The Lords Goff and Hobhouse Memorial Lecture

Is Law no more than a working hypothesis?

Lord Goff so suggested in his 1986 Child & Co, Oxford Lecture. But was he right?

The Rt Hon Lord Justice Longmore

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THE LORDS GOFF AND HOBHOUSE MEMORIAL LECTURE

FOREWORD

This lecture has been established to commemorate two of the finest commercial lawyers, Robert Goff and John Hobhouse. The lecture itself is intended to focus on issues of commercial law which are of immediate contemporary interest, whether they have been debated over years or have newly emerged.

The commercial lawyers whom this lecture is intended to honour each had the gifts of searching intellectual analysis and hard work. With these gifts, they sought to identify clearly stated principles and legal rules which would be of service to English commercial law. This is evident in their respective careers, as advocates, puisne judges, Lord Justices, and finally members of the Judicial Committee of the House of Lords.

Robert Goff was the senior lawyer, born in 1926, and after being educated at Eton and Oxford, was called to the Bar in 1951, taking silk in 1967, and was appointed to the bench in 1975, before appointment as a Lord of Appeal in Ordinary in 1986. John Hobhouse, as the younger man, followed a similar trajectory in his career, born in 1932, and after Eton and Oxford, was called to the Bar in 1955, taking silk in 1973, and was appointed to the bench in 1982, and capping his career as a member of the House of Lords in 1998, succeeding Robert Goff.

Robert Goff had started his career as a barrister at Ashton Roskill's chambers at 8 King's Bench Walk and John Hobhouse at Henry Brandon's chambers at 7 King's Bench Walk. These two sets were soon to merge. Robert Goff and John Hobhouse were fellow members of chambers over many years. They appeared as advocates against each other, apparently for the first time in 1963 (Blandy Bros & Co Lda v Nello Simoni Ltd [1963] 2 Lloyd's Rep 24, 393).

They had, however, less opportunity to sit together on the bench. They sat together twice in the House of Lords and twice in the Privy Council. In one of those cases (Attorney-General v Blake [2001] 1 AC 268), John Hobhouse dissented, perhaps reflecting the tension in commercial law which requires striking a balance between commercial certainty and flexible justice. In another case (Thomas v Baptiste [2001] 2 AC 1), in the Privy Council, Robert Goff and John Hobhouse delivered a joint dissenting opinion, explaining the relationship between the "due process of law" and international treaties. They both used their wisdom and extensive learning to allow a principled development of clear rules of commercial law, even if their approaches were, on occasion, different.

A lecture on English commercial law acknowledges the debt it owes to Lords Goff and Hobhouse.

IS LAW NO MORE THAN A WORKING HYPOTHESIS?[1]

LORD GOFF SO SUGGESTED IN HIS 1986 CHILD & CO, OXFORD LECTURE. BUT WAS HE RIGHT?

THE LORDS GOFF AND HOBHOUSE MEMORIAL LECTURE

LORD JUSTICE LONGMORE

INTRODUCTION

1. We must never forget that, were it not for Shakespeare, Milton would be our greatest poet. At some stage every civilised person must seek to engage with Milton and Robert Goff was no exception. It was while I was his pupil that he was reading Paradise Lost and, although he probably did not devote long hours of his life to considering how he himself would justify the ways of God to men, he would regale me each morning with an update on the battles between Satan and the angels of the Almighty. I often think that Robert's judgments have a breadth of vision and depth of learning which can rightly be described as Miltonian and, if the title of my lecture suggests that one of his most famous utterances may not be entirely correct, it is a suggestion which is not only muted but genuinely hesitant.

2. It was Lord Goff's sensitivity to the interaction between facts and principles, and in a wider sense to the interaction between societies and the laws by which they are content to be governed, which led him to the statement which I would like to put under the microscope in this lecture. According to Lord Goff, in his Child & Co lecture in 1986, **"seen in the perspective of time all statements of the law … are no more than working hypotheses".**

3. Yet in the passage just prior to this statement, Lord Goff acknowledged that "the framework within which we work today" was governed by what he called "fundamental legal principles" developed over the course of legal history. That truism must be correct. The thesis I would like to develop this evening suggests

1 I gratefully acknowledge the very considerable assistance provided by my judicial assistant, Mr Jacob Rabinowitz, in the preparation of this lecture. He is not, of course, responsible for any infelicities let alone any errors which the diligent listener may discern.

that there are, indeed, principles of law that are now so fundamental, so entrenched, and so clearly correct, as to provide the framework within which more incremental developments of the law must take place. In other words, there are principles whose displacement would be unthinkable; and to that extent, they cannot be regarded as no more than working hypotheses.

