SCCH No.276470

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Irving Oil Ltd. v. Hi-Liner Fishing Gear and Tackle Company, 2007 NSSM 91

BETWEEN:

IRVING OIL LIMITED

Claimant

- and -

HI-LINER FISHING GEAR AND TACKLE COMPANY and CREIT MANAGEMENT LIMITED,GRESTION CREIT LIMITEE

Defendants

DECISION

Adjudicator:David T.R. Parker

HEARD: May 31, 2007
DECISION: JULY 20, 2007

Counsel: The Claimant Irving Oil Limited was represented by Jeremy Gay.
The Defendant Hi-Liner Fishing Gear and Tackle Company was represented by Kent Noseworthy
The Defendant Creit Management Limited was represented by .
. Lindsay Jardine.

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Parker: - This matter was commenced in the Supreme Court of Nova Scotia and the Claimant subsequently elected to have the action proceed in the Small Claims Court of

Nova Scotia. Creit Management Limited was added as a Defendant in the action by way of an Order of this court and the Statement of Claim was likewise amended in the same Order, dated April 2, 2007.

The claim was against the Defendants jointly and severally for unpaid products and services supplied by the Claimant in the amount of $6,251.72.

The Defendant, Hi-Liner Fishing Gear & Tackle Company ["Hi-Liner"]. In April 2004 executed an amendment to its lease with the landlord wherein it acquired additional space in the premises it was renting. Hi-Liner's witness acknowledged the Defendant was responsible for heat under the head lease and the amended lease.

The Defendant Hi-Liner was to take over the premise, in June 2004. A letter dated June 2, 2004 was sent to the Defendant by the landlord, who advised the Defendant Hi-Liner to contact Nova Scotia Power and Irving Oil Limited in order to ensure that services would be connected.

A credit application to the Claimant was completed on June 4, 2004 for propane and was sent to the Defendant, but never executed by the Defendant Hi-Liner. The Defendant's commercial application was declined by the Claimant as a credit report was unsatisfactory, and the incorrect corporate name was put on the application. The date on this application was June 4, 2004.

Unit 10 being the premises acquired by the Defendant, Hi-Liner under the amended lease received propane from November 2004 to April 2005.

In June 2005 the Defendant was contacted by the Claimant and another commercial account request was completed as the Defendant told the Claimant to sign him up. The

Defendant Hi-Liner thought it was for air conditioning, but the Defendant's witness also said he was told by Claimant space number 10 had a heating unit and they supply propane and do you want an account and he said yes.

The Claimant was sending its invoices to another party in 2004 that were not responsible for the account. The meter readings for propane as evidence in exhibit C.-1 was unreliable in 2003, and the Claimant's system of billing is at times difficult to determine.

In 2005 propane supplied to the Defendant Hi-Liner was paid for by the Defendant. It really comes down to the billings for 2004 that are being brought into question. The amount of propane, charged out in 2004 for the unit in question is $3,725.78 based on Exhibit D-8.

Counsel bases their entire argument on the remedy of restitution. In doing so, they have referred to a case from the Supreme Court of Nova Scotia Appeal division as it then was, and cited as ***Carabin v. Offman*** [1988] N.S.J. No. 434. Hart J.A. gives a thorough review of the law as it stands in Nova Scotia at that time. I refer to the following passages from that decision:

"**The principal ground of appeal is that this was not an appropriate case for granting restitution on the basis of *unjust enrichment* and it is with that issue that I will now deal.**

As authority for granting the remedy of restitution, Mr. Justice Hallett referred to the cases mentioned by him in an earlier decision, Preeper et al v. Preeper et al (1978), 27 N.S.R. (2d) 82. That was a case in which the purchasers entered possession of a property under a verbal agreement of sale, assumed mortgage payments and made improvements to the property. It was expected by the parties that a cloud on the title would be removed and, in the meantime, the purchasers assumed that they were purchasing the property while the owners assumed that they were merely occupying as tenants. When the owners sued for possession, they were successful but Hallett, J., after reviewing the leading cases dealing with the concept of restitution, concluded:

- **In the case before me, the parties did have a special relationship as they had made an agreement (as far as they were concerned) respecting the sale and purchase of land, which fell through because of the title**

difficulties. The agreement was unenforceable for the reasons that I have indicated that there had not been any meeting of minds on the purchase price and, as a consequence, the acts of part performance were of no avail to the Defendants. However, the Defendants went into possession with the knowledge and consent of the plaintiffs and, in accordance with their agreement, began to make payments on the mortgage and, did so throughout the duration of their possession. The Defendants, even before going into possession and throughout their possession, made substantial repairs and improvements to the property.

- **In my view, the relationship between the plaintiffs and the Defendants was marked by the two characteristics referred to by MacKinnon, J.A., in Nicholson v. St. Denis in that the plaintiffs knew the repairs were being made and acquiesced. Therefore, having regard to the relationship between the parties and the circumstances of the case, I am of the opinion that it is just and reasonable that the plaintiffs pay to the Defendants the sum of $4,707.00, representing the value of the improvements to the property.**

- **The case before me is distinguishable from McGrath v. Hazlett (1976), 13 N.S.R. (2d) 567; 9 A.P.R. 567, in which case the plaintiff, a purchaser of a property at a tax sale, went ahead and made improvements to the property in the face of warnings that the former owner had a year in which to redeem the property and under those circumstances Hart, J., found that it was not a proper case in which equity could come to the assistance of the plaintiff.**

