UNJUST ENRICHMENT CLAIMS & COUNTERVAILING OBLIGATIONS

KRISHNAPRASAD KIZHAKKEVALAPPIL

EXETER COLLEGE

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ABSTRACT

This thesis investigates the relationship between unjust enrichment claims and countervailing legal entitlements of the defendant. It examines the cases that deny restitution on the basis that the enrichment was owed to the defendant under a valid legal obligation. The authorities suggest that there are two separate rules that perform this function: ‘the good consideration rule’ and the ‘legal obligation qualification’.

This thesis argues that the good consideration rule is best explained as an enrichment qualification. The ‘consideration’ provided by the defendant offsets the enrichment received. In net terms, this leaves the defendant in an enrichment-neutral position.

The legal obligation qualification is more difficult to account for. Most academic explanations of this rule are based on the assumption that unjust enrichment is subsidiary to other legal obligations. However, no convincing reasons have been offered to support a general doctrine of subsidiarity in the English law of unjust enrichment. The thesis argues that in order to explain the legal obligation qualification one must ask two principal questions: what are the normative reasons that justify unjust enrichment claims? Does the presence of a countervailing legal entitlement defeat any of these reasons?

In view of the uncertainty relating to the normative justification for unjust enrichment, this thesis uses two prominent theoretical accounts as its framework: the entitlement thesis and corrective justice theory. On either view, it is argued, the legal obligation qualification can be explained by the need to maintain equality between the claimant and the defendant.

The equality explanation has many implications for the operation of the legal obligation qualification. For instance, it confirms that the rule operates by denying primary liability. It is suggested, therefore, that the legal burden on this point must fall on the claimant. More importantly, the justificatory scope of the equality thesis extends to cases that have, thus far, been treated as instances of application of the good consideration rule. For the future, therefore, it is suggested that the language of ‘good consideration’ must be abandoned.

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INTRODUCTION

More than a decade ago, in a leading House of Lords decision on unjust enrichment, Lord Scott said:[1]

> If a contract has been entered into that would not have been entered into but for a mistake, but the contract is then completed by a payment of the price for the goods or services that the payee has supplied, the payment cannot be recovered unless the contract can be set aside. The proposition seems such an obviously correct one that it may seem pointless to ask why it is that it is correct. But I think the question does need to be asked for the answer casts, in my opinion, valuable light on the nature of the restitutionary remedy for the recovery of money paid under a mistake.

This thesis attempts to answer that question. A restitution claim is not available in respect of a benefit that was received by the defendant in discharge of a valid legal obligation. This proposition is, Lord Sumption recently said, 'supported by more than a century and a half of authority'.[2] Yet its justification remains obscure. That is the central enquiry that this thesis undertakes.

The relationship between unjust enrichment claims and countervailing legal obligations has attracted much attention lately. Professor Burrows has described this as a 'hotly debated issue'[3] in the restitution of mistaken enrichments. More recently, this question narrowly divided seven Justices of the UK Supreme Court in *International Energy Group v Zurich Insurance*.[4] Unassisted by a coherent account of the relationship between restitution claims and countervailing legal entitlements, the judges fundamentally disagreed on this issue. This thesis attempts to provide a

[1] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [84] (Lord Scott).

[2] *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36.

[3] Andrew Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 774.

[4] *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471 ('*Zurich Insurance*').

defensible account of that relationship. Importantly, in doing so, it will presume the validity of the conventional unjust factors model of restitution.

The thesis proceeds as follows. **Chapter 1** argues that, from a doctrinal standpoint, there are two distinct rules that deny restitution claims on the basis that the defendant was entitled to a benefit: 'the good consideration rule' and 'the legal obligation qualification'. **Part I** examines the good consideration rule. **Chapters 2 and 3** argue that the good consideration rule is best explained as an enrichment qualification. **Part II** considers the legal obligation qualification. **Chapter 4** argues that this principle ought to be conceptualised as a bright-line rule rather than as a flexible exception. **Chapter 5** surveys the academic explanations for the principle and **Chapter 6** critiques its judicial treatment in *Zurich Insurance*. **Chapters 7 and 8** set out the positive case. They use, as their framework, two prominent accounts of the normative basis for unjust enrichment claims: the entitlement thesis and corrective justice theory. On both accounts, it is suggested that the legal obligation qualification is best justified by the need to maintain equality between the claimant and the defendant. Finally, **Chapter 9** outlines the doctrinal consequences of the equality explanation. They are largely in line with the prevalent judicial and academic thinking regarding the operation of the legal obligation qualification.

CHAPTER 1

THE GOOD CONSIDERATION RULE & THE LEGAL OBLIGATION QUALIFICATION

The authorities suggest that there are two distinct qualifications that deny unjust enrichment claims on the basis that the enrichment was owed to the defendant under a valid legal obligation. I will call one of them the 'good consideration rule' and the other, the 'legal obligation qualification'. Separating out these distinct qualifications is an important preliminary step before examining the scopes and justifications for each of these rules.

Consider two illustrations.

> *Example 1*: X owed a debt to C and D. X conveyed Blackacre to C in discharge of its debt. However, Blackacre was subject to a mortgage securing D's debt. X and C agreed that C should pay off D's debt. After clearing that debt, C realised that X was not entitled to Blackacre. C's claim against D for restitution failed.[1]
>
> *Example 2*: C owed £100 to both D and X. C intended to pay X but mistakenly paid D. C's claim for restitution from D failed.[2]

It has often been assumed that in both cases, C's claim is precluded by the same rule.[3] This has been differently termed the 'good consideration rule',[4] the defence of

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[1] *Aiken v Short* (1856) 1 Hurl & N 210, 156 ER 1180.

[2] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65. See also, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 32–33.

[3] *Fairfield Sentry Ltd (In Liquidation) v Migani* [2014] UKPC 9 [18] (Lord Sumption); Keith Mason, John Carter & Gregory Tolhurst, *Mason & Carter's Restitution Law in Australia* (2nd edn, LexisNexis Butterworths 2008) 440; Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson & Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 493–495.

[4] Charles Mitchell, Paul Mitchell & Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [29-02]; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 172.

‘discharge for value’[5] and the ‘bona fide payee’ exception.[6] This chapter will demonstrate that, from a doctrinal point of view, C’s claims in Examples 1 and 2 are denied by two distinct rules: the good consideration rule and the legal obligation qualification, respectively.

A comparison of Lord Sterndale’s speech in *Steam Saw Mills*[7] and Goff J’s decision in *Barclays Bank* may provide a useful starting point. In the former case, the claimant held a licence from the Russian Government to import timber. As a condition of the licence, the claimant was required to deposit the purchase price with the defendant. The dispute concerned payments made by the claimant on 9 November 1917. By then, the Russian government had been overthrown by revolution. The claimant argued that had it been aware of this fact, it would not have made those payments. Lord Sterndale rejected the claim for restitution. He reasoned that ‘if a man pays money under a mistake of fact, there being a liability to pay it, if the fact of which he was ignorant does not discharge him from that liability, he cannot recover it back’.[8] Consider now, *Barclays Bank*. There, the claimant bank, in making the disputed payment, had mistakenly overlooked a countermand order by its customer. The bank was granted restitution. That was because the payment was unauthorised,

[5] George Palmer, *The Law of Restitution*, vol 3 (Little, Brown 1978) 496ff.

[6] American Law Institute, *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute 2011) §67 (‘R3RUE’).

[7] *Steam Saw Mills Company Ltd v Baring Brothers* [1922] 1 Ch 244 (CA).

[8] Ibid 250. See also, *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [85] (Lord Scott); *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [177].

and consequently, incapable of discharging the defendant's debt. Had this not been the case, Goff J would have rejected the claim. He held that the claim would fail if:[9]

> the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt.

In contrast to the formulation in *Steam Saw Mills*, there are three distinctive features that are noteworthy about this passage. First, it suggests that the payment must have been made 'to discharge' the debt. An unintentional payment is unlikely to meet this requirement. Secondly, according to Goff J, this rule was derived from *Aiken v Short*.[10] The facts of that case are identical to Example 1. Reference to a decision arising from such a specialised factual matrix suggests that Goff J was not referring to a defence as general as the one formulated by Lord Sterndale.[11] Finally, Goff J further qualified the good consideration rule by reference to the payee's state of mind. The defence may fail, he said, 'if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith'.[12]

None of these restrictions appear to have been considered by Lord Sterndale. None of them are relevant to Example 2 either. Consider, for example, the requirement that the payment must have been intended to discharge the debt. Example 2 fails to meet this standard. C's payment was intended to discharge a debt owed to X,

[9] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695 (Goff J).

[10] *Aiken* (n 1).

[11] Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell & William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 169.

[12] *Barclays Bank* (n 9) 695 (Goff J).

but what it in fact discharged was a debt owed to D. Surely, it is insufficient that the payment was intended to discharge *a* debt.

The doctrinal distinction between the good consideration rule and the legal obligation qualification was also recently affirmed by Lord Sumption in the Privy Council in *DD Growth Premium v RMF Strategies*.[13] He said,[14]

> It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right.

Therefore, it is difficult to disagree with Burrows when he suggests that the 'factual distinction [between Examples 1 and 2] appears to mark an important conceptual divide'.[15] This chapter substantiates that claim. It suggests that the distinction between the good consideration rule and the legal obligation qualification is marked by two features: (**A**) In Example 2 (unlike Example 1) the legal obligation operated *between the claimant and the defendant*; (**B**) In Example 1 (unlike Example 2) the payment was *intended* to discharge the debt.

A. LEGAL OBLIGATION BETWEEN THE CLAIMANT AND DEFENDANT

One of the central features that distinguishes Example 1 from Example 2 is the operation of a legal obligation between the claimant and the defendant. In Example 1, unlike Example 2, the legal obligation operated between a third party (X) and the

[13] *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36.

[14] Ibid [62].

[15] Burrows, 'Is There a Defence of Good Consideration?' (n 11) 168.

defendant. The defendant's legal entitlement against the claimant has important consequences for the law of unjust enrichment.[16] An example.

> *Example 3*: C owes £100 to D. C does not intend to pay D, but mistakenly does so. D accepts the payment in discharge of the debt. C seeks restitution from D. C's claim will fail.[17]

Broadly, there are two views on the implications that C's debt to D has for C's claim for restitution. On one view, the legal obligation is a complete bar. To Stevens[18] and Virgo,[19] that is because absence of basis is a necessary condition for restitution. Friedmann, however, explains this result on the basis that, permitting restitution under these circumstances will 'nullify the obligation'.[20] Burrows advocates a second, more flexible, approach. To him, this issue raises questions regarding the interplay between unjust factors, and the defendant's legal entitlement against the claimant.[21] Therefore, the question is whether 'the legal entitlement of D to the payment from C is outweighed by the injustice constituted by D receiving a payment that C mistakenly did not mean to make'.[22]

It is unnecessary to take a position on this debate presently. It suffices to note that neither of these accounts can explain the denial of restitution in cases where the legal obligation is not owed by the claimant. Take Friedmann's explanation first. It is

[16] Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991) 247.

[17] *Steam Saw Mills* (n 7).

[18] Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling & James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 7.

[19] Virgo, 'Demolishing the Pyramid' (n 3) 488ff.

[20] Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations' (n 16) 248.

[21] Burrows, 'Is There a Defence of Good Consideration?' (n 11) 167.

[22] Ibid 177.

difficult to see how reversing a transfer between C and D has the effect of 'nullifying' an obligation owed by X to D. In fact, Friedmann recognises this difficulty:[23]

> The common explanation given for the denial of recovery from the creditor is that, since he was entitled to that which he had received, his enrichment is not 'without legal ground'… The main weakness of this argument is that the creditor, though he only received that which was due to him, had not received it from the debtor but from a third person who acted under mistake and was not liable to him.

Burrows is equally clear on this point. He has repeatedly stressed that the obligation must be owed by the claimant to the defendant.[24] In fact, in a previous edition of his commentary, he had categorically suggested that the defendant's legal entitlement 'does not appear to provide a sound justification' for denying restitution 'where, as on the facts of *Lloyds Bank*, the payee has no legal entitlement *against the payor* to be paid'.[25] This is unsurprising since it is inconceivable how, on Burrows's model, an unjust factor that operates between C and D can be weighed against a legal entitlement owed by X to D. In sum, while Example 2 may be readily explained on the basis of C's legal obligation to D, the denial of restitution in Example 1 requires a different justification.

I will now consider an important challenge to the conceptual division that this chapter seeks to draw: Virgo's suggestion that Examples 1 and 2 are both explicable on the 'presence of basis' bar. In his view, 'where there is a valid basis for the receipt

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[23] Daniel Friedmann & Nili Cohen, 'Payment of Another's Debt' *International Encyclopedia of Comparative Law* X (1991) 58.

[24] Burrows, 'Is There a Defence of Good Consideration?' (n 11) 168; Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Andrew Burrows & Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 43–44; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 88–89.

[25] Andrew Burrows, *The Law of Restitution* (2nd edn, Butterworths 2002) 137 (emphasis in original). See also, Alexander Schall, 'Three-party Situations in Unjust Enrichment Epitomised by Mistaken Bank Transfers' [2004] Restitution Law Review 110, 116; Helen Scott, 'Restitution of Extra-contractual Transfers: Limits of the Absence of Legal Ground Analysis' [2006] Restitution Law Review 93, 96.

of the enrichment by the defendant, this should bar the claim to restitution'.[26] Notably, he extends the presence of basis bar even to Example 1. In that case, it is the discharge of D's debt that constitutes the basis for C's payment.[27] This argument must however, be read along with Virgo's conception of 'basis':[28]

> The bar to restitution should apply where the receipt of the enrichment by the defendant can be considered to be <u>legally effective in some way</u>, in the sense that the transfer to the defendant <u>has a legal consequence</u>, as will occur for example where the transfer has discharged an existing obligation.

With respect, Virgo's extension of the presence of basis bar to Example 1 is incorrect. The point of departure in establishing this is the meaning of 'basis'. There are at least two ways in which that idea can be understood: one, subjective and the other, objective. The subjective understanding links 'basis' to the claimant's purpose for making the transfer.[29] There is a failure of basis whenever the claimant's purpose fails. On the objective view however, the claimant's purpose is irrelevant. 'Basis' is the legal relationship between the parties.[30] In Example 3, for instance, C's indebtedness to D constitutes the basis.[31] It is unnecessary to resolve the conflict between these two competing approaches here. It suffices to note that neither conception can bridge the conceptual gap between Examples 1 and 2.

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[26] Virgo, 'Demolishing the Pyramid' (n 3) 488.

[27] Ibid 494–495.

[28] Ibid 489 (emphasis added).

[29] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 102–103; Sonja Meier, 'No Basis: A Comparative View' in Andrew Burrows & Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 43–44.

[30] Jacques Du Plessis, 'Fraud, Duress & Unjustified Enrichment: A Civil Law Perspective' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 206–207.

[31] Scott (n 25) 98.

Consider the subjective notion first. Example 1 is explicable on that view. The purpose of C's transfer was to discharge X's debt to D. C's payment did achieve that purpose. Consequently, there is no failure of basis. However, this view runs into difficulties in explaining Example 2. The purpose of C's payment in that case was to discharge a *debt owed to X*. The transfer failed to achieve that purpose. On the subjective understanding of basis, therefore, restitution must be available in Example 2. The subjective notion thus fails to provide a common explanation for Examples 1 and 2. Notably, Virgo rejects the subjective understanding of basis. In his view, 'basis' must be understood objectively.[32] Let us consider that argument now. The objective notion provides a ready explanation for Example 2. The basis in that case is the legal obligation between C and D. However, it cannot account for Example 1. That is because a legal obligation can constitute a valid 'basis' only if it operates between the claimant and the defendant. An illustration.[33]

> *Example 4:* C, D1 and D2 were sureties for the performance of an obligation owed by X to Y. X defaulted. Y obtained judgment against C for the whole amount. C has a valid claim against D1 and D2 for contribution.

C's claims against D1 and D2 are based on unjust enrichment.[34] C's payment was made in pursuance of a valid basis: the judgment. Why does this not preclude C's claim? The answer is that the basis (i.e. the judgment) operated between C and Y, and not between C on the one hand and D1 and D2 on the other.[35] As Smith argues:[36]

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[32] Virgo, 'Demolishing the Pyramid' (n 3) 489.

[33] *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270, 126 ER 1276.

[34] Burrows, *The Law of Restitution* (n 25) 455–460.

[35] Birks, *Unjust Enrichment* (n 29) 159. See also, Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations' (n 16) 258.

[36] Lionel Smith, 'Demystifying Juristic Reasons' (2007) 45 Canadian Business Law Journal 281, 295.

> If the guarantor wanted to recover from the creditor, he would have to impugn the obligation in the guarantee in some way. But he does not have to do that to recover from the primary debtor. We might well be tempted to say that an obligation owed to someone other than the person enriched is not a juristic reason.

Cases on recoupment reaffirm this conclusion.[37] Faced with this difficulty, Virgo admits that a legal basis is effective only if it operates between the claimant and the defendant:[38]

> [I]f the claimant can establish that the liability to the third party was ultimately borne by the defendant, a claim for restitution against the defendant will not be barred by the provision of basis, since, as between the claimant and the defendant, no legal basis exists for the payment.

Why then does the 'presence of basis' bar operate in Example 1? The only difference between Examples 1 and 4 is that in the former, the basis operates between a third party and the defendant whereas in the latter, it operates between a third party and the claimant. On principle, it is difficult to see why they must be treated differently.

It may be suggested that Examples 1 and 4 can be reconciled by understanding 'basis' as the defendant's entitlement. On that view, there is a basis if the defendant has a valid right to receive the payment; it is irrelevant who owed that obligation. However, this contention seems unacceptable in the light of the judicial trend. Consider for example, *Durrant.*[39] There, the claimant was seeking restitution of overpaid tithe charges. The overpayment resulted because, in addition to land that belonged to the claimant, the collection books recorded against his name, a piece of land whose title vested with a third party. Indisputably, tithe charges in respect of that property were owed to the defendant. Furthermore, the claimant's payment was also

[37] *Moule v Garret* (1872) LR 7 Exch 101; *Downer Enterprises, Re* [1974] 1 WLR 1460 (Ch).

[38] Virgo, 'Demolishing the Pyramid' (n 3) 496.

[39] *Durrant v Ecclesiastical Commissioners for England & Wales* (1880) 6 QBD 234.

identifiable as tithe charges in respect of that land. However, the claim was upheld.[40] This is inexplicable if the defendant's right to receive the payment alone constitutes a basis. The decision in *Baylis*[41] reaffirms this result. There, the claimants mistakenly continued to pay tithe charges to the defendant despite the expiry of their leaseholds. Here, again, the defendant had a valid right to receive the payments, albeit from a third party. However, that did not preclude restitution.