4. Such an analysis has frequently been asserted in the context of the principles of human rights law which many people consider to be immutable and fundamental. But I would prefer to consider principles which may be regarded as settled in the field of commercial law. I will first consider several areas in which the position adopted by the common law might once have been no more than a working hypothesis, but where the law has now arrived at principles that must be regarded as settled. I will then consider the contribution of Lord Goff himself in the process of developing settled principles. I will then close by considering a case in which a majority in the House of Lords, gave credence to the view that law is no more than a working hypothesis by radically departing from established principles in order to satisfy the justice of the case, but in which a dissenting Lord Hobhouse, in whose honour too this lecture is given, made a convincing stand in favour of a fundamental and established principle.

SETTLED PRINCIPLES

5. A brief tour of the undergraduate teaching syllabus discloses a range of principles taught and widely accepted to be fundamental. In listing them, I hesitate for fear of stating the obvious but that itself illustrates the point to be made: these principles are fundamental and unlikely now to change.

6. As for the law of contract, a contract is concluded when an offer on certain terms is made and accepted in circumstances where at least one of the parties gives consideration and both parties intend to create legal relations; and the terms of that agreement can be objectively discerned.

7. As for the law of tort, and more particularly the law of negligence, a defendant will be liable for damage caused to the claimant where that harm arises out of physical harm to the claimant's person or property as a result of the defendant's failure to take reasonable care, at least in circumstances where the relationship between the claimant and the defendant is held to be sufficiently close, and the court determines that it would be fair, just and reasonable to impose such liability.

8. The existence of these general principles and their firm grounding in English law does not mean that the theory of the law as a working hypothesis is to be rejected outright: far from it. Rather, what they indicate is that areas of the law tend to go through a phase of development in which the position that prevails at any given time is only a working hypothesis; but that this phase is not in all cases permanent, such that the law may eventually arrive at a position which is more than a working hypothesis and may be regarded as settled.

9. The comparatively tentative emergence (or, as Lord Goff put it in his Maccabean lecture, the difficult birth) of forum non conveniens provides an example of this phenomenon. For many years mere presence of a defendant in the geographical jurisdiction of England and Wales was enough to give an English court jurisdiction over him or her unless the exercise of that jurisdiction could truly be said to be oppressive and vexatious. In The Atlantic Star [1974] A.C. 436 Mr Robert Goff QC urged the House of Lords to adopt the principle that a stay of proceedings should be granted when there was a clearly more appropriate forum elsewhere, thus bringing English law into line with Scottish law, among other systems of law. The House declined to do so and only accepted Mr Goff's argument to the extent of deciding that the concepts of oppressiveness and vexatiousness should be less rigorously interpreted than before. It took another four years for the House of Lords to realise that Mr Goff's argument was correct and only since MacShannon v Rockware Glass Ltd [1978] A.C. 795 has the principle of forum non conveniens become an accepted principle of English law. We can see that the original state of the law could fairly be described as a working hypothesis and even more clearly that the law as stated in The Atlantic Star was a working hypothesis. But now the birth of the doctrine of forum non conveniens has been achieved, it is surely inaccurate to describe it as a working hypothesis. It is here to stay.

10. More recently there has been a good example of law as a working hypothesis in connection with damage to cargo claims where the shipowner has sought to rely on the Hague Rules exception of inherent vice and here I tread hesitantly into the same water as that traversed that Sir Julian Flaux in his last year's Goff/Hobhouse lecture. He mentioned a case called Volcafe Ltd v Comapnia Sud America de Vapores S.A. [2017] Q.B. 915 in which he (with the agreement of Gloster and King LJJ) had given a judgment in favour of the shipowners in a case in which bags of coffee had been carried in containers from Colombia to Bremen but had been found to be damaged on arrival. The coffee was known to be hygroscopic meaning that it absorbs, stores and emits moisture so that if containers are unventilated it is necessary for them to be lined with an absorbent material such as cardboard or corrugated or "kraft" paper. No one knew if the proper quality of such paper had been used on the voyages. Most practitioners brought up in the era of the Flowergate [1967] 1 Lloyds Rep. 1 and the Albacora [1966] 2 Lloyds Rep. 53 would have thought that once the shipowner had shown that the coffee was liable to deteriorate during the voyage, he had shown inherent vice and that the cargo-owner then had the burden of proving breach of contract on the part of the shipowner in the form of breach of Article III rule 2 of the Hague Rules viz. that the carrier had failed properly to handle, carry and care for the cargo during the voyage. That, at any rate was the working hypothesis on which I normally worked when dealing with damage to cargo claims and the decision of the Court of Appeal came as no surprise.

11. The Supreme Court, however, squashed any such notion. In a judgment drawing on the ancient law of bailment, Lord Sumption (with whom all the other members of the court agreed) held that the principle that a bailee had the burden of proving that the goods were lost without negligence on his part had survived the introduction of the Hague Rules and that meant that the shipowner had the burden of showing that he was not in breach of the Article III rule 2 obligation laid on the shipowner properly and carefully to load, handle, carry, care for and discharge the cargo. He was able to call up decisions of Wright J, Scrutton LJ and, notably, that of Hobhouse J in The Torenia [1983] 2 Lloyds Rep 201, 216. As Lord Sumption uncontroversially said:-

> "Scrutton LJ and Lords Wright and Hobhouse (as they later became) were notable authorities in this area of the law".

