an unauthorised driver to drive the vehicle. Having regard to the appellant's breach of the contract, Capital was entitled to recover damages arising from that breach, which was the sum paid by Capital to the third party in settlement of the claim."

And at para 13, he said:

> "Based on the breach of the contract between the appellant and Capital, Capital was entitled to recover from the appellant the sum paid to the third party on behalf of the appellant."

5. With respect, something has here gone awry with the reasoning of the lower courts. When his employee drove the truck with the defendant's consent, there was no breach by the defendant of his contract of insurance with the claimant. The consequence, as a matter of contract law, was simply that, while the employee was driving, the defendant was not insured (subject to any statutory provision to the effect that, even though the policy was "owner driver only", the employee should be treated as insured). There was no term, express or implied, in the insurance policy that the defendant could not give permission to anyone else to drive his truck. It follows that the principal reasoning of the lower courts cannot stand. The claimant cannot recover from the defendant the sum paid out to the third party as damages for a breach of contract comprising allowing the employee to drive the truck.

6. Having cleared the ground, we are now in a position to focus on the issues that are at the heart of this appeal. I will refer to the first as the "contractual/statutory indemnity" issue and the second as the "unjust enrichment" issue. Albeit not clearly articulated, the first was pleaded and, albeit through a glass darkly, may be regarded as having been considered by Rahim J and by the Court of Appeal. The second was raised

on its own initiative by the Court of Appeal and, given the pleadings, there is an issue as to whether it was appropriate for the Court of Appeal to have done so.

4. The contractual/statutory indemnity issue

7. Further or in the alternative to its claim for damages for breach of contract, the claimant in paras 12-16 of its amended statement of case claimed the sum of $43,400 by way of a contractual and/or statutory indemnity. Both Rahim J and the Court of Appeal saw this issue as concerned with the question whether the claimant was entitled to settle the claim with the third party on behalf of the defendant. In that context, they referred to section 4(7) of the Motor Vehicles Insurance (Third Party Risks) Act (an Act of 1933 (Trinidad) and 1941 (Tobago), with the latest relevant amendment being in 1996). That subsection reads as follows:

> "Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons."

8. As both the lower courts explained, that provision was interpreted by Kokaram J in the High Court of Trinidad and Tobago in *Selwyn Benjamin v Stephen Jairam*, in a judgment delivered on 9 June 2006, as meaning that an "owner driver only" policy was extended to provide cover for a driver driving with the permission of the owner. But, as the lower courts went on to explain, that interpretation of section 4(7) was overruled as incorrect by the Privy Council, on an appeal from the Court of Appeal of Trinidad and Tobago, in *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC 33. The Privy Council held that section 4(7) did not extend cover to those who were not authorised to drive under the policy. Rather what it did was to lay down that, despite the privity of contract doctrine, a party who was authorised to drive under the policy, but was not the party who had entered into the contract of insurance (and in this sense was a third party beneficiary of the contract), had the right to enforce the contract of insurance. Section 4(7) did not mean that a driver who was not covered under the insurance policy should be treated as if he or she was covered. That advice of the Privy Council was handed down on 16 August 2012.

9. Rahim J thought that the relevance of these cases was that, at the time that the claimant settled the dispute with the third party, the state of the law was governed by the earlier (incorrect) interpretation adopted in *Selwyn Benjamin v Stephen Jairam* and that, therefore, at that time "[i]n accordance with the Act … the Claimant did have the authority to settle the claim on the Defendant's behalf" (para 24). This was upheld by

the Court of Appeal which said, at para 11, that "[b]ased on section 4(7) of the Act, Capital had the right to settle the claim with the third party."

10. A central difficulty is that it is not made clear in either judgment how this issue, framed in terms of the insurer's authority, relates to the claim for an indemnity of $43,400. However, towards the end of the hearing before us, and in answer to our questions, Mr Navindra Ramnanan, counsel for the defendant, indicated that a possible way in which his opponent, Mr Reshard Khan, counsel for the claimant, might be putting his case turned on the clause in the policy headed "Avoidance of Certain Terms and Right of Recovery". This reads:

> "Nothing in this Policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this Policy or of any other person to recover an amount under or by virtue of the Legislation BUT the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the Legislation."

