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Editors

E.H. HONDIUS, *Universiteit Utrecht, Molengraaff Instituut voor Privaatrecht, Utrecht, The Netherlands. Tel. 31-30-2537167, Telefax: 31-30-2537203; E-mail: E.Hondius@law.uu.nl*

M.L. STORME, *Universiteit Gent, Coupure 3, Gent, Belgium. Tel: 32-9-2243499; Telefax: 32-9-2239950; E-mail: matthias.e.storme@vlaanderen.org*

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The true meaning of the above so called 'postponement' letter, if interpreted according to arts. 173 and 200 of the GCC,²⁰ which deal with the interpretation of juridical acts,²¹ is that BFC would be repaid before any other Parc's creditor, belonging to Holding, that is, before OOL, also part of the Omni group, the Parc's creditor, secured with a second charge on Parc's property. True intention of BFC and Parc at the time of the signature of the above letter was that BFC would be satisfied before OOL. As the only way for BFC to be satisfied before OOL was the subrogation to RTB's rights and in particular to its rights as a creditor secured with a first charge on Parc's property, it is clear that what BFC and Parc mutually meant was the subrogation of BFC to RTB's security, to the extent that BFC paid to RTB Parc's loan. The said subrogation would give BFC the rights of a first mortgagee over Parc's property, but no greater rights than it had bargained for, as, according to the abovementioned, what BFC had bargained for and got, was nothing else than priority over all other creditors of the group, which interpreted also according to arts. 173 and 200 of the GCC, means, in the particular case subrogation to the first mortgagee's rights.

So, even if the application of Art. 858 by analogy would be considered too daring and is not accepted, the same solution would be given when examining the internal relation between Parc and BFC. According to the analysis that preceded, Parc not only undertook against BFC the obligation to repay the amount paid to RTB, when the loan will be due, but also, by handing to it the 'postponement letter' agreed for the subrogation of BFC to RTB's rights, giving its consent for the maintenance of the first mortgage in favour of BFC also.²²

The abovementioned agreement between BFC and Parc for subrogation to the first mortgagee's rights is permitted according to article 361 of the GCC, introducing the principle of freedom of contracts,²³ and does not violate the principle of protection of third persons, that could be affected by the particular agreement. Here third person, that might be affected, is OOL, who would be repaid only after BFC, in case of the validity of the above agreement. The said agreement

²⁰The former lays down that 'When interpreting a declaration of will, the true intention shall be sought without adherence to the words' and the latter 'Contracts shall be interpreted according to the requirements of good faith after consideration also of common usages'. See relatively STATHOPOULOS, *Contract Law in Hellas*, Ch. 3, § 2 I, no. 170, p. 125. For an analysis of said arts. (in Greek) see, among others, M. STATHOPOULOS, under arts. 173 and 200, in Ap. Georgiadis & M. Stathopoulos (eds.), *Civil Code I, General Principles*, P. Sakkoulas, Athens, 1978, where also reference to a rich relative literature.

²¹For the method and criteria of interpretation see STATHOPOULOS, *supra*, § 2II, nos. 171-173, pp. 126-128.

²²For the validity of this consent no special, and in particular no notarial, form is required, as for the consent of the owner of the immovable for the maintenance of the mortgage, after the assumption of debt by a third person [see relatively GEORGIADIS, *op. cit. supra* (note 2), § 43, no. 21, p. 436; KRITIKOS, *op. cit. supra* (note 10), no. 5]. However, as the change of the person of the chargee constitutes a change of the terms of the claim secured, according to arts. 1313 § 1, no. 4 and § 2 of the GCC, a relative note has to be made in the mortgage records of the district in which the immovable is situated. Omission of the said note, however, does not impair the validity of the consent, but may only create an obligation to pay damages to the person harmed from the omission [see relatively SPYRIDAKIS, *op. cit. supra* (note 5), § 27, § 61, § 62, no. 2, § 63, no. 5, § 64, no. 2, § 74, no. 8].

²³For an analysis of this art. (in Greek) see, among others, M. STATHOPOULOS, under Art. 361, in Ap. Georgiadis & M. Stathopoulos (eds.), *op. cit. supra* (note 2).

does not constitute a prohibited by law contract *against* a third person, OOL's rights are not in danger, as OOL is secured with a *second* charge and the identity of the person entitled to the first charge is indifferent to it. If this person is RTB or BFC or even RTB and BFC as co-creditors is irrelevant to OOL, as long as their satisfaction does not exceed the amount secured for with a first charge.