This is not the place or the time to debate whether another decision could (or should) have been reached. My only purpose (apart from noting how delighted cargo underwriters and Messrs Clyde & Co must be) is to say that the question of burden of proof in cargo claims governed by the Hague Rules must now be regarded as settled and can no longer be regarded as a working hypothesis. Even if another cargo claim came before the Supreme Court (an event which, on past history, has only happened once every 50 years or so) a different conclusion would be most unlikely.

12. If the principles I have mentioned suggest that the law may be regarded at times as a working hypothesis but at times much more than that, other developments of the common law do not fit easily with the notion of law as a working hypothesis at all. The development of the law in relation to rape within marriage provides an example. From time immemorial until fairly recently it was not regarded as a crime for a husband to have sex with his wife without her consent. To describe that as a working hypothesis is counter-intuitive if not, to our susceptibilities, actually offensive. Eventually this state of the law came to be seen as morally unsatisfactory and therefore "wrong". In the vivid metaphor used in this context by Sir Philip Sales in his article "The common Law; Context and Method" 2019 LQR 47 there comes what he calls a threshold or tipping point where a head of pressure builds up for judicial change or adaptation of the common law to keep pace with current social values, beyond which change in the law becomes legitimate as an acceptable safety valve. So it was with marital rape when it came to be decided by the Court of Appeal that forcibly to have sex with one's wife constituted the crime of rape, a decision which was duly approved by the House of Lords, see R v R [1992] 1 A.C. 599. It is surely inconceivable that this could ever change and it is now equally counter-intuitive to consider the present law (that forcible sex within marriage constitutes rape) to be no more than a working hypothesis. Like the doctrine of forum non conveniens it is here to stay.

PRINCIPLES DEVELOPED BY LORD GOFF

13. So much, for generalities. I now turn to consider two lines of authority in which Lord Goff played a major role, from which can be derived principles which must, in my view, be regarded as settled; or, in other words, which are more than working hypotheses.

(1) Restitution cases

14. Perhaps unsurprisingly, the first cases I would like to discuss are authorities fundamental to the development of the law of restitution.

Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548

15. The first such case came before the House of Lords at the beginning of 1991, five years into Lord Goff's tenure in that court. Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548 concerned an attempt by the claimant law firm to recover from the Playboy Club, owned and operated by the defendant gambling club, sums equivalent to money stolen from the law firm's client account by Mr Cass, a rogue partner at the law firm, and gambled away at the club.

16. Between March and November 1980, Mr Cass dishonestly acquired around £320,000 from his firm's client account. Some of that money he returned leaving a net shortfall of £220,000. The sum won by the club and lost by Cass amounted to £174,000, of which at least £154,000 was the solicitors' money. The solicitors sought to recover the full £220,000 they had lost.

17. Before the Court of Appeal, the solicitors relied on the judgment of Lord Mansfield in Clarke v Shee & Johnson (1774) 1 Cowp 107. In that case, the clerk of the claimant brewer received money, intended for the use of the claimant, from the claimant's customers. The clerk paid £460 of that money to the defendant in return for lottery tickets. Lord Mansfield, giving the judgment of the Court of Queen's Bench, held that the claimant was entitled to recover the sum of £460 from the defendant as money had and received by him for the use of the plaintiff.

18. The majority of the Court of Appeal, however, distinguished that case and

dismissed the solicitors' claim on the basis that the club received the money taken by Mr Cass in good faith and for valuable consideration, namely gambling chips, or, alternatively, the chance of winning his bets and then of being paid.

19. Lord Goff began his analysis by dismissing the argument of the club that the solicitors had no legal title to the money taken by Mr Cass, without their authority, from the client account [572-574]. While the solicitors had no legal title to the money actually withdrawn by Mr Cass, that money was withdrawn pursuant to a chose in action which was the solicitors' legal property, namely the debt owed by the bank in favour of the solicitors. The solicitors could trace their property in that chose in action into its product.

20. As to whether the club received the money in good faith and for valuable consideration, Lord Goff found that whilst the club's good faith was not in doubt, it had provided no valuable consideration in return for the solicitors' money [574-577].

21. For present purposes, however, it is Lord Goff's analysis in response to the third defence advanced by the club that is most significant [577-583]. The club submitted that the solicitors' claim was an action for money had and received, which should only succeed where the defendant was unjustly enriched at the expense of the claimant. Thus, according to the club, if it would be unjust or unfair to order restitution, the court should decline to do so, and the question of injustice or unfairness was a broad question to be answered, ultimately, in the discretion of the court.

