Unjust Enrichment Claims by Informal Carers

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An informal carer is an individual who, in the absence of a contractual duty to do so, 'looks after and supports a friend, relative or neighbour who could not manage without their help … due to age, physical or mental illness or disability' (Directgov, 'Top tips for carers' <http://www.direct.gov.uk/en/CaringForSomeone/CaringAndSupportServices/DG_10016779>).

In a number of recent cases, such carers have invoked the equitable doctrine of proprietary estoppel to claim an interest in the property of a care recipient following an oral testamentary promise made to them by that recipient of care (see, eg *Jennings v Rice* [2002] EWCA Civ 159). Private law mechanisms of support for carers are likely to become increasingly significant in the decades to come (see, generally, MPC Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France' [2001] *Cambridge Law Journal* 165). This article considers the scope for a claim by an informal carer against the recipient of his care in the law of unjust enrichment.

It might be assumed that a remedy could readily be sought by a carer on the basis that the care recipient was unjustly enriched by the services provided. Indeed, Sarah Nield has said that the idea of such a claim has 'immediate resonance' (S Nield, 'Testamentary Promises: A Test Bed for Legal Frameworks of Unpaid Caregiving' (2007) 58 *Northern Ireland Legal Quarterly* 287, at p 294). Even so, the possibility of using the principles of unjust enrichment to claim a remedy for caring or other domestic services, such as a quantum meruit calculated according to their reasonable value, remains controversial in England, and there is a general 'uncertainty surrounding this emerging area of law' (Nield, 'Testamentary Promises', at p 295). Writing in 2007, Rosalyn Wells claimed that in England unjust enrichment had not yet been used successfully to enforce a testamentary promise (R Wells, 'Testamentary Promises and Unjust Enrichment' (2007) 15 *Restitution Law Review* 37, at p 38). Nevertheless, unjust enrichment has recently been pleaded alongside estoppel in a domestic case (*Cook v Thomas* [2010] EWCA Civ 227) and there is scope for development in the law.

It is relatively well-established that, in England and Wales, a successful unjust enrichment claim involves the enrichment of the defendant at the expense of the claimant in particular circumstances rendering the

enrichment unjust and where there are no defences (*Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL), at p 227; cf P Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn, 2005)). The two most significant elements for the purposes of a claim by a carer – the nature of the enrichment and the possible 'unjust factors' – are considered in the following sections. The general attitude to unjust enrichment in the domestic context in England is then explored and contrasted with that prevailing in Canada.

Care Services as Enrichment

There is some doubt as to whether the provision of care services would even constitute a relevant enrichment, the first requirement of a claim. Sir Jack Beatson has argued that 'pure' services, producing at most an improvement in the 'human capital' of the defendant and neither an end product nor a saving in expenditure, do not constitute an enrichment (J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press, 1991), at p 23). Some care does produce a saving in expenditure. Indeed, a common scenario could well involve an informal carer who enabled the care recipient to remain in her own home rather than enter formal care, which could have been costly in financial as well as emotional terms (see, eg *Walters v Smee* [2008] EWHC 2029 (Ch), [2009] WTLR 521).

Many carers would still be excluded by Beatson's approach, and his definition is widely considered to be too restrictive. Graham Virgo claims that there is an objective enrichment if reasonable people are prepared to pay for a relevant service in the market (G Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn, 2006), at p 72; see also P Birks, 'In Defence of Free Acceptance', in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991), at pp 132–135). Moreover, in *Re Berkley Applegate (Investment Consultants) Ltd (No 1)*, for example, Deputy Judge Edward Nugee QC accepted that the skill and labour of a liquidator could be compensable out of property that he had administered even though it did not directly enhance the value of the assets in question ([1989] Ch 32, at p 50).

Even if it is established that the provision of particular care services does constitute enrichment, subjective devaluation could obstruct the claim (see, eg *Falcke v Scottish Imperial Co* (1886) 34 Ch D 234 (CA)). This principle allows a care recipient to claim that, whatever reasonable people might say, she did not value the care provided and was not therefore enriched by it. Admittedly, this could be

countered by using the doctrine of incontrovertible benefit (*Cressman v Coys of Kennington (Sales) Ltd* [2004] EWCA Civ 47), whereby the benefit received is so obviously objectively beneficial that 'any subjective devaluation argument … can be dismissed out of hand' (A Burrows, The Law of Restitution (Oxford University Press, 3rd edn, 2011), at p 48). This dismissal might be justified on the basis that the carer anticipated necessary expenditure on the part of the care recipient. Simone Degeling argues that the doctrine of incontrovertible benefit is of 'wide application' in cases on carers for the tortiously injured (S Degeling, *Restitutionary Rights to Share in Damages: Carers' Claims* (Cambridge University Press, 2003), at p 60), and the same may be true in the situations with which this article is concerned. Free acceptance, considered as a possible unjust factor in the next section, may also counter suggestions of subjective devaluation.