Although this clause was not mentioned in either of the judgments of the courts below, and was not specifically referred to in the claimant's pleaded statement of case or written case before us, it does indeed appear to be a way to understand the claim for the contractual/statutory indemnity. The idea is that, while the policy is "owner driver only", in so far as there is legislation which dictates that such a policy must also be treated as covering those driving with the owner's permission and, in so far as a consequence of that legislation is that the insurer is bound to discharge what would otherwise be a person's uninsured liability to a third party, the insurer is entitled to an indemnity from that person.

11. The thinking behind that contractual provision is made clearer when one considers sections 8 and 12 of the Motor Vehicles Insurance (Third Party Risks) Act. What each of those provisions does is to negate certain restrictions on, or conditions of, a contract of insurance so that the insurance is valid even if the operation of those restrictions or conditions would otherwise have rendered the insurance invalid. But, crucially for helping to understand the thinking behind the contractual provision, those statutory provisions go on to protect an insurer's right to a contractual indemnity from the insured, or to confer on the insurer a right to an indemnity, which indemnifies the insurer in respect of the sums it has paid to discharge the liability to the third party of the person who would otherwise be uninsured. Section 8(2) reads:

> "Nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the

> latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

Section 12(2) reads:

> "Nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

12. One can therefore see that, in the light of sections 8 and 12, the "Avoidance of Certain Terms and Right of Recovery" provision in the policy of insurance, set out in para 10 above, makes good sense. It would also explain why, if the correct interpretation of section 4(7) of the Motor Vehicles Insurance (Third Party Risks) Act was that adopted in *Selwyn Benjamin v Stephen Jairam*, that contractual provision would be relevant to the operation of section 4(7) in an analogous way to its operation in relation to sections 8(2) and 12(2). It would be providing, or incorporating into the contract, the insurer's right to an indemnity for having discharged the liability of the (otherwise) uninsured person.

13. However, we now know, after the decision in *Presidential Insurance Co Ltd v Resha St Hill*, that the interpretation of section 4(7) taken in *Selwyn Benjamin v Stephen Jairam* was incorrect. Moreover, developments of, and changes to, the common law operate retrospectively: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (albeit that in *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680, para 41, Lord Nicholls recognised that one should "never say never" to prospective overruling at common law). The same retrospectivity must and does apply in respect of judicial interpretations of legislation. This is shown by, for example, the following clear statement of Lord Woolf MR in the Court of Appeal in *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [1999] QB 1043, 1050 (upheld by the House of Lords at [2001] 2 AC 19), in which an earlier interpretation of a criminal sentencing statute had been overruled and the applicant was, as a consequence, held to be entitled to damages for false imprisonment:

> "any authoritative decision of the courts stating what is the law operates retrospectively. The decision does not only state what the law is from the date of the decision, it states what it has always been. This is the position even if in setting out the law the court

> overrules an earlier decision which took a totally different view of the law."

14. It follows that, on the correct interpretation, applied to the facts of this case, section 4(7) never operated to require the insurer to discharge liability where the driver was uninsured and did not give the insurer a right to an indemnity. On the facts of this case, it further follows that section 4(7) has no relevance, and never had any relevance, to the "Avoidance of Certain Terms and Right of Recovery" clause in the policy; and that the words "the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the Legislation" do not, and never did, refer to section 4(7).

