Against the subsidiarity of unjust enrichment

[This is a pre-copyedited, author-produced version of an article accepted for publication in the *Law Quarterly Review* following peer review. The definitive published version is available online on Westlaw UK in the *L.Q.R.*'s July 2022 issue]

Since Lord Rodger observed that "[d]iscussions of unjust enrichment are bedevilled by language which is often almost impenetrable" (*Shilliday v Smith* 1998 S.C. 725 at 727), uncertainty has continued to result from difficulties with this area of law's working vocabulary (*HM Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29; [2018] A.C. 275 at [38]). The judgment of the Court of Appeal in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 points to a significant, desirable development in this regard: we should stop talking about the subsidiarity of unjust enrichment.

For present purposes, the facts and decision may be related briefly. Dargamo and Azitio contracted each to purchase from Avonwick half of the shares in Castlerose for $950m. Part of this sum was intended as payment for transfers to parties behind Dargamo of further assets, including shares in two other companies. But no further share transfers were effected. Dargamo claimed against Avonwick in unjust enrichment for failure of basis, seeking restitution of that part of the $950m alleged to be attributable to the further shares. The claim was unsuccessful. The "fundamental reason" for this was that the Castlerose contract specified no condition for the payment to Avonwick of $950m other than the transfer of the Castlerose shares, a condition which did not fail but was fulfilled ([2021] EWCA Civ 1149 at [79], [112]-[113], [115]-[119]). Avonwick's enrichment at Dargamo's expense was not, therefore, unjust. In any event, the parties' wider extra-contractual intentions about the further company shares were too unsettled to colour the contractually expressed condition on which the $950m were to be paid ([2021] EWCA Civ 1149 at [5], [17], [20]-[28], [107]-[111], [132]-[135]).

The main point of interest in Carr L.J.'s leading judgment (with which Sir Timothy Lloyd and Asplin L.J. agreed) emerges from engagement with the view "that a claim in unjust enrichment functions as a 'gap-filling' device which is in some way subsidiary to the law of contract" ([2021] EWCA Civ 1149 at [75]). Though her Ladyship approved Dr Wilmot-Smith's criticism of the gap-filler designation as conclusory ([2021] EWCA Civ 1149 at [75]; citing (2020) 136 L.Q.R. 196, 198), her suggestion that an unjust enrichment claim is gap-filling, not "in the sense of seniority or a minority, or being junior", but "because there is no space for the law of unjust enrichment in particular claims" ([2021] EWCA Civ 1149 at [76]) may be open to the same objection. The "fact that there is 'no room' for a non-contractual claim is the conclusion to, not the premise of, an argument" ((2020) 136 L.Q.R. 196, 197; though see *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] EWHC 2591 (Ch) at [106]-[107]). More encouraging is the denial in the same part of Carr L.J.'s judgment that a "claim in unjust enrichment is in some way … subsidiary to a claim in contract" ([2021] EWCA Civ 1149 at [75]). This observation was not separated out from discussion of the gap-filler metaphor or fully explained. But it is correct and may aid the beneficial disappearance of the vocabulary of subsidiarity from accounts of unjust enrichment's interactions with other areas of law and legal institutions. It deserves to be elaborated upon.

Many describe the constraint of unjust enrichment claims by contractual regimes in terms of subsidiarity, as when the exclusion of unjust enrichment by contract is referred to generally as a "subsidiarity doctrine" (*Miraki v Griffith* [2021] NSWCA 263 at [35], [84]); or when situations where unjust enrichment claims are prevented by express contractual provisions for, or prohibitions of, restitution, are taken as specific examples of unjust enrichment's subsidiarity to contract law (see, respectively, R. Grantham and C. Rickett (2001) 117 L.Q.R. 273, 273-274, 291-293; A. Burrows,