- **In the case before me, the plaintiffs, if they considered the Defendants, following the discovery of the title defect, to be only tenants, they should have made that very clear to the Defendants and their failure to do this and their acquiescence in the Defendants making the improvements was a wrong done to the Defendants.**

When applying these principles in the case at bar, Mr. Justice Hallett stated:

- **I have reached the conclusion that this is an appropriate case to grant the remedy of restitution. I should note that every time someone suffers a loss it is not necessarily a loss that should be compensated. This point was made by the Ontario Court of Appeal in Nicholson v. St. Denis et al (1976), 57 D.L.R. (3d) 699, to which I made reference in Preeper et al v. Preeper et al (1978), 27 N.S.R. (2d) 82 at p. 87.**

- **In Nicholson v. St. Denis, the Court concluded that in most cases where restitution has been ordered, there has existed a special relationship between the parties which is frequently contractual at the outset which would have made it unjust for a Defendant to retain a benefit and that the relationship between the parties is generally marked by two characteristics; first, knowledge of the benefit on the part of the Defendant and, secondly, either express or implied request by the Defendant for the benefit or, which is of relevance in this case, acquiescence in its**

performance. In this case, the parties had a contractual relationship arising out of the oral lease. Secondly, Mr. Offman, who was Mrs. Offman's authorized agent in all the dealings with the plaintiff, knew the plaintiff was undertaking the extensive leasehold improvements and certainly acquiesced in his carrying out the work which resulted in a substantial improvement to the second floor of the Quinpool Road property owned by the Defendant, Mrs. Offman. In this case, a situation had developed between the parties which was really beyond their contemplation when the terms of tenancy were agreed upon and incorporated in the Lease. They did not contemplate that the noise problem would be so serious that it would lead them to conclude that the tenancy could not continue. Mr. Carabin should have insisted on a clause that would have allowed him to make noise at intolerable levels. He did not. Mr. Offman should have listened to Mr. Carabin when he was explaining how noisy a fitness training centre can be. He did not. Both contributed to the problem they now have.

There can be no doubt that an action now lies in Canada for restitution based upon the *unjust enrichment* of a Defendant at the expense of a plaintiff and that this remedy can be applied with or without the aid of legal techniques such as quasi-contract, constructive or resulting trusts. Deglman v. Guaranty Trust Co. of Canada et al [1954] S.C.R. 725; County of Carleton v. City of Ottawa, [1965] S.C.R. 663; Pettkus v. Becker, [1980] 2 S.C.R. 834; White et al v. Central Trust Cmpany (1984), 7 D.L.R. (4th) 236.

The problem with this type of action is in the limitation or control of its use as a method of preventing injustice within our legal System. At one extreme it is argued that any *unjust enrichment* can be remedied by a trial judge by the exercise of an unfettered discretion. At the other end of the spectrum, the remedy must be withheld unless it can be shown that the enrichment was obtained by some form of fraudulent or unconscionable action which would demand that the courts restore the equilibrium of the parties. The many cases that have been based upon claims of unjust enrichment in recent years have rejected both of these extremes and have attempted to place the type of limits and controls on the grant of the remedy that they consider appropriate in each individual factual situation.

A recent discussion of the attempts by the courts to place limits on the use of restitution to prevent *unjust enrichment* may be found in an article entitled, "Developments in the Law of Restitution" by J.R. Maurice Gautreau, Q.C. in 1984-85 volume 5, The Advocates Quarterly at p. 419. At p. 429 the author states:

6. Limits

- **The view has been expressed not only in English courts but also in Canadian courts that the principle of unjust enrichment is too broad and undefined and can lead to the administration of justice without rules. This was the criticism levelled by such jurists as Hamilton L.J. in Baylis v. Bishop of London(36) and Scrutton L.J. in Holt v. Markham." Martland J.,(38) as recently as 1980, after referring to the generalized concept of constructive trust as a trust imposed by law whenever justice and good conscience require it, said:**

- **In my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe Judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guidelines.**

- **It is respectfully submitted that these fears are more notional than real and, in fact, are no more realistic than those expressed when the broad principle of modern negligence law was enunciated. But, having said this, it remains to be seen how far our courts will go in granting restitutionary remedies:**

  - **... the law will afford a remedy for *unjust enrichment* in the absence of valid judicial policy militating against it. The real challenge for the courts, therefore, appears to be the definition of the outward limits of restitutionary remedies. As Beetz J. put it in Cie Immobiliere Viger Ltee v. Laureat Giguere Inc., [1977] 2 S.C.R. 67 at p. 76, 10 N.R. 277: "The theory of unjustified enrichment is no longer open to debate; discussion relates only ... to the conditions of application." Pending broad conceptual clarification as experience develops, the limits of the application of the principle can perhaps most easily be drawn by applying to new situations policies developed in closely related areas about which well-established criteria have developed. Sometimes this will be done in the traditional manner by stretching existing categories to encompass closely related situations. Thus considerations similar to those applying to duress have been extended to other cases where there has been undue or illegitimate pressure exercised by one person on another and concepts like "practical compulsion" have been adopted.(39)**

- **What happens when the principle of *unjust enrichment* comes into conflict with the principles of freedom and integrity in contracts? It has been held that the *unjust enrichment* principle will be curtailed in the face of a freely negotiated and valid contract even though there might be a secret benefit received and retained**.