In sum, the 'legal basis' analysis fails to provide a straightforward answer to Example 1. The strongest evidence of this may be found in civilian jurisdictions that adopt the 'absence of basis' approach.[42] If Example 1 were readily explicable on that methodology, one would expect that these problems would be susceptible to straightforward solutions in those jurisdictions. However, this is far from the truth. In Germany, for example, the objective conception of basis has failed to provide a clear answer to three-party cases.[43] In fact, the Bundesgerichtshof has found these problems so complex that it has had to resign itself to the conclusion that it is difficult to lay down hard and fast rules in this area.[44] This suggests that cases such as Example 1 are not answerable on the objective conception of 'basis'. Their solution lies elsewhere.

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[40] See also, *Lowe v Wells Fargo Co Express* 96 P 74 (Kan 1908). Scottish Courts have taken the same view: Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law* (Scot Law Com DP No 95, 1993) [2.166], [2.179].

[41] *Baylis v Bishop of London* [1913] 1 Ch 127 (CA).

[42] This issue is considered in more detail in the Conclusion (B).

[43] Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 209; Sonja Meier, 'Mistaken Payments in Three-Party Situations: A German View of English Law' (1999) 58 CLJ 567.

[44] Peter Schlechtriem, Christoph Coen & Rainer Hornung, 'Restitution and Unjust Enrichment in Europe' (2001) 9 European Review of Private Law 377, 408.

Another challenge to the conceptual division that this chapter seeks to draw arises from Lord Hope's dictum in *Kleinwort Benson*.[45] He said that 'the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him'.[46] This may be read as suggesting that it is irrelevant whether the sum was owed by the claimant or by a third party. On closer reading however, it appears that he was referring to an enrichment qualification. He went on to say:[47]

> As for the concept of enrichment, a person is enriched when he receives a payment which <u>the payer was not bound by any obligation to make to him</u>…. The common law accepts that the payee is <u>enriched where the sum was not due to be paid to him</u>, but it requires the payer to show that this was unjust.

Thus, according to Lord Hope, a defendant who merely receives what was due to her is not enriched. Interestingly, this is closely aligned with the enrichment thesis that Chapter 2 of this thesis advances. The validity of that suggestion is however contingent on a second element: the payor's intention to discharge the debt. It is to that requirement that I now turn.

B. INTENTION TO DISCHARGE THE DEBT

This section lays out the second factor that marks the separation between the good consideration rule and the legal obligation qualification: the requirement that, the good consideration rule operates only if the claimant's payment was intended to discharge the debt. Goff J's insistence in *Barclays Bank* that the payment must have been made 'to discharge'[48] the debt supports this view. Consider an example.

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[45] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

[46] Ibid 408 (Lord Hope).

[47] Ibid 408–409 (Lord Hope) (emphasis added).

[48] *Barclays Bank* (n 9) 695.

Example 5: C, D1 and D2 were victims of X's fraud. X misrepresented to C that C was paying D1 and D2 for the supply of goods. Meanwhile, X induced D1 and D2 to believe that the payment from C was made in discharge of debts owed by X's companies. D1 and D2 accepted the payment in discharge of those debts. On discovering the fraud, C sought restitution from D1 and D2.

C's payment was not intended to discharge the debts owed to D1 and D2. This led to a division of views in the New South Wales Court of Appeal in *Hills Industries*.[49] The question was whether C's payment attracted the good consideration rule. Allsop P and Meagher JA reached opposite conclusions. Allsop P admitted that 'the expression of the matter in proposition (2)(b) in *Barclays Bank* appears to require the intention of the payer to pay off a debt'.[50] Ultimately, however, he preferred to rely on American cases that espoused the contrary view. Meagher JA on the other hand, refused to apply the good consideration rule outside of the confines of its formulation in *Barclays Bank.* Interpreted in this way, the good consideration rule is inapplicable to these facts.[51] On appeal, the High Court of Australia preferred the latter view. It concluded that the good consideration rule has no application to these facts since '[C's] payments were not made to discharge [X's companies'] debts to [D1] and [D2]'.[52]

As early as in 1926, the House of Lords had considered a similar factual situation in *RE Jones.*[53] There, a fraudster owed the defendant company £5000. Unable to satisfy this debt, he induced the claimant to make that payment. The

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[49] *Hills Industries Ltd v Australian Financial Services & Leasing Pty Ltd* [2012] NSWCA 380, (2012) 295 ALR 147.

[50] Ibid [113].

[51] Ibid [200]. See also, Andrew Burrows, 'Good Consideration in the Law of Unjust Enrichment' (2013) 129 LQR 329, 332.

[52] *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 88 ALJR 552 [101] (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis added).

[53] *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670 (HL).

claimant paid, believing that it was making a deposit for the purchase of motorcars. The defendant, however, accepted the payment in discharge of the fraudster's debt. When the fraud was discovered, the claimant sought restitution of the deposit. The House of Lords upheld this claim. Why did the good consideration rule not preclude restitution in this case? The answer lies in the fact that the payment was not intended to discharge the defendant's debt.[54] In fact, the claimant was entirely unaware of the fraudster's debt.

In both these cases, the payor's absence of intention to discharge the debt resulted from a mistake as to the existence of the debt. The same result follows even when the payor's mistake relates to the identity of the debtor.[55] *Durrant*[56] confirms this. There, the question was whether the claimant can recover tithe charges it paid to the defendant under the mistaken impression that they were due from the claimant whereas in fact, that liability fell on a third party. This question was answered in the negative. How can this result be reconciled with the good consideration rule? The answer must similarly be that the claimant's payment did not intend to discharge the third party's liability.[57]

The same conclusion follows even when the absence of the payor's intention resulted from a mistake as to the identity of the payee. The Scottish decision in *Bank of New York*[58] illustrates this. There, the claimant bank mistakenly transferred funds to

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[54] Daniel Friedmann, 'Payment of Another's Debt' (1983) 99 LQR 534, 551; Friedmann & Cohen (n 23) 63; Meier, 'Mistaken Payments in Three-Party Situations' (n 43) 579.

[55] Scottish Law Commission (n 40) [2.163].

[56] *Durrant* (n 39).

[57] Friedmann, 'Payment of Another's Debt' (n 54) 550; Robin Evans-Jones, 'Identifying the Enriched: Some Complex Relationships Involving the Condictio Indebiti' (1992) 4 Scots Law Times 25, 29.

[58] *Bank of New York v North British Steel Group* 1992 SLT 613 (OH).

the defendant's account. However, coincidentally, its customer was in fact indebted to the defendant for a lesser sum. The Court rejected the claimant's application for summary judgment. However, in doing so, Lord Caplan distinguished between a 'mistake as to the identity of the due recipients' and 'a mistake as to the amount which ought to have been sent'.[59] Restitution is not available in the latter case except as to the overpayment. In the former case, however, 'the debt which the [claimant] intended to discharge was not due in law to [the defendant] and the payment can be recovered from [the defendant]'.[60]

A brief overview of the Roman law equivalent of the good consideration rule—'the suum recepit' rule—will reinforce the significance of the payor's intention. That rule, as formulated in the Justinian's Digest (D.12.6.44) translates as follows: 'there is no recovery from a person who receives what is owed to him even although it is paid by someone other than the true debtor'.[61] Admittedly, the requirement of intention is not apparent in this formulation. However, there is abundant academic support for the view that this requirement was understood to have been implied.[62] As Schall argues:[63]

> [I]t did not suffice under that rule either that the mistaken payment was somehow due to the plaintiff (sic: defendant) from another person. The term 'ab alio… solutum est' suggests that the 'alius' must have been transferred intentionally in discharge of the true debtor's obligation.

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[59] Ibid 614 (Lord Caplan).

[60] Evans-Jones (n 57). Many civilian jurisdictions similarly insist that the payment must have been intended to discharge the debt: see, Schlechtriem, Coen & Hornung (n 44) 412.

[61] Cited in Evans-Jones (n 57) 26. See also, Helen Scott, 'Unjustified Enrichment' [2012] Annual Survey of South African Law 1046, 1048.

[62] Patrick Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (Bell & Bradfute 1824) 39–40; Andrew Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Stair Society 1993-1995) 217–218; David Hume, *Baron David Hume's Lectures*, *1786-1822*, vol 3 (George Paton ed, Stair Society 1939) 34; Scottish Law Commission (n 40) para 2.175.

[63] Schall (n 25) 128.

Now consider Example 2 again. There, the debt that C's payment discharged was not the one that C intended to discharge. Thus, Example 2 fails to meet the requirement that the payment must have been intended to discharge the debt. As demonstrated above however, that requirement is integral to the operation of the good consideration rule.[64]

It may be suggested that the decision of the Court of Appeal in *Lloyds Bank Plc v Independent Insurance Co Ltd*[65] ('*Lloyds Bank*') is inexplicable on this view. There, the claimant bank, on the request of its customer, paid £162,388 to the defendant. This payment discharged a debt owed by the customer to the defendant. The bank made the payment believing that certain cheques deposited by its customer had been cleared. However, one of these cheques was dishonoured. Consequently, the customer's account was substantially overdrawn. Based on this mistake, the bank sought restitution from the defendant. The Court of Appeal rejected this claim. It was held that by discharging the debt owed by the customer, the defendant had provided 'good consideration' for the bank's payment. But it is unlikely that the bank intended to discharge that debt. As Burrows suggests, 'the claimant bank had no knowledge of the

[64] It is controversial whether 'intention' is also necessary to satisfy a prior requirement: the discharge of a debt. This thesis does not attempt to resolve that issue. However, regardless of whether intention is necessary to discharge a debt, it is suggested here that it is an element of the good consideration rule. The decision of the High Court of Australia in *Hills Industries* vindicates this claim. There, the discharge of the debt was not in dispute. However, the Court took the view that intention was a necessary element of the good consideration rule. This is also evident from Goff J's insistence in *Barclays Bank* that the payment must have been made 'to discharge and does discharge' the debt. If intention was only a requirement of the discharge of a debt, it would have been unnecessary to insist that the payment must also be made 'to discharge' the debt. The requirement that the payment 'does discharge' the debt would have subsumed that ingredient. For the debate on 'automatic discharge', see, Burrows, *The Law of Restitution* (n 24) 460–467; Virgo, *The Principles of the Law of Restitution* (n 4) 225–230; Peter Birks & Jack Beatson, 'Unrequested Payment of Another's Debt' (1976) 92 LQR 188; Friedmann, 'Payment of Another's Debt' (n 54).

[65] *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 (CA).

underlying purpose of the payment and did not know that it was to discharge a debt'.[66] Does this mean that the decision in *Lloyds Bank* is incorrect?[67] It does not. The necessary reconciliation may be found in the nature of the banker-customer relationship. As Zyl notes:[68]

> A bank which effects payment of a cheque in accordance with its mandate and within its authority has no interest in the underlying agreement or in the reason for the payment by cheque. It is for all practical purposes, no more than a conduit or 'neutral functionary' whose payment of the cheque facilitates performance by the customer, as debtor in terms of the underlying agreement, to the third party payee, as creditor in terms thereof. By paying the cheque the bank does not effect performance of the customer's obligation to the third party. It is the customer who performs with the assistance or through the mediation of the bank.

Consequently, in *Lloyds Bank*, the relevant intention is that of the customer, not the bank. Stated differently, if the customer's payment was intended to discharge the debt, the interposition of the bank does not mean that the payment is no longer made 'to discharge' the debt. This view finds recognition in *Lloyds Bank* itself. There, Waller LJ said:[69]

> It must be remembered that the formulation in the Simms case [1980] Q.B. 677 itself contemplates that 'the money is paid to discharge and does discharge a debt owed…' The case further recognises that where the bank meet a cheque payable to A which in fact pays a debt that C owes to A, the bank are paying money <u>to discharge</u> that debt.

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[66] Burrows, 'Is There a Defence of Good Consideration?' (n 11) 171.

[67] The result in *Lloyds Bank* is also explicable on the basis that the defendant's enrichment was not 'at the expense of' the bank, but the third-party. While that explanation may be correct on principle, it does not withstand scrutiny as an explanation for the good consideration rule: See Chapter 3(B)(2).

[68] DH Zyl, 'Unauthorised Payment and Unjust Enrichment in Banking Law' in Francis Rose (ed), *Restitution and Banking Law* (Mansfield 1998) 3.

[69] *Lloyds Bank* (n 65) 127 (Waller LJ) (emphasis added).

C. TWO DISTINCT RULES: THE AUTHORITIES

The distinction between the good consideration rule and the legal obligation qualification has, albeit rarely, received express judicial acceptance. The decision of the Supreme Court of Queensland in *Queensland University of Technology*[70] is an example. There, the claimant university sought restitution of its payments to the defendant builder. It argued that the defendant had committed a breach of the contract by failing to maintain its building licence. The defendant raised two defences: first, the payments were made for good consideration and secondly, the defendant's breach 'did not affect existing obligations to pay for past work'.[71] These defences broadly correspond to the good consideration rule and the legal obligation qualification, respectively. The Court addressed the second defence first. That was accepted on the basis that the contract only provided for a temporary suspension of payments;[72] the payment was, thus, owed under the contract. Notably, the good consideration rule was considered as a separate restriction, although in the light of the earlier conclusion it was unnecessary to decide on its application.[73]

The *Third Restatement on Restitution and Unjust Enrichment* also adopts a distinction that re-affirms the conceptual separation between the good consideration rule and the legal obligation qualification. The equivalent of the legal obligation qualification, §62, provides that a prima facie right to restitution may be defeated if 'the benefit conferred did not unjustly enrich the recipient when the challenged

[70] *Queensland University of Technology v Project Constructions* [2002] QCA 224, [2003] ALMD 2309.

[71] Ibid [6].

[72] Ibid [26].

[73] Ibid [28].

transaction is viewed in the context of the parties' further obligations to each other'.[74] Though this provision is opaquely worded, its operation is made clear by the illustrations. Illustration 2, for instance, is identical to the two-creditor example (Example 2).

§67 of the Restatement, on the other hand, corresponds to the good consideration rule. It states that the payee has a valid defence if, inter alia, she 'accepts the funds in satisfaction or reduction of the payee's valid claim as creditor of the payor or of another person'.[75] Illustrations to §67 bear a striking resemblance to the leading English cases on the good consideration rule.[76]

The elements of separation between §62 and §67 also resemble the dividing line between the good consideration rule and the legal obligation qualification. First, as noted above, the presence of a legal obligation between the claimant and the defendant is one of the central features that distinguishes the good consideration rule from the legal obligation qualification. Similarly, §62 only takes into account the 'parties'… obligations to each other'. In contrast, for the purposes of §67 it suffices that the payee was the 'creditor of the payor or of another person'. Secondly, §67 does not apply if the payee had notice of the payor's mistake. This resembles Goff J's 'footnote' in *Barclays Bank* regarding the payee's awareness of the claimant's mistake. However, as with the legal obligation qualification, that requirement is irrelevant for §62.[77] Finally, as with the good consideration rule and the legal

[74] R3RUE (n 6) §62.

[75] Ibid §67.

[76] See Ibid §67, illustration 1.

[77] Ibid §62, illustration 2.

obligation qualification, there is an overlap between §62 and §67.[78] That arises because §67, just as the good consideration rule, is not confined to three-party cases. It is to this issue that I now turn.

D. LEGAL OBLIGATION AND GOOD CONSIDERATION: AN OVERLAP

In *Barclays Bank*, Goff J said that the debt discharged may be owed 'by the payer or by a third party'.[79] Thus, the good consideration rule is applicable to two-party cases. The decision of the New Zealand Supreme Court in *Stiassny*[80] confirms this. The dispute in that case concerned the liability of the claimant partnership to pay GST. GST was paid because the receivers of the claimant believed that a failure to pay would lead to their personal liability. In fact, this fear was misplaced. The claimant sought restitution of mistakenly paid GST. The claim was rejected. In doing so, the New Zealand Court of Appeal applied the rule as formulated in *Barclays Bank* together with its restrictive features. It was considered relevant that the payment was made 'to discharge' the debt[81] and that the defendant received the payment in good faith.[82] On appeal, this was confirmed by the New Zealand Supreme Court.[83] As noted previously, these features are irrelevant to the legal obligation qualification.

To conclude, the good consideration rule is distinguishable from the legal obligation qualification on account of two features: (a) the operation of a legal

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[78] Burrows, 'Is There a Defence of Good Consideration?' (n 11) 181.

[79] *Barclays Bank* (n 9) 695 (Goff J).

[80] *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106. See also, *National Mutual Life Association v Walsh* (1987) 8 NSWLR 585 (NSWSC) (Clarke J); *Orix Australia Corporation Ltd v Moody Kiddell & Partners* [2005] NSWSC 1209.

[81] *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, (2012) 10 NZBLC 99-704 [85].

[82] Ibid [105].

[83] *Stiassny* (NZSC) (n 80).

obligation between the claimant and the defendant and (b) the claimant's intention to discharge the debt. Part I of this thesis will examine the good consideration rule and Part II, the legal obligation qualification.

PART I

THE GOOD CONSIDERATION RULE

CHAPTER 2

THE ENRICHMENT EXPLANATION

This chapter argues that the best explanation for the good consideration rule lies in the absence of the defendant's enrichment. This claim is advanced in two parts. **Part A** suggests that in evaluating the defendant's enrichment, a conditionally related disenrichment must be taken into account (the 'net benefit approach'). **Part B** applies the net benefit thesis to explain the good consideration rule as an enrichment qualification.

A. THE NET BENEFIT APPROACH

An example.

> *Example 1*: C pays £10,000 to D for a car worth £8,000. Realising that D had misrepresented the value of the car, C rescinds the contract and seeks restitution of £10,000.

There are two ways of characterising D's enrichment. On one view ('the independent claims theory') D is enriched by £10,000. C's claim against D is however subject to a counter-claim for £8,000.[1] On another view, D is enriched by the 'net benefit' (£2,000).[2] The second idea (the 'net benefit approach') is based on the notion that enrichments and disenrichments within the same transaction must be netted off against each other.

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[1] Elise Bant, *The Change of Position Defence* (Hart 2009) 96–101; Andrew Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012) 21–22.

[2] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 225–226; Robert Stevens & Ben McFarlane, 'In Defence of Sumpter v. Hedges' (2002) 118 LQR 569, 583–584; Ben McFarlane, 'Unjust Enrichment, Rights and Value' in Donal Nolan & Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 584.

English law's choice between these methodologies is seemingly equivocal. In contrast, the answer is tolerably clear under German law. *Saldotheorie* ('the doctrine of balance') supports the latter view. It suggests that when parties' mutual performances are conditional on each other, the claimant is only entitled to claim against the defendant, the difference between those values.[3] The remainder of this section is devoted to establishing that the net benefit approach is well founded in English law.

1. The Positive Case for the Net Benefit Approach

As a starting point, the reasons for dissatisfaction with the independent claims theory may be illustrated with an example.[4]

> *Example 2*: C swaps her horse for D's cow. After the transfer, the cow dies while it is in C's possession. C discovers a ground for rescission, avoids the contract, and demands the return of the horse.