A Restatement of the English Law of Unjust Enrichment (2012), at p. 151). However, in these instances, the subsidiarity of unjust enrichment is impossible, because there *is* no unjust enrichment to *be* subsidiary to any contractual regime. To speak of unjust enrichment's subsidiarity, or of its playing a subsidiary role, is misleading. We should not refer to a claim as if it exists in a given fact situation when it does not. We will achieve greater clarity about what, doctrinally, is happening when unjust enrichment appears to be constrained as outlined above by reasoning as follows. Unless the objective basis on which a contract is concluded fails, in which event an unjust enrichment claim may be permitted despite the contractual context (*Argyle UAE Ltd v Par-La-Ville Hotel and Residences Ltd* [2018] EWCA Civ 1762 at [51]), then "no cause of action for restitution of unjust enrichment *can exist* where the action is *inconsistent* with the express or implied terms of [the] contract" (*Anderson v McPherson (No 2)* [2012] WASC 19 at [232], [234]-[239], esp [239] (emphasis added; references omitted)). In such a situation, any impugned enrichment is not unjust for the purposes of the law of unjust enrichment, and because there is no restitutionary claim, no issue of its subsidiarity can arise. *Dargamo v Avonwick* itself is an illustration of this. The basis for the contractual payment of the $950m did not fail, so no unjust enrichment claim existed on the facts.

Carr L.J. was concerned only with the interface of unjust enrichment with contract law, but her Ladyship's denial of the subsidiarity of unjust enrichment is of broader import. It also holds good when considering how best to conceive of unjust enrichment's relations with property claims and statutory regimes. For example, it has been argued that unjust enrichment is subsidiary to property, in that the retention of property rights in an asset which comes into a defendant's possession prevents the defendant from being unjustly enriched, with the result that in a case like *Foskett v McKeown* [2001] 1 A.C. 102; [2000] 3 All E.R. 97, no unjust enrichment claim arises, and the vindication of the claimant's title is the proper means of recovery (Grantham and Rickett (2001) 117 L.Q.R. 273, 273-274, 291-292). But this cannot be an instance in which unjust enrichment and property stand in a relationship of subsidiarity. Unjust enrichment cannot assume a subsidiary status or play a subsidiary role in a given fact situation if it does not exist in that situation.

We should also avoid describing unjust enrichment as subsidiary to statute. A statutory regime may, for example, require the conferral of a benefit (*Commissioner of State Revenue v ACN 005057349 Pty Ltd* [2017] HCA 6; (2017) 261 C.L.R. 509 at [87]), or expressly or impliedly displace a restitutionary claim (*R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; [2011] 2 A.C. 15 at [15], [35], [39]). Each of these situations involves a statute entirely inconsistent with an unjust enrichment claim. Such statutes justify enrichments. In respect of justified enrichments, unjust enrichment claims do not arise. Neither situation, therefore, can be an example of unjust enrichment's subsidiarity, because it does not exist to be subsidiary to the statutory regime.

In a different kind of case, a statute does not exclude an unjust enrichment claim, but alters principles of unjust enrichment in their application to a set of facts, as where a change of position defence is barred to uphold the policy of a statutory regime (*Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 (Cay); [2020] A.C. 1111 at [75]-[117]). Subsidiarity is an inapt description of what happens in situations like these, too. Statute's primacy where unjust enrichment's unrestrained concurrent operation might stultify it is absolute and invariable. A relationship of subsidiarity is incompatible with what one might call the absolute sovereignty of any of the entities said to be in that relationship (M. Campbell [2021] L.M.C.L.Q. 535, 547; (2020) 24 Edin L.R. 1, 19-20), sovereignty of a kind which statute always enjoys over the common law (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61 at [42]).

Subsidiarity should be eliminated from the vocabulary we use to speak about unjust enrichment's relations with contract, property, and statute. It is to be hoped that, though brief, Carr L.J.'s statement in *Dargamo v Avonwick* is both a sign of progress in, and will contribute to, this process.

Mat Campbell
University of Glasgow