22. Lord Goff seized this opportunity to confirm, at the highest level, the arrival of the principle of unjust enrichment into English law and the propriety of that principle. The solicitors' claim, he held, was "founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors" [578].

23. This question, however, was not simply "a matter of discretion for the court"; the court did not have "carte blanche to reject the solicitors' claim simply

because it thinks it unfair or unjust in the circumstances to grant recovery". Rather, "where recovery is denied, it is denied on the basis of legal principle". Thus, having announced the arrival of the law of unjust enrichment, Lord Goff set about formulating some of its principles.

24. In this case, those principles included the defence of bona fide change of position, a defence which had hitherto at most received only partial recognition in English law [578-580]. Lord Goff proceeded to formulate the availability of that defence where a defendant's position has so changed that it would be inequitable in all the circumstances to require him to make restitution. As Lord Goff said "The time for its recognition in this country is, in my opinion, long overdue", 580B.

25. In Lipkin Gorman, then, Lord Goff was responsible for the establishment of two principles intended and subsequently demonstrated to be far more than working hypotheses. First, in general terms, the principle of restitution for unjust enrichment was brought to the forefront of English law and comprised the basis on which the claim was decided. The place of that principle in English law has never seriously been doubted since. Second, and more specifically, the defence of change of position was identified, conceptualised and formulated. Lord Goff was typically sensitive to the dangers of formulating the defence in too specific a fashion, and thereby, in his words, "inhibit[ing] the development of the defence on a case by case basis, in the usual way" [580]. The defence was thus formulated broadly, and it is difficult to see how the principle of that defence could ever be departed from. Certainly, there is room for debate as to its scope and application to particular facts. But again, just as few would argue that the law of unjust enrichment is liable to disappear, so few would argue that the defence of change of position is in danger of abandonment.

26. The aptness of the recognition of the defence of change of position is demonstrated by the fact that the House of Lords did not permit the solicitors to recover the full amount of their loss (£220,000) but only the amount by which, on analysis, the club had in fact been, unjustly enriched (namely £150,960).

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] A.C. 70.

27. If Lord Goff in Lipkin Gorman was able to announce the arrival of the principle of restitution for unjust enrichment, in Woolwich Equitable Building Society v Commissioners of Inland Revenue [1993] A.C. 70 he "entrench[ed] [that principle] in English law", to use the words of Professor Gareth Jones. [2]

28. In that case the claimant, under protest and reserving its rights, had paid the Revenue sums totalling £57m in respect of claims to tax on the basis of regulations that were found, in the course of prior judicial review proceedings, to be invalid and void [102-104]. Consequent on the judicial review proceedings, the revenue agreed to repay the building society the principal sum, but refused to pay interest on that sum [105]. The building society thus brought a claim to recover interest on the sum of £57m, calculated to be £7.8m [105-108].

29. The building society's claim was brought on the basis that the sums paid were repayable to Woolwich as of right, as money had and received to the use of Woolwich. As such, the sums were repayable as debt, and interest was recoverable from the date the sums were paid over at such rate and for such period as the court should think fit [106].

30. The Revenue contended on the contrary that insofar as the building society had any right in law to recover the capital sums, that right arose under a contract for repayment implied from the circumstances in which the building society had originally made the payments. That agreement, it was alleged, stipulated that the Revenue would hold the sums pending the outcome of proceedings to determine the validity of the underlying regulations. Any entitlement to repayment, and thus to interest on the sums, arose only from the date of the judicial review judgment, not from the date the sums were first paid [106].

31. Lord Goff said that the appeal was of immense importance "for the future of the law of restitution" [163E]. With that in mind, he conducted a review

2 Gareth Jones, "Lord Goff's contribution to the Law of Restitution", in "The search for Principle, Essays in Honour of Lord Goff of Chieveley" (OUP, 1999) p. 217

of the relevant authorities. That review disclosed that the law of restitution permitted recovery of money paid under a mistake of fact and of money paid under compulsion, but not of money paid under a mistake of law [164D]; [164-165]. Indeed, money not paid under a mistake of fact or under compulsion was generally not recoverable at common law according to authorities up to and including the decision of the Court of Appeal in that case [165-166].

32. As it happened, the building society had not paid the money under a mistake of fact nor under compulsion: it had, from the start, contested the legitimacy of the Revenue's claim [173D]. Further, to extend the meaning of 'compulsion' to cover the circumstances of the case would be to stretch that concept "to the utmost" [173E]. Confronted with these difficulties, the building society submitted that the court should "reformulate the law so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money" [171F].