Under the independent claims theory, C's claim to the horse and D's claim to the cow are autonomous. Each party bears the risk that the other may raise a defence. So, C can plead change of position against D's claim for the cow. In effect, therefore, C can recover the horse and pay nothing for the value of the cow. Consider now, two variations.

> *Example 2A*: C swaps her horse for D's cow. After the transfer, the cow dies due to C's *negligence*. C rescinds the contract and demands the return of the horse.

[3] Basil Markesinis, Werner Lorenz & Gerhard Dannemann, *The German Law of Obligations - The Law of Contracts and Restitution: A Comparative Introduction*, vol 1 (Clarendon 1997) 764–765; John Dawson, 'Erasable Enrichment in German Law' (1981) 61 Boston University Law Review 271, 295.

[4] Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Hart 2013) 73.

> *Example 2B*: C swaps her horse for D's cow. After the transfer, C *intentionally* kills the cow believing in good faith that the loss is her own. C rescinds the contract and demands the return of the horse.[5]

C is entitled to the return of the horse in both cases. D has no claim in either case. C's negligence does not prevent her from relying on the defence of change of position.[6] Consequently, in Example 2A, C can plead change of position on the basis of the death of the cow. Similarly, in Example 2B, as long as C was unaware of the ground for rescission, even C's intentional act of killing the cow does not disentitle her from pleading change of position.[7] Intuitively, these results seem incorrect. There are also reasons of principle that vindicate that intuition.

i. The Net Benefit Approach: Principle

The independent claims thesis leads to an indefensible allocation of risks. In general, the party in control of an asset must also bear the risk of its loss.[8] Ensuring the identity of control and risk in this way protects third parties from losses that they cannot possibly prevent. It also respects the autonomy of parties to decide whether they wish to incur expenses for the protection of their assets.[9] However, the independent claims theory leads to the consequence that the claimant-recipient of an

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[5] Ibid.

[6] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

[7] Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 102.

[8] Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd rev edn, Clarendon 1998) 593; Phillip Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. the Defence of Change of Position' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 274; Daniel Visser, 'Unjustified Enrichment in Comparative Perspective' in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 982.

[9] Daniel Visser, *Unjustified Enrichment* (Juta 2008) 499.

asset no longer assumes the risk that her own actions may deteriorate the asset.[10] That risk is passed on to the defendant although she is entirely incapable of exercising control over the asset.[11] In sum, each party acts as 'the insurer of the other; each bears the risk for the mistakes that the other might make'.[12]

One may wonder whether the risk reasoning advanced above is incorrect because, if accepted, it seemingly negates the application of the change of position defence even to unilateral transfers. After all, 'the accidental destruction… of a benefit… forms the paradigm example of disenrichment that attracts the application of the… change of position defence'.[13]

The answer to this suggestion leads me to a second objection to the independent claims thesis. That is based on the notion of 'conditionality'. When mutual exchanges are conditional on each other, their 'factual reciprocity' must also influence their unwinding.[14] In the case of mutually conditional performances, each party confers a benefit on the other on the basis that the other will reciprocate. Splitting the transaction up into two individual transfers ignores this aspect of the transfer. Further, since the parties conferred enrichments on each other acting in furtherance of a

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[10] Reinhard Zimmermann, 'Restitution after Termination for Breach of Contract in German Law' [1997] Acta Juridica 121, 129; Visser, *Unjustified Enrichment* (n 9) 498.

[11] Reinhard Zimmermann & Jacques Du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' [1994] Restitution Law Review 14.

[12] Visser, *Unjustified Enrichment* (n 9) 104.

[13] Bant, *The Change of Position Defence* (n 1) 99.

[14] Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 142–143; Häcker (n 4) 73; Hellwege (n 8) 271.

common basis, reversing the transaction without regard to it also violates their autonomy.[15]

With that background, we can now return to Bant's objection. The answer to her objection is that unilateral enrichments and mutual exchanges of benefits have different consequences for the change of position defence. Admittedly, the operation of that defence in unilateral transfers does, as Bant suggests, shift the risk of loss to the claimant. As an aside, some have argued on that basis that the scope of this defence must be curtailed.[16] Importantly, that objection is significantly stronger for conditional transfers. An example.

> *Example 3*: C pays £10,000 to D for a car worth £8,000. C sells the car and invests the price in shares. The shares are rendered worthless due to a market fall. Later, realising that D misrepresented the value of the car, C rescinds the contract and seeks restitution of £10,000 from D.

Under the independent claims thesis, C has a change of position defence against D's claim. On one view, that defence protects C's autonomy.[17] In Example 3 however, that defence must be weighed against D's autonomy. D's decision to transfer the car was based on the expectation of C's payment. Therefore, reversing that payment without restoring the value of the car infringes D's autonomy.

Unsurprisingly, excluding the change of position defence when the conferral of benefits are conditional is quite unremarkable in English law. *Goss v Chilcott*[18] illustrates this. The defendants, Mr and Mrs Goss had obtained a loan from the claimant. The loan agreement was subsequently rendered void. The claimant brought

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[15] Hellwege (n 8) 274. See also, James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston University Law Review 1009, 1024–1025.

[16] Zweigert & Kötz (n 8) 593; Visser, *Unjustified Enrichment* (n 9) 717–718.

[17] Edelman (n 15).

[18] *Goss v Chilcott* [1996] AC 788 (PC).

a claim for restitution of the loan. The defendants argued that they had passed on the loan to a third party and were hence entitled to rely on change of position. Lord Goff rejected this argument:[19]

> [The defendants] had… allowed the money to be paid over to Mr. Haddon in circumstances in which, as they well knew, the money would nevertheless have to be repaid to the company. They had, therefore, in allowing the money to be paid to Mr. Haddon, deliberately taken the risk that he would be unable to repay the money.

A similar approach was adopted in *Haugesund Kommune*.[20] There, the defendant municipality argued that it had changed its position by investing, unsuccessfully, the sums received under a swap agreement. In a passage that, in substance, affirms the risk-allocation reasoning, Tomlinson J rejected this claim:[21]

> The case is far removed from that where the recipient of what he reasonably believes is an out and out payment to him pays that amount away to charity. Here the municipalities always knew that they had to repay the money… I can see no basis upon which it can begin to be suggested that in these circumstances it would be inequitable to require the municipalities to make restitution. That would be to impose upon Depfa the risk of investments over which they were not consulted and over which they had no control.

These decisions are best rationalised on the basis that change of position is ruled out by the conditionality associated with the enrichment.[22]

The final objection to the independent claims theory is that it leads to different results in cases that must be treated alike. Compare these examples.

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[19] Ibid 799 (Lord Goff) (emphasis added).

[20] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549.

[21] *Haugesund Kommune v Depfa ACS Bank* [2009] EWHC 2227 (Comm), [2010] Lloyd's Rep PN 21 [163] (Tomlinson J) (emphasis added). Affirmed on appeal: *Haugesund Kommune* (CA) (n 20).

[22] Edelman (n 15) 1025; Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling & James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 32.

> *Example 4A*: C buys a pen worth £2 from D for £4. C pays £5 and D returns the £1 balance. Later, C rescinds the transaction for misrepresentation.
>
> *Example 4B*: Facts are identical to Example 4A, except that C pays £4 exact change for the pen. C rescinds the transaction for misrepresentation.

Adopting the independent claims theory leads to the result that D's enrichment is computed differently in Examples 4A and 4B. D's enrichment is £5 in 4A whereas it is £4 in 4B. However, the factual difference between these examples is entirely fortuitous. Faced with this difficulty, proponents of the independent claims theory may contend that D's enrichment is £4 in both cases as that was the 'value' transferred to D. However, my objection to the independent claims thesis is precisely that it does not permit one to reach that result. The result that D's enrichment is £4 can only be reached by defining enrichment in terms of the net value transferred to D. The view that the value transferred to D is £4 is therefore nothing but an implied acceptance of the net benefit theory. In sum, it is difficult to disagree with Birks' conclusion that:[23]

> [T]he two-claim approach can produce bizarre results. One claimant may fortuitously encounter an obstacle or bar which the other escapes, with the consequence that for very slight reasons the parties to the one exchange may end up in very different situations.

ii. The Net Benefit Approach: Authorities

The net benefit approach has also been accepted by the courts. The most cited example is Hobhouse J's decision in *Westdeutsche*.[24] One of the claims there sought to reverse a void interest rate swap between Kleinwort Benson and Sandwell Borough

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[23] Birks, *Unjust Enrichment* (n 2) 226.

[24] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QB) (Hobhouse J). See also *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, 129; Charles Mitchell, Paul Mitchell & Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [31-18]–[31-20].

Council. Overall, Kleinwort Benson had made a net payment of £196,322 to Sandwell. However, it was argued that the six-year limitation period must be calculated from the date of each payment. This would have meant that the recovery of the first three payments was time-barred. Rejecting this argument Hobhouse J held that the claim could only be for the defendant's net enrichment:[25]

> Where there have been a whole succession of payments one way and the other in respect of a single underlying transaction, both equity and justice require that one should have regard to the totality of those payments and the resultant overall benefit and detriment… At no time during the history of this transaction has there been a cause of action for more than the net balance existing at any given time.

The net benefit approach also derives support from Lord Templeman's speech in *Lipkin Gorman*.[26] There, Lord Templeman proceeded on the basis that the defendant club was only enriched by the difference between the sums staked with it (£561,014.06) and the winnings it paid out (£378,294.06). He said:[27]

> [I]f Cass had paid £20,000 derived from the solicitors to a car dealer for a motor car priced at £20,000, the car dealer would not have been enriched. The car dealer would have received £20,000 for a car worth £20,000. But an innocent recipient of stolen money will be enriched if the recipient has not given full consideration.

Admittedly, Lord Goff analysed the club's disenrichment in terms of change of position. However, that was based on his finding that independent bets could not be aggregated as if they constituted a single transaction.[28] In other words, enrichments and disenrichments across different bets are not conditional on each other. Hobhouse

[25] *Westdeutsche* (n 24). See also, *South Tyneside Metropolitan Borough Council v Svenska International Plc* [1995] 1 All ER 545 (QB) 548 (Clarke J).

[26] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[27] Ibid 560 (Lord Templeman).

[28] Ibid 582 (Lord Goff).

J's decision in *Kleinwort Benson*[29] vindicates this. The facts were identical to *Westdeutsche*. However, the claimant attempted to circumvent the limitation period by aggregating payments across five different interest rate swaps. This was rejected on the basis that 'each interest rate swap contract was an independent transaction'.[30]

Henderson J's decision at first instance in *Littlewoods*[31] also impliedly accepts the net benefit approach. The question there was whether corporation tax that would have been paid had it not been for the disputed VAT payments, be taken into account in computing the Revenue's enrichment. This question was answered in the negative. However, that was only because it could not be said that these two liabilities 'arose out of the same underlying transaction'.[32] Consequently, 'the position is not analogous with that considered… in [*Westdeutsche*]'.[33]

The net benefit approach has also been approved in other commonwealth jurisdictions. Consider the New Zealand High Court's decision in *Nimmo.*[34] There, a fraudster embezzled money from the claimant and converted it into cheques at the defendant bank. Rejecting a 'knowing receipt' claim against the bank, Blanchard J held:[35]

[29] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QB).

[30] Ibid 979 (Hobhouse J).

[31] *Littlewoods Retail Ltd v Revenue & Customs Commissioners* [2014] EWHC 868 (Ch), [2014] BVC 23 (Henderson J).

[32] Ibid [434].

[33] Ibid.

[34] *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218 (NZHC).

[35] Ibid 224–225 (Blanchard J). It may be suggested that this case is inconclusive since the imposition of a constructive trust for knowing receipt is not based on the principle of unjust enrichment. However, Blanchard J proceeded on the assumption that it is: Ibid 225.

> [The bank] undoubtedly received the moneys… [It] immediately put Mr. Eaton in possession of bank cheques and travellers cheques and debited its books accordingly. The net result… was that [the bank] was in no better position as a result of the transaction. It had not been enriched.

On similar facts, in *Cigna Insurance*,[36] the Court refused to hold a bank liable as a constructive trustee for 'knowing receipt' because it had paid out an amount equal to an initial deposit. The bank, the Court held, was 'merely a depository or channel through which the moneys are transferred'.[37]

iii. The Net Benefit Approach: Operation

Thus far, the attempt was to demonstrate the acceptability of the net benefit thesis on principle and authority. This section makes two brief points about its operation.

First, it must be evident from the justification for the net benefit rule that it applies only when the benefits are conditional on each other i.e. when the exchange took place in furtherance of a common basis between the parties. Consequently, fortuitous exchanges of value cannot be netted off against each other.

Secondly, the requirement of 'conditionality' also precludes the application of the net benefit approach to cases where the defendant was aware of the claimant's mistake. A leading German decision illustrates this.[38] The plaintiff bought a used car from the defendant. The defendant had knowingly misrepresented to the plaintiff that the car was accident-free. Later, the plaintiff met with an accident which rendered the car valueless. After this, the plaintiff learnt about the previous accidents. A claim for restitution was brought. The question was whether *Saldotheorie*—the German

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[36] *Cigna Life Insurance New Zealand v Westpac Securities* [1996] 1 NZLR 80 (NZHC).

[37] Ibid 87.

[38] BGH 14 October 1971, BGHZ 57, 137.

equivalent of the net benefit approach—applied here. The Bundesgerichtshof answered this question in the negative:[39]

> The basic principle of the Saldotheorie… also illustrates the limits of its application… The defendant caused the purchaser to conclude the sale contract by fraud, which the plaintiff, as the defendant knew, had he known that the car purchased had been involved in an accident, would certainly not have concluded… The defendant company must therefore allow itself to be treated as if… <u>it had already known when it received the purchase price and transferred the car to the plaintiff of the defect in the legal basis for the exchange of performances rendered by both parties</u>… Thereby however, the internal justification for an application of the Saldotheorie in the present case lapses.

Notably, the Court placed emphasis on the fact that the defendant was aware of the claimant's mistake. This is because it is the defendant's knowledge of the claimant's mistake that vitiates the common basis underlying the transaction. That is fatal to the application of the net benefit approach.[40]

2. Objections to the Net Benefit Approach

This section answers three questions: (**i**) Do structural differences between the English and German legal systems preclude the adoption of the net benefit approach in England? (**ii**) Is Lodder right in suggesting that the proponents of the net benefit approach misunderstand the notion of 'transfer of value'? (**iii**) Does the idea that enrichment may consist in either rights or value pose significant challenges for the net benefit thesis?

i. Structural Differences Between English and German Legal Systems

Two major differences between the English and German legal systems have been relied on as precluding the adoption of the net benefit approach in England. First

[39] Ibid cited in Dannemann (n 14) 237 (emphasis added).

[40] Hellwege (n 8) 279.

among them is the dichotomy between immediate enrichment and extant enrichment. English law adopts the former[41] and German law, the latter. The second is the fact that German law adopts the 'absence of basis' approach whereas English law requires positive reasons for reversing enrichments.[42]

a. Immediate Enrichment and Extant Enrichment

The distinction between the immediate and extant enrichment approaches has been relied on to support two distinct arguments. First, it has been argued that the net benefit thesis is derived from the extant enrichment approach adopted by German law.[43] Secondly, it has been suggested that *Saldotheorie* is inconsistent with English law's commitment to the immediate enrichment approach.[44] I will examine each of these contentions in turn.

The extant enrichment approach is embodied in §818(3) of the German Bürgerliches Gesetzbuch ('BGB'). It provides that the obligation to surrender or replace value is excluded if the recipient is no longer enriched. However, the net benefit approach does not follow from this rule. In principle, the rule in §818(3) is entirely compatible with the independent claims theory. An example.

> *Example 5*: C pays £10,000 to D for a car worth £8,000. The car is destroyed while it is in C's possession. Later, realising that D misrepresented the value of the car, C seeks restitution of £10,000.

One could apply §818(3) in conjunction with the independent claims thesis to this example. On that view, C's claim against D and D's claim against C are both

[41] Mitchell, Mitchell & Watterson (eds), *Goff & Jones* (9th edn) (n 24) [4-24].

[42] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 172 (HL) (Lord Goff).

[43] Bant, *The Change of Position Defence* (n 1) 98.

[44] Lodder (n 1) 22.

restricted to the value surviving. Therefore, C is entitled to the return of £10,000. C is, however, not liable to return the car or its value. In fact, German law had adopted this approach (Zweikondiktionenlehre) in the past.[45] Minor pockets of German law (claims by the mentally incapable and minors for example) still follow that view.[46] Of course, such claims are not exceptions to §818(3). This must indicate that *Saldotheorie* is not contingent on that provision. In fact, the net benefit approach is often seen as an exception to §818(3).[47] Consider for instance, this passage from Dawson's influential article:[48]

> The effort so far has been to show that 'innocent' receivers of unjustified enrichment have been protected by every available means against every loss that can cause enrichment to diminish or disappear… <u>the addition of only one other feature will be enough to throw into reverse the usual exemption from all forms of risk that is granted to 'innocent' receivers of gain</u>. If the receiver gave something of value in exchange for his gain that has since diminished or vanished, then to the extent of the value given the risk of loss shifts and any loss that occurs is his. This is the result of the 'net balance' (Saldo) theory.

Thus, the net benefit theory is 'an exception to the protection normally granted to the enrichment debtor by… §818(3)'.[49] It does not follow from the extant enrichment rule. Neither is its validity conditional on the acceptance of that approach.

Now consider Lodder's suggestion that the net enrichment theory is inconsistent with the immediate enrichment approach adopted by English law. This argument is flawed as it conflates two distinct issues: first, at what point in time should the defendant's enrichment be evaluated? Second, are conditionally related

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[45] Zimmermann & Du Plessis (n 11) 41.

[46] Häcker (n 4) 73.

[47] Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15 OJLS 403, 413; Michael Jewell, 'The Boundaries of Change of Position - A Comparative Study' [2000] Restitution Law Review 1, 31.

[48] Dawson (n 3) 294 (emphasis added).

[49] Zimmermann & Du Plessis (n 11) 40. See also, Jewell (n 47) 31.

disenrichments of the defendant relevant in computing the defendant's enrichment? A test of timing—that is what immediate enrichment is—cannot resolve the second question. That much is clear from that the fact that the defendant's disenrichment may be antecedent to or simultaneous with the enrichment. Lodder seems to admit that 'antecedent or simultaneous events and conduct' are excluded if they are 'extraneous to the receipt of value in a defective transaction factually enriching the defendant'.[50] Disenrichments on which the conferral of a benefit are conditional are almost never 'extraneous to the receipt of value'. Therefore, in effect, Lodder's approach draws a sharp distinction between disenrichments that are antecedent to or simultaneous with the enrichment on the one hand, and disenrichments that are subsequent to the enrichment on the other. This is indefensible because, within a transaction, whether the defendant's disenrichment is antecedent or subsequent to the enrichment is often fortuitous.