The Unjust Factor

Having shown that the care recipient was enriched at his expense, the claimant carer must still identify the relevant unjust factor through which restitution can be sought (see, eg *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558, at para [21]). This is not an easy task, and Wells argues that 'the courts have not always scrupled to identify the unjust factor present in more recent quantum meruit cases' (Wells, 'Testamentary Promises and Unjust Enrichment', at p 69).

Several factors could be relevant, but a fundamental difficulty faced by the carer who seeks a remedy is that in many situations he can plausibly be described as a 'domestic risk-taker' (the phrase is used by John Mee to describe the claimant in the estoppel case of *Thorner v Major and Others* [2009] UKHL 18, [2009] 2 FLR 405: J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' [2009] CFLQ 367, at p 374). In other words, it could often be said that the carer voluntarily assumed caring responsibilities without entering a contract, and 'gambled' (A Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 *Law Quarterly Review* 576, at p 578) on the care recipient's willingness to pay for his services after the event. Virgo considers it a fundamental principle that where a claimant has acted officiously in transferring a benefit, restitution will not come to his aid (Virgo, *Principles of the Law of Restitution*, at pp 39–40; see also *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, at paras [25]–[27]). On this analysis, a carer will have to demonstrate that he did not act entirely voluntarily and officiously, by pointing to an unjust factor present in circumstances where he cannot be deemed a 'risk-taker'.

The ground that may seem most apposite to a care scenario (Nield, 'Testamentary Promises', at p 297)

is based on the conduct of the defendant rather than the impaired consent of the claimant carer in conferring the benefit (P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised edn, 1989), at p 265). That possible unjust factor is 'free acceptance' (see, generally, Birks, *An Introduction to the Law of Restitution*, ch 8). It would be relevant where a care recipient fails to reject the care services provided by the claimant in spite of knowing that the claimant expected to be paid for the care, or to receive some other benefit in return. Many scholars, however, have refused to recognise free acceptance as a ground of restitution. Virgo prefers the view that free acceptance can be invoked only to prevent subjective devaluation (Virgo, *Principles of the Law of Restitution*, at pp 121–124), and Andrew Burrows objects to it as a possible ground of restitution because it includes risk-takers (Burrows, 'Free Acceptance and the Law of Restitution'). Although there have been recent signs in commercial cases that free acceptance is recognised by some English judges, (*Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418, at para [13]; *Greater Manchester Police v Wigan Athletic FC* [2008] EWCA Civ 1449, at para [66]; *Benedetti v Sawaris* [2010] EWCA Civ 1427, at para [143]), its status as an unjust factor seems fragile at best.

Wells considers failure of consideration to be a 'more promising' factor than free acceptance as regards the enforcement of testamentary promises (Wells, 'Testamentary Promises and Unjust Enrichment', at p 69). Indeed, Peter Birks, at one time the 'strongest proponent' of free acceptance as an unjust factor (Virgo, *Principles of the Law of Restitution*, at p 122), later recognised failure of consideration as a better explanation of many cases (Birks, 'In Defence of Free Acceptance') even before he changed his views on the nature of an unjust enrichment claim (Birks, *Unjust Enrichment*). Failure of consideration is based on the idea that the claimant's enrichment of the defendant was conditional, and therefore vitiated by the non-performance of what the defendant promised or the failure of a contingent condition (see, eg Virgo, *Principles of the Law of Restitution*, ch 12). The precise formulation of the 'failure of consideration' principle for these purposes is open to doubt (compare *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, at para [43] and J Getzler, 'Quantum Meruit, Estoppel, and the Primacy of Contract (2009) 125 *Law Quarterly Review* 196, at p 202), although it may not depend on a contractual context (Virgo, *Principles of the Law of Restitution*, at p 307) and the meaning of 'consideration' for these purposes is broader than that used in the law of contract (see, eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL)). Indeed, the courts have shown some willingness to allow unjust enrichment claims in respect of work done in anticipation of a contract that never materialised (see, generally, E McKendrick, 'Work Done in Anticipation of a Contract which Does Not Materialize', in W

Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart, 1998)). It is notable that a quantum meruit was awarded in *Cobbe v Yeoman's Row Management Ltd*, a case whose claimant has been deemed a 'commercial risk-taker' (A Goymour, 'Cobbling Together Claims where a Contract Fails to Materialise' [2009] *Cambridge Law Journal* 37, at p 40). Nevertheless, the Supreme Court recently analysed a case of preparatory work as one in which a contract had in fact materialised (*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14), rather than adopting a restitutionary analysis (see PS Davies, 'Anticipated Contracts: Room For Agreement?' [2010] *Cambridge Law Journal* 467 for discussion).

It will often be difficult to imply or even expect a contract in a care case because of problems regarding certainty and intention to create legal relations (see, eg *Dable v Peisley* [2009] NSWSC 772), and this article deals specifically with situations where the care provided is informal by its nature and not governed by a contract. Moreover, in his extra-judicial writings Lord Neuberger has said that it is 'rather doubtful' that David Thorner, the claimant in the leading proprietary estoppel case on testamentary promises and (farming labour) services (*Thorner v Major and Others* [2009] UKHL 18, [2009] 2 FLR 405), would have succeeded in a quantum meruit claim (D Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] *Cambridge Law Journal* 537, at p 542). He appears to make this suggestion because a contract between the parties was never even anticipated, and in spite of the fact that there was a sufficient understanding between them to justify a successful estoppel claim. A carer may also encounter difficulties if the failure of consideration must be total rather than partial (see Wells, 'Testamentary Promises and Unjust Enrichment', at p 69 for discussion of this point).

Necessitous intervention is another possible basis of relief, although its status as a general principle is unclear (see J Kortmann, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford University Press, 2005), ch 11 for a general discussion of claims by 'good Samaritans' in English law). In any event, it could be difficult to argue that a long-term care situation involves sufficient urgency to justify an argument based on necessity (Degeling, *Restitutionary Rights to Share in Damages*, at p 95; cf D Sheehan, 'Negotiorum Gestio: A Civilian Concept in the Common Law?' [2006] *International and Comparative Law Quarterly* 253, at p 275). The scope of the officiousness principle is particularly uncertain in relation to necessitous intervention. For example, the claimant's intervention may not be justified on the basis of necessity 'when another more appropriate person is available and willing to act' (*Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL), at p 76). Moreover, Virgo implies that a carer is likely to act officiously if he fails to take an opportunity to communicate with a care recipient (Virgo,

Principles of the Law of Restitution, at p 289), and Degeling acknowledges that such communication is likely to be possible in most care situations (Degeling, *Restitutionary Rights to Share in Damages*, at p 95). A necessitous care situation of sorts was at issue in *Re Rhodes* (1890) 44 ChD 94 (CA), where it was held that family members who had paid for a now-deceased person to remain at an asylum had no claim against the deceased's estate because they had paid the money out of kindness and did not intend to create an obligation of repayment. Claimants who provide care directly could face similar obstacles.

The carer could attempt to invoke mistake as a relevant unjust factor (see, eg Virgo, *Principles of the Law of Restitution*, ch 8). A mistaken belief by the carer that a valid contract has been concluded between himself and the care recipient (Wells, 'Testamentary Promises and Unjust Enrichment', at p 70), or that he is a beneficiary under the care recipient's will, may be relevant. On the other hand, if he knows that the care recipient has not made a will and inaccurately believes that she will do so in the future, that is likely to be considered a misprediction and would not justify a claim (Nield, 'Testamentary Promises', at p 297). Finally, Degeling argues for a right to a remedy for carers based on an unjust factor called the 'policy against accumulation' in the specific context where the care recipient is a victim of a tort who has successfully claimed damages against the tortfeasor (Degeling, *Restitutionary Rights to Share in Damages: Carers' Claims*).

It can therefore be seen that it is difficult to identify the unjust factor upon which a carer may base his claim in unjust enrichment.