15. Although the lower courts did not make clear how they were viewing the basis for the contractual or statutory indemnity claimed, they were incorrect in thinking that one should apply the relevant law as it was erroneously thought to be at the time of the payment in settlement of the third party claim: see paras 22-24 of Rahim J's judgment and para 9 of the Court of Appeal's judgment. That was to reject the retrospectivity of a decision overturning an earlier judicial interpretation of a legislative provision and was therefore an error of principle. Moreover, no other good reason was given by the lower courts, or by counsel on behalf of the claimant in his written and oral submissions to the Board, as to why the claimant is entitled to a contractual or statutory indemnity from the defendant. We therefore conclude, contrary to the decisions of the lower courts, that the claimant has not established that it is entitled to the sum claimed by reason of a contractual or statutory indemnity.

5. The unjust enrichment issue

(1) Introduction

16. The Court of Appeal decided that, as an alternative to the other claims, the claimant was entitled to recover the sum of $43,400 (plus interest) on the basis of unjust enrichment. The unjust enrichment issue came to the fore in an unusual way. As Narine JA explained at para 14:

> "At the close of oral submissions we invited counsel to provide further written submissions on the issue of unjust enrichment, and in particular whether the pleaded case of Capital provided an alternative basis for recovery of the sum paid from the appellant on the ground that he was unjustly enriched by the settlement of his liability. In my view the facts pleaded by Capital are sufficient to raise the issue (see *Moule v Garrett* (1872) LR 7 Exch 101)."

17. Narine JA went on to explain that, in his view, there were sufficiently pleaded facts, backed up by the evidence before the judge, to support a successful unjust enrichment claim. In para 14, Narine JA pointed to the following as being "clear on the pleadings and the evidence":

> "(i) the existence of the contract of insurance; (ii) breach of the contract by permitting a person not authorised under the policy of insurance to drive the vehicle; (iii) the accident which gave rise to the third party claim, and the liability of the appellant for same; (iv) the request of the appellant to Capital to handle the claim of the third party, (demonstrated on the evidence by his approach to Capital after the accident via his employee, the completion of a claim form in which his driver indicated that he was the party in the wrong, and his payment of the uninsured excess); (v) the consequential payment thereafter by Capital of the third party claim; (vi) the inability of Capital on the state of the law as it then stood, to avoid payment of the third party's claim against the appellant; (vii) the appellant's obtaining, by Capital's payment, the benefit of his discharge from legal liability to the third party; and (viii) the unconscionable refusal of the appellant to make restitution to Capital in circumstances in which he had accepted liability by having his employee fill out the claim form to this effect, and paid the excess under the policy, while yet retaining the benefit of Capital's payment on his behalf."

18. It has now become conventional to recognise (see, eg, *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, para 10 and *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29; [2018] AC 275, paras 24, 39-42) that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence. The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words "unjust enrichment" are used but the claimant must identify sufficient facts to show how those three elements are satisfied: see *Goff and Jones, The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-38). The important purpose of a statement of case is to ensure, as a matter of fairness, that the defendant knows the case it has to meet.

19. Moreover, as regards the third of those elements, the claimant must identify what was referred to by counsel for the claimant - using the term coined by Peter Birks (see, eg, "Unjust Enrichment - a Reply to Mr Hedley" (1985) 5 Legal Studies 67, 71;

Restitution - the Future (1992), p 41) - as the "unjust factor" and is sometimes alternatively referred to as the ground for restitution. See *Goff and Jones, The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-21). Examples of unjust factors are mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. For judicial acceptance of the need for, and terminology of, an unjust factor, see, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 408-409 per Lord Hope; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, paras 50, 62 and 67; *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] UKSC 19; [2012] 2 AC 337, para 81, per Lord Walker. In the Court of Appeal of Trinidad and Tobago in *Jaipersad v Shiraze Ahamad*, in a judgment delivered on 24 February 2015, Mendonca JA (with whom Bereaux JA and Narine JA agreed) said the following at para 23:

> "English law, which the parties agree is the law applicable in this context to this jurisdiction … identifies specific grounds for restitution sometimes referred to as unjust factors. These factors are the trigger for the restitutionary remedy on the ground that it is unjust to retain the benefit."