Furthermore, the authorities that Lodder relies on for the immediate enrichment argument[51] are cases where the Courts did not have occasion to consider the implications of a conditionally related disenrichment of the defendant. Further, in many of these cases, the reason the claim was restricted to original receipt was because subsequent benefits were not 'at the expense of' the claimant.[52] Consider for instance, *Greenwood.*[53] There, the defendant was enriched by two distinct benefits—

[50] Lodder (n 1) 198.

[51] *Baker v Courage & Co* [1910] 1 KB 56 (KB); *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (CA); *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QB); *Pavey & Mathews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221; *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561; *Yeoman's Row Management Limited v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752.

[52] Robert Stevens, 'Three Enrichment Issues' in Andrew Burrows & Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 54.

[53] *Greenwood v Bennett* [1973] QB 195 (CA). See also, *Yeoman's Row Management* (n 51).

the value of services rendered (£226) and appreciation in the car's value (£325)—simultaneously. However, the claimant was only awarded the value of his services. It is difficult to see how this result is dictated by the immediate enrichment rule. Faced with this difficulty, Lodder admits that the 'at the expense of' requirement may provide 'a second reason in support of the immediate enrichment approach'.[54] In fact, this was the only reason for the results in these cases.

In sum, contrary to Lodder's suggestion, the dichotomy between the immediate enrichment and extant enrichment approaches does not rule out the net benefit approach.

b. Absence of Basis and Unjust Factors

English and German legal systems adopt different approaches to the 'unjust' enquiry. This has also been relied on as precluding the adoption of the net benefit approach in English law.[55]

However, the net benefit analysis does not follow from the commitment of a legal system to the absence of basis approach. In contrast to the question, 'is there a juristic reason for the retention of an enrichment?' a legal system committed to the 'absence of basis' analysis could equally ask, 'is there a juristic reason that justifies the receipt of this enrichment?' The best evidence of this is the fact that some civilian jurisdictions committed to the 'absence of basis' approach do not adopt the net benefit analysis. In Spanish law, for example, the general rule is that disadvantages sustained in exchange for or after the enrichment are not relevant to the determination of the

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[54] Lodder (n 1) 204.

[55] Bant, *The Change of Position Defence* (n 1) 98.

defendant's enrichment.[56] Similarly, Romanian law distinguishes between claims arising out of payment of an undue debt and other claims in unjust enrichment. The net enrichment approach only applies to the latter category.[57] Under the Portuguese Civil Code enrichment is understood broadly as 'the thing acquired'. It is unclear whether this precludes the net benefit approach. Both the net benefit approach as well as the independent claims theory have therefore attracted adherents in Portugal.[58] Same is the case under Dutch law.[59] Thus, English law's commitment to unjust factors does not automatically commit it to the independent claims theory.

ii. The 'Transfer of Value' Objection

Lodder builds a case against the net benefit approach based on the notion of 'transfer of value'. To him, the net benefit approach rests on the assumption that a transaction at market value involves no transfer of value. That, according to him, is incorrect. Even in such cases there are two equal and opposite transfers of value.[60]

There are two responses to this argument. First, let us assume that Lodder is correct in suggesting that a transaction at market value does involve two opposing transfers of value. That still leaves open the question whether they must be treated independently, or netted off. Secondly, his argument incorrectly understands the idea that value is an inherently 'relational'[61] concept: a proposition Lodder accepts. The

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[56] Christian Bar & Stephen Swann, *Principles of European Law*: *Unjustified Enrichment* (Stephen Swann, Padraic McCannon & Susan Singleton trs, OUP 2010) 359.

[57] Ibid 362.

[58] Ibid 362.

[59] Ibid 363.

[60] Lodder (n 1) 22.

[61] Ernest Weinrib, 'The Normative Structure of Unjust Enrichment' in Charles Rickett & Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 21; Ernest Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles

label 'relational' represents two distinct ideas. The first of them is that value is a quantitative notion that facilitates comparison of distinct assets by reducing them to a single comparable dimension.[62] Thus, 10 apples and 20 oranges are comparable when reduced into monetary terms. Lodder accepts this. However, 'relationality' also has a second meaning. This is what Klimchuck calls relationality in a 'deeper sense':[63]

> Value… is not a kind of asset, first in the transferor's and then in the transferee's possession. Instead it is an intrinsically relational concept, because <u>the value of a thing is ascertained only in the process of exchange</u>… Saying that there has been a transfer of value in a transaction expresses the fact that <u>the transferee has got something for nothing</u>… the substance of the transfer at issue conforms, in a deep way, to the correlativity essential to the structure of corrective justice, because <u>we cannot identify a transfer of value outside of a particular transaction</u>.

Stated differently, the inherent relational character of value means that the question whether there has been a transfer of value cannot be answered outside of a transaction. As noted before, the contrary argument commits itself to the conclusion that when I buy a pen for £4, the consequences of that transaction for the law of unjust enrichment differ depending on whether I pay £4 exact change or I pay £5 and accept £1 back.[64] Weinrib is therefore right in concluding that, '[e]xchange features a movement of things of value… from each party to the other. It does not, however, feature any movement of value'.[65] In sum, the notion of a 'transfer of value' supports rather than detracts from the net benefit approach.

Mitchell & James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 36.

[62] Lodder (n 1) 20.

[63] Dennis Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell & James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 88–89 (emphasis added).

[64] Compare Examples 4A and 4B, above.

[65] Weinrib, 'Correctively Unjust Enrichment' (n 61) 36–37.

iii. Enrichment as Value and Enrichment as Rights

It has been suggested by Chambers, and subsequently by Lodder that enrichment may consist in either value or rights.[66] Assuming the correctness of that thesis, this section considers whether it poses significant challenges for the net benefit approach.

On one view, the rights and value thesis is entirely unproblematic for the net benefit approach. Rights can be netted off against each other just as value.[67] With respect, this is incorrect. Value is a quantitative notion that facilitates the comparison of different assets.[68] That is what makes it possible to net off values against each other. This is untrue of rights. Consider an example.

> *Example 6*: C buys a car worth £10,000 from D for £10,000. D had represented to C that the manufacturer of the car follows ethical labour practices. This is found to be untrue. C seeks rescission and restitution of the £10,000.

In terms of value, D is not enriched at all. This is because D gave a car worth £10,000 in return for £10,000. But what about the rights involved? Assume that the £10,000 is traceable in D's hands. D has been enriched by the right to that sum. At the same time, D has been disenriched by her right to the car. It is impossible to net these rights off against each other. When Bant suggests that exchange of rights leaves the defendant in an 'enrichment-neutral position',[69] she is referring to the value of those rights, not the rights themselves.

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[66] Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell & James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 242; Lodder (n 1) chs 3, 4 and 5.

[67] Elise Bant, 'Rights and Value in Rescission: Some Implications for Unjust Enrichment' in Donal Nolan & Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 615.

[68] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 61) 21; Weinrib, 'Correctively Unjust Enrichment' (n 61) 36.

[69] Bant, 'Rights and Value in Rescission' (n 68) 615.

However, conceding that netting is impossible when the enrichment consists in rights does not negate the net benefit approach. This is because characterising the enrichment as rights does not permit the claimant to evade results that would have been reached if the enrichment had been characterised as value. Consider Example 6 again. Assuming that C's payment is traceable in D's hands, C has the liberty to frame D's enrichment as consisting in either rights or value.[70] As suggested before, D is not enriched in the form of value. Can C overcome this result by arguing that D is enriched by the receipt of the right to £10,000? In the guise of restitution of rights to that sum then, can C recover £10,000 from D? C cannot. The first step in defending this view is to note that in Example 6, D's enrichment consists only in rights and not value. That is because D's enrichment in the form of value has already been netted off against a corresponding disenrichment. The second step is the proposition that when a defendant's enrichment consists solely in rights, restitution must also consist of rights alone. That process cannot involve an incidental reversal of value. This is what permitting C to recover £10,000 would amount to.

Lodder supports this proposition. He suggests that in combining claims for rights and value it must be ensured that 'restitution of one would not incidentally achieve restitution of the other'.[71] Cases that insist that restitution of rights over land may be awarded only when credit is given for the value of improvements carried out by the defendant[72] further vindicate this claim. An example.

[70] Lodder (n 1) 219.

[71] Ibid.

[72] See Robert Stevens, 'When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?' (2012) 92 Boston University Law Review 919, 931.

> *Example 7*: C mistakenly conveys Blackacre to D. D believes in good faith that she has title to Blackacre and carries out improvements over it. Realising the mistake, C later seeks restitution of rights over Blackacre.

C's claim can succeed only if C gives credit for the value of improvements effected by D.[73] Thus, in *Cooper v Phibbs*,[74] the House of Lords insisted that the claimant's right to restitution of rights over land was subject to a lien in favour of the defendant securing the value of the defendant's improvements. This was so despite the fact that the claimant was seeking restitution of the very rights that were transferred to the defendant. Defendant's improvements did not change the nature of that right.[75]

Further support for this argument may be derived from *Greenwood*.[76] Holding that Mr Harper was entitled to claim against the owners of the car, the value of services that he mistakenly carried out, Lord Denning reasoned that:[77]

> [I]f [the owners] had brought an action for conversion… the company would have to give credit for the work which Mr. Harper had done on it… if [the owners] had brought an action in detinue… they could have recovered from him the value of the car… as improved by Mr. Harper's work… I should think that justice would require that Mr. Harper should be able to recover the cost of his work from [the owner]. Otherwise, you would get the very odd result that the company… could - by this indirect means - recover from Mr. Harper more than they could by suing him directly in conversion.

It must equally be true that the owners cannot evade this result by seeking restitution of their right to the car. That is because restitution of the right to the car would incidentally achieve a transfer of the value represented by repairs carried out

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[73] *The Attorney General v Balliol College, Oxford* (1744) 9 Mod 407, 88 ER 538; *Bright v Boyd* 2 Story 605, 4 F Cas 134 (1843); *Jensen v Probert* 148 P 2d 248 (Or 1944).

[74] *Cooper v Phibbs* (1867) LR 2 HL 149.

[75] McFarlane (n 2) 588.

[76] *Greenwood* (n 53).

[77] Ibid 201 (Lord Denning).

by Mr Harper. Thus, Bant is right when she says that 'even if value is irrelevant in establishing enrichment by receipt of rights, this does not mean that value is irrelevant to restitution of those rights'.[78]

In sum, the net benefit thesis is inapplicable when the defendant's enrichment consists in rights. However, that does not preclude the application of that approach to enrichment in the form of value. Neither does it point to an inherent flaw in the net benefit approach.

B. THE GOOD CONSIDERATION RULE AS AN ENRICHMENT QUALIFICATION

The previous section demonstrated that the net benefit approach to evaluating conditional enrichments is well founded in English law. When the defendant's enrichments and disenrichments are conditional on each other, they must be netted-off. On that basis, this section explains the good consideration rule as an enrichment qualification.

1. Applying the Net Benefit Thesis to the Good Consideration Rule

An example.

> *Example 8*: X owed a debt to C and D. X conveyed Blackacre to C in discharge of its debt. However, Blackacre was subject to a mortgage securing D's debt. X and C agreed that C should pay off D's debt. After clearing that debt, C realised that X was not entitled to Blackacre. C's claim against D for restitution failed.[79]

Is D enriched here? On the net benefit methodology, D is not. D is seemingly enriched by the payment from C. However, that payment was intended to clear X's

[78] Bant, 'Rights and Value in Rescission' (n 67) 637.

[79] *Aiken v Short* (1856) 1 Hurl & N 210, 156 ER 1180.

debt to D and consequently, ‘conditional’ on it. Stated differently, the common basis between C and D was that D would accept that payment in discharge of X’s debt. In net benefit terms therefore, D’s enrichment (the payment from C) and disenrichment (discharge of X’s debt) must be netted off against each other. Overall, this leaves D in an enrichment-neutral position.

The fact that D’s disenrichment does not result in C’s enrichment, it may be argued, precludes the application of the net benefit methodology to Example 8. However, no part of the justification for the net benefit thesis relies on the mutual enrichment of both parties. An example.

> *Example 9*: Under a contract between C and D, C gives a horse to D on the basis that D will give a cow to X. The cow dies while it is in X’s possession. Later, C discovers that D had misrepresented the value of the cow. C rescinds the transaction and seeks restitution from D.

The reasons that justify the net benefit methodology apply with equal force to this example. Consider first, the risk-allocation reasoning. In Example 9, the independent claims theory places the risk of the cow’s death on D. On that approach, C has a valid claim against D. However, D’s claim against X will be defeated by the change of position defence. This result is susceptible to the same objections that the independent claims thesis leads to in mutual exchanges. Characterising C’s claim against D and D’s claim against X as two independent claims also fails to take into account the conditionality underlying the transaction, the second justification for the net benefit thesis. D’s transfer of the cow to X was premised on the common basis between C and D that C would transfer a horse to D. This requires that the transaction must be unwound as a whole.

There is some judicial support for the application of the net benefit approach to Example 9. Consider the decision of the High Court of Australia in *Lumbers.*[80] There, a building sub-contractor claimed against the owner of the land, the value of its work. In computing the owner's enrichment, the Court took account of his disenrichment in the form of his obligation to pay the main contractor, a third party to the claim:[81]

> [I]t was said that the [owners] would receive a "benefit", a "gain" or a "windfall" if they were not found to be liable to [the sub-contractors]… The accuracy and the relevance of any such characterisation depends upon whether the [owners] had performed their obligations under their contract with [the main-contractor]. If the [owners] have not fully performed their obligations under their contract with [the main-contractor], by not paying all that is due to [it], it is evident that the [owners] have not received any benefit, gain or windfall. They would remain liable to [the main contractor]. Questions of benefit, gain or windfall could arise only if [the main contractor] has no further claim against the [owner].

In other words, the owner is enriched only if the benefit consisting of the building work is not offset by an obligation owed by him to the main contractors.[82] Thus, the owner's disenrichment (consisting of the obligation owed to the main contractor) is relevant to the evaluation of his enrichment. More relevantly, the fact that the disenrichment was directed towards a third party and not the claimant does not preclude the application of the net benefit approach. The same view was adopted by the New Zealand High Court in *Cigna Insurance*.[83] There, the Court refused to hold a bank liable as a constructive trustee for 'knowing receipt' on the basis that it

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[80] *Lumbers v W Cook Builders Pty Ltd (In Liquidation)* [2008] HCA 27, (2008) 232 CLR 635. See also, *NIML Ltd v MAN Financial Australia Ltd* [2004] VSC 449, 1 BFRA 204 [79] (Harper J).

[81] *Lumbers* (n 80) [119]–[120].

[82] Angus O'Brien, 'The Relationship Between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*' (2011) 32 Adelaide Law Review 83, 99.

[83] *Cigna Life Insurance* (n 36). See also, *Compagnie Commerciale Andre SA v Artibell Shipping Company Ltd (No 2)* 2001 SC 653 (OH) [16].

had paid out to a third party (other than the claimant), an amount equal to the initial deposit.

In *Barclays Bank*, Goff J imposed two qualifications to the application of the good consideration rule. One concerned the state of mind of the claimant and the other, the defendant. The enrichment thesis explains both these restrictions. It was pointed out earlier in this chapter that the net benefit approach applies only when the enrichment and disenrichment are conditional on each other i.e. linked by a common basis between the parties.[84] With that premise in mind, we can now turn to the qualifications.

Consider first the requirement that the good consideration rule is only attracted by payments that are intended to discharge the debt.[85] When analysed from the lens of the net benefit approach, this requirement confines the good consideration rule to cases where the claimant's payment is made on the basis, shared by both parties,[86] that the debt will be discharged. Consider an example.

> *Example 10*: C owes £100 to both D and X. C intends to pay X but mistakenly pays D. C seeks restitution from D. C's claim will fail.[87]

Here, the condition underlying C's payment is not the discharge of D's debt. However, that is the basis of D's disenrichment. Therefore, the good consideration rule is inapplicable here.[88]

[84] See Chapter 2(A)(1)(i), above.

[85] See Chapter 1(B), above.

[86] *Mahme Trust* (n 21) [148].

[87] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65.

[88] Note, however, that here restitution is precluded by the legal obligation qualification.

The second qualification concerns the state of mind of the payee. That restriction was formulated in these terms:[89]

> [E]ven if the payee has given consideration for the payment… that transaction may itself be set aside (and so provide no defence to the claim) if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith.

The net benefit thesis explains this qualification as well. As the previous section demonstrated, the net benefit approach has no application in cases where the defendant is aware of the claimant's mistake.[90] Similarly, the fact that the payor's mistake was induced by the payee or the payee's knowledge of the mistake, defeats the common basis between the parties. This is fatal to the application of the net benefit approach, and consequently, the good consideration rule.[91] As noted previously, Courts in Germany have treated the defendant's awareness of the claimant's mistake as precluding the application of *Saldotheorie*. German Courts have also applied that qualification in circumstances that attract the good consideration rule. Thus, in claims for restitution of mistaken payments by banks, German Courts have routinely awarded restitution when the defendant was aware of the claimant's mistake.[92]

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[89] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695 (Goff J). See also, *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 (CA) 130.

[90] See Chapter 2(A)(1)(iii), above.

[91] Hellwege (n 8) 279.

[92] BGH 16 June 1983, BGHZ 87, 393; BGH 19 January 1984, BGHZ 89, 376, cited in Markesinis, Lorenz & Dannemann (n 3) 734, 796, 798.

2. The Enrichment Explanation: Authorities

There is considerable support in academic writing for the view that the good consideration rule is best explained on the basis of the absence of the defendant's enrichment.[93]

In addition, there are two significant judicial pronouncements in the English Courts that affirm the enrichment explanation. One of them, Lord Hope's reasoning in *Kleinwort Benson*,[94] was considered in Chapter 1. In a passage that seems to affirm the crux of the enrichment analysis he said,[95]

> As for the concept of enrichment, a person is enriched when he receives a payment which the payer was not bound by any obligation to make to him… The common law accepts that the payee is enriched where the sum was not due to be paid to him, but it requires the payer to show that this was unjust.

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[93] Graham Virgo, 'Recent Developments in Restitution of Mistaken Payments' (1999) 58 CLJ 478, 481; James Edelman & Elise Bant, *Unjust Enrichment in Australia* (OUP 2006) 99–100; William Swadling, 'Restitution and *Bona Fide* Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (United Kingdom National Committee of Comparative Law 1997) 79; Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991) 247; DH Zyl, 'Unauthorised Payment and Unjust Enrichment in Banking Law' in Francis Rose (ed), *Restitution and Banking Law* (Mansfield 1998) 25; Ross Grantham, 'Security of Contract: The Challenge from Restitution' (2000) 16 Journal of Contract Law 102, 112–113; Visser, *Unjustified Enrichment* (n 9) 200, 203; Daniel Visser, 'Searches for Silver Bullets: Enrichment in Three-Party Situations' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 534–542; Niall Whitty, 'Indirect Enrichment in Scots Law: Part 1' (1994) 2 Juridical Review 200, 203; Hector MacQueen, 'Payment of Another's Debt' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 482; Andrew Kull, 'Rationalizing Restitution' (1995) 83 California Law Review 1191, 1236–1239; Du Plessis (n 30) 213; Lionel Smith, 'Property, Subsidiarity and Unjust Enrichment, Key Issues in Comparative Perspective' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2010) 605; John Dawson, 'The Self-Serving Intermeddler' (1974) 87 Harvard Law Review 1446–7; D Laycock, 'Restoring Restitution to the Canon' (2012) 110 Michigan Law Review 929, 940.