Unjust Enrichment in the Domestic Context

Walsh v Singh [2009] EWHC 3219 (Ch), [2010] 1 FLR 1658, a case involving the property and business affairs of former fiancés, may be illustrative of the current attitude of the English judiciary to the use of unjust enrichment in the domestic context (see, eg N Piska, 'A common intention or a rare bird? *James v Thomas*; *Morris v Morris*' [2009] CFLQ 104, at pp 115–120 for a summary of the potential obstacles to quantum meruit claims by unmarried cohabitants in England). In Walsh it was considered fatal for the purposes of a quantum meruit award that the claimant 'never intended to charge' for services relating to her fiancé's business project (*Walsh v Singh*, at para [65]). On this basis, her claim was distinguished from that in *Cobbe*. Miss Walsh was found to have contributed voluntarily and 'in the expectation of a long-term relationship and eventual marriage' rather than a reward (*Walsh v Singh*, at para [65]). More generally, and without discussing particular unjust factors, Judge Purle QC expressed concern that '[i]f

dashed expectations of a long-term domestic relationship open the door to unjust enrichment claims, a wide range of claims which the concept of unjust enrichment was never meant, and is ill equipped, to deal with will come marching through' (*Walsh v Singh*, at para [67]).

It may be possible to distinguish care cases from *Walsh v Singh*, not least because the judge found it impossible to value Miss Walsh's services in the context of the parties' quasi-marital relationship, and because a carer may be more likely to have acted for a reward of some kind. Nevertheless, it is conceivable that Judge Purle QC's more general statement will become influential even if it is questionable whether the constructive trust or proprietary estoppel are any more equipped to deal with 'domestic' cases than are the principles of unjust enrichment.

In contrast to the position in England, unjust enrichment has been applied with notable success in Canada to provide a remedy for informal carers (see Wells, 'Testamentary Promises and Unjust Enrichment' for a full discussion of the enforcement of testamentary promises in Canada through unjust enrichment; Nield, 'Testamentary Promises' considers the position specifically as regards carers).

A leading example of the Canadian jurisprudence is the decision of the Court of Appeal of British Columbia in *Clarkson v McCrossen* (1995) 122 DLR (4th) 239. The case involved a woman who went to considerable lengths to care for her mother and then her stepfather, and brought a successful claim in unjust enrichment against her stepfather's estate. Hinds J, with whom the other two judges agreed, held that the deceased was enriched by the claimant's services. Those services were 'varied in nature and substantial in value' (*Clarkson v McCrossen*, at para [43]) and included periods of nursing the deceased in his own home. There was said to be no juristic basis for the enrichment (the test applied in Canada: see Wells, 'Testamentary Promises and Unjust Enrichment', at p 68 for discussion). The claimant 'was under no obligation, contractual, statutory or otherwise,' to render the services (*Clarkson v McCrossen*, at para [53]), and there was a 'substantial body of evidence' suggesting that 'both her mother and her stepfather had consistently told [the claimant] … that upon their death the family home would be hers' (*Clarkson v McCrossen*, at para [37]). The stepdaughter therefore had a legitimate expectation that she would inherit the family home. The applicant had been left only a small legacy following an argument with her stepfather over his remarriage, and the deceased's enrichment was deemed to be unjust. The claimant was awarded an amount representing the 'value received' by the deceased by virtue of the services (*Clarkson v McCrossen*, at para [72]).

The Canadian law of unjust enrichment is more developed than its English equivalent in its application

to cases within the scope of this article. However, it is perhaps unsurprising that the body of law has frequently been applied to carers in Canada, since in the context of conjugal cohabitation it is invoked for similar purposes to the common intention constructive trust in England (see, eg JD Payne and MA Payne, *Canadian Family Law* (Irwin, 3rd edn, 2008), at pp 61–62; the Supreme Court of Canada recently considered the application of unjust enrichment principles to the breakdown of non-marital relationships in *Kerr v Baranow* [2011] SCC 10). Similarly, when deciding on the appropriate remedy in a domestic case, Canadian judges have gone beyond what would be considered the boundaries of unjust enrichment in England and Wales (Wells, 'Testamentary Promises and Unjust Enrichment', at p 68).

Conclusion

Since it is highly uncertain and underdeveloped in its application to the scenarios under discussion, it can be concluded that an informal carer is likely to encounter difficulty in utilising the English law of unjust enrichment at present. In any case, given the controversial nature of private law claims by carers in general, unjust enrichment has the disadvantage of potentially generating more of a sense of entitlement on the part of the carer than, for example, a statutory claim on the care recipient's estate that is subject to judicial discretion (see, eg *Plumley v Bishop* [1991] 1 FLR 121 (CA)), or even proprietary estoppel. Nevertheless, future unjust enrichment-based claims by carers should not be ruled out.