20. The need to identify an established unjust factor, or some incremental development from it, also lies behind the obiter dicta of Mann J discussing pleading in unjust enrichment cases in *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at para 16:

> "[I]t seems to me that it has not been established that the authorities have yet moved to a position in which it can be said that there is a freestanding claim of unjust enrichment in the sense that a claimant can get away with pleading facts which he says leads to an enrichment which he says is unjust … A claimant still has to establish that his facts bring him within one of the hitherto established categories of unjust enrichment, or some justifiable extension thereof."

(2) The unjust factor

21. The fundamental difficulty with the Court of Appeal's reasoning on the pleading and evidence of unjust enrichment, set out in para 17 above, is that, even if one were to consider that all the other elements of an unjust enrichment claim were sufficiently pleaded and proved on the evidence, it was here essential - so that the defendant knew the case against him - that the claimant made clear the unjust factor. Although there was no express reference to the claim being in unjust enrichment, in para 17 of its statement

of case, the claimant, further or in the alternative, claimed the sum of $43,400 as paid by the claimant under compulsion; and in the Court of Appeal, Narine JA's reference to the payment being "due to compulsion by law" (para 11) and his later reference (in para 14) to *Moule v Garrett* (1872) LR 7 Exch 101, which is a leading case on restitution for legal compulsion, indicates that the focus was on legal compulsion as the unjust factor. Put another way, to use a well-worn phrase, the claim was for the "compulsory discharge of another's liability". See generally Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015), pp 233-253. However, for essentially the same reason that has been set out in para 15 above to explain why the claimant fails on the contractual/statutory indemnity issue - namely that the retrospective effect of the decision in *Presidential Insurance Co Ltd v Resha St Hill* meant that section 4(7) never operated to require the insurer to discharge a liability to a third party where the driver was uninsured - so in this context there never was any legal compulsion. The claimant was not being compelled to pay the third party by reason of any statutory or contractual obligation because, on the correct understanding of the law, there was no such statutory or contractual obligation. Therefore, legal compulsion, which may be said to have been the pleaded ground for restitution, the unjust factor, could not be established and the Court of Appeal was wrong to decide the contrary.

22. In any event, it is not clear to the Board that this would be a case of legal compulsion as exemplified by *Moule v Garrett*. In that case, the claimant was the tenant of certain premises. He assigned the lease to B who then assigned it to the defendant. The lease contained a repairing covenant and the landlord recovered damages from the claimant for breach of that covenant during a period when the defendant was in possession. The claimant was awarded restitution from the defendant of the sum paid in damages to the landlord. But it is significant that, on those facts, both the claimant and the defendant had a liability to the landlord in the sense that the landlord could have proceeded directly against either of them for breach of the repairing covenant. Cockburn CJ cited with approval, at p 104, the following passage from *Leake on Contracts*, 1st ed at p 41:

> "where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount."

However, on the facts of the case before us, it would appear that the claimant had no liability to pay the third party because the third party could not have sued the claimant. Counsel for the claimant suggested that, by reason of section 10A of the Motor Vehicles Insurance (Third Party Risks) Act, the third party could have joined the claimant to an action against the defendant so that the claimant was at least "compellable by law" to pay. But section 10A would have come into operation only if section 10 applied and that would have required that a judgment had already been obtained by the third party

against the defendant. It is therefore far from clear that the claimant was "compellable by law" in the required sense. However, it is unnecessary for the Board to resolve this issue because, as has been made clear in the last paragraph, our decision rejecting legal compulsion rests on the retrospective effect of *Presidential Insurance Co Ltd v Resha St Hill*.

