

## Is Unjust Enrichment Fundamental Breach in disguise?

Fundamental breach was big news in the 1970's, a new legal doctrine advanced by the late Master of the Rolls, Lord Denning, that said exclusion clauses could not protect a party against breach of a fundamental term of a contract, no matter how widely that exclusion clause was drafted. I confess I was a fan of that doctrine. It seems fair. You looked at how serious the breach was, and if serious - or fundamental - enough, you could forget reliance on any exclusion clause.

However, in 1981, in *Photo Production Ltd v Securicor Transport Ltd [1980] AC 827* a heavy-weight House of Lords decided there was no such rule of law or doctrine and that whether an exclusion clause was apt to exclude or limit liability was simply a matter of construction of the contract.

Interestingly, I took my master's degree in marine law in 1982, shortly after the *Photo Production* case, and my dissertation dealt extensively with it.

Now, there is a new equitable hero on the block, unjust enrichment, which at first glance seems to have purchased a few of the clothes formerly worn by fundamental breach. But is that the correct analysis?

Unjust enrichment is a form of restitution where a party has been enriched, or has received a benefit, the enrichment was unjust, and was at the expense of the claimant. This all sounds fine, but the apparent similarity with fundamental breach arises when unjust enrichment is used in an attempt to bypass the clear words of a contract.

In a very recent summary judgment application, *Olympic Council of Asia v Novans Jets LLP [2021] EWHC 1063 (Comm)*, sums were paid by the claimants under a block hours contract for the provision of an aircraft. The contract was terminated without all the block hours having been used due to alleged non-payment of certain invoices by the claimant. The claimant is seeking to recover a proportion of the sums it had paid on the grounds of unjust enrichment, despite the contract providing "payment paid to Lessor is non-refundable".

The summary judgment application did not succeed, and the issues remain live, but the relevant point, I would submit, is this: pre *Photo Production Ltd*, the clear words of an exclusion clause would not operate if the breach they sought to protect was fundamental. Should similar considerations apply in regard to unjust enrichment cases, such that the clear words of a contract should not apply if to do so would result in unjust enrichment?

Alternatively, is the correct analysis that one should always have regard to the clear words of the contract? Where should the line be drawn?

It seems to me that it is premature to expect unjust enrichment to end up as a new species of fundamental breach any time soon.

In Costello v McDonald [2011] EWCA Civ 930 Etherton LJ said:

*"The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance..."*

And Lord Neuberger in Arnold v Britton [2015] AC 1619:

*"while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed"*

In many cases, what seems to be happening is that the words of the contract will be very carefully analysed for accuracy, and that is particularly the case where the parties do not have assistance from lawyers at the drafting stage.

However, what I have seen in several recent cases I have been involved in (arbitration and court) is that unjust enrichment is being deployed by parties more frequently when seeking to challenge what they see (rightly or wrongly) as an unjust or perhaps unintended outcome. This popularity is relatively new, and the exact scope still unclear.

Whilst I don't think that fundamental breach has been reborn in a different guise as unjust enrichment, it is becoming a "thing" that lawyers like me have to pay close attention to and this is putting greater emphasis on contract drafting skills.

It is also a warning to parties to get good advice early in the drafting process.



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#### **CONTACT**

Bargate Murray  
44 Worship Street  
London EC2A 2EA  
[www.bargatemurray.com](http://www.bargatemurray.com)

T: +44 (0)20 7375 1393

E: [yachtgroup@bargatemurray.com](mailto:yachtgroup@bargatemurray.com)  
[aviationgroup@bargatemurray.com](mailto:aviationgroup@bargatemurray.com)  
[propertygroup@bargatemurray.com](mailto:propertygroup@bargatemurray.com)