



11 April 2017

PRESS SUMMARY

Lowick Rose LLP (in liquidation) (Appellant) v Swynson Ltd and another (Respondents)
[2017] UKSC 32
On appeal from: [2015] EWCA Civ 629

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

This appeal arises from an unsuccessful management buyout of Evo Medical Solutions (“Evo”) made through Evo Medical Solutions Ltd (“EMSL”) in 2006. The buyout was funded by an interest-bearing loan of £15m to EMSL by Swynson Ltd (“Swynson”), a company owned and controlled by Mr Hunt, a wealthy investor. Prior to the buyout, Swynson instructed an accountancy firm formerly known as Hurst, Morrison Thomson, now Lowick Rose LLP (in liquidation) (“HMT”), to carry out due diligence on Evo. It is common ground that HMT was negligent in failing to draw attention to fundamental problems about Evo’s finances, and that the transaction would not have gone ahead but for that failure.

By July 2007, Evo was at risk of financial collapse. As a result, Mr Hunt caused Swynson to lend EMSL a further £1.75m in July 2007 and £3m in June 2008. At or about the same time, Mr Hunt acquired the majority beneficial ownership of EMSL. In December 2008, the 2006 and 2007 loans were refinanced. Mr Hunt and EMSL entered into a loan agreement under which Mr Hunt personally made a short-term non-interest bearing loan of £18.663m to EMSL. This was for the specific purpose of enabling EMSL to repay Swynson the original loan, with the aim of cleaning up Swynson’s balance sheet and reducing its liability to tax. EMSL duly repaid the loan, but eventually ceased business and was unable to meet its liabilities.

Swynson and Mr Hunt brought proceedings against HMT seeking to recover damages for losses resulting from the buyout and the making of all three loans in 2006, 2007 and 2008. HMT contends that they have no liability for damages on the basis that Swynson has suffered no loss, because EMSL repaid Swynson the whole of the original loan in December 2008. The Court of Appeal by a majority upheld the judge’s award of damages of £15m. This was because they held that the judge had been right to regard the December 2008 refinancing as *res inter alios acta*. It did not therefore affect the amount of Swynson’s recoverable loss.

JUDGMENT

The Supreme Court unanimously allows HMT (Lowick Rose LLP)’s appeal. Lord Sumption gives the lead judgment, with which Lord Neuberger, Lord Clarke and Lord Hodge agree. Lord Neuberger and Lord Mance give concurring judgments.

REASONS FOR THE JUDGMENT

Res inter alios acta

The general rule that loss which has been avoided is not recoverable as damages is subject to an exception in respect of collateral payments (*res inter alios acta*), where these are received independently

of the circumstances giving rise to the loss [11]. The payments made by Mr Hunt to EMSL and by EMSL to Swynson to pay off the 2006 and 2007 loans cannot be regarded as collateral. First, the transaction discharged the very liability whose existence represented Swynson's loss [13]. Secondly, the money Mr Hunt lent to EMSL in December 2008 was not an indirect payment to Swynson, even though it ultimately reached them. Mr Hunt's agreement to make that loan and the earlier agreements of Swynson to lend money to EMSL were distinct transactions between different parties, each made for valuable consideration [13]. Thirdly, the consequences of refinancing could not be recoverable as the cost of mitigation, because the loan to EMSL was not an act of Swynson and was not attributable to HMT's breach of duty [13; 45; 97].

Transferred loss

The judge and Court of Appeal were correct to reject Swynson's second argument, based on the principle of transferred loss. This principle is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered [14-15; 52-53; 102-105]. It does not arise here because it was no part of the object of the engagement of HMT, or any other aspect of the 2006 transaction, to benefit Mr Hunt [17; 54; 108].

Unjust enrichment

HMT was not unjustly enriched by Mr Hunt's provision of funds to EMSL to repay Swynson, with the result that Mr Hunt may not be subrogated to Swynson's claims against them:

- i. Lord Sumption is prepared to assume for the sake of argument that HMT was enriched [20], while Lord Neuberger and Lord Mance consider that HMT has undoubtedly been enriched in economic terms as a result of the discharge by EMSL of the loan due to Swynson [113; 57].
- ii. Lord Sumption is again prepared to assume that if HMT was enriched, it was at Mr Hunt's expense [20]. Lord Neuberger considers that HMT's enrichment was not sufficiently directly effected by Mr Hunt's advance of the new loan [114-115], while Lord Mance notes that the questions whether a benefit was obtained "at the expense of" the claimant and whether it would be "unjust" for the defendant to retain it are difficult to separate in the present case [58-68].
- iii. Mr Hunt's case is that the enrichment of HMT was unjust because he made a mistake in assuming that the December 2008 refinancing would not affect the claim he and/or Swynson had against HMT [21; 78]. But the purpose of the law of unjust enrichment is to correct normatively defective transfers of value [22; 117]. The role of equitable subrogation in this context is to replicate as far as possible the element of the transaction whose absence made it defective [31; 86]. The December 2008 refinancing was not a defective transaction: Mr Hunt got precisely what he intended to get, namely the discharge of EMSL's debt to Swynson and a right to recover the new loan from EMSL [32-35; 119; 87]. As Lord Neuberger and Lord Mance also note, the fact that HMT received a benefit as an unforeseen and incidental consequence of Mr Hunt's pursuit of those objectives does not establish any normative or basic defect in the arrangements made [117; 87-89].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>