23. Although not entirely clear, it would appear that, in the submissions made to us, counsel for the claimant, as an alternative to the unjust factor of legal compulsion, sought to rely on mistake of law. Assuming that that was so, this was therefore a new point that was not raised in the courts below. At the hearing before Rahim J and in the Court of Appeal, no case was advanced by the claimant that the payment made to settle the third party's claim was made as a result of a mistake of law and that the claimant was entitled to restitution on that basis. That a causative mistake of law, as well as a mistake of fact, counts as an unjust factor was laid down in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. Once the correct interpretation of section 4(7) had been made clear in *Presidential Insurance Co Ltd v Resha St Hill*, overruling *Selwyn Benjamin v Stephen Jairam*, the claimant might have been able to establish that, in making the payment to discharge the liability of the third party, it had been acting under a mistake of law (for example, in believing that it had a legal liability to the defendant to do so). The Privy Council's ruling in the *Resha St Hill* case was delivered in August 2012 and there was a pre-trial review in this case in November 2012. The claimant therefore had the opportunity to amend, or to seek permission to amend, its statement of case so as to allege a mistake of law. It failed to do so.

24. The difficulty that arises is that, not only has a mistake claim not been pleaded, but the claimant has not adduced any evidence that the payment was caused by a mistake of law. As we have seen in para 2 above, having initially been asked by the claimant to pay the excess, which he duly did, the claimant advised the defendant, in a letter dated 10 April 2007, that he would need to deal directly with the third party's insurers because he was not covered under the policy as it was "owner driver only" and, at the relevant time, he had not been driving. But then by letter dated 21 June 2007, without any further communication in the meantime, the claimant advised the defendant that it had settled with the third party in the sum of $43,400. No explanation for that apparent change of mind was given by Lynette Persad, the witness for the claimant, in her witness statement. Certainly, there is nothing in her statement that directly supports a submission that the payment was caused by a mistake of law. Furthermore, even if mistake of law had been pleaded, and even if there was evidence to support it, the defendant would have been entitled to cross-examine Ms Persad, so as to explore the state of mind of the claimant at the time of payment to the third party. The following may have been a central question at issue: was the claimant making a mistake of law that caused the payment or was it paying in a situation where it had significant doubts or suspicion as to what the correct view of the law was and chose to settle the claim in any event? In other words, the defendant might have sought to argue that the claimant was not entitled to restitution for mistake because it had taken the risk of being

mistaken. See, eg, Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015), pp 177-179 for a helpful discussion of the cases on risk-taking in the context of mistake.

25. Had the claimant pleaded mistake, there would also have been an interesting question of law as to whether mistake can trigger restitution for the discharge of another's liability. This is not the standard mistaken payment case of the mistaken payor seeking restitution from the payee. Indeed counsel for the defendant pleaded in its defence (at para 9(d)) that the claimant's proper redress would have been against the third party's insurer (as payee) for money paid by mistake. But that claim would have been problematic because, on the face of it, the payment was made under a valid contract of compromise and a claim for restitution against the payee for the mistaken payment could only have succeeded if that contract was void (or voidable). Be that as it may, the claim with which we are concerned is against the defendant and, in respect of this claim, the relevant enrichment is not the payment itself but the discharge of the defendant's liability. In principle, there seems no good reason why reliance on mistake rather than legal compulsion should mean that no restitution is available in respect of the discharge of another's liability. However, the case law on this question is far from straightforward: see, eg, Birks, *An Introduction to the Law of Restitution*, revised ed (1989), pp 185-193; and *Goff and Jones on The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2018), para 5-61). As nothing turns on further examination of this issue, and as we have heard no submissions on it, we decline to say anything more about it.

26. In the Board's view, therefore, a claim for unjust enrichment should not have succeeded. The relevant unjust factor could not have been legal compulsion. If anything, it was mistake of law which was neither pleaded nor proved.

(3) Enrichment and defences

27. There are further reasons why the unjust enrichment claim based on legal compulsion should not have been upheld and why it is now too late to raise a claim based on mistake. These concern the defendant's enrichment and the defences of estoppel and change of position.

28. As regards the defendant's enrichment, in para 6 of its defence, the defendant averred that the claimant's compromising of the claim by the third party

> "severely prejudiced the defendant, in that he was deprived of the opportunity to defend the Claim by the third party in the event that the defendant opted to do so."