Consequently and concluding, we would agree with the judge's holding that, as against OOL, BFC was entitled to be subrogated to the first charge to the extent that its money was used to repay the debt which it had secured.

Portuguese Case Note

JÚLIO GOMES

Professor of Law, Universidade Católica Portuguesa

Banque Financière de la Cité v Parc (Battersea) Ltd and others, [1998] 1 All ER 737, presents the Portuguese lawyer, as well as the English, with an interesting set of problems and raises a number of difficult questions.

The main facts of the case are as follows: a debtor (Parc) wishes to pay part of a loan secured with a first charge on a piece of land; over the same property there is a second charge securing another loan. The debtor belongs to a group of companies controlled by a Swiss national; the creditor who benefited from the second charge was equally a member of the same group of companies and the charge 'related to an intra-group debt'. The debtor approaches another bank (BFC) and tries to obtain a loan but a number of problems arise: in the first place, to avoid a requirement of disclosure of the Swiss banking law the loan did not occur directly from BFC to Parc but instead BFC lent the money to the general manager of the Holding company (Mr. Herzig) of the group to which Parc belonged and the latter took the necessary steps to ensure that the sum was used by Parc to pay its debt. During the negotiations that preceded the loan and at the request of BFC, Mr. Herzig handed a letter which read as follows: 'This is to confirm that we and all companies of our group will not demand any repayment of loans granted to Parc (Battersea) Ltd., London, until the full repayment of your loan of DM30,000,000 granted to Mr. M. Herzig...'. Mr. Herzig and the Holding did not have the necessary authority to bind the other companies of the group - as Lord Hoffmann points out 'the persons who negotiated the transaction had no authority to commit OOL [the other company of the group whose credit was secured by a second charge] to such an undertaking and it was not binding upon it'. BFC did not arrange for any other security and it deemed that this sort of 'negative security' provided by this letter of postponement would be enough. In the event the group collapsed, Parc went insolvent and OOL claimed that it was unaware of the postponement letter and was not bound by it.

The Court of Appeal and the House of Lords reached opposite conclusions: the judgement of the former was in favour of OOL; the letter of postponement was not binding on OOL and it was neither consulted nor informed from the said letter. The bank had not been careful enough in providing for adequate securities and it ought not to obtain through subrogation or unjust enrichment what it had failed to obtain during the negotiations. Such a view was strongly criticized and rejected by the House of Lords although the speeches of the Judges show a somewhat different sensitivity to a number of factors.

To begin with even if the letter of postponement was not binding upon the other companies of the group, it was 'the result of a negotiation between commercial men' and BFC would not have lent the money were it not for its mistake in believing that such a letter provided an effective protection. The main issue was according to Lord Hoffmann 'the scope of the equitable remedy of subrogation', which is 'a means by which the court regulates the legal relationships between plaintiff and a defendant or defendants in order to prevent unjust enrichment'. The equitable subrogation - differently from the contractual subrogation - belongs to the law of restitution. Since, in the words of Lord Steyn 'unjust enrichment ranks next to contract and tort as part of the law of obligations' and 'it is an independent source of rights and obligations' the court undertook the task of asking the four questions whose answer in England determines whether restitution must take place or not: was there an enrichment? Was the enrichment at the expense of the plaintiff (BFC)? Was the enrichment unjust? Were there any defences? The House of Lords considered that OOL was enriched at the expense of BFC and also that the enrichment was unjust. The unjust factor could very well be unilateral and in this case BFC had expected that 'by reason of the letter its loan would be repaid in priority to the debts owing by Parc to the companies in the Omni Group' [752].

If a similar case had to be decided by a Portuguese court, I believe much of the controversy would be very similar. Firstly the ambiguity of the letter poses a problem: some would probably consider it to be a 'comfort letter'²⁴ whereby the Holding company states that it will take the necessary steps to ensure that the bank would be paid with priority to the other companies of the group. If the letter was understood as an engagement of the other companies made by a person who lacked the authority to bind them, the letter would be ineffective against them. Since the Portuguese courts have been very modest in their attempts to lift the corporate veil, it can probably be assumed that the only person held responsible would be the author of the letter.

In the Portuguese legal system subrogation can either be contractual or legal.²⁵ The former may happen in two situations: if a third person pays the creditor, the latter may subrogate him in his rights at the moment when the payment occurs; but subrogation can also take place by the initiative of the debtor and without the need

²⁴On the subject of 'comfort' letters in Portugal see A. PINTO MONTEIRO/J. GOMES, 'Sobre as Cartas de Conforto na Concessão de Crédito', in *AB VNO AD OMNES*, Coimbra, 1995, pp. 413 et seq.