33. Lord Goff considered that "[t]he justice underlying [the claimant's] submission [was] … plain to see" [171F]. The question, therefore, was whether the "simple call of justice" could and should be answered [172D]. Lord Goff determined to answer that call [172-177], holding that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right [177F]. In so doing, he found assistance from isolated dicta of Martin B, Montague Smith J, Atkin LJ and Sir Owen Dixon to the effect that money paid under protest pursuant to an ultra vires demand was recoverable as of right. He decided to rekindle what he called that "fading flame" and reformulated the law of restitution to accord with that principle [168D]. To the objection that to take such a step would be legislating without the authority of Parliament and overstep the traditional boundary separating permissible development of the law from impermissible judicial legislation, he acknowledged the existence of that boundary but said he was never quite sure where to find it and proceeded undeterred. By the narrow majority of 3 – 2, that was the decision of the House.

34. The specific principle established in <u>Woolwich Building Society</u>, relating to the recoverability as of right of taxes paid pursuant to an ultra vires demand, may be said to be more vulnerable to attack than the more general principle established in <u>Lipkin Gorman</u>, relating to the defence of change of position. In particular, it is not inconceivable that the principle in <u>Woolwich Building Society</u> might be departed from by a future court that prioritises administrative pragmatism over legal principle. Nevertheless, perhaps the most important consequence of <u>Woolwich Building Society</u> arose from that which may have been least contentious in that case: namely, the consolidation and re-organisation of authorities on restitution for unjust enrichment. That re-organisation demonstrated the limited nature of the doctrine, especially in so far as the House of Lords was not yet ready to accept recovery of money paid under mistake of law, but in so doing also demonstrated its defined and principled nature. It is no exaggeration to say that, in combination with <u>Lipkin Gorman</u>, the judgment of Lord Goff in <u>Woolwich Building Society</u> cemented the principle of restitution for unjust enrichment in English law.

<u>Kleinwort Benson Ltd v Lincoln City Council and Others</u> [1998] 2 A.C. 349

35. The third authority I would like to consider in the field of unjust enrichment is the case of <u>Kleinwort Benson Ltd v Lincoln City Council and Others</u> [1982] 2 A.C. 349. In that case, the claimant bank sought restitution of sums paid under interest rate swaps entered into with four defendant local authorities. Those swaps had been declared to be beyond the powers of local authorities and thus void, in the case of <u>Hazell v Hammersmith and Fulham London Borough Council</u> 2 A.C. 1.

36. The bank sought to argue that the sums paid had been paid under a mistake, in particular the mistaken belief that those sums fell to be paid pursuant to a binding contract between it and each local authority. By this means, the bank sought to overcome the challenge it faced in the form of limitation: of the £811,000 paid over to the authority, £424,000 had been paid more than six years before the claim had been brought. The bank argued that the mistake under which it had laboured in paying over the money was a mistake within the meaning of section 32(1)(c) of the Limitation Act 1980, thus entitling the bank to benefit from the more forgiving limitation regime afforded by that provision in respect of an action for relief from the consequences of a mistake.

37. Lord Goff noted that the mistake relied upon by the bank comprised a mistake of law; and that, in light of the authorities he had set out in Woolwich Building Society, restitution would not be granted in respect of such a mistake. The bank was therefore seeking "a decision that that long-established rule should no longer form part of the English law of restitution" [366E]. The issues that fell to be considered were thus, first, whether the rule precluding money paid under a mistake of law should remain part of English law; and, second, if not, whether defences should be established in respect of cases where the money has been paid under a settled understanding of the law subsequently changed by judicial decision, or where the money has been the subject of an honest receipt by the defendant [367B].

38. In respect of the first, fundamental issue, the court was faced with an anomalous situation in which both parties to the litigation agreed that the rule precluding recovery of money paid under a mistake of law should be abandoned, but the local authorities urged that this task be left to the Law Commission rather than being undertaken by the House of Lords [367E]. Lord Goff, however, refused to abandon "a long-standing rule of law" simply on the basis that the parties to the litigation had consented to such abandonment, and thus proceeded to consider "whether it is indeed in the public interest that the rule should be maintained, or alternatively that it should be abrogated altogether or reformulated" [368A].

39. The rule was first established in the case of Bilbie v Lumley (1802) 2 East 469 [389D], and its position was confirmed in the subsequent case of Brisbane v Dacres (1813) 5 Taunt. 143 [369F]. The rule had been heavily criticised since then, but Lord Goff, ever-aware of the sensitivity of law to the times in which it is expounded, warned that it would be "unhistorical for us now to castigate our legal ancestors for adopting a doctrine which was widely understood in their time to achieve practical justice" [317H]. In particular the rule was a response to an "amalgam" of quite sensible fears, for example that it would be too easy to assert a mistake of law [371F].

40. Nevertheless, the time had come to recognise that both the call of justice and the fears underlying the rule could be answered by the recognition of a right to recovery in respect of payments made under a mistake of law, coupled with the formulation of suitable defences.

41. To some extent, the mounting criticism of the rule was responsible for this conclusion. Most fundamentally, justice appeared to demand that money paid to a payee which would not have been paid to him but for the payer's mistake should in general be repaid. Furthermore, the distinction drawn between mistakes of fact, which were capable of grounding recovery, and mistakes of law, which were not so capable, produced capricious results and had led to a rule that was uncertain and unpredictable in its application [372].