In his written and oral submissions before us, Mr Ramnanan further developed this point by denying that the discharge of liability was an enrichment or, at least, an enrichment to the value of $43,400. He submitted, for example, that it was not clear that there was any liability on behalf of the defendant because this was an unusual case where there was no negligent driving (although we have significant doubts about this submission given that the defendant had a duty of care to maintain the vehicle). In any event, the defendant might have been able to secure a more favourable settlement (ie to pay a lower sum than the $43,400).

29. The Court of Appeal partly dealt with this point earlier in Narine JA's judgment, at paras 12-13, when it said that, as the defendant had requested that the claimant settle the claim, and as the facts of the accident provided no realistic basis for defending the claim, and as the defendant had not informed the claimant that it wished to defend the claim:

> "it is too late in the day for the appellant to raise the issue that by Capital's settlement of the third party claim … he was deprived of the opportunity to defend the claim, since he made no attempt whatsoever to defend the third party claim."

Subsequently, at para 14, when precisely focussing on unjust enrichment, Narine JA pointed to the defendant being liable for the accident and that the defendant had requested Capital to handle the claim of the third party,

> "[that request being] demonstrated on the evidence by his approach to Capital after the accident via his employee, the completion of a claim form in which his driver indicated that he was the party in the wrong, and his payment of the uninsured excess …"

30. In our view, this emphasis on the defendant having requested the claimant to settle the claim with the third party was not the correct way to answer the question of the defendant's enrichment in the context of a claim for unjust enrichment. While it is correct that, by the submission of the claim form and the payment of the excess, the defendant can be said to have requested the claimant to settle the third party's claim, his unchallenged witness statement indicated that he did so because he thought that the claimant would be settling the claim under the policy. In other words, he was impliedly assuming that the insurer would be settling the claim *without seeking recourse against him*, just as would have been the position had he himself been driving. In the light of that, the Court of Appeal should not have concluded, on the evidence, that he was enriched by the sum paid to settle the third party's claim. The defendant had put forward a reason why the discharge of the liability did not enrich him by the sum paid, despite his request, and, in so far as the claimant wished to dispute that the defendant's request

was made on the basis of there being no recourse against him, that should have been explored at trial and it was not.

31. Turning to possible defences to the unjust enrichment claim, in his witness statement, at paras 10 and 13, the defendant stated that the claimant represented to him that the accident was covered by the terms of the policy and that he acted upon that representation by paying the requested excess (the excess being $2,000). Counsel for the defendant submitted to the Board that, in the context of a claim in unjust enrichment, these facts provided a defence of estoppel. In other words, the submission was that the claimant is estopped from denying that the defendant is entitled to the benefit of the discharge of the third party's claim without recourse against the defendant. The Court of Appeal did not mention the possible defence of estoppel. Yet in his written submissions to the Court of Appeal, counsel for the defendant raised, in general terms, possible defences to unjust enrichment; and the witness statement of the defendant clearly referred to the ingredients of a defence of estoppel by its focus on a representation plus detrimental reliance. At least on the face of it, the claimant could rely on estoppel to deny the unjust enrichment claim (assuming, without deciding, that the all or nothing defence of estoppel continues to survive as a defence to unjust enrichment alongside the proportionate defence of change of position: see *Goff and Jones on The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), chapter 30)).

32. The same can be said of the change of position defence. This defence was specifically referred to in the written submissions of counsel for the defendant to the Court of Appeal; and reliance was placed on *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 in which this defence to a claim in unjust enrichment was authoritatively accepted by the House of Lords. Counsel for the defendant submitted to the Court of Appeal, and again to the Board, that the defendant might have been able to show that, in addition to the payment of the excess, there were other respects (for example, by losing the opportunity to defend the substantive claim for negligence by the third party) in which he changed his position (in anticipation of, or subsequent to, the discharge of the third party's liability). That a change of position can be in anticipation of an enrichment, as well as subsequent to it, is shown by *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, PC, and *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663. The important point for this case is that the Court of Appeal did not deal with change of position and that, not to do so, while concluding that the claimant should succeed on the basis of unjust enrichment, was an error of principle.