²⁵PIRES DE LIMA/ANTUNES VARELA, *Código Civil Anotado*, volume I, 4^a ed., 1987, Coimbra, pp. 604 et seq.

of the creditor's consent.²⁶ That may happen whenever a third person pays the debt or when he or she loans the money in order for the debtor to pay his debt. Such a subrogation without the consent of the creditor has been called anomalous²⁷ but it fulfills an useful role allowing the debtor to switch creditors and to choose a more lenient creditor or a more favourable loan. It has, however, a number of requirements: subrogation may only occur until the moment of the payment and not afterwards and the payment is the condition and the measure of the subrogation.²⁸ If the third party does not pay directly to the creditor but instead makes a loan that enables the debtor to pay, it is imperative in order for the subrogation to occur in favour of the lender to make an express mention in the written document of the loan that the third party is subrogated in the creditor's rights. The failure to take such a step means that subrogation will not occur. The requirement for an express statement that the lender will be subrogated in the creditor's rights has the purpose of protecting other creditors against a fraudulent behaviour of the debtor although it must be acknowledged that the protection it affords is rather meagre.

Legal subrogation takes place in a number of cases typified by the law and one of them is precisely a case of *condictio indebiti*, namely when a person pays a debt of someone else because he mistakenly believed that it was its own; the payor has the right to ask for the restitution of its payment unless the creditor who did not know of his mistake lost securities or the evidence of his right, did not ask the true debtor for payment and in the meanwhile the debtor became insolvent or simply did not enforce his right in due time and it prescribed.

It would therefore be possible in Portugal for a bank who makes a loan to demand to be subrogated in the creditor's rights. However, if the bank did not take that precaution it is unlikely that a claim based on unjust enrichment would succeed.²⁹ Unjust enrichment in Portugal is a subsidiary remedy that can only be invoked when there are no other means of repairing a damage or of achieving restitution. The subsidiarity principle has been under attack³⁰ recently but one of its main purposes is to avoid *fraus legis* and in spite of the fact that subsidiarity has been subject to different interpretations it would possibly be argued that the legal requirements for conventional or voluntary subrogation to take place must not be circumvented by invoking unjust enrichment. The reasoning of the Court of Appeal

²⁶The Portuguese law followed the French model in this respect: see J. MESTRE, *La Subrogation Personnelle*, Paris, 1979, pp. 38-39, on the subject of the historical development of subrogation in the Ancien Régime and the importance of the Édit d'Henri IV, may 1609.

²⁷VAZ SERRA, *Sub-rogação nos direitos do credor*, Boletim do Ministério da Justiça n° 37, 1953, pp. 5 et seq., at p. 26.

²⁸R. DE ALARCÃO/H. MESQUITA, *Sub-rogação nos direitos do credor*, Parecer Forense, Rio de Janeiro, 1979, at p. 11. See also M.J. DE ALMEIDA COSTA, *Direito das Obrigações*, 7^a ed., Coimbra, 1998, pp. 727 et seq., at 733.

²⁹On the relationship between unjust enrichment and subrogation see L.M. TELES DE MENEZES LEITÃO, *O Enriquecimento sem Causa no Direito Civil*, Lisboa, 1996, pp. 824 et seq.

³⁰See L.M. TELES DE MENEZES LEITÃO, *op. cit.*, pp. 941 et seq and J.M. VIEIRA GOMES, *O Conceito de Enriquecimento, o Enriquecimento Forçado e os vários Paradigmas do Enriquecimento sem Causa*, Porto, 1998, pp.415 et seq. For a defence of the subsidiarity principle see D. PAREDES LEITE DE CAMPOS, *A Subsidiariedade da Obrigação de restituir o Enriquecimento*, Coimbra, 1974.

would probably prevail: if the Bank did not act with the proper care and did not obtain a voluntary subrogation it ought not to be allowed to get an equivalent position by invoking unjust enrichment. And it is an equivalent position to the extent that it allows an unsecured creditor to be paid with priority over the creditor with the second charge. As a matter of fact, even if the subsidiarity principle did not exist in Portugal, restitution based on unjust enrichment would be in a similar case troublesome; Lord Steyn stated that 'the neglect of BFC is akin to the carelessness of a mistaken payer: it does not by itself undermine the ground of restitution' [741]. In Portugal, as well, the absence of fault of the plaintiff is not a requirement for restitution to take place although the degree of the lack of care may be relevant as in the aforementioned case of the payment of someone else's debt. Nevertheless, instead of an unjust factor that triggers restitution the question would probably be whether OOL had a ground to retain the payment it received. And it must be added that even if the mistaken belief of OOL in the binding effect of the postponement letter was essential to the decision to grant the loan and the debtor knew it, that would simply result in the loan being a voidable contract; however since the Portuguese law does not have a device similar in its sophistication to tracing³¹ and the reivindicatio of money does not seem possible³² and there are no restitutionary rights in rem the bank would simply be an unsecured creditor.