- **Jirna Ltd. v. Mister Donut of Canada Ltd.(40) involved a franchise business. During negotiations leading to the franchise agreement, the franchisor represented that franchisees got the benefit of volume purchasing. The franchisee was obliged to buy his products from distributors approved by the franchisor at prices negotiated by the franchisor. The franchisor received kickbacks or secret commissions from the distributors. At trial the plaintiff succeeded in an action for an accounting for profits on the basis of breach of fiduciary duty. It was stated that, to the extent of requiring supplies to be purchased as mentioned, the relationship was very close and akin to an agency or venture in common. The Ontario Court of Appeal reversed this and was upheld in the Supreme Court of Canada. It was**

pointed out that the agreement defined the relationship of the parties as "independent contractors" and, although the court in some cases can and should find the relationship different from what the parties stated, it requires exceptional circumstances such as a real disparity in bargaining position. Here, the parties were experienced businessmen and fully capable of negotiating to protect their interests.

- **In Lister (Ronald Elwyn) Lid. v. Dunlop Canada Ltd.,(41) Estey J. stated:**

  - **Where the parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts**.

- **In contrast to the above views there is the very strong dissenting judgment of Dickson J. (as he then was) (concurred in by Laskin C.J.C.), in Hydro Electric Com'n of Nepean v. Ontario Hydro(42) where the relationship between *unjust enrichment* and contract was considered, but with a different conclusion. For reasons that will be stated later this judgment carries much more weight than the usual dissent. In fact, his views may well show the path of the future. The case involved the recovery of money which was classified as a payment under mistake of law. Dickson J. traced the history of the distinction between mistake of fact and mistake of law. In simplest terms he held that such a distinction was illfounded, served no useful purpose and, in any event, was incapable of application in practice. The significance of the judgment, in addition to the welcome intellectual destruction of the mistake of law defence, lies in the broader exposition of the law of *unjust enrichment* in the context of contract law. He said:**

  - **The adoption of the rule [that money paid under mistake of law cannot be recovered] at the beginning of the nineteenth century occurred at a time when the spirit of the law was becoming opposed "to such idealistic formulations as 'aequum et bonum'" (Anson's Law of Contract, 25th ed. (1979), at p. 646). This change in spirit was nourished by the prevailing philosophical, political and economic ideologies of the nineteenth century, the premise being that partners to a contract are enlightened individuals exercising discrimination and free will and Courts should not disturb their contractual relations. Stability of contractual relations resulted from this policy of judicial non-interference; stability of contractual relations then became the justification for judicial non-interference...**

  - **The principle of sanctity of contract implies the assumption of risk by the parties of the consequences of contracting, again an implication perfectly consonant with the supremacy of free will and enlightened self-interest. But, as Professor Waddams points out ...:**

- **"... an examination of the case shows that, as with unconscionability, so with mistake, contract values are not absolute and must be weighed against other considerations.**

. . . . .

- **Everyone is against *unjust enrichment*, just as we are all in favour of enforcement of valid contracts. If the contract is enforceable, then the enrichment cannot be unjust. But if the enrichment is unjust then the contract must be unenforceable. The circle is inextricable. *Unjust enrichment* is no formula for easy solutions. But it does, it is suggested, provide a useful framework in which to strike the necessary balance."**

- **Certainty in contractual relations cannot be the sole and overriding principle guiding the Courts.(43)**

- **Dickson J. continued, quoting the words of Lord Wright in Fibrosa.(43a) On the point in issue, he concluded:(44)**

- **Finally, the most significant judicial development in the area of mistake of law is not an exception or qualification to the rule but rather the resurgence in English and Canadian jurisprudence of the doctrine of restitution or unjust (or unjustified) enrichment. The Fibrosa decision, supra, and Lord Wright's reasons in particular, marked the "modem revival of restitution as a flexible and knowing system" (Waddams, The Law of Contracts (1977), at p. 213, footnote 6). Once a doctrine of restitution or *unjust enrichment* is recognized, the distinction as to mistake of law and mistake of fact becomes simply meaningless.**

There have been many references in the cases to the undesirability of permitting courts to have a free reign in granting the remedy of restitution in the case of unjust enrichment. Dickson, J. (as he then was), when writing the majority judgment in Pettkus v. Becker, [1980] 2 S.C.R. 834 stated:

- **How then does one approach the question of *unjust enrichment* in matrimonial causes? In Rathwell I ventured to suggest there are three requirements to be satisfied before an *unjust enrichment* can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.**

- **The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of The Ruabon Steamship Company, Limited v. London Assurance with these words: "... I cannot understand how it can be asserted that it is part of the common law that where one person gets some**

advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." (p. 10) Lord Macnaghten, in the same case, put it this way: "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it". (p. 15) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

In Nicholson v. St. Denis (1976), 57 D.L.R. (3d) 699, MacKinnon, J.A., when speaking for the Ontario Court of Appeal, had this to say at p. 701:

- **After an extensive reference to authority, the learned trial Judge came to the conclusion that St. Denis had received and retained a benefit "which it is against conscience that he should keep". The judgment is based on the view that this was a case of *unjust enrichment*.**

- **In my view, the trial Judge was in error in extending that remedy to the facts of this case. He relied on the words of Lord Wright in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] A.C. 32 at p. 61:**

    - **It is clear that any civilized system of law is bound to provide remedies for cases of what has been called *unjust enrichment* or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.**

    - **The trial Judge acknowledged that the words were extremely broad and general but he felt that the Court should not attempt to whittle them down. Counsel for the plaintiff took the position in this Court that these words really meant that it was totally dependent upon the individual Judge's conscience as to whether he considered the circumstances such as to give rise to the remedy of *unjust enrichment*.**

    - **If this were a true statement of the doctrine then the unruly horse of public policy would be joined in the stable by a steed of even more unpredictable propensities. The law of unjust enrichment, which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a Defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense. That does not mean that restitution will follow every enrichment of one person and loss by, another. Certain rules have evolved over the years to guide a Court in its determination as to whether the doctrine applies in any particular circumstance.**

    - **It is difficult to rationalize all of the authorities on restitution and it**

would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the Defendant to retain the benefit conferred on him by the plaintiff -- a benefit, be it said, that was not conferred "officiously". This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the Defendant, and secondly, either an express or implied request by the Defendant for the benefit, or acquiescence in its performance.