[94] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

[95] Ibid 408–409 (Lord Hope).

More recently, in *DD Growth Premium 2X Fund*,[96] Lord Sumption adopted the enrichment reasoning. In denying an unjust enrichment claim on the basis that it was owed to the defendant under a valid legal obligation, he said, '[i]t is fundamental that a payment cannot amount to enrichment if it was made for full consideration'.[97]

Interestingly, South African Courts have also adopted the enrichment explanation. The leading decision is *Govender*.[98] A customer ('S') of the claimant-bank entered into a contract with the defendant for hiring a bus. Later, S decided to not use the bus. However, the agreement with the defendant was not cancelled. Nevertheless, S instructed the claimant bank to stop payment on a cheque he had issued to the defendant. The bank paid, overlooking the countermand. On discovering the mistake, the bank sought recovery. This claim was rejected.[99] The Court reasoned:

> The question which must be posed is whether plaintiff has shown that defendant was unjustifiably enriched by the payment of the cheque. The fact of the payment of money is itself prima facie proof of enrichment, but not conclusive proof. In assessing whether defendant has been enriched by the payment account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money.[100]
>
> [T]he defendant who has performed, or held himself ready and willing to perform a contractual obligation, here the hiring out of the bus, is prima facie not unjustifiably enriched by the receipt of a payment in consideration for the hire of the bus.[101]

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[96] *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36.

[97] Ibid [62] (Lord Sumption).

[98] *Govender v Standard Bank of South Africa* [1984] 2 All SA 497 (C).

[99] In South African law, even an unauthorised payment discharges the debt: Ibid 513.

[100] Ibid 511.

[101] Ibid 513.

A little over a decade later, a similar issue arose for consideration in *B & H Engineering*.[102] There, the Court reiterated that:[103]

> If this payment served to discharge [the defendant's] debt, [the defendant] would have lost its claim for that amount against [a third party]. [The defendant's] net position would accordingly have remained the same. There would have been no enrichment.

3. Explaining the Case Law on the Good Consideration Rule

This section demonstrates that the enrichment thesis can explain the results in the leading cases on the good consideration rule. Four categories of cases may be considered.

i. Three Party Cases

Consider, first, *Aiken v Short.*[104] The facts are identical to Example 8, above. There, Bramwell B rejected the claim on the basis of the now discarded 'supposed liability' test.[105] According to Platt B, however, the claim was precluded because the payment was owed to the defendant.[106] Though Pollock CB agreed with this reasoning, his speech offers some guidance on what 'consideration' means. He said:[107]

> The [claimant] had paid the money in one sense <u>without any consideration</u>, but the defendant had a perfect right to receive the money from [the third party], and the [claimant] paid for him.

In other words, it is immaterial that the 'consideration' did not benefit the claimant. 'Good consideration' is a defendant-oriented enquiry. Notably, this is

[102] *B & H Engineering v First National Bank of South Africa Ltd* [1995] 1 All SA 545 (A).

[103] Ibid 546. See also, *ABSA Bank Ltd v Lombard Insurance Company Ltd* [2012] 4 All SA 485 (SCA) [14], [19].

[104] *Aiken* (n 79).

[105] Ibid Hurl & N 215, ER 1182.

[106] Ibid Hurl & N 214–215, ER 1182.

[107] Ibid Hurl & N 214, ER 1181 (Pollock CB) (emphasis added).

entirely consistent with the enrichment explanation. The application of the defence stands or falls with the enrichment of the defendant. Whether the relevant disenrichment moved to the claimant or to a third party is inconsequential.[108] For the purposes of the good consideration rule, all that matters is that the payment discharged a debt owed to the defendant.[109]

The two leading English cases on the good consideration rule—*Barclays Bank* and *Lloyds Bank*—are also explicable on this basis. The results in these cases turned crucially on whether the payment discharged a debt owed to the defendant.[110] In *Barclays Bank*, the customer had countermanded the cheque. The bank's payment was, therefore, unauthorised and did not discharge the defendant's debt.[111] Consequently, the defendant was enriched by the receipt of the payment. The claim succeeded. In *Lloyds Bank*, in contrast, the claim was denied. There, the mistake consisted in the bank's unawareness that the customer's account was overdrawn. Notably, this does not affect the bank's authority to pay. Thus, the payment did discharge the defendant's debt. As a result, the defendant was not enriched.

ii. Two Party Cases

The enrichment explanation can also account for the application of the good consideration rule to two-party cases. The only feature that distinguishes these cases from three-party cases is that, here, the defendant's debt is owed by the claimant and

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[108] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 175–176.

[109] See also, *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 88 ALJR 552.

[110] Carmel McLure, 'Failure of Consideration and the Boundaries of Restitution and Contract' in Simone Degeling & James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 214.

[111] For a contrary view see, Roy Goode, 'The Bank's Right to Recover Money Paid on a Stopped Cheque' (1981) 97 LQR 254.

not a third party. But that is inconsequential. The decision of the New Zealand Supreme Court in *Stiassny*[112] illustrates this. There, the claimant sought restitution of GST it paid under a mistake, although it was owed to the Revenue. Applying Goff J's qualification 2(b), the Court rejected the claim. It reasoned that 'the [claimant] did owe the amount of GST which it paid… Therefore [the defendant] gave good consideration in accepting its payment in discharge of the debt'.[113]

iii. Disenrichment Other Than Through the Discharge of a Debt

It must follow as a logical corollary of the enrichment explanation that 'consideration' provided by the defendant need not consist in the discharge of a debt. This is evident from Goff J's formulation in *Barclays Bank*: the good consideration rule applies '<u>in particular</u> if the money is paid to discharge, and does discharge, a debt'.[114] The disenrichment of the defendant may consist in the discharge of any other obligation or even in the provision of other benefits. The decision of the Victoria Court of Appeal in *Ovidio Carrideo* illustrates this.[115] There, the dispute arose from the failure of the landlord to provide the tenant a disclosure statement. Under the relevant statute, this nullified the tenant's obligation to pay rent. In ignorance of this, the tenant paid the rent. The tenant's claim for restitution was rejected. Chernov JA noted that the defendant landlord had permitted the claimant to use the premises. This constituted 'good consideration'. Similarly, 'consideration' may consist in the provision of

[112] *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106. For other examples of application of the good consideration rule to two-party cases, see, *National Mutual Life Association v Walsh* (1987) 8 NSWLR 585 (NSWSC) (Clarke J); *Orix Australia Corporation Ltd v Moody Kiddell & Partners* [2005] NSWSC 1209.

[113] *Stiassny* (NZSC) (n 112) [65].

[114] *Barclays Bank* (n 89) 695 (Goff J) (emphasis added).

[115] *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6, 1 BFRA 612.

services[116] or security,[117] or even the release of an obligation to pay tortious damages.[118]

iv. Unjust Factors Other Than Mistake

The enrichment thesis also suggests that the good consideration rule applies regardless of the unjust factor involved. Thus, it has been applied in claims based on duress.[119] Consider *Flower v Sadler.*[120] The claimant employee sought to set aside certain bills of exchange drawn in favour of the defendant. Allegedly, those bills were procured by the defendant's threat to prosecute him. Even if that were true, the payment would have been irrecoverable because 'a debt was actually due from [the claimant], and there is nothing illegal in a creditor endeavouring to obtain payment of his debt'.[121] In *Ward v Lloyd*,[122] similarly, a claim for restitution based on duress was rejected on the basis that the claimant did nothing more than demand what was legitimately owed to him. Similarly, in *Astley v Reynolds*,[123] the claimant had pawned his plate with the defendant for £20. The defendant threatened to not return the plate unless an additional £10 was paid. Though the claim based on duress succeeded, the

[116] *National Mutual Life Association* (n 112).

[117] *Spaulding v Kendrick* 51 NE 453 (Mass 1898).

[118] *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337.

[119] For the contrary view, see, *Clark v Woods* (1848) 2 Ex 395, 154 ER 545.

[120] *Flower v Sadler* (1882) 10 QBD 572 (CA).

[121] Ibid 575.

[122] *Ward v Lloyd* (1843) 6 Man & G 785, 134 ER 1109.

[123] *Astley v Reynolds* (1731) 2 Str 915, 93 ER 939.

claimant was only entitled to recover the surplus of £10. One explanation for this result is that the sum of £20 was legally due.[124]

Australian Courts also support the view that the good consideration rule is not restricted to claims for the restitution of mistaken enrichments. For example, three judges of the Supreme Court of Western Australia affirmed the view that a claim based on duress will not succeed if the disputed payment was owed to the defendant.[125] Giles J endorsed a similar approach in *Equiticorp Financial Services*.[126] There, the defendant was not enriched by the receipt of the disputed payment since it was owed a greater sum.[127]

Finally, in *Stiassny*, the New Zealand Supreme Court also suggested that the good consideration rule may deny claims based on the *Woolwich* principle.[128]

To summarise, the good consideration rule is best understood as an enrichment qualification. Despite the receipt of a benefit, the corresponding discharge of an obligation negates the defendant's net enrichment. Judicial reasoning and academic commentary support this view. The results in cases applying the good consideration rule are also explicable on this basis.

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[124] Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson & Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 495.

[125] *Scolio Pty Ltd v Cote* (1992) 6 WAR 475 (SCWA) 482 (Ipp J & Seaman J), 484 (Rowland J).

[126] *Equiticorp Financial Services Ltd v Equiticorp Financial Services Ltd* (1992) 29 NSWLR 260 (NSWSC).

[127] Ibid 300–301. See also, Edelman & Bant (n 93) 346.

[128] *Stiassny* (NZSC) (n 112) [67].

CHAPTER 3

OBJECTIONS & ALTERNATIVE EXPLANATIONS

Chapter 2 argued that the good consideration rule is best rationalised as an enrichment qualification. **Part A** of this chapter responds to two main objections to the enrichment explanation. They arise from: (1) the law relating to the mistaken discharge of unenforceable obligations and (2) the rules regarding valuation of debts. **Part B** evaluates some alternative explanations for the good consideration rule.

A. OBJECTIONS TO THE ENRICHMENT EXPLANATION

1. Unenforceable obligations

One potential objection to the enrichment thesis may arise from cases where the defendant's 'consideration' consists in the discharge of an unenforceable obligation, say, a time-barred debt. An example.

> *Example 1*: C owes D £100. That debt is now time-barred. Intending to discharge the debt, though unaware that the debt is unenforceable, C pays £100 to D. C later seeks restitution from D. C's claim will not succeed.[1]

Here, D's disenrichment consists in the discharge of a valueless debt. On the basis that valuation of enrichments is a factual enquiry,[2] it may be argued that D's receipt of £100 and her loss of a valueless claim cannot be balanced off against each other. Consequently, it may be argued that D is enriched in net terms. How then can the denial of restitution in Example 1 be explained? The answer lies in the legal obligation qualification. As suggested in Chapter 1, the claim in Example 1 is susceptible to two distinct defences, the good consideration rule and the legal

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[1] *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 680–681; *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097.

[2] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 408.

obligation qualification. Despite the unavailability of the good consideration rule therefore, the legal obligation that operates between C and D denies C's claim. Indeed, Courts have never purported to apply the good consideration rule in cases resembling Example 1. Their reasoning in those circumstances has almost entirely relied on the legal obligation owed by C to D.[3]

2. Valuation of debts

Another objection to the enrichment explanation concerns the valuation of debts. Goudkamp and Mitchell have hinted at this point. The enrichment explanation, they say, 'rests on the false premise that a legal right to be paid money... is worth as much as having the money in hand'.[4] In valuing a debt, it may further be argued, a discount must be made to account for the fact that the debtor may default. If accepted, this objection would mean that, in good consideration cases, the defendant's enrichment (i.e. the receipt of money) and the disenrichment (i.e. the value of the debt) do not balance each other out. Thus, overall, the defendant may still be enriched despite the loss of the debt.

This objection does not withstand scrutiny. Unless there is positive evidence to suggest that the debtor may default—for instance, as a consequence of insolvency—the law of unjust enrichment makes no discount in valuing a debt for the purposes of evaluating the defendant's enrichment. This claim is vindicated by at least three areas in the law of unjust enrichment where the defendant's enrichment is linked to the

[3] *Moses* (n 1) Burr 1012, ER 680–681; *Bize* (n 1) Term Rep 286–287, ER 1098; *Larner v London County Council* [1949] 2 KB 683 (CA) 688; *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [168], [169], [177].

[4] James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 152.

value of a debt. As will be shown below, in all of these instances, a debt is prima facie valued at its face value.

First, consider cases where the claimant (C) discharges a debt owed by the defendant (D) to a third-party (X). Here, D's enrichment consists in being relieved of the financial burden of having to discharge the debt. Evidently, D's enrichment is equal to the value of the debt discharged. Yet, it has never been suggested that a discount ought to be made to reflect the fact that, even if C had not discharged the debt, D may have defaulted in paying X, or indeed, that X may have chosen to not pursue her claim against D. In fact, the law of unjust enrichment adopts the contrary approach. The discharge of a debt owed by D to X is, in these circumstances, considered an incontrovertible enrichment for D.[5] It is also well accepted that 'the measure of [D's] enrichment is the value of the discharged liability'.[6] Almost all cases that have considered this issue have presumed that this is equal to the face value of the debt.

Consider, for example, *Filby v Mortgage Express*.[7] There, Mr and Mrs Filby held a joint development loan account with Midland bank. The account had a debit balance of £194,586. Later, the Filbys mortgaged one of their properties with the claimant. Pursuant to the mortgage, a sum of £60,801 (from the claimant) was used to bring down the debit balance on the Filbys' Midland account. Subsequently, the claimant sought restitution from Mrs Filby. She was enriched, it was argued, as a consequence of being relieved of the financial burden she owed under the Midland

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[5] Burrows, *The Law of Restitution* (n 2) 49.

[6] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [4-34].

[7] *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759.

account. Her enrichment was held to be 'equivalent to the unsecured personal rights of Midland Bank against [Mrs Filby]'.[8] This was held to be £60,801 i.e. the extent to which Mrs Filby's debt to Midland was reduced by the payment.[9] This conclusion rests on the premise that the value of the debt owed to Midland by Mrs Filby is reduced by an amount equal to the monetary sum paid by Mrs Filby to Midland. This would be inexplicable unless the value of the debt is presumed to be the same as its face value.

Exall v Partridge[10] is another illustration. There, the claimant had paid off rent owed by the defendants to their landlord. This was necessitated by the fact that the landlord had taken away the claimant's carriage by way of distress. The claimant sought recoupment from the defendants. Clearly, their enrichment is equivalent to the value of the landlord's claim against them. Yet, no discount was made to reflect the possibility of default. The defendants were held liable to reimburse the claimant for the entirety of the sum that he had paid the landlord i.e. the full amount due as rent.

A second example may be found in cases where the defendant's enrichment consists in a claim foregone by the claimant.[11] Here, typically, the claimant releases the defendant from a liability. *Gibb v Maidstone & Tunbridge NHS Trust*[12] is an example. There, the dispute arose in the context of the termination of Ms Gibb's employment. Under a negotiated settlement, the defendant NHS trust agreed to pay Ms Gibb a sum of £250,000 as compensation. Subsequently, it was discovered that

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[8] Ibid [64].

[9] Ibid [67].

[10] *Exall v Patridge* (1799) 8 Term Reports 308, 101 ER 1405. See also, *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534 (CA).

[11] See, Mitchell, Mitchell and Watterson (n 6) [4-37].

[12] *Rose Gibb v Maidstone & Turnbridge Wells NHS Trust* [2010] EWCA Civ 678.

the compromise agreed was ultra vires, and hence, void. Consequently, the employer was no longer contractually liable to compensate Ms Gibb. She argued however, that the defendant employer had been unjustly enriched at her expense. The value of the defendant's enrichment was said to consist of 'the value of the statutory unfair dismissal claim which she forewent'.[13] The likely award by an employment tribunal on a statutory dismissal claim in this context would be, it was agreed, £69,590.[14] That was said to be the extent of the defendant NHS trust's enrichment. No reduction was made to reflect the difference in value between the monetary value of the claim, and its 'true' value.

Finally, if Goudkamp's and Mitchell's objection is correct, then we will need to reconsider the evaluation of enrichments in the context of a ubiquitous type of unjust enrichment claim: restitution arising from bank transfers. Imagine that C transfers £100 to D's bank account. In theory, D's enrichment is not the receipt of £100 in cash. It consists in the bank owing £100 to D. As Burrows puts it,[15]

> A (current) bank account is simply a contractual arrangement between a bank and its customer whereby the bank owes a debt to its customer (where the account is in credit).

If Goudkamp's and Mitchell's objection is correct, then surely, some discount ought to be made to reflect the possibility of default by the bank. Yet, it has never been suggested that the value of D's enrichment is anything less than £100. Indeed, the cases have consistently held the contrary.[16] Burrows justifies this result on the

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[13] Ibid [24].

[14] Ibid [33].

[15] Burrows, *The Law of Restitution* (n 2) 45–46.

[16] *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 (QB); *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 (Ch D). See also, Andrew Burrows, Ewan McKendrick and James Edelman, *Cases and Materials on the Law of*

basis that a bank's creditworthiness is always 'assumed'.[17] However, it is difficult to see how, on principle, this idea can be confined to banks. Certainly, default—for instance as a consequence of insolvency—by a bank is not impossible. Neither is it inevitable that all non-bank entities will default in paying their debts. The preferable approach, therefore, is to value debts at their face value unless there is contrary evidence on the basis of which a discount ought to be made.

In sum, both the major challenges to the enrichment thesis—the law on restitution of payments made to discharge unenforceable obligations and valuation of debts—may, on closer examination be reconciled with that approach.

B. ALTERNATIVE EXPLANATIONS

This section will consider some alterative explanations for the good consideration rule. It will be suggested that none of them withstand scrutiny.

1. Change of Position Explanation

In *Lloyds Bank*, Waller LJ explained the good consideration rule as a change of position qualification. In his view, 'if a payment has discharged the debt, then unless an order to return the money reinstates the debt, the payee will have changed his

Restitution (2nd edn, OUP 2006) 841; Andrew Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012) 75–76.