42. More important than criticism of the rule, however, was the growing maturity of the field of restitution as a whole. Lord Goff cited in particular "the combined effect of two fundamental changes in the law", both of which had been wrought by the House of Lords – and one might add, substantially by Lord Goff himself – in Lipkin Gorman. Those changes were, first, the "recognition that there exists a coherent law of restitution founded upon the principle of unjust enrichment"; and second, the recognition of the defence of change of position within that body of law [373].

43. A blanket rule of non-recovery in respect of mistake of law payments was clearly not consistent with the first development; and the second development demonstrated that the fears apparently justifying the retention of that blanket rule could be assuaged by means of properly formulated exceptions to recovery. Lord Goff thus concluded that the rule should be abandoned, but that that abandonment must be accompanied by consideration of the exceptions to recovery [373; 375].

44. In that connection, Lord Goff proceeded to reject as a matter of principle all three potential exceptions to recovery proposed by the local authorities. A rule that recovery was barred where the payment was made on the basis of a settled understanding of the law at the time the payment was made, which understanding has subsequently been overruled, would be based on the erroneous premise that such a payment is not made under a mistake at all [376-384]; a rule barring recovery where the defendant honestly believed at the time of receiving the payment that he was entitled to retain the money

would be excessively wide [384-385]; and the argument that a party who has received full performance under the relevant contract cannot establish any injustice against himself failed, inter alia, to take account of the fact that the cause of action in restitution for unjust enrichment accrues at the moment the unwarranted payment is made [385-387].

Conclusion on unjust enrichment cases

45. The principles established by these cases are surely much more than "working hypotheses". In particular, it is possible to extract from those judgments three principles which may reasonably be said to be fundamental.

46. The first is, in Lord Goff's own words, the "recognition that there exists a coherent law of restitution founded upon the principle of unjust enrichment". The second is that that law provides a general right of recovery of money paid under a mistake, whether of fact or law. Lord Goff himself thought that this second principle was the "inevitable" consequence of the first principle [373C] – so to the extent that the first principle is fundamental, it follows that the second must also be so. The third principle is that that general right of recovery is subject to appropriate defences, of which one is the rule that recovery will be barred where a defendant's position has so changed that it would be inequitable in all the circumstances to require him to make restitution. Again, the scope and proper application of this defence may be debatable but its existence is more than a working hypothesis. It may well be said that in the sphere of the law of restitution, Lord Goff has himself disproved his dictum that the law is no more than a working hypothesis.

47. As Professor Gareth Jones said of Lord Goff "His judgments and speeches have been instrumental in persuading his colleagues on the Bench and in the House of Lords that unjust enrichment is not 'well-meaning sloppiness of thought' but is the principle underlying the law of restitution and that the law of restitution is an integral part of the English law of obligations".[3] Recent authorities in the Supreme Court have proceeded on the principles settled by Lord Goff, and have tended to concentrate on the requirement that any enrichment has to be "at the expense of the claimant". This requirement was given a restrictive interpretation in Investment Trust Corporation v RCC

3 Op. cit. p. 233

[2017] UKSC 29 but the general principles set out in Lipkin Gorman were never questioned.

(2) Assumption of responsibility cases

48. If Lord Goff is best known for his definitive contribution to the law of restitution, his contribution to the law of negligence was almost equally fundamental, albeit perhaps less strikingly innovative. I refer in this connection to the critical support and clarification he provided to the principle that a defendant may be held liable in negligence insofar as the defendant has assumed responsibility towards the claimant.

49. That principle, of course, had originally emerged in the 1960s in the decision of the House of Lords in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465. But as Lord Goff himself noted, that case had been "widely regarded as concerned with liability in damages in respect of a negligent misstatement, and also with liability in negligence for pure economic loss" (Spring, [317E]).[4] Moreover, insofar as it had been recognised, the principle of assumption of responsibility had been subject to powerful criticism, which resulted in questioning whether Hedley Byrne could apply to the negligent provision of services as well as to negligent misstatement.

50. It was Lord Goff who ensured that the common law did not, in his words, "lose sight of the principle which underlay the decision" that is, the principle of assumption of responsibility. In three decisions handed down within seven months of each other, between July 1994 and February 1995, Lord Goff unearthed that principle, brought it to the front lines of the law of negligence, and re-laid it as a foundation stone of that area of the law. This principle, again, must now be regarded as so fundamental as to be more than a mere working hypothesis.

Spring v Guardian Assurance

51. The first of these decisions was the case of Spring v Guardian Assurance [1994] UKHL 7 [1995] A.C. 296. That case concerned a claim by an insurance policy salesman, Mr Spring, against his former employer in relation

4 See below.

to a negative and negligently produced reference provided by the defendant to a prospective new employer. That prospective employer relied on the negative reference in refusing to take Mr Spring on. Mr Spring framed his claim against his former employer by reference to a number of different causes of action, but the House of Lords was solely concerned with claims in negligence and for breach of contract.

