



UNJUST ENRICHMENT: A DISPUTES MECHANISM TO REBALANCE CLIMATE CHANGE-LINKED GAINS?

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The increasing focus on environmentally sustainable business and climate change has thrown a spotlight on conduct and profits in industries seen as direct and indirect contributors to the global problem of climate change.

Climate-related litigation has traditionally targeted governments, including through the use of judicial review to challenge decisions (and potential violations of the Climate Change Act, international standards and human rights law). Mass tort litigation and nuisance claims against fossil fuel companies have also featured in other jurisdictions. These types of actions typically seek loss-based relief (e.g. compensation) or declaratory relief to prevent loss events arising. At present, English law remedies for climate change victims remain largely untested. Claims in tort are likely to encounter substantive problems relating to causation and are procedurally complex (and therefore time and cost intensive). Human rights related claims are still experimental and the link between climate change and human rights is underdeveloped to say the least. Whether or not English courts are asked to adopt the same approach as the Dutch court in *Netherlands v. Urgenda* Foundation also remains to be seen (imposing a duty of care on the government to protect individuals' human rights from the effects of climate change).

We also see claims emerging against corporates in England and Wales and the potential claims landscape against directors and companies for breach of statutory duties (under the Companies Act and Financial Services and Markets Act), negligence and misrepresentation has been widely acknowledged. We consider another approach and potential role for climate-related litigation: when a person or organisation is enriched at the expense of another in circumstances that the law sees as unjust. The branches of restitution and unjust enrichment are relatively young as a matter of English law. While the case law is long-standing, the subject was only authoritatively dealt with by the House of Lords in 1991 in *Lipkin Gorman v Karpnale Ltd.* It is also one of the few areas of English law that has formally received (in 2012) a "restatement" – a powerfully persuasive, but non-legislative, statement of the law with the input of the judiciary.¹ Unjust enrichment reflects a "corrective justice" theory of law: that citizens have a right to restoration in equity when a party has deliberately externalised to them the costs of a climate-related activity, while asymmetrically internalising the benefits (usually in the form of profits).²

Unjust enrichment in English law

Unjust enrichment requires that:

- i. A defendant was enriched or received a benefit (which could include goods, services or cost savings);
- ii. The enrichment occurred at the claimant's expense (where a sufficient causal connection exists between the transfer of the benefit by the claimant and the enrichment of the recipient); and
- iii. The enrichment was unjust (which may be demonstrated by a broad range of factors including duress, undue influence, exploitation, ignorance, illegality, and failure of consideration among others).

There are several defences that may be deployed by defendants. Among those is the 'change of position' general defence that can apply to almost all unjust factors and where the defendant's circumstances have changed detrimentally as a result of the unjust enrichment. Where there is no available defence, remedies in restitution may (among other things) require the defendant to reimburse the claimant according to the value of the enrichment, or enable a claimant

¹ A Restatement of the English law of unjust enrichment (2012). Andrew Burrows, assisted by an advisory group of academics, judges and practitioners (including Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Mance, Lord Justice Moore-Bick and Mr Justice Etherton)

² https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1066&context=penn_law_review_online

to trace into the defendant's assets. Whereas compensatory damages look at the claimant's loss, restitution looks to restore the benefit from the defendant to the claimant, providing a disincentive to making unjust gains.



Unjust enrichment in the BAT Litigation

Last year one action in tort and unjust enrichment was given the green light to proceed against two multinational tobacco groups alleged to have facilitated unlawful, exploitative and dangerous conditions of Malawian tobacco farmers – an example of litigation that focusses on the 'social' limb of the term 'Environmental, Social and Governance'.

The claimant farmers argue that the tobacco groups benefited from the receipt of valuable tobacco leaves and agricultural services at a cost well below market value.³ The claimants argue their degree of vulnerability, the extent and egregiousness of their exploitation and the size of the profits made in consequence of that exploitation are so exceptional as to require the availability of a restitutionary remedy for unjust enrichment even if the defendants' enrichment is indirect. While the defendants had not received the benefits directly from the claimants, they are alleged to have structured their involvement in a way deliberately intended to give the outward impression of separation from the tobacco farms.

If the farmers succeed at trial, unjust enrichment may become a popular additional claim in similar supply chain litigation against UK companies, and which could extend to climate change issues.

Discussion

"At the claimant's expense" is the general (and controversial) concept within the law of unjust enrichment that describes the need for causation between a claimant and a defendant's enrichment. In the past, practitioners described the need for a "transfer of value" or that the defendant's enrichment must be a "subtraction from the claimant". However, the 2012 restatement of unjust enrichment by English judges makes clear that neither active conduct by the claimant or a loss on the part of the claimant is required, so long as the enrichment of the defendant is "from" the claimant – an approach supported by the House of Lords in *Sempra Metals Ltd v IRC*.⁴

ESG (and the relevance of litigation as a tool for driving ESG values) has gained traction among lawyers and companies in recent years. Although there is no cause of action specifically designed for ESG, the approach to "causation" in unjust enrichment (as described above) is reflective of the values of ESG. In the climate change context, unjust enrichment could be used as a basis for liability when a defendant has been enriched "at the claimant's expense", relieving claimants from satisfying the otherwise high bar of causation set by tort or the problems associated with using human rights as a proxy. Instead, unjust enrichment enables litigants to bring claims based on "factors" that render a defendant's enrichment "unjust".