- **He concluded at p. 704:**

  - **St. Denis neither sought nor desired the work to be carried out on the property, and was given no opportunity to express his position until long after the work was completed. He has been guilty of no wrongdoing, nor of encouraging the plaintiff in his work. I can see no grounds, under the circumstances of this case, for extending the doctrine of *unjust enrichment* or of restitution to the circumstances of this case.**

The Court of Appeal in New Brunswick in White v. Central Trust Company (1984), 7 D.L.R. (4th) at p. 236 dealt with a factual situation somewhat similar to the Deglman case. La Forest, J.A. (as he then was) had this to say:

- **Not surprisingly, of course, where possible courts will rely on established categories to meet restitutionary claims. Thus in Pettkus v. Becker (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, Martland, Ritchie and Beetz, JJ. relied on the concept of resulting trust, but Dickson J. (Laskin, C.J.C., Estey, McIntyre, Chouinard and Lamer JJ. concurring), after rejecting the applicability of a resulting trust in the circumstances, used the concept of a constructive trust as a tool to effect restitution where an *unjust enrichment* had occurred. At least in the context of matrimonial causes, Dickson J. was willing to suggest a wide application for the principle of unjust enrichment. He stated at p. 273 D.L.R., pp. 847-8 S.C.R.:**

  - **"Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan [supra] put the matter in these words: "... the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an *unjust enrichment* might arise ... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of**

society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury ...

- **This would appear to mean that the law will afford a remedy for *unjust enrichment* in the absence of valid judicial policy militating against it. The real challenge for the courts, therefore, appears to be the definition of the outward limits of restitutionary remedies ...**

    - **Most authorities, but not all. recognized that an action for unjustified enrichment is subject to the existence of the following conditions:**
        - **1. an enrichment;**
        - **2. an impoverishment;**
        - **3. a correlation between the enrichment and the impoverishment;**
        - **4. the absence of justification;**
        - **5. the absence of evasion of the law;**
        - **6. the absence of any other remedy.**

- **This, as I mentioned, was a civil law case but a universal principle such as we are dealing with here affords an excellent opportunity for cross-fertilization between Canada's two legal systems. Indeed, there is a considerable measure of agreement with Beetz J.'s formulation in the following statement of Dickson J. in Pettkus, at p. 277 D.L.R., p. 852 S.C.R.**:

    - **For the *unjust enrichment* principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute.**

George B. Klippert, in his text *Unjust Enrichment*, discusses the present state of judicial uncertainty as it relates to the imposition of the remedy of restitution. At p. 33 he states:

- **What is the cause of this uncertainty and inconsistency in the restitution cases? Two explanations might be offered. First, the defenders of the implied contract approach could point to the Canadian experience and conclude that *unjust enrichment* as the exclusive basis for liability has left the whole matter of obligation in a restitution case to the complete discretion of the court and the Canadian courts have ended up with no**

system at all. Second, it can be argued that change may appear as anarchy before being finally assimilated. A period of confusion may be the inevitable cost until the courts adjust to a different method of decision-making. It becomes a transition period for the courts and the legal profession. With the advantage of hindsight we know that Deglman and Carleton v. Ottawa(45) are milestone decisions. These decisions have provided a new generation of Canadian judges with "legal tools and techniques which have an in-built flexibility".(46) But what are the safeguards against the arbitrary imposition of civil liability? The challenge is to reconcile this in-built flexibility which comes from using a general principle to impose civil liability with rules designed to make judges accountable for the way they exercise their discretion.(47)

- **Looking back over this period we find a jurisprudence to accommodate a new approach to unjust enrichment. As we will see in later chapters, more of the pre-Deglman quasi-contractual cases have been absorbed than jettisoned. But the possibility remains that a judge may decide that *unjust enrichment* leaves the question of liability to his absolute discretion. In the trial court judgment of Nicholson v. St. Denis(48) Gould D.C.J. reviewed the development of *unjust enrichment* since Deglman and concluded that: "Ultimately the case appears to reduce itself to the simple question -- what result does the Court consider to be in accordance with good conscience?"(49) Thus after giving a "most thorough consideration" to the problem, Gould D.C.J. concluded that it was against conscience for the Defendant to retain a benefit derived from the plaintiff.(50) The Defendant appealed. In the Ontario Court of Appeal, the plaintiff contended that Lord Wright's definition of unjust enrichment in Fibrosa "really meant that it was totally dependent upon the individual judge's conscience as to whether he considered the circumstances such as to give rise to the remedy of unjust enrichment."(51) MacKinnon J.A. rejected this broad discretionary power, and held that unjust enrichment was subject to a number of important control devices.**

- **Have we left the third stage of progression? The answer is clearly that the courts have not yet become fully accustomed to applying such a broad, flexible principle. There is something more involved than an individual sense of fairness, justice or good conscience. Yet those considerations are part of the principle. The challenge has been to develop some objective standards so that an unjust enrichment case turns upon uniform criteria applied in all similar cases. The third and fourth stages overlap until these uniform criteria, which may be called control devices, have been widely accepted throughout the court system.**