52. On the issue of negligence, the core question was whether a person who provides a reference in respect of a former employee owes a duty of care to that party in relation to the preparation of the reference [361B-C]. Lord Goff held, quite simply, that such a duty of care was owed, and that the source of that duty was the principle in Hedley Byrne: namely, an assumption of responsibility by the defendant, and reliance by the claimant on the exercise by the defendant of due care and skill [316E].

53. In the course of his analysis, as I have mentioned, Lord Goff attributed that principle to Hedley Byrne, and set to work defining its scope and limits [317-319]. The principle, for example, was not limited to the provision of information and advice, but rather extended to include the performance of other services, such as the service rendered by a lawyer to his client; nor was the 'special skill' required on the part of the defendant to be understood narrowly. Special knowledge, such as the special knowledge of the employer as to the skills and temperament of his employees, would be sufficient.

Henderson v Merrett

54. Lord Goff performed a very similar exercise in his judgment in Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145, handed down less than three weeks after the decision in Spring. That case concerned claims brought by a number of Names at Lloyd's against members' agents, managing agents and combined (managing and members') agents who were alleged to have negligently mismanaged funds to which the claimant Names had subscribed. In the case of so-called 'indirect' agents, with whom the claimant did not directly contract, the question arose as to whether liability could arise in tort.

55. As in Spring, Lord Goff answered this question by reference to what he discerned to be the underlying principle in Hedley Byrne. The case had been taken as authority for the imposition of liability, in certain circumstances, in respect of words as wells as deeds and in respect of pure economic loss not parasitic upon physical damage. But its true significance lay in the principle adopted by all their Lordships in that case, namely that liability in negligence may be founded upon as assumption of responsibility by the defendant towards the claimant [178-181]. In Henderson the managing agents had plainly assumed responsibility in the relevant sense towards the Names in syndicates which they managed even though they had no contract with the Names [182D]. They therefore owed a prima facie duty of care to the Names, subject to the question of whether that duty was displaced by the contractual context.

56. A further question was then raised, namely whether the mere existence of a contract excluded liability in tort. That was important in the case of members' agents who had a contract with the Names. It was held that tortious and contractual liability could exist side by side, in spite of decisions to the contrary, including one in the Privy Council. That also is no longer a mere working hypothesis.

White v Jones

57. I may also refer briefly to the judgment of Lord Goff in White v Jones [1995] 1 A.C. 207. In that case, a father executed a will disinheriting his two daughters in the wake of a family feud. Happily, the parties reconciled and the father resolved to execute a new will, with his daughters as intended beneficiaries. However, his solicitor negligently delayed the preparation of this new will, and the father died before the will had been prepared. As a result, the two daughters were disinherited pursuant to the old will. The daughters brought a claim in negligence against the solicitors.

58. As in the case of Woolwich Building Society, and perhaps characteristically, Lord Goff conducted his legal analysis against the background of what he called the "impulse to do practical justice" [259]. In this case, the clear justice of the situation in his view lay in ensuring a disappointed beneficiary could recover her losses from a solicitor shown to be negligent. Insofar as the law failed to provide a remedy in such circumstances, that failure comprised "a lacuna in the law which needs to be filled" [260A].

59. The question, then, was "whether it is possible to give effect in law to the strong impulse for practical justice" [260G]. Lord Goff again found a positive answer [267-269] in the principle of assumption of responsibility [268D].

Conclusion on assumption of responsibility

60. It is this link between the principle of assumption of responsibility, and the interests of justice, which to my mind renders the principle fundamental, and more than just a working hypothesis. The means used by courts to decide whether or not one party has objectively assumed responsibility towards another party maybe debatable. But the principle that a party which has voluntarily assumed responsibility towards another party should be liable for loss suffered by that party, even in the absence of contractual relations and even where that loss is purely economic, is so clearly in accord with modern thinking that no court could now rationally depart from it. In extracting that principle from Hedley Byrne, and shielding it from the criticism to which it had been subject, Lord Goff may once again be said to have disproved his own theory that the law is no more than a working hypothesis.

Influential dissent

61. I would like, finally, to take an instance which is to some extent against my own argument, namely the decision of the House of Lords in the well-known case of Attorney General v Blake [2001] 1 A.C. 268. In that case the House sanctioned the remedy of an account of profits for breach of contract if the case was sufficiently "exceptional".

62. Few judgments can claim a more arresting opening than that of the majority judgment. "My Lords", Lord Nicholls began, "George Blake is a notorious, self-confessed traitor" [275C].

63. In 1944, in the midst of the Second World War, Mr Blake was recruited by the Crown as a member of the Secret Intelligence Service. In August of that year, as a prerequisite to his employment, he signed a declaration undertaking "not to divulge any official information gained by me as a result of my employment either in the press or in book form".