Other jurisdictions

In the US, where the volume of climate-change litigation dwarves that seen to date in England and Wales, unjust enrichment has been pleaded ancillary to other causes of action in claims against companies and directors:

i. A claim against a shoe manufacturer was recently dismissed after the plaintiff (a consumer) failed to establish that the company's environmental impact claims were materially misleading, and so the remaining claims which included unjust enrichment in respect of the company's profits similarly failed and were also found to have been inadequately pleaded.

In dismissing the unjust enrichment claim the court also was not convinced that it was not merely duplicative of other causes of action.⁵

ii. Fossil fuel producing companies are being sued by local governments for having knowingly and substantially contributed to the climate crisis while concealing and misrepresenting the associated dangers. The companies are alleged to have profited from the manufacture, distribution and sale of fossil fuels and by not incurring the costs necessary to reduce the impacts of their contributions to climate change, at the expense of the plaintiffs and plaintiff communities.⁶

iii. A shareholder derivative action against the directors of a company which produces a purportedly biodegradable plastic alternative alleges failure to correct the company's false and misleading statements including as to the product's biodegradability and exposing the company to reputational and financial damages as a result. The unjust enrichment claim points to the compensation received by the directors, which was allegedly either tied to the false and misleading statements or to the company's performance/ inflated valuation, or was unjust in light of the directors' bad faith conduct.⁷

iv. A separate derivative claim against a fossil fuel company for material misrepresentations around its use of carbon proxy costs and damage to the company's image and goodwill (as well as the financial liability associated with related investigations and a securities class action) also alleges unjust enrichment based on the compensation and remuneration received by directors while breaching their fiduciary duties to the company.⁸

3 Josiya & Ors v British American Tobacco Plc & Ors [2021] EWHC 1743 (QB)

4 [2007] UKHL 34

5 Dwyer v. Allbirds, Inc., No. 21-CV-5238 (CS), 2022 WL 1136799 (S.D.N.Y. Apr. 18, 2022)

6 Boulder County Commissioners, et al v. Suncor Energy Inc., et al., No. 19-1330 (10th Cir.)

7 Perri v. Croskey, No. 1:21-cv-01423 (D.Del.)

8 In re Exxon Mobil Corp. Derivative Litig., No. 2:19-CV-16380-ES-SCM, 2020 WL 5525537 (D.N.J. Sept. 15, 2020)



Considerations for litigants

Targets for future litigation

The targets for such climate-related unjust enrichment litigation are broad – they include fossil fuel companies benefiting from the exploitation of land (and relatedly workers), as well as institutions and governments that facilitate and finance companies or projects where unjust factors such as ignorance, incapacity or misrepresentation are at play. Investigative journalists at Global Witness estimated that certain financial institutions received \$1.74 billion in interest, dividends and fees from financing the parts of agribusinesses groups that carry the highest deforestation risk – primarily soy, beef, palm oil and pulp and paper.⁹ They note that tropical deforestation is responsible for 8 per cent of global CO₂ emissions and has played a key role in driving up global temperatures and biodiversity loss. Financial institutions are therefore a realistic target for unjust enrichment claims, as well as other claims commonly pleaded with unjust enrichment (such as negligence and misstatement-related causes of action).

Procedural and substantive barriers

While unjust enrichment claims may be seen as a mechanism to “strip” companies of profits obtained by one or more of the various “unjust factors”, this is subject to a claimant (or claimants) having legal standing to bring a claim – as discussed above, there must be a connection between (i) the defendant’s enrichment and (ii) the enrichment being at the claimant’s expense. That discussion has not occurred in respect of climate change issues. Claimants bringing a claim on a representative basis or group basis may also face practical and procedural issues, such as whether a representative or “test” claimant is representative of a wider group or class.

Litigation risk for companies and directors

The employment of unjust enrichment claims in English (and international) disputes to date, together with the reports of investigative journalists such as those by Global Witness, are important indicators for multinational corporations operating in the energy, manufacturing and financial services industries (among others). These industries have been marked as direct and indirect contributors to climate change and face the biggest risk of “corrective justice” applications of the unjust enrichment claim.

Provided the necessary components are established, unjust enrichment claims could prove to be a valuable tool in the absence of (or alternative to) statutory, contractual or tortious causes of action, to redress the balance between those contributing to the climate crisis and those paying the price. That said, the nature of climate-related litigation means that parties will often be amenable to settlement and so it may be some time before such an action is tested. In the interim, companies and directors should keep in mind the framework of unjust enrichment in the context of their activities, from managing supply chains to setting board remuneration.

Where unjust enrichment claims against companies succeed, companies may face a second wave of litigation from shareholders for any misstatements linked to the facts of a given unjust enrichment dispute. Directors may also face investigations or derivative claims to account for remuneration linked to those funds. Much then depends on whether and to what extent, the unjust enrichment claim is used to rebalance gains obtained by parties and industries that are seen as the root of climate change.