The Newfoundland Supreme Court recently dealt with a claim of a landlord to recover possession of property which he had leased for a ten year period with an option to renew and an option to purchase. During the term of the lease, the tenant failed to pay the rent and failed to take up either the option to renew or to purchase at the end of the term. In the action for possession by the landlord the tenant argued that he was entitled to

recover for the substantial improvements that he had made to the property during the term of the lease in the expectation that he would eventually become the owner. Mr. Justice Steele tried the case reported as Dodds-Parker v. White (1985), 55 Nfld. & P.E.I.R. 250 and he stated at p. 254:

- **I accept as good law the following statement by Lord Cranworthy, C., in Ramsden v. Dyson (1866), L.R. 1 H.L. 129; 14 W.R. 926:**

    - **"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. But to raise such an equity two things are required - first, that the person expending the money should suppose himself to be building on his own land; and, secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him, and not to the person expending the money in the belief that he is owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land, with the benefit of all the expenditure made on it. It follows, as a corollary from these principles - or perhaps it would be more accurate to say it forms part of them - that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end ..."**

    - **White was not a stranger on the property of Dodds-Parker and certainly White did not incur the expenses and costs of improving or enhancing the value of the property supposing himself to be doing so on his own land. This was not a case where the occupier wrongly believed himself to be the true owner and innocently expended money carrying out improvements while the real owner knowing better deliberately remained silent permitting the occupier to persist in his blunder. The reality is that White was the tenant of Dodds-Parker and I am satisfied that not only did he duly execute the lease but was fully aware of his limited interest or term under the lease. The issue is whether there are special circumstances existing whereby in law or equity the lessor ought to be prevented from taking possession of the land together with all the improvements and additions, or in the alternative, if the lessor is to have possession whether the tenant (White) is to be compensated for his expenditures over and above his obligation by covenant to keep in good repair What are the "special circumstances" that would make possible the granting of the remedy or relief now requested by**

White?

- **I am not aware of any technical legal meaning to be attached to the phrase "special circumstances". I feel sure that when Lord Cranworthy used the phrase he did so with the intention of permitting great flexibility and wide discretion to the interpretor. As expected the facts of each situation become critical. In my opinion an occupier would be entitled to relief by way of reduction of rent or compensation where he carried out the improvements, in the absence of any express covenant or agreement, while acting upon a misrepresentation, fraudulent or otherwise or upon any deceit by the landlord calculated to induce the tenant to build improvements and additions which he otherwise would not have done. This was not the case here.**

I had occasion some years ago to deal with a somewhat similar situation where a purchaser at a tax sale made substantial improvements even though he knew that the property could be redeemed within a year by the owner. In McGrath v. Hazlett (1976), 13 N.S.R. (2d) 567, I concluded at p. 573:

- **The plaintiff's claim is based upon the equitable jurisdiction of the Court and must therefore be founded upon some wrong-doing on behalf of the Defendant which led to the plaintiff's loss. If the Defendant knew of the plaintiff's mistaken belief in his rights to recover for expenditures made on the property and deliberately acquiesced in those expenditures being made in the hope of gaining a future advantage, then relief would be granted. If the Defendant had fraudulently led the plaintiff to believe that the property would not be redeemed and he was safe in proceeding with his expenditures I am sure that a Court of equity could not permit him to take advantage of his fraud.**

The Federal Court of Canada dealt with the issue of *unjust enrichment* in McLaren v. The Queen, [1984] 2 F.C.R. 899. The facts were stated in an editorial note as follows:

- **The facts were that a rancher mortgaged his land in favour of the Industrial Development Bank and his interest was subsequently foreclosed. The Department of Indian Affairs and Northern Development acquired title. The rancher commenced legal proceedings (which eventually ended without success) seeking a further opportunity to redeem. While these were in progress, the rancher was permitted, under an informal agreement, to remain in adverse possession. It was during this period that the plaintiffs supplied seed and services to the rancher and they have brought action to recover the value of these from Her Majesty on the grounds of either agency of necessity or *unjust enrichment*. There was here no question of any contractual relationship between the plaintiffs and the Defendant.**

Mr. Justice Muldoon, after citing the statement of Lord Wright in the Fibrosa case, said:

- **One can hardly quarrel with this principle, but one wonders in what circumstances it is to be applied. Certainly if there be two parties to an arrangement and one of them, by words or conduct, has induced the second to enrich the first in circumstances in which the second would be unlikely to have made a gift to, or conferred a gratuitous benefit upon, the first one whose words or conduct are proved, then it seems clear that the principle ought to be applied. But what if there were the intervention of a third party? Or what if there were no arrangement between the plaintiff and the Defendant, at all? What if, as in the case at bar, both of those circumstances were found? so it is that the expression of Lord Wright's dictum is rather more simple and clear than its application.**

Mr. Justice Muldoon then refers to the remarks of MacKinnon, J.A. in the Nicholson v. St. Denis case in which a "special relationship" between the parties was found to be necessary and he continued:

- **What is that special relationship? It may be contractual, fiduciary or matrimonial. It may be a very casual arrangement, or an unenforceable contract. It seems to be the sine qua non of success, but it is not an inevitable guarantee of success. A special relationship is a factor in all but two of the cases, cited here by counsel, in which the plaintiffs have succeeded. It is the essential nexus between the Defendant's words and conduct, and the plaintiff's conferring of the benefit ..."**

After referring to cases in which a special relationship was held to exist and others in which it was not, Muldoon, J. concluded:

- **The plaintiffs here knew, of course, that they themselves did not own the land in question. In light of the general knowledge of people in the area that Lees was being forced off his former land by the government, the plaintiffs probably knew, and certainly had good reason to believe that Lees was in unlawful possession. They all knew that they had supplied the seed and services to Lees, and not to the Defendant, and they all believed that it was Lees to whom they must look for payment.**

- **There was, no doubt, a probable basis for misunderstanding between the Defendant and Lees, fuelled and enhanced by the latter's virtually invincible hope and determination not to be displaced but, indeed, to regain title to the ranch without any interruption of occupancy. Indian Affairs, advised by the Department of Justice, was simply letting Lees remain in occupancy until judicial authorization had been obtained to evict him from the land. That authorization was accorded sooner than either Lees or the Defendant expected and when it came, the Defendant with absolutely no inconsistency, in regard to past conduct, moved promptly to effect the eviction.**

- **The salient factor in this case is the absence of any special relationship between the parties. The plaintiffs and the Defendant were drawn into this dispute because of the conduct of John Harold Maxwell Lees, against whom the plaintiffs would have had a cause of action for the value of seed and services, if they had elected to pursue it. In the circumstances of this case, in the absence of any special relationship, and on the evidence, the Defendant must be exonerated and the plaintiffs' actions must be dismissed, with costs to be taxed, if the Defendant chooses to exact them.**

In Herman v. Smith (1985), 42 R.F.L. (2d) 154, Waite, J. of the Alberta Queen's Bench held that a woman who had lived as a common law spouse for six and one-half years was entitled to compensation for her efforts in maintaining the Defendant's assets even though her contribution did not cause an appreciation in the value of the assets. At p. 160 he stated:

- **If it is necessary, analytically, to find an unjust enrichment in favour of or to the benefit of the Defendant, it can be found in the fact that during the course of the six or seven-year relationship the Defendant, in fact and in substance, received, for all practical purposes, the full benefits of a good, sound and healthy marriage without in the end result facing or having to suffer any of the obligations arising from that relationship. And if deprivation to or of the plaintiff is required, it can be found without difficulty in the continuing services and the labour involved in them that she expended, and the supplying of those benefits to the Defendant during that period of time. I am not satisfied that, as a matter of modern principle, that type of pigeon-holing ought to be required, but if it is I'm satisfied the evidence supports it in this case.**

It would appear to me that this decision is a very simplistic exercise of complete and unfettered discretion on the part of a trial judge and does not meet the criteria which have been developing for the control of the principle of *unjust enrichment*. This view appears to be shared by Mr. James G. MacLeod of the Faculty of Law of the University of Western Ontario who is the author of an annotation printed in the report of the case.

I also refer to a recent decision of this Court, which looked at the elements of unjust enrichment, as well as whether unjust enrichment was an appropriate remedy of this Court. The decision was appealed to the Supreme Court of Nova Scotia in which it was determined that it was not necessary for a special relationship to exist between the parties in order to allow the remedy of unjust enrichment. The Supreme Court of Nova Scotia in that appeal also concluded that Small Claims Court of Nova Scotia does have the jurisdictional authority to deal with the remedy of unjust enrichment. I shall refer to the Small Claims Court decision and the relevant paragraphs related to the elements

necessary for the implementation of the remedy of restitution. I shall also refer to the appealed decision all of which have referred to in arriving at a decision in this case. The Small Claims Court decision is cited as follows: ***Wacky's Carpet & Floor Centre v. Maritime Project Management Inc.*** [2006] N.S.J. No. 98, and the relevant paragraphs are the following:

"This issue of *unjust enrichment* which has been put squarely before this Court by the Claimant is somewhat problematic. It is an equitable remedy which is possibly a remedy not to be doled out by this Court, and if it is within the ambit of this Court then subjective judicial discretion must be avoided in meting it out as a remedy. The superior courts have ensured its objectivity through the use of a three-part test which I shall refer to further on in this decision.

24 I will first deal with *unjust enrichment* as a remedy and then I shall deal with it as a remedy which this Court can or cannot allow in the exercise of its judicial duties.

25 Another word for unjust enrichment is restitution, and while restitution is a remedy that can come about for breach of contract, it is an equitable remedy that exists when there is no contract or in instances where there is a quasi-contract. For example, when the parties thought they had an agreement but due to an operation of law, example, the inclusion of the Statute of Frauds on an agreement, the law will consider restitution. The courts will not allow someone to obtain an unjustifiable benefit when they have provided labour or materials even though there may not be a valid contract between the parties. As Justice MacKinnon said in the now infamous case, Nicholson v. St. Denis (1975) 8 O.R. (2d) 315,

- **"The law of unjust enrichment, which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a Defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense."**

26 This doctrine of unjust enrichment has been reviewed by Justice Murphy in the case of Imperial Oil Ltd. v. Atlantic Oil Workers Union Local No. 1 [2004] N.S.J. No 380 and it is the most succinct comprehensive review that I have come across and I refer to it here.

- **In Deglman v. Brunet Estate, [1954] S.C.R. 725, the Supreme Court of Canada considered a situation where the Respondent had an oral agreement with his aunt by which he claimed she had promised to leave him a piece of land in her will in exchange for services to be performed in her lifetime. Although he was unable to establish the writing requirements of the Statute of Frauds, the Court found that he was entitled to recover the value of the services on the basis of quasi-contract or restitution as described in Fibrosa Spolka Akcyjna**

v. Fairbairn Lawson Combe Barbour Ltd., [1943] A.C. 32 (H.L.). In that case, when the unjust enrichment doctrine was in its infancy, Lord Wright stated that a man could not retain "the money of or some benefit derived from another which it is against conscience that he should keep." Justice Wilson, for the Supreme Court of Canada, put the principle in these terms in Palachik et al. v. Kiss, [1983] 1 S.C.R. 623: "Equity fastens on the conscience of the appellant and requires him to deliver up that which it is manifestly inequitable that he retain."