[17] Burrows, *The Law of Restitution* (n 2) 45–46.

position in no longer having a remedy against the debtor'.[18] With respect, this explanation runs into insuperable problems.[19]

First, all leading authorities on the good consideration rule treat it as a defence distinct from change of position. In *Barclays Bank*, for instance, Goff J listed good consideration [2(b)] and change of position [2(c)] separately.[20] Thereafter, English Courts have consistently maintained the distinction between these two rules.[21] Leading authorities in Australia,[22] Canada[23] and Hong Kong[24] have also recognised this separation.

Secondly, the change of position explanation fails to account for the requirement that, for the good consideration rule to operate, the payment must have

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[18] *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 (CA) 126 (Waller LJ). See also, *K&S Corp Ltd v Sportingbet Australia Pty Ltd* [2003] SASC 96, [2004] ALMD 250 [161]; Robert Goff & Gareth Jones, *Goff & Jones: The Law of Restitution* (Gareth Jones ed, 6th edn, Sweet & Maxwell 2002) 41-001–41-002; Robert Goff & Gareth Jones, *Goff & Jones: The Law of Restitution* (Gareth Jones ed, 7th edn, Sweet & Maxwell 2007) [41-001]–[41-002].

[19] See generally, Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 175–176; Sonja Meier, 'Mistaken Payments in Three-Party Situations: A German View of English Law' (1999) 58 CLJ 567, 588.

[20] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695 (Goff J). See also, *Lloyds Bank* (n 18) 130 (Peter Gibson LJ); Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell & William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 171–172.

[21] *Stephen John Edmond Jones v Kelly Churcher, Abbey National Plc* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [48]–[55], [56]; *Mahme Trust Reg v Nezhet Tayeb* [2002] EWHC 1543 (Ch), [2003] WTLR 21 [146], [147]; *Midland Bank Plc v Guadalupe ValeroConchita Foulis* (CA, 4 March 1991); *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [84] (Lord Scott) (*DMG*); *Gulf International Bank BSC v Albaraka Islamic Bank BSC* (QB, 24 July 2003).

[22] *David Securities v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 CLR 353, 379; *ANZ Banking Group Ltd v Westpac Banking Corporation* (1987) 164 CLR 662, 673; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 88 ALJR 552 [100], [101]; *Hills Industries Ltd v Australian Financial Services & Leasing Pty Ltd* [2012] NSWCA 380, (2012) 295 ALR 147 [81].

[23] *BMP Global Distribution v Bank of Nova Scotia* 2009 SCC 15 [21]–[22].

[24] *Takahashi v Shu* [2011] HKCFA 15 [40].

been intended to discharge the debt.[25] Change of position rests on the basis of a causal relationship between the claimant's payment and the defendant's discharge of the debt. On that view, it is immaterial whether the claimant's payment was intentional.

Thirdly, as Waller LJ expressly recognised,[26] the change of position explanation rests on the assumption that a debt, once discharged, cannot be revived.[27] However, as Moore has convincingly demonstrated, that assumption is questionable.[28] In *Aiken v Short*—on which Goff J premised the good consideration rule in *Barclays Bank*—Bramwell B proceeded on the basis that restitution may lead to the revival of debts.[29] The subsequent judicial trend also vindicates that view. Consider for example, *Colonial Bank.*[30] The claimant wished to remit some money to the British bank. Due to an error, that amount was credited to the defendant bank. One of the claimant's customers happened to be a customer of the defendant. The defendant credited the mistaken payment against the customer's overdraft. Upon realising the mistake, the claimant sought restitution. The defendant argued that the sum had been used and could not be recalled. Rejecting this argument, the Court held, '[n]othing was done except by private entries made by the defendants in their own book… They had not in any way altered their position'.[31] By crediting the payment against the customer's overdraft, the bank had discharged the debt. This is evident from the fact that, if the claimant had never sought restitution, that payment would have been received in

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[25] See Chapter 1(B), above.

[26] *Lloyds Bank* (n 18) 126.

[27] Burrows, 'Is There a Defence of Good Consideration?' (n 20) 171.

[28] Jonathon Moore, 'Restitution from Banks' (DPhil thesis, University of Oxford 2000) 306–307. See also, John Dawson, 'Erasable Enrichment in German Law' (1981) 61 Boston University Law Review 271, 289.

[29] *Aiken v Short* (1856) 1 Hurl & N 210, 216; 156 ER 1180, 1182.

[30] *The Colonial Bank v The Exchange Bank of Yarmouth* (1885) 11 App Cas 84 (PC).

[31] Ibid 88.

satisfaction of the debt. Thus, 'the reduced balance in the overdrawn account… reflect[ed] the legal relationship between bank and customer'.[32] However, the fact that the debt was discharged did not preclude restitution.

Recently, the High Court of Australia in *Hills Industries* confirmed that, at least in some circumstances, debts may be revived.[33] There, a fraudster induced the claimant to make to the defendant payments that were accepted in discharge of debts owed by third parties. The Court found it difficult to regard 'the discharge as irreversible, given that it was founded in [the third party's] fraud against [the claimant]'.[34]

Fourthly, it is difficult to reconcile the causation element of the change of position defence with the good consideration rule. That is because the good consideration rule 'applies even if the client would have discharged the debt in any event and therefore could not claim a change of position'.[35] An example.

> *Example 2*: A owes B, £100. A does not intend to pay B, but does so by mistake. B would have voluntarily waived the debt the next day anyway. Can A recover £100 from B?

Here, the change of position defence is not available to B. To satisfy that defence, the defendant must establish that, 'but for' the enrichment (£100), she would not have suffered the disenrichment (the discharge of the debt).[36] B would have suffered that detriment in any event the next day. Thus, there is no causal link

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[32] Moore (n 28) 307.

[33] *Australian Financial Services* (n 22).

[34] Ibid [102].

[35] James Edelman & Elise Bant, *Unjust Enrichment* (2nd edn, OUP 2016) 345.

[36] *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818.

between B's enrichment and disenrichment. In contrast, since the good consideration rule does not contain a causation qualification, B is entitled to rely on that rule.

Finally, the Supreme Court of New Zealand has suggested that the good consideration rule may also deny claims based on the *Woolwich* principle.[37] However, the change of position defence is not available in such cases.[38]

2. Contractual Restriction and 'At the Expense of' Explanations

This section considers two related explanations for the good consideration rule. Consider first, the contractual restriction explanation. This suggests that the denial of restitution in cases such as *Lloyds Bank* is based on the need to protect contractual bargains.[39] The focus here is on the contract between the customer (third party) and the bank (the claimant). According to this explanation:[40]

> [T]he bank should not be entitled to restitution from [the defendant] because this would undermine the contractual risks (especially the risk of the customer's insolvency) undertaken by the bank in the contract with its customer.

An example.[41]

> *Example 3*: Under a contract, X owes £10,000 to D. X discharges this debt through a payment from her account with C bank. C makes the payment to D overlooking the fact that X does not have sufficient funds in her account. C cannot recover the payment from D.

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[37] *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106 [67].

[38] *Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2008] EWHC 2893 (Ch), [2009] STC 254 [337]–[342].

[39] Burrows, 'Is There a Defence of Good Consideration?' (n 20) 170; Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 90–91; Peter Birks, 'The Burden on the Bank' in Francis Rose (ed), *Restitution and Banking Law* (Mansfield 1998) 220.

[40] Burrows, 'Is There a Defence of Good Consideration?' (n 20) 172–173.

[41] *Lloyds Bank* (n 18).

The contractual restriction explanation asserts that allowing C to claim restitution from D will disturb the contractual risks between C and X. That is because, by relying on restitution against D, C does not have to look to X for payment. Consequently, C no longer assumes the risk of X's insolvency. But, a fortiori, did D not assume the risk of X's insolvency under the contract between X and D? If D is entitled to retain C's payment, D does not have to proceed against X. By parity of reasoning, this must mean that D no longer assumes the risk of X's insolvency. In sum, since C and X have both assumed the risk of X's insolvency, redistribution of the insolvency risk cannot explain why the law of restitution must prefer one over the other.

Burrows relies on *Costello*[42] in support of his argument. There, in pursuance of a contract with Oakwood (a company), the claimant constructed houses on the defendant's land. It was held that the claimant could not proceed against the defendant, as that would disturb the contract between the claimant and Oakwood. In contrast to Example 2 however, there was no contract between the defendant and Oakwood. Thus, the defendant had not assumed the risk of Oakwood's insolvency. As Etherton LJ said, 'legally enforceable promises were made only between Oakwood and the claimants'.[43] The decision in *Pan Ocean*[44] is susceptible to a similar analysis. There, the owner of a ship (X) had assigned the benefit of a charter (with C) to the defendant (D). C's claim against D for the restitution of overpaid hire was denied, inter alia, on the basis that that would permit C to evade the risk of X's insolvency. In

[42] *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244.

[43] Ibid [21] (Etherton LJ).

[44] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL). See also, *Lumbers v W Cook Builders Pty Ltd (In Liquidation)* [2008] HCA 27, (2008) 232 CLR 635.

contrast to Example 2, however, it is difficult to argue that, under the assignment contract between X and D, D had assumed the risk of X's insolvency as regards hire payments. This is because, generally, D would look to C, and not X, for those payments. In any event, there was another reason in that case for concluding that the risk of non-payment must be borne by C and not D: the remedial consequences of overpayment of hire were specifically governed by the contract between C and X.[45] Lord Goff said:[46]

> [T]he relevant contract imposes on the assignor [X] an obligation of repayment in the circumstances in question, and that there is nothing in the assignment which even contemplates, still less imposes, any additional obligation on the assignee [D] to repay.

The risk of non-payment consequent upon X's insolvency was therefore rightly imposed on C.

Consider now, the 'at the expense of' explanation. It suggests that the defendant's enrichment is not 'at the expense of' the claimant-bank, but its customer.[47] Birks adopted this reasoning to explain the result in *Lloyds Bank*.[48] But why is it that the defendant's enrichment is not 'at the expense of' the claimant-bank? There are two possible responses to this query.

On one view, the validity of the 'at the expense of' analysis is contingent on the valid contract between the claimant and the third party. Birks affirmed that view. His analysis was based on the fact that 'the party making the performance [i.e. the claimant] and thus conferring the benefit had a valid contractual right to be paid for

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[45] James Goodwin, 'Contract, Unjust Enrichment, and Risk' (2012) 128 LQR 503, 504.

[46] *Pan Ocean* (n 44) 166 (Lord Goff).

[47] Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (Clarendon 1995) 335.

[48] Ibid.

that performance by the other party to the contract [i.e. the customer]'.[49] However, what about cases where the claimant was fraudulently induced to make a payment to the defendant? In such cases, the third party's fraud renders the contract with the claimant invalid. Indeed, fraud vitiates the procurement of the claimant's performance. Thus, in these cases the claimant's performance is not made 'on behalf of' the third party in any meaningful sense. Thus, fraudulent procurement of the claimant's performance—an area where the good consideration rule has been applied on numerous occasions[50]—fall outside the purview of this version of the 'at the expense of' explanation.

Alternatively, it may be argued that the defendant's enrichment is not 'at the expense of' the bank because there is no 'performance link' between the bank and the defendant.[51] This argument derives support from civilian jurisdictions such as Germany. In Germany, Wilburg and subsequently, Von Caemmerer suggested that the law of unjustified enrichment is (with the exception of certain residual categories) concerned with the reversal of defective 'performances' i.e. 'purposive transfers'.[52] In short, in order for there to be a valid claim to reverse a defective performance, 'the transferor must be pursuing a purpose towards the enriched party'.[53] This analysis offers a plausible answer to cases such as *Lloyds Bank*. As Krebs puts it,[54]

> if the [customer X] decides to pay the [defendant D] by bank transfer, and for this reason requests his bank to pay [D] and debit the corresponding

[49] Birks, *Unjust Enrichment* (n 39) 89–90.

[50] *Australian Financial Services* (n 22); *Gaffner v American Finance Co* 206 P 916 (Wash 1922); *Associates Discount Co v Clements* 321 P 2d 673, 679 (Okla 1958).

[51] See generally, Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

[52] Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 208.

[53] Ibid 218.

[54] Ibid 208.

> amount to his account, [X] is rendering his performance to [D], although he is doing so indirectly.

As a logical corollary, the claimant bank is not rendering a 'performance' to the defendant; the bank does not pursue a purpose towards the defendant.

At first blush, the 'purposive performance' analysis offers an attractive solution to the problem in cases such as *Lloyds Bank*. On closer scrutiny, however, it cannot explain the operation of the good consideration rule in English law. This is because, the 'purposive performance' reasoning fails to distinguish between cases where the debt owed to the defendant is discharged and cases where it is not. Consider for instance, *Barclays Bank*. There, as a consequence of a countermand order from the customer, the debt owed by the customer to the defendant was not discharged. Consequently, it was held, the good consideration rule is inapplicable. Despite the fact that the debt was not discharged, however, it is difficult to see how the bank can be said to have rendered a 'purposive performance' to the defendant. Regardless of the discharge of the debt, the bank is unlikely to have been aware of the purpose of the payment. Thus, whether or not the debt owed to the defendant is discharged, the purposive performance requirement would deny restitution. Clearly, this is not reflective of the way in which the good consideration rule operates.

A 1984 decision of the Bundesgerichtshof[55] confirms this analysis. The facts were remarkably similar to *Barclays Bank*. However, the Bundesgerichtshof reached the opposite result. The claimant brewery had ordered its bank to stop payments of rent to the brewery's landlords. Mistakenly, the bank continued to pay. Subsequently,

[55] BGHZ 89, 376 (19.1.1984) cited in Krebs (n 52) 225.

the bank discovered its mistake and sought restitution from the defendants. Despite the stop order, it was held:[56]

> The performance relationship, as perceived by the defendants, was between the brewery and the defendants – the bank's involvement was merely instrumental in getting the brewery's money to the defendants.

Clearly therefore, the 'purposive performance' analysis operates regardless of the discharge of the debt owed to the defendant. For that reason, it is incapable of explaining the operation of the good consideration rule in English law. It is unsurprising, therefore, that Birks resiled from this version of the 'at the expense of' explanation. He said, this analysis, if accepted:[57]

> would… endanger the bank's right to recover from the immediate payee any mistaken payment made in the belief that it was paying on the credit of its customer, even an accidental second payment.

Moreover, even in the category of cases where the 'at the expense of' reasoning provides a valid reason for rejecting restitution, it does not withstand scrutiny as an *explanation* for the good consideration rule. This is because, as I will now demonstrate, it fails to explain the scope of the good consideration rule. It must therefore be understood as an additional reason, independent of the good consideration rule, for denying restitution.

First, neither of these explanations attempts to account for the good consideration rule on its own terms. They both suggest that the good consideration rule masks the real reason for denying restitution.[58] Consequently, they must give way

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[56] Ibid. See also, Meier (n 20) 603.

[57] Birks, 'The Burden on the Bank' (n 39) 219-220.

[58] Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 CLJ 414, 421 (making a similar argument in the context of the counter-restitution explanation for the 'total failure' requirement).

to an explanation that takes the good consideration rule seriously on its own terms. As an earlier edition of Goff and Jones noted:[59]

> [The 'at the expense of explanation'] is an attractive analysis, but it was not the ground of the Court of Appeal's decision [in *Lloyds Bank*] which was that the defendant-payee had given good consideration… The fact that the decision may be explained on other grounds does not mean that the Court of Appeal's reasoning was unsound.

Secondly, both explanations fail to account for the operation of the good consideration rule in two-party cases. In such cases, there is no separate contractual assumption of risks that requires protection. Neither is it plausible in those cases to argue that the enrichment is not 'at the expense of' the claimant.

Thirdly, both these explanations also fail to explain two significant qualifications to the good consideration rule: the requirement that the payment must have been intentional, and that the good consideration rule will not apply if the payor's mistake was induced by the payee or if the payee was aware of the payor's mistake.[60] Neither of these qualifications are relevant to protecting the integrity of the contract between the claimant and the third party.[61] The state of mind of the defendant is also irrelevant to the 'at the expense of' requirement.

Finally, the contractual restriction explanation bases itself on the validity of the contractual obligations between the claimant and the third party.[62] No question of protecting contractual risks arises if that contract is void. Notably, however, the invalidity of the contract between the claimant and the third party has not been seen as precluding the application of the good consideration rule. Consider for example, *Hill*

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[59] Goff & Jones (7th edn) (n 18).

[60] *Barclays Bank* (n 20) 695; *Lloyds Bank* (n 18) 130 (Peter Gibson LJ).

[61] Moore (n 28) 313.

[62] Birks, *Unjust Enrichment* (n 39) 90.

Industries.[63] There, a fraudster (the third party) procured a financier (the claimant) to make payments to the defendants. The contract between the claimant and the third party concerned non-existent goods and was, hence, void.[64] In the New South Wales Court of Appeal, Allsop P and Meagher JA disagreed on whether the requirement of intention was necessary.[65] However, neither suggested that the invalidity of the contract was relevant to the application of the good consideration rule. Nor was there any suggestion to that effect in the High Court of Australia.[66]

3. Compromise Explanation

This explanation suggests that the good consideration rule is an instantiation of the defence of 'contractual compromise' or 'honest receipt'.[67] However, elements of the good consideration rule do not vindicate this claim. First, the good consideration rule does not require a settlement between the parties. Secondly, the contractual compromise defence is restricted to cases where the contract operates between the claimant and the defendant.[68] The good consideration rule is not so confined. Finally, the compromise defence is primarily oriented to ensure finality of litigation. As Edelman and Bant note, however, it is difficult to see how the good consideration rule

[63] *Australian Financial Services* (n 22). See also, *Gaffner* (n 50).

[64] See also, Andrew Burrows, 'Good Consideration in the Law of Unjust Enrichment' (2013) 129 LQR 329, 329 (noting that the contract between the claimant and the defendant was also void for common mistake).

[65] *Hills Industries* (n 22).

[66] *Australian Financial Services* (n 22).

[67] *Peter Hookway v Racing Victoria Limited* [2005] VSCA 310, 13 VR 444 [39]; Keith Mason, John Carter & Gregory Tolhurst, *Mason & Carter's Restitution Law in Australia* (2nd edn, LexisNexis Butterworths 2008) 878–882.

[68] *Peter Hookway* (n 67).

which does not require 'threatened litigation, compromise or even demand by the plaintiff' can be concerned with protecting the finality of disputes.[69]

4. Bona Fide Purchase Explanation

It has also been suggested that the good consideration rule is an application of the bona fide purchase defence. Though that view was preferred in the 3rd edition of Goff and Jones,[70] later editions resiled from this view.[71] Interestingly, however, this explanation has reappeared in the latest edition of Goff and Jones.[72]

Unfortunately, the scope of the bona fide purchase defence itself remains unclear. It is impossible within the confines of this thesis to clear up the doctrinal controversies surrounding its application. Consequently, this section will consider in outline, the major competing accounts of the bona fide purchase defence. It will then demonstrate that none of them can satisfactorily account for the good consideration rule.