6. Two subsidiary points

33. Although they formed no part of the submissions before us, there are two subsidiary points that, for completeness, it may be thought helpful to mention.

34. The first is that, in para 17 of the statement of case, the claimant pleaded, as one of several alternatives, that the defendant "requested" the claimant to compromise the third party's claim on behalf of the defendant. It might therefore be thought that the claimant was alleging that there was a contractual right to an indemnity because, by the defendant making that request, and the claimant acting on it, the parties had entered into a separate contract. It might be said by the claimant that, by that contract, the defendant promised, in return for the claimant's promise to compromise the third party's claim, to pay the excess and to indemnify the claimant for the sum paid to discharge the third party's liability. Had counsel for the claimant sought to defend the decision of the Court of Appeal on this basis, such a submission would have failed not least for much the same reason as has been set out in para 30 above. The defendant was not (impliedly) promising to indemnify the claimant for settling the third party's claim. Rather the request was being made by the defendant on the basis that there would be no recourse against him and his payment of the excess supported that as being the objectively correct interpretation of such an additional contract. Had the claimant intended to have recourse against the defendant for an indemnity, it should have made the position clear by express words.

35. The second subsidiary point is that the claimant did not seek to rely on the "claims control" clause (condition 2) in the policy, which provides that the claimant is "entitled to take over and conduct in [the Insured's] name the defence or settlement of any claim …". The Board invited counsel for the claimant, Mr Khan, to clarify whether he was making any submission as to the relevance of this clause in giving the claimant authority to settle a claim falling within the general scope of the policy even if, on the facts, the particular claim was not covered, as the third party's claim in this case was not (because it was caught by the exception in the policy for liability incurred whilst a vehicle was being driven by a person other than the insured). Mr Khan confirmed that the claimant was not advancing any such argument. Had such an argument been made, it might have raised an interesting question of interpretation although, even if the claims control clause were to be interpreted as giving the claimant authority to settle the third party's claim, it would not follow that the claimant could necessarily recover the amount paid in settlement from the insured. But as this issue was not raised, it would be inappropriate to say anything more about it.

7. Conclusions

36. We do not underestimate the complexities that can arise where a legal ruling is overturned as happened in this case with the overturning of *Selwyn Benjamin v Stephen Jairam* by this Board in *Presidential Insurance Co Ltd v Resha St Hill*. Nevertheless, with respect, our conclusion is that the Court of Appeal was wrong to refuse the defendant's appeal against the decision of Rahim J. To summarise, the Board's central reasoning is as follows:

(i) The Court of Appeal was incorrect to uphold Rahim J's decision that the claimant can recover from the defendant the sum paid out to the third party ($43,400) as damages for a breach of contract comprising allowing the defendant's employee to drive the truck.

(ii) On the "contractual/statutory indemnity" issue, the Court of Appeal was incorrect to uphold Rahim J's decision that the claimant is entitled to the sum claimed by reason of a contractual or statutory indemnity. One should not have been interpreting the insurance policy by applying the law as it was erroneously thought to be at the time of the payment in settlement of the third-party claim.

(iii) On the "unjust enrichment" issue, the Court of Appeal was incorrect to decide that a claim in unjust enrichment should succeed on the basis of legal compulsion; and mistake of law was neither pleaded nor proved. Issues relating to the defendant's enrichment and defences provide further reasons why the unjust enrichment claim based on legal compulsion should not have been upheld and why it is now too late to raise a claim based on mistake.

37. For all these reasons, the appeal should be allowed. Moreover, the claim should be dismissed because it would plainly be inappropriate for the claimant to be allowed now to amend its claim by pursuing an action in unjust enrichment based on a mistake of law. There has already been a trial of this action which was the claimant's opportunity to advance its case in the way that it thought best. It would be unfair and prejudicial to the defendant to allow the claimant a second bite of the cherry.