- **Para. 97 The test for unjust enrichment was set out by Justice Dickson (as he then was) in Rathwell v. Rathwell, [1978] 2 S.C.R. 436, and again in Pettkus v. Becker, [1980] 2 S.C.R. 834. Justice Dickson held in that case, for the majority of the Court:**

    - **[T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach ... is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies**.

- **Para. 98 The Supreme Court has most recently confirmed the reasoning in Pettkus v. Becker as the proper approach to unjust enrichment in Garland v. Consumers' Gas Co., [2004] S.C.J. No. 21, para. 30, (reported at (2004), 237 D.L.R. (4th) 385). In that case, the Court, per Iacobucci J. held, following the reasoning of Justice MacLachlin (as she then was) in Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762, that establishing enrichment and deprivation requires a "straightforward economic analysis", with other considerations being incorporated into the analysis to determine whether there was a juristic reason for the enrichment (Garland, at para. 31). Justice Iacobucci set out the proper approach to the juristic reason analysis as follows**:

- **The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. ... The established categories that can constitute juristic reasons include a contract ..., a disposition of law ..., a donative intent ..., and other valid common law, equitable or statutory obligations ... If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis.**

- **The prima facie case is rebuttable, however, where the Defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the Defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.**

- **As part of the Defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed.**

- **The point here is that this area is an evolving one and that further cases will add additional refinements and developments. [paras. 44-46]**

- **In my view that passage from Garland represents the state of the law on the analysis of "juristic reason."**

27 Whenever the three-pronged tests have been met in terms of *unjust enrichment*, the cases have shown that there must be some sort of special relationship between the plaintiff and Defendant. This in effect puts a fourth hurdle or test in place that must be met. As Justice MacKinnon said in the Nicholson case on Appeal:

- **The law of *unjust enrichment*, which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a Defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense. That does not mean that restitution will follow every enrichment of one person and loss by another. Certain rules have evolved over the years to guide a Court in its determination as to whether the doctrine applies in any particular circumstance.**

- **It is difficult to rationalize all of the authorities on restitution and it would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the Defendant to retain the benefit conferred on him by the plaintiff - a**

benefit, be it said, that was not conferred "officiously". This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the Defendant, and secondly, either an express or implied request by the Defendant for the benefit, or acquiescence in its performance.[emphasis added]

28 There is no juristic reason present which would take this outside the scope of the doctrine of unjust enrichment. Further, the Defendant Dr. did receive a benefit and there was a corresponding loss to the Claimant. The question then becomes, is there some nexus or special relationship between the parties. The only relationship the parties have with one another is that materials of the Claimant are in the Dr.'s home. The Defendant Dr. did not meet with the Claimant, the Defendant Dr. did not ask the Claimant to sell him the materials, the Defendant Dr. took no charge over the laying of the floor in question here, the Defendant Dr. did not order the materials, materials and labour to install them in the home nor were they invoiced to the Defendant Dr. The Defendant Dr. did not expect to pay for the material as he paid the other named Defendant PJ or his Company for same. As it turned out, the Defendant PJ was a rogue in the sense he disappeared without meeting his obligations to the Claimant and Defendant Dr.

29 If I am wrong on this relationship business being a prerequisite to *unjust enrichment*, then certainly the three tests have been met."

The Wacky Carpet case was appealed as I indicated is cited as follows: ***Wacky's Carpet & Floor Centre v. Maritime Project Management Inc.*** 153 A.C.W.S. (3d) 351

The relevant portions of that case which refer to unjust enrichment as well as its acceptance as a remedy in the Small Claims Court of Nova Scotia are as follows:

"**At the Small Claims trial heard January 17, 2006, Adjudicator David T. R. Parker held that there had been a contract between Joseph and Maritime, however, there had not been a contract between Wacky's and Joseph. It was further held that there was no *unjust enrichment* because there did not exist a special relationship between Wacky's and Joseph.**

Issue:

[9] Is the remedy of unjust enrichment available to Wacky's?

Analysis:

[10] The Supreme Court of Canada has determined that a remedy would ensue where there was; (a) an unjust enrichment; (b) a corresponding deprivation, and (c) an absence of a juristic reason for enrichment. Pettkus v. Becker (1980) 2 S.C.R. 834. In his decision,

the Adjudicator determined that all three criteria had been met.

[11] The Adjudicator determined, however, that there also had to be some nexus or special relationship between the parties. He wrote:

- **The question then becomes, is there some nexus or special relationship between the parties. The only relationship the parties have with one another is that materials of the Claimant are in the Dr.'s home. The Defendant Dr. did not meet the Claimant, the Defendant Dr. did not ask the Claimant to sell him the materials, the Defendant Dr. took no charge over the laying of the floor in question here, the Defendant Dr. did not order the materials, materials and labour to install them in the home nor were they invoiced to the Defendant Dr. The Defendant Dr. did not expect to pay for the material as he paid the other named Defendant PJ or his Company for same. As it turned out, the Defendant PJ was a rogue in the sense he disappeared without meeting his obligations to the Claimant and Defendant Dr.**