Virgo and Swadling afford a narrow scope for the bona fide purchase defence. To them, this defence is an exception to the *nemo dat* principle; it has no role to play in cases that are not concerned with the vindication of property rights.[73] Since none of the leading cases on the good consideration rule were based on subsisting property

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[69] Edelman & Bant (n 35) 345. See also, Andrew Kull, 'Rationalizing Restitution' (1995) 83 California Law Review 1191, 1238.

[70] Robert Goff & Gareth Jones, *The Law of Restitution* (3rd edn, Sweet & Maxwell 1986) 108–109.

[71] Goff & Jones (6th edn) (n 18) [41-001]; Goff & Jones (7th edn) (n 18) [41-001].

[72] Mitchell, Mitchell and Watterson (n 6) [29-21]. See also, *Lloyds Bank* (n 18) 133 (Peter Gibson LJ).

[73] Virgo, *The Principles of the Law of Restitution* (n 19) 656; William Swadling, 'Restitution and *Bona Fide* Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (United Kingdom National Committee of Comparative Law 1997) 79–105.

rights, this version of the bona fide purchase defence cannot explain the good consideration rule.

To Key, the operation of the bona fide purchase defence turns on the nature of the claim; this defence 'will operate… to vest property rights in the defendant… a bona fide purchase does not remove an *in personam* claim'.[74] Almost all leading cases applying the good consideration rule were *in personam* claims. Therefore, this account of the bona fide purchase defence also fails to satisfactorily account for the good consideration rule.

On a broader view, the bona fide purchase defence ensures consistency between unjust enrichment and property law.[75] As Birks suggests, 'the personal claim has to be killed off by the defence of bona fide purchase in order to avoid the stultification of the proprietary exception to *nemo dat*'.[76] According to this view, however, the good consideration rule must only operate where the bona fide purchase defence in property law applies to exclude the *nemo dat* rule. It has never been suggested however that the application of the good consideration rule is linked to the application of the *nemo dat* principle. Birks himself thought that the good consideration rule was not so confined.[77] Consequently, this version of the bona fide purchase defence also fails to explain the good consideration rule.

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[74] Paul Key, 'Bona Fide Purchase as a Defence in the Law of Restitution' [1994] LMCLQ 421, 426.

[75] Burrows, *The Law of Restitution* (n 2) 576–577; Burrows, 'Is There a Defence of Good Consideration?' (n 20) 168.

[76] Birks, *Unjust Enrichment* (n 39) 240–245.

[77] Peter Birks, 'The Role of Fault in the Law of Unjust Enrichment' in William Swadling & Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 1256.

The broadest version of the bona fide purchase defence is the one proposed by Barker.[78] To him, this defence is oriented to promote 'transactional security'; it protects the sanctity of the contract between the defendant and a third party. This account however restricts the operation of the bona fide purchase defence to cases where the defendant received the benefit by way of exchange with a party other than the claimant.[79] It is unsurprising therefore that Barker himself admits that cases applying the good consideration rule cannot be explained on the basis of bona fide purchase:[80]

> [A]lthough the idea that D has given 'good consideration' in good faith sounds very like the defence of bona fide purchase, the latter is, to my mind, also a blind alley. This is because the policy of transactional security underpinning the bona fide purchase defence need only be invoked where the defendant has received a benefit by way of exchange with a party other than the plaintiff.

Finally, there is at least one objection that applies to all accounts of the bona fide purchase defence considered above. It is that bona fide purchase is a complete defence; it applies regardless of the value of the consideration provided.[81] However, the good consideration rule operates in a pro tanto manner.[82]

5. Presence of Basis Explanation

Virgo argues that the good consideration rule must be understood as an instantiation of the 'presence of basis' bar. In his view, restitution is denied in these cases because

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[78] Kit Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in Peter Birks (ed), *Laundering and Tracing* (Clarendon 1995) 193.

[79] *Barclays Bank Plc v Boulter* [1999] 1 WLR 1919 (HL) 1925–1926.

[80] Barker (n 78).

[81] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 580–581.

[82] *Devaux v Conolly* (1849) 8 CB 640, 137 ER 658; *Anglo-Scottish Beet Sugar Corporation, Ltd v Spalding Urban District Council* [1937] 2 KB 607 (KB).

the defendant's retention of the enrichment is justified by a valid 'basis'.[83] This view was considered and rejected in Chapter 1.[84] In sum, it was suggested that 'presence of basis' can only explain the denial of restitution in cases where the basis operates between the claimant and the defendant. However, the good consideration rule operates even when the obligation is owed between the defendant and a third party.

[83] Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson & Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 493–495.

[84] See Chapter 1(A), above.

PART II

THE LEGAL OBLIGATION QUALIFICATION

In Chapter 1 it was argued that countervailing legal obligations influence unjust enrichment claims through the operation of two distinct rules: the good consideration rule and the legal obligation qualification. Part I examined the good consideration rule. Part II will consider the legal obligation qualification.

Part II proceeds in three sections. Section I is devoted to understanding the legal obligation qualification doctrinally. Section II advances the negative case. It critiques the explanations offered for the legal obligation qualification by commentators and by the courts. Finally, Section III advances the positive case setting out the preferable explanation for and operation of the legal obligation qualification.

SECTION I

UNDERSTANDING THE LEGAL OBLIGATION QUALIFICATION

This section aims to understand the operation of the legal obligation qualification. Although some ground was covered in Chapter 1, a difficult issue remains unanswered: is the legal obligation qualification a bright-line rule or a flexible exception? Chapter 4 considers this question.

CHAPTER 4

BRIGHT-LINE RULE OR FLEXIBLE EXCEPTION?

Chapter 1 compared the legal obligation qualification and the good consideration rule. This process offered two significant takeaways regarding the operation of the legal obligation qualification: (a) the legal obligation qualification operates when a legal obligation exists between the claimant and the defendant; (b) unlike in the case of the good consideration rule, the legal obligation qualification does not require an intentional payment.

A key question remains unanswered: is the legal obligation qualification a bright-line rule or a flexible exception? There are suggestions both in academic commentary[1] and in judicial authority[2] in favour of the latter view. This chapter will argue that this is incorrect. There are three important challenges to the bright-line conception of the legal obligation qualification: (a) the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd*[3] (b) the House of Lords' decision in *Deutsche Morgan Greenfell Group Plc v Inland Revenue Commissioners*[4] and (c) the law relating to restitution of benefits conferred under unenforceable contracts. It will be suggested that all three may be reconciled with the bright-line conception of the legal obligation qualification.

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[1] Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013).

[2] *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471. This decision is examined in more detail in Chapter 6.

[3] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516.

[4] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 ('*DMG*').

A. *ROXBOROUGH:* RESTITUTION WITHIN A CONTRACT

Does the decision of the High Court of Australia in *Roxborough* suggest that the legal obligation qualification must operate as a flexible exception? That is the question that this section considers.

1. The Decision in *Roxborough*

The claimant and respondent were retailers and wholesalers of tobacco, respectively. They were both licensees under the New South Wales Business Franchise Licenses (Tobacco) Act 1987 ('the Act'). The contractual arrangement between the parties was that, in anticipation of the wholesaler's payment of license fee, the retailer would advance an equivalent sum to the wholesaler. On 5 August 1997, the High Court of Australia declared the imposition of license fee under the Act invalid.[5] Consequently, the respondent was no longer required to pay this sum. However, the claimant had already paid the wholesaler an amount attributable to the fee. The claimant sought restitution of that sum.

The High Court of Australia awarded restitution. The Court held that failure of consideration is not limited to the failure of contractual reciprocation, it includes the disappearance of a contemplated state of affairs; here, the wholesaler's license fee liability.[6] The finding that there was a failure of consideration in these circumstances raised for the first time, several significant questions: did the retailer's obligation subsist despite the invalidity of the license fee? Would granting restitution in these

[5] *Ha v New South Wales* [1997] HCA 34, (1997) 189 CLR 465.

[6] *Roxborough* (n 3) [16] (Gleeson CJ, Gaudron and Hayne JJ).

circumstances contradict contractual obligations? The majority does not provide a satisfactory answer to these questions. It merely asserts that:[7]

> [W]hile the wholesale price, exclusive of the tax, was arrived at by the operation of forces of supply and demand in the market for tobacco products, and reflected the negotiated agreement of the parties, the tax was imposed externally by government.

At first blush, the conclusion of the majority contradicts the conception of the legal obligation qualification as a bright-line rule. That is because the retailer's payment was seemingly made to discharge a contractual obligation. Thus, the legal obligation qualification ought to have precluded the claim.[8] On closer examination, however, the majority's conclusion is justifiable. It may also be reconciled with the bright-line conception of the legal obligation qualification based on the conditional nature of the retailer's contractual obligations. Before substantiating that claim, however, I will briefly examine two other commonly advanced explanations for *Roxborough*.

2. Negotiability Reasoning

Burrows supports the decision in *Roxborough*. According to him, restitution in that case did not interfere with contractual allocation of risks. This is because the 'tax element was imposed outside the risks bargained for'.[9] Similarly, to Birks, the 'crucial

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[7] Ibid [13].

[8] Kirby J dissented on the ground that the validity of the contract precluded restitution: Ibid [166] (Kirby J).

[9] Andrew Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 767–777; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 90.

fact is that neither the payment of the tax nor the amount of that payment were viewed as negotiable'.[10]

With respect, this explanation does not withstand scrutiny. It is true that the statute imposed the license fee liability on the wholesaler. However, it does not follow that it was not subject to negotiation. A close examination of the statutory scheme vindicates this claim. Under Section 41(1)(c) of the Act, the primary liability for the license fee fell on the wholesaler.[11] By virtue of the contractual arrangement between the parties, however, that burden had been shifted to the retailer. The claim that the license fee was not subject to negotiation between parties is, thus, inaccurate. As O'Brien notes:[12]

> Although the payment of the tax by *someone* was non-negotiable, as between themselves the retailer and wholesaler had clearly engaged in negotiation ending in an agreement that the retailer in effect pay the tax.

All that was non-negotiable is the quantum of the fee. That was pre-determined by the statute. However, this is likely to be equally true of other costs incurred by the wholesaler. An example.

> *Example 1:* C, a retailer and D, a wholesaler agree to engage X, a carrier for transporting goods. The contract provides that transport charges shall be borne by C.

Here, it is incorrect to argue that the transport charges were 'externally imposed' and, therefore, not subject to negotiation between parties. Parties could have agreed that D will bear that expense. However, it is as true here, as it was in

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[10] Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 OUCLJ 1, 5 (emphasis added). See also, *Roxborough* (n 3) [13].

[11] *Roxborough v Rothmans of Pall Mall Australia Ltd* [1999] FCA 107 (Emmet J).

[12] Angus O'Brien, 'The Relationship Between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*' (2011) 32 Adelaide Law Review 83, 95 (emphasis in original).

Roxborough that the quantum of these charges was not subject to negotiation between the parties. That, however, is inconclusive.

The negotiability explanation also fails to explain the judicial trend. Consider for example, *Orphanos v Queen Mary College*.[13] There, the claimant was a student of the defendant college. When the dispute arose, he had only lived in the UK for three years. The college denied him the benefit of being charged fees at 'home rate' on the basis that living in the EEC for the purposes of education did not constitute 'ordinary residence'. Subsequently, the House of Lords clarified that 'ordinary residence' included educational residence.[14] On this basis, the claimant sought restitution of the excess fee. If the negotiability explanation is correct, restitution should have been granted. That is because the quantum of fees was externally imposed. The House of Lords, however, denied restitution. What proved conclusive was the fact that fees at 'overseas rate' was due under a contract between the parties. The House of Lords' finding that fees should have been levied at 'home rate' did not absolve the claimant from that liability.

Equally, restitution within a contract has also been granted in circumstances where no part of the bargain was 'externally imposed'. Consider, for instance, the decision of the Supreme Court of South Australia in *Shuman*.[15] The claimants purchased from the defendant what they believed to be an invaluable dinosaur bone. In fact, it turned out to be worthless. Restitution of the purchase price was granted. Here, no part of the consideration was externally imposed; it was wholly subject to

[13] *Orphanos v Queen Mary College* [1985] AC 761 (HL). See also, Birks, 'Failure of Consideration and its Place on the Map' (n 10).

[14] *Reg v Barnet London Borough Council, Ex parte Shah* [1983] 2 AC 309 (HL).

[15] *Shuman v Coober Pedy Tours Pty Ltd* [1994] SASC 4401, (1994) 175 LSJS 159. See also, James Edelman & Elise Bant, *Unjust Enrichment* (2nd edn, OUP 2016) 267.

negotiation between the parties. As subsequent sections will demonstrate, the correct explanation for this result is that the payment was conditional on the defendant's performance. Failure of the counter-performance meant that the purchase price was not due. Thus, restitution did not contradict the claimant's contractual obligation.

3. Allocation of Risks Reasoning

According to Beatson, the law of unjust enrichment may sometimes perform a gap-filling function within subsisting contracts:[16]

> If the reason for not allowing concurrence of action between restitutionary and contractual claims before discharge is to do with not subverting risk allocation and contractual valuation then doctrine should be directly focused on those factors… Except in the case of speculative contracts, it should not be assumed, as it has been in the past, that all risks have been distributed to one side or the other. Where all risks have not been so distributed, there will be a gap in the contractual allocation and there is room for adjustment either by applying the principle of unjust enrichment or some other principle.

Under this approach, results in cases such as *Roxborough* turn crucially on whether the risk that the license fee may be declared invalid was distributed between the parties.[17]

Insofar as the 'allocation of risks' reasoning relies on factors other than the operation of contractual obligations, it faces insuperable problems. First, this argument presumes that the only reason for not allowing restitution within subsisting contracts is to prevent subversion of risk allocation. As Chapter 2 demonstrated, however, at least in some cases, there may be other more fundamental reasons for denying restitution such as, for example, the absence of a primary element of unjust

[16] Jack Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 Theoretical Inquires in Law 83, 94.

[17] Peter Birks, 'Failure of Consideration and its Place on the Map' (n 10); Ralph Cunnington, 'Failure of Basis' [2004] LMCLQ 234.

enrichment. If that view is accepted, the focus must turn to parties' contractual obligations; the more abstract question of whether particular risks were allocated is unhelpful.

Secondly, the determination of whether certain risks were allocated between parties is replete with indeterminacies. This is especially so since proponents of the allocation of risks reasoning offer no concrete methodology for identifying gaps in contractual bargains.[18] Otherwise than through express or implied contractual terms, it is unclear how this exercise is meant to work.[19] It is unsurprising therefore that the application of this methodology to *Roxborough* has led to radically opposite results. Beatson and Virgo argue that *Roxborough* is incorrectly decided since the burden of proving that there was no allocation of risks must fall on the claimant. The claimant cannot discharge that burden.[20] Cunnington, on the other hand, applies the same methodology to reach the opposite result.[21] The intermediate position, that this risk was 'shared' between the parties, has also found adherents.[22]

Finally, the 'allocation of risks' reasoning is based on the incorrect assumption that contractual silence on specific eventualities equates to a gap in the parties' bargain. As Smith suggests:[23]

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[18] Tang Wu, 'Unjust Enrichment Within a Valid Contract: A Close Look at Roxborough v Rothmans of Pall Mall Australia Ltd' (2007) 23 Journal of Contract Law 201.

[19] Mitchell McInnes, 'Unjust Factors, Juristic Reasons and Contracts in Anglo-Canadian Law' in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff 2007) 31.

[20] Jack Beatson & Graham Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 LQR 352, 357.

[21] Cunnington (n 17) 250–251.

[22] Peter Jaffey, 'Failure of Consideration: Roxborough v Rothmans' (2003) 66 Modern Law Review 284.

[23] Stephen Smith, *Contract Theory* (OUP 2004) 285.

> Read literally, what such contracts state is that the parties' obligations are unconditional (save as provided for in the contract)… Indeed, the claim that silence indicates a gap in a contract is inconsistent with the basic idea that contractual obligations are promissory obligations.

Consider an example.[24]

> *Example 2*: C enters into a contract with D under which C promises to lend her car to D on hire. One week before the commencement of the hire, C realises that the market price of car hires has doubled. The rise in market prices was unforeseen and consequently, not subject to negotiation.

In the absence of an implied term to that effect, it would surely be incorrect to suggest that there is a gap in the contractual allocation of risks as regards the increase in prices. As Chadwick LJ said in *Bromarin*:[25]

> It is not an appropriate approach to construction to hold that, where the parties had contemplated an event A, and they did not contemplate event B, their agreement must be taken as applying only in event A and cannot apply in event B.

In sum, the fact that parties in *Roxborough* did not contemplate the invalidity of the license fee at the time of contracting does not mean that that there is a gap in the allocation of risks. That conclusion can only be reached if the claimant's obligation was conditional on the validity of the license fee. It is to that question that I now turn.

4. Conditionality Reasoning

Stevens suggests that the correct methodology of analysing the question in *Roxborough* is by asking whether the retailer's contractual obligation was conditional on the validity of the license fee:[26]

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[24] Ibid 285–286.

[25] *Bromarin v IMD Investments* [1999] STC 301 (CA) (Chadwick LJ).

[26] Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling & James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 29. See also, Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or

> [W]hat would the position have been if [the retailer] had not been paid at the time when invalidity of the tax had been discovered? … Is this portion of the price earned even where the purpose of charging it, payment of a tax to the state, will never be fulfilled. Precisely the same question is determinative of the issue where the price has been paid in advance.

The remainder of this section makes three claims. First, the retailer's obligation in *Roxborough* was conditional on the validity of the license fee. Secondly, the conditionality of that obligation means that there is no conflict between unjust enrichment and contract. Finally, on this basis, the decision in *Roxborough* can be reconciled with the bright-line conception of the legal obligation qualification.

Although Burrows adopts the negotiability reasoning as the primary justification for *Roxborough*, he also argues persuasively that the retailer's obligation was conditional on the wholesaler's license fee liability:[27]

> In the *Roxborough* case, the tax element was a fixed separate element from the rest of the price... Separated out in this way, one can see that, once the tax was held not to be owing, that part of the price could also be said not to be owing albeit that no particular clause could be struck down as void.

There is also some judicial support for this view. In *Warne County Produce*[28] for example, Cardozo CJ considered a fact situation nearly identical to *Roxborough*. He held:[29]

> This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events… This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise.

Complementary Concepts?' in Charles Rickett & Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 174–175.

[27] Burrows, 'Restitution of Mistaken Enrichments' (n 9) 767.

[28] *Wayne County Produce Co v Duffy-Mott Co Inc* 155 NE 669 (NY 1927).

[29] Ibid 669 (Cardozo CJ).