64. Blake, however, did exactly that. Between his defection in 1951 and his conviction in 1961 for five offences under the Official Secrets Act 1911, Blake disclosed a range of valuable secrets to foreign agents. Having been sentenced to 42 years' imprisonment, he escaped after only five, breaking out of Wormwood Scrubs for a life in exile in Moscow.

65. In May 1989, a publisher, Jonathan Cape Ltd, entered into a contract with Mr Blake to publish his autobiography. In breach of Blake's undertaking parts of that autobiography related to his activities as an officer of the SIS. Cape agreed to pay Blake a total of around £150,000 as advances against royalties and, in September 1990, the book was released with the title No Other Choice.

66. In May 1991, the Attorney General brought an action seeking to deprive Blake of the fruits of his defection and disloyalty. After various false starts in the lower courts, the Crown ultimately sought to prevent Blake from profiting from his breach of contract by claiming an account of profits in circumstances where, because the information in the book was no longer confidential, there was no obvious loss for which the Crown could claim compensation.

67. Lord Nicholls agreed with the Crown's contention. He gave the leading speech and relied in particular on what he called "the solitary beacon" of Wrotham Park Estates v Parkside Homes [1974] 1 WLR 798 in which damages had been awarded to an owner of land on which a developer in breach of contract with the landowner had built houses. Brightman J had, according to Lord Nicholls, applied analogous cases of a defendant invading or abusing the claimant's property in which the proprietary remedy of an account of profits had been ordered and said there was no obvious reason why a remedy available for breach of a proprietary right, should not also be available for breach of contract in an exceptional case. In his dissenting speech Lord Hobhouse pointed out that what Brightman J had ordered was actually compensatory damages not an account of profits and that it was contrary to principle to order an account of profits in a breach of contract case. Subsequent courts have had difficulty in confining the remedy of an

account of profits for breach of contract to sufficiently exceptional cases and the penultimate paragraph of Lord Hobhouse's' speech has a prophetic ring:-

> "I must also sound a further note of warning that if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitutionary rights beyond those presently recognised by the law of restitution, such a step will require careful consideration before it is acceded to."

68. The next case in which a question of non-compensatory damages for breach of contract arose before the Supreme Court came after various courts of appeal in other cases had wrestled with the apparent acceptance in Blake that an account of profits is available in sufficiently exceptional cases. Some serious back-tracking occurred and, while the Court did not say in terms that, on the facts, Attorney General v Blake should have been differently decided, the decision must, in my view, have been heavily influenced by Lord Hobhouse's dissenting speech, although no express acknowledgement of it was made. In One Step (Support) Ltd v Morris-Garner [2018] 2 WLR 1353 Lord Reed gave the majority speech and said that the relevant part of Lord Nicholls' speech was not altogether easy to understand. He made no less than six qualifications to it, the last of which was in the following terms:-

> "… in relation to Lord Nicholls's speech, the connection which he drew between Wrotham Park and an account of profits has had consequences in the later case law which are unlikely to have been intended. One has been a view that damages assessed on the basis of a hypothetical release fee, and an account of profits, are similar remedies (partial and total disgorgement of profits, respectively), at different points along a sliding scale, calibrated according to the degree of disapproval with which the court regards the defendant's conduct: see, for example, Experience Hendrix [2003] 1 All ER (Comm) 830, paras 36-37 and 44. Related to this has been a view illustrated by the present case, that damages assessed on the basis of a hypothetical release fee, like an account of profits in some circumstances, are available at the election of the claimant, and can be awarded by the court at its discretion whenever they might appear to be a just response. Neither view can be justified on an orthodox analysis of damages for breach of contract."

The similarity of this passage to Lord Hobhouse's prediction speaks for itself.

69. Attorney General v Blake is a good example of the law in action, showing the practical way in which courts deal with exceptional circumstances. Nevertheless, the dissenting judgment of Lord Hobhouse, and more recently the judgment of Lord Reed in One Step, serve to demonstrate that the route adopted in Blake was a truly exceptional one insofar as it departed from the orthodox principle of compensatory damages. In asserting orthodox principle and in emphasising the exceptional nature of the decision in Blake, those judgments once again suggest that there are principles of law which may now be regarded as settled, such that departures therefrom are to be regarded as truly exceptional.

Conclusion

70. So, while the concept of law as a working hypothesis is entirely understandable, to call it no more than a working hypothesis is rather to over-state the case. In my view, a happier expression might be that the law is a "continuing exploration" a phrase which I would commend to all those who labour at the frontiers of the law.

71. Be all this as it may, it is time to return to Milton in a lighter vein and to remind ourselves of the words of a much lesser but still very considerable poet, the author of A Shropshire Lad:-

> "Malt does more than Milton Can
> To justify God's ways to man."

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