[12] The Adjudicator (and Joseph) rely upon the case of Nicholson v. St. Denis et.al., (1975) 8 O.R. (2d) 315 (Ont.C.A.) as authority for the proposition that such a relationship is a pre-requisite to recovery. I agree with the Wacky's submission that Nicholson suggests simply that such relationships form a significant thread which runs through the jurisprudence, but not that there is an additional burden that must be met by a Claimant. Here, the three criteria having been met, Wacky's is entitled to be paid. The law is not as clear as one would hope. MacKinnon JA stated:

- **It is difficult to rationalize all of the authorities on restitution and it would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the Defendant to retain the benefit conferred on him by the plaintiff - a benefit, be it said, that was not conferred 'officiously'. This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the Defendant, and secondly, either an express or implied request by the Defendant for the benefit, or acquiescence in its performance.**

[13] The Federal Court in Robert McLaren, Garry Seeman and Donald Thompson v. The Queen, [1984] 2 F.C. 899, subsequently determined the significance of a special relationship. As opined by Justice Muldoon in that case:

- **What is that special relationship? It may be contractual, fiduciary or matrimonial. It may be a very casual arrangement, or an unenforceable contract. It seems to be the sine qua non of success, but it is not an inevitable guarantee of success. A special relationship is a factor in all but two of the cases, cited here by counsel in which the plaintiffs have succeeded. It is the essential nexus between the Defendants' words and conduct, and the plaintiffs conferring of the benefit ..**

[14] In The Law of Restitution, Looseleaf Edition, the authors, Peter D. Maddaugh and John D. McCamus, speak to this issue at page 33-18, where they note that:

- **On this point the Court of appeal offers little guidance and appears to come perilously close to suggesting that, in the absence of such a relationship, coupled with either a request for or acquiescence in the receipt of the benefit, no recovery will be allowed. The adoption of such a view would mark a significant retreat from established principles of restitutionary liability.**

[15] On balance, the presence of a special relationship will be persuasive but not necessarily conclusive in the fact-finder's analysis. The absence of a special relationship will not necessarily defeat a claim.

[16] Here, the facts do establish that there was a "casual arrangement" as contemplated by Justice Muldoon in McLaren, supra. In Nicholson, MacKinnon JA stated that for there to have been a special relationship the Defendant must have had knowledge of the benefit, and he must have either requested it, or acquiesced to its performance. In that case the Defendant, St. Denis, was unaware that the work had been performed, and so it was held that no special relationship existed. The same is not true in this case as Joseph was clearly aware that the work was being performed, and had in fact selected the flooring from Wacky's store.

Cross Appeal:
[17] The Adjudicator did find that the Small Claims Court has the equitable jurisdiction to determine *unjust enrichment*. I agree. [See Gaudet v. Prudential Assurance Co. et al, [1988] N.S.J. No. 457; 88 N.S.R. (2d) 391; Credit Union Atlantic Ltd. v. MacLean, [1996] N.S.J. No. 223; 152 N.S.R. (2d) 314; Magnum Contracting Ltd. v. DLG Contracting Ltd., [2004] N.J. No. 432 (NL. Prov. Crt.); 936464 Ontario Ltd. (c.o.b. Plumbhouse Plumbing & Heating) v. Mungo Bear Ltd., [2003] O.J. No. 3795.."

In the case before this court the Defendant Hi-Liner received a letter from the landlord at the time it was acquiring the extra rental space in the premises. The letter gives the Defendant Hi-Liner particulars of the electrical and propane meters servicing the unit 10 space that the Defendant was taking over. The Defendant's owner said he remembered contacting the power company but did not remember contacting the propane company, the Claimant herein, at the time. The Defendant's witness only remembers the Claimant contacting them 2005.

I accept the Defendant Irving Oils argument that the Defendant did make an inquiry on June 4, 2004 as evidence in the commercial application for propane. This application

simply declines to provide the Defendant with credit. Based on the documents previously referred to and the Defendant's own testimony I do not accept that the Defendant Hi-Liner did not know there was propane being supplied to the unit despite the fact that there was no written formal contract in place between the Defendant and Claimant.

The Claimant ended up sending invoices for propane to another party and when it was finally figured out to whom to send it, the Defendant was understandably shocked by the amount, as it covered a good portion of one year. Other than the amount owing for 2004 the Defendant has paid his account. Irving Oil in these circumstances would be hard-pressed to justify charging any interest on the amount outstanding for 2004.

As stated earlier in the ***Wacky*** decision, at paragraph 25…. **" Another word for *unjust enrichment* is restitution, and while restitution is a remedy that can come about for breach of contract, it is an equitable remedy that exists when there is no contract or in instances where there is a quasi-contract**."

In my view, the evidence shows there is no juristic reason, that is contractual, in this case, for allowing recovery and the Defendant denies there was contract. As there is no contract, this leads the court into consideration of the principle of unjust enrichment. At the very best there is a quasi-contract between the parties as evidenced by the commercial application, the letter of June 2, 2004, and the fact that the Defendant under the lease was responsible for paying for the heat being supplied to the rented premises. Assuming therefore there is no contract as argued by the Defendant, there is, as I stated an equitable remedy of restitution. In this case, the Defendant did receive a benefit, heat for unit 10, supplied by the Claimant at a cost to the Claimant. The three requirements for unjust enrichment have been established.

Therefore, based on the remedy of restitution, I shall award the Claimant the amount of $3,725.78 and costs. I also agree with the defence of Creit in that there never was a contract with Creit, nor was Creit the owner of the premises of the time the propane was being supplied to the premises in question here. The claim against Creit shall be

dismissed accordingly.