Belgian Case Note

LAURENT DU JARDIN

Avocat au barreau de Bruxelles; Assistant à l'Université catholique de Louvain

ET

CHARLES DEMOULIN

Juriste, Deminor

L'objet de la présente note est d'examiner la décision rendue par la House of Lords le 26 février 1998 au regard des règles du droit belge. L'intérêt de l'analyse résulte notamment du fait que la décision des Lords fait usage de concepts qui existent également en droit belge mais qui y reçoivent parfois une toute autre portée.

En l'espèce, il s'agit pour un prêteur, la Banque Financière de la Cité (ci-après 'BFC'), de se voir reconnaître dans le recouvrement de sa créance la priorité à

³¹On tracing see P. BIRKS, *Mixing and Tracing, Property and Restitution*, Current Legal Problems 1992, pp. 75 et seq.

³²On the *reivindicatio* of money see J.M. VIEIRA GOMES, op. cit., at pp. 615 et seq.

l'égard d'une société Omnicorp Overseas Limited (ci-après OOL), laquelle dispose, à la suite d'une opération intra-groupe, d'une hypothèque sur un immeuble appartenant à une société sœur, Parc (Battersea) Limited (ci-après 'Parc'). Nous ne reprenons pas davantage l'exposé des faits de la cause. Ceux-ci sont amplement décrits par Lord Hoffmann.

Plusieurs questions doivent être examinées:

- la mesure dans laquelle la société OOL est liée par un engagement de subordination de sa créance tant que Parc n'a pas entièrement remboursé BFC (engagement qualifié en l'espèce de '*postponement letter*') (§1),
- les conséquences du paiement au premier prêteur, Royal Trust Bank (ci-après 'RTB'), de la somme empruntée auprès de BFC au regard des règles de la subrogation (§2),
- la possibilité pour BFC de faire usage de la théorie de l'enrichissement sans cause (§3).

1. Relativité des Engagements

La *postponement letter* précise que Holdings (société-mère du groupe Omni dont font également partie OOL et Parc), ainsi que toutes les sociétés du groupe ('*we and all companies of our group*'), ne demanderont pas le remboursement des prêts consentis à Parc tant que cette dernière n'aura pas remboursé l'intégralité du prêt octroyé par BFC.³³ BFC s'efforce de démontrer que la *postponement letter*, et les obligations qui en résultent, peuvent être opposées à toutes les sociétés du Groupe Omni, en ce compris OOL.

a. Absence de mandat, exprès ou apparent

La *postponement letter* n'est signée que par le General Manager de Holdings, un sieur Herzig, et une autre personne (dont il est seulement précisé qu'elle est Officer de la même société). Si tous deux semblent bien avoir le pouvoir d'engager Holdings, la question se pose différemment pour OOL.

Conformément au droit belge des sociétés, les signataires de la *postponement letter* n'auraient pu l'engager que dans l'hypothèse où ils auraient eu le pouvoir de la représenter, soit en une qualité d'organe de la société (ce qui ne semblait pas être le cas en l'espèce), soit en vertu d'un mandat donné par OOL.³⁴

³³A propos des sûretés négatives, voyez A. VERBEKE, I. PEETERS, 'Negatieve zekerheden', *DAOR*, 1996, liv. 39, pp. 39 et s.

³⁴Sur la question de la représentation des sociétés commerciales en droit belge, voyez TH. TILQUIN, V. SIMONART, *Traité des sociétés*, Tome I, Bruxelles, Kluwer, 1996, pp. 693 et s.; C. BERTSCH, 'La gestion interne et la représentation externe des S.A., S.P.R.L. et S.C.R.L.', *Guide des sociétés commerciales*, Bruxelles, Kluwer, 1998, pp. 527 à 544; D. HISETTE, 'La représentation des sociétés anonymes et sociétés privées à responsabilité limitée', *Le droit des sociétés - Aspects pratiques et conseils des notaires*, Bruxelles, Bruylant, 1999, pp. 269 à 285; B. TILLEMANN, *Bestuur van vennootschappen*, Leuven, Biblio,