Notably, this reasoning was cited with approval in *Roxborough*.[30] *123 East Fifty-Fourth Street* is another example.[31] There, the defendant restaurant owner paid tax which was, in fact, not due. The defendant recovered the tax amount. However, that amount had already been passed on by the defendant to its patrons. The question was whether the patrons could recover the tax component from the defendant. The second circuit Court of Appeals held:[32]

> [I]f, before the plaintiff had paid it, the treasury had declared that the tax was not due, the plaintiff could not have successfully resisted the guests' demand that it be turned back to them, the very purpose for which they had paid it having then become incapable of execution.

In other words, the obligation of the patrons to pay the tax component was conditional on the validity of the defendant's tax liability. This reasoning has also been adopted in Australia.[33] In fact, in the New South Wales Court of Appeal, Gyles J had decided *Roxborough* on this basis.[34]

5. ***Roxborough*: The Conditionality Explanation**

The previous section demonstrated that, in *Roxborough*, the retailer's obligation was conditional on the validity of the license fee. Once this is accepted, it becomes apparent that restitution in those circumstances did not contradict the contractual obligation.

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[30] *Roxborough* (n 3) [18].

[31] *123 East Fifty-Fourth Street v United States* 157 F 2d 68 (2d Cir 1946).

[32] Ibid 71.

[33] *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (Mason CJ).

[34] *Roxborough v Rothmans of Pall Mall Australia Ltd* [1999] FCA 1535 [100] (Gyles J). See also, *James More & Sons Ltd v University of Ottawa* 49 DLR (3d) 666 (Ont HC).

The proposition that restitution can follow from the failure of conditional obligations, even within a subsisting contract, commands some judicial support. *British American Continental Bank* is one example.[35] There, the dispute concerned a currency exchange transaction. Bankruptcy proceedings had been commenced against the purchaser. Unaware of this, the claimant paid the defendant. Later, the claimant sought restitution. It was argued that the payment was made in fulfillment of the claimant's liability and was, hence, irrecoverable. This argument was rejected on the basis that the payments were mutually conditional. Failure of one defeated the other.[36]

The conditionality reasoning establishes two propositions. First, the retailer's obligation in *Roxborough* was conditional on the wholesaler's license fee liability. Secondly, in cases where conditional obligations fail, restitution may operate within a subsisting contract. When read together, these propositions reconcile *Roxborough* with the bright-line conception of the legal obligation qualification. The invalidity of the license fee meant that the retailer was not under a liability to pay the defendant. Therefore, the payment did not discharge the wholesaler's claim against the retailer. The invalidity of the statute defeated that claim. Consequently, the award of restitution in *Roxborough* does not contradict the conceptualisation of the legal obligation qualification as a bright-line rule.

B. *DMG*: AN 'EU ESTOPPEL' EXPLANATION

The decision of the House of Lords in *DMG* is puzzling in many respects. The characterisation of the claimant's mistake, the true import of ECJ's judgment in

[35] *British American Continental Bank v British Bank for Foreign Trade* [1926] 1 KB 328 (CA).

[36] Ibid 344–345 (Scrutton LJ), 341 (Warrington LJ).

Metallgesellschaft,[37] whether the tax was due when it was paid and, finally, the significance of the claimant's failure to opt for a Group Income Election ('GIE'); none of these points are free from controversy. The focus of this section is on a narrower issue. It suggests that the decision in *DMG* can be reconciled with the operation of the legal obligation qualification based on the principle of 'EU estoppel'.[38]

1. The Decision in *DMG*

The dispute concerned the claimant's obligation to pay Advance Corporation Tax ('ACT'). Under the Income and Corporation Taxes Act 1988 ('the Act') dividend distributions by UK resident companies were subject to ACT. However, ACT could later be set off against Mainstream Corporation Tax ('MCT'). Notably, the Act provided for an exemption for distributions between companies that had opted for GIE. However, this exemption was only available if the paying company and the receiving company were both resident in the UK.[39] This provision was challenged before the ECJ in *Metallgesellschaft*. The ECJ found that the discriminatory nature of the GIE provisions breached the freedom of establishment guaranteed by the EC Treaty.[40] The remedial consequences of this conclusion were, however, left to national Courts.[41] That issue arose for the consideration of the English Courts in *DMG*.

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[37] Joined cases C-397/98 & 410/98 *Metallgesellschaft Ltd & Others, Hoechst AG & Another v Inland Revenue Commissioners* [2001] ECR I-1727.

[38] Terminology adapted from *Foster v British Gas Plc* [1988] ICR 584 (CA) (Lord Donaldson MR).

[39] Income and Corporation Taxes Act 1988, s 247(1).

[40] *Metallgesellschaft* (n 37) [76].

[41] Ibid [96].

The claimants were a German holding company and its UK subsidiaries. The residence requirement denied them the opportunity to opt for GIE. Had this not been the case, they argued, a GIE would have been made. This would have meant that the subsidiary was not liable for ACT. Consequently, the claimants sought restitution from the Revenue. Two features of the claim are notable. First, the claimant's ACT had been set off against its MCT liability. Consequently, the Revenue's enrichment consisted solely in a timing advantage. Secondly, to take advantage of the extension of the limitation period for claims seeking 'relief from the consequences of a mistake',[42] the claimant chose to rely on the unjust factor of mistake.

At first instance, Park J granted restitution.[43] He made two significant findings. First, the judgment in *Metallgesellschaft* did not nullify DMG's tax liability. Secondly, DMG's mistake consisted in not realising that it 'could have made group income elections… which would have had the effect of preventing the ACT from being payable'.[44] The Court of Appeal took a different view. According to Parker LJ, ECJ's judgment nullified the claimant's obligation to pay tax.[45] Thus, DMG's mistake consisted in its belief that ACT was payable; in fact, it was not. The House of Lords reversed this judgment.[46] Leaving aside the wide array of issues addressed by the law lords, the discussion here will be confined to two questions: was the ACT due when it was paid? If so, what implication does that conclusion have for restitution?

[42] Limitation Act 1980, s 32(1)(c).

[43] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2003] EWHC 1779 (Ch), [2003] 4 All ER 645 (Park J) ('*DMG* (Ch)').

[44] Ibid [21].

[45] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2005] EWCA Civ 78, [2006] 2 WLR 103 (Parker LJ).

[46] *DMG* (n 4).

None of the judges except Lord Scott convincingly addressed the difficulty posed by the fact that the claimant was seeking restitution of a sum that was due under a valid obligation. Lord Hoffmann agreed with the Court of Appeal that 'the mistake was about whether DMG was liable for ACT'.[47] Further, in his view, the ECJ's judgment did not nullify the tax liability. This conclusion, along with the fact that the claimant did not exercise GIE should have led him to consider the implications of the fact that the claimant was seeking restitution of a sum that was due. He sought to overcome that difficulty in this passage:[48]

> The election provisions were purely machinery, which DMG would undoubtedly have used, by which it could enforce its right to exemption from liability.

Lord Walker similarly dismissed GIE as a 'procedural requirement'.[49] Lord Hope, in contrast, characterised the mistake differently. Agreeing with Park J, he held that the claimant's mistake consisted in its belief that GIE was not available.[50] Beyond this, he did not address the difficulty posed by the fact that ACT was in fact due. Lord Scott dissented. In his view, the ECJ's judgment did not nullify the claimant's ACT liability. Based on that premise, he reasoned:[51]

> [I]f the legal obligation under which the money was paid cannot be, or has not been, invalidated, then, in my opinion, whether or not it can be shown that 'but for' the mistake in question the money would not have been paid, a restitutionary remedy for the recovery of the money would not be available.

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47 Ibid [32] (Lord Hoffmann).

48 Ibid [32] (Lord Hoffmann).

49 Ibid [143] (Lord Walker).

50 Ibid [62] (Lord Hope).

51 Ibid [85] (Lord Scott).

2. Reconciling *DMG* with the Legal Obligation Qualification

At first blush, the decision in *DMG* contradicts the legal obligation qualification. That is because the claimant's payment was made to discharge a statutory obligation. On closer examination, however, the decision in *DMG* can be reconciled with the legal obligation qualification. That claim is premised on three propositions: (**1**) The ACT was owed when it was paid; (**2**) Proposition (1) dictates the characterisation of the mistake; (**3**) The principle of 'EU estoppel' precludes the Revenue from relying on Section 247(1) against the claimant.

i. The ACT Was Due When It Was Paid

The view that the ECJ's decision in *Metallgesellschaft* nullified the claimant's ACT liability is incorrect. First, this reasoning misunderstands the relationship between EU norms and national legislations.[52] The European Communities Act, 1972, incorporates obligations created by the European Union into the English legal system.[53] In cases of conflict they take precedence over domestic norms. However, the appropriate remedy to rectify national legislations that contravene EU norms is the process of 'disapplication' by national Courts.[54] Non-compliance with EU norms does not automatically nullify primary legislations. This was the view adopted by the Court in *Thoburn*.[55] As Craig remarks:[56]

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[52] Robert Stevens, 'Justified Enrichment' (2005) 5 OUCLJ 141, 143.

[53] European Communities Act 1972, s 2(1).

[54] *Regina v Secretary of State for Transport, Ex parte Factortame Ltd & Others (No 2)* [1991] 1 AC 603 (HL).

[55] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

[56] House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, vol 1 (10th Report 2010–11) [21] <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/633i.pdf> accessed 22 September 2014.

> What Lord Justice Laws said in *Thoburn* was that the constitutional impact of EU law on national law was not going to be dictated top-down by the European Court of Justice on our courts… So it is for our courts to decide what they believe to be the impact of EU law within our national constitutional order.

Secondly, a close reading of *Metallgesellschaft* negates the view that the tax was not owed. The ECJ did not hold the levy of ACT invalid. In contrast, it was the discriminatory nature of the taxation regime that contravened the EC Treaty:[57]

> [W]hat is contrary to Community law… is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement.

Finally—and this must follow from the second point—there were at least two ways in which the breach of the EC Treaty could have been rectified: by making GIE available to all companies regardless of residence or by making them inapplicable even for UK resident companies. Either would have ensured that the taxation regime was non-discriminatory. The choice between these two methods must be left to the member-state. The view that ACT liability is automatically nullified by the ECJ's decision pays inadequate attention to this consideration.

ii. Characterising the Mistake

The previous section established that the ACT was due when it was paid. This must mean that the Court of Appeal's characterisation of the mistake was incorrect. The claimant's belief that it was liable to pay ACT was true.[58] Rather, the relevant mistake

[57] *Metallgesellschaft* (n 37) [83]. See also, Robert Chambers, '*Deutsche Morgan Grenfell Group Plc v IRC*' (2006) 6 OUCLJ 227, 228; Stevens, 'Justified Enrichment' (n 52) 143.

[58] *DMG* (Ch) (n 43) [231].

consisted in DMG's belief that it was not eligible to make a GIE. On the true state of the law, that was false.

iii. EU Estoppel

The principle of 'EU estoppel' was first evolved by the ECJ in the context of 'direct effect' of unimplemented directives.[59] Its first authoritative formulation is in Advocate General Warner's opinion in *Enka*:[60]

> A member state that fails fully to give effect to a directive is in breach of the Treaty… to allow it… to rely upon that fact as against a private person in proceedings in its own Courts would be to allow it to plead its own wrong.

Within a span of two years, 'EU estoppel' was adopted as a full-fledged rationale for the direct effect of unimplemented directives.[61] The ECJ first made that move in *Ratti.*[62] There, criminal proceedings had been initiated against Mr Ratti under an Italian law which required manufacturers of chemical products to affix labels indicating the substances present in them and their volume. At the time of prosecution, the charging legislation ought to have been amended to ensure compliance with Directive 73/173. This would have resulted in the repeal of the provision under which Mr Ratti was charged. The ECJ concluded that the proceedings against Mr Ratti were unlawful. It held:[63]

> [A] member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against

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[59] Sacha Prechal, *Directives in EC Law* (2nd rev edn, OUP 2005) 218–223.

[60] Case 38/77 *Enka BV v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 2203, 2226 Opinion of AG Warner. See also, Alan Dashwood, 'The Principle of Direct Effect in European Community Law' (1978) 16 Journal of Common Market Studies 229.

[61] Paul Craig & Gráinne Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 280.

[62] Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629.

[63] Ibid [22].

individuals, on its own failure to perform the obligations which the Directive entails.

Subsequent case law of the ECJ has reaffirmed the 'EU estoppel' principle. The ECJ's decision in *Faccini Dori*,[64] for instance, reinforced the estoppel reasoning. It held that the *Ratti* line of cases was intended to 'prevent a State from taking advantage of its own failure to comply with Community law'.[65] The State's failure to comply with EU norms must not deprive individuals of the benefit of those norms. Subsequently, the estoppel rationale has been reiterated by the ECJ, inter alia, in the context of directives intended to ensure equality of working conditions between men and women,[66] social security benefits,[67] and employment in the armed forces.[68] English Courts have also affirmed the EU estoppel doctrine.[69]

iv. Reconciling DMG with the Enrichment Thesis

As established in Section (ii), the claimant's mistake in *DMG* was its belief that it was not eligible to make a GIE. That mistake was causally linked to the Revenue's enrichment. This establishes a prima facie case for restitution. There are, however, two complications. First, it may be suggested that the claimant did not make a mistake as to the availability of GIE. That is because, even if the claimant had applied to exercise GIE, Revenue would have rejected that claim relying on the residence

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[64] Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325. See also, Case C-316/93 *Nicole Vaneetveld v SA Le Foyer* [1994] ECR I-763, Opinion of AG Jacobs [20].

[65] *Faccini Dori* (n 64) [2].

[66] Case 152/84 *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

[67] Case 286/85 *Norah McDermott & Ann Cotter v Minister for Social Welfare & the Attorney General* [1987] ECR 1453.

[68] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

[69] *Foster v British Gas Plc* [1991] 2 AC 306 (HL) 315; *Marks & Spencer Plc v Customs & Excise Commissioners (No 1)* [2000] 1 CMLR 256 (CA); *Rolls Royce Plc v Mrs D Doughty* [1988] 1 CMLR 569 (UKEAT).

requirement in Section 247.[70] Secondly, it may be argued that the claimant's valid statutory obligation to pay ACT precludes restitution. That liability subsisted as long as the claimant did not exercise GIE. As Stevens puts it, 'the election was like a lever which, when pulled, could prevent liability from arising'.[71] In *DMG*, the claimant never pulled the lever.

However, both these arguments are incorrect for the same reason. Both of them permit the Revenue to rely on the discriminatory and, hence, unlawful residence requirement in Section 247 against the claimant. The first objection relies on the fact that even if the claimant attempted to make a GIE, the Revenue would have rejected it. However, that rejection would have been premised on the discriminatory residence requirement in Section 247. This is precisely the line of reasoning that 'EU estoppel' prevents the Revenue from taking. By virtue of that principle, the Revenue cannot, as against the claimant, rely on its own unlawful rejection of the claimant's GIE. That is because such rejection would be an act in breach of the EU law. In essence, the Revenue would be relying on its own breach of the EU law to deny restitution to the claimant. That is impermissible.

Consider now, the second objection. The crux of that objection is this: since the claimant did not in fact exercise a GIE, its ACT payment was made in pursuance of a valid statutory obligation. This precludes a remedy in unjust enrichment. The first step towards establishing the incorrectness of this argument lies in examining the circumstances under which the claimant failed to exercise GIE. As Park J found at first instance, the only reason the claimant chose to not exercise the GIE was because

[70] Graham Virgo, 'Deutsche Morgan Grenfell: Restitution of Tax Paid by Mistake' [2004] BTR 8, 10–11.

[71] Stevens, 'Justified Enrichment' (n 52) 142–143.

Section 247—a provision in breach of the EC Treaty—precluded that option.[72] For the Revenue to rely on the liability of the claimant that arose solely by virtue of its failure to exercise the GIE, therefore, amounts to the Revenue relying on its own unlawful act (in the form of Section 247) to deny the claimant a restitutionary remedy that would otherwise have been available.[73] The principle of EU estoppel precludes this result.

v. Advantages of the 'EU Estoppel' Explanation

The 'EU estoppel' explanation has the added advantage that it reconciles the decision in *DMG* with two other commonly proposed counterfactuals.

> *Example 3A*: C seeks restitution of tax from the Revenue. C argues that she would not have had to pay the tax had she not mistakenly failed to exercise an election in a deed of variation.[74]
>
> *Example 3B*: C seeks restitution of tax from the Revenue. C argues that, had she not used up her tax reliefs against an earlier unlawful exaction by the Revenue, she would have been able to offset those reliefs against the later levy of lawful tax.[75]

In Examples 3A and 3B, the tax was paid in pursuance of C's valid statutory liability. In contrast to *DMG* however, that liability was not procured by the Revenue's breach of obligations. Thus, the Revenue may rely on the claimant's legal obligation as precluding restitution. Consequently, the decision in *DMG* does not further C's claim in these examples. The 'EU estoppel' explanation for *DMG* therefore permits one to

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[72] *DMG* (Ch) (n 43).

[73] See, Charles Mitchell & Monica Chowdry, 'Tax Legislation as a Justifying Factor' [2005] Restitution Law Review 1, 18 ('*Deutsche Morgan Grenfell* was anomalous, in that the infringing statutory section did not impose a liability, but rather denied the claimants an opportunity which it gave other taxpayers to escape from a liability or, more accurately, to defer their liability to a later date').

[74] *Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2008] EWHC 2893 (Ch), [2009] STC 254 [257].

[75] *Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2010] EWCA Civ 103, [2010] STC 1251 [181] (Arden LJ).

reach the intuitively appealing result that C's claims in 3A and 3B must be rejected. It also suggests that the decision in *DMG* does not support the idea that the legal obligation qualification is a flexible rule; *DMG* was simply a case where the defendant was estopped from relying on the countervailing legal obligation.

C. UNENFORCEABLE CONTRACTS

The previous sections demonstrated that *Roxborough* and *DMG* are both compatible with the bright-line conception of the legal obligation qualification. This section will consider a third instance that seemingly contradicts the bright-line conception of the legal obligation qualification: restitution of money paid or services rendered under an unenforceable contract.

In relation to this 'exception', Burrows notes:[76]

> When a contract is unenforceable… the contractual obligations under it are probably best viewed as valid… however, there can be restitution of money paid or for services rendered under an unenforceable contract; and the best justification for that is that restitution does not conflict with the contractual allocation of risk given that the contract is unenforceable.

Similarly, Havelock has argued that since an unenforceable contract 'is not effective… it is fully disposed of and allowing an unjust enrichment claim cannot interfere with the primacy of contract'.[77]

Although Burrows cites no authorities in support of this proposition in the commentary, in the *Restatement*,[78] he relies on the Canadian Supreme Court's

[76] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 90.

[77] Rohan Havelock, 'A Taxonomic Approach to Quantum Meruit' (2016) 132 LQR 470, 484.

[78] Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 34–35.

decision in *Deglman v Guaranty Trust Co of Canada*[79] ('*Deglman*') and the Australian High Court's decision in *Pavey & Mathews Pty Ltd v Paul* ('*Pavey*').[80]

This section will argue that cases granting restitution in respect of payments made or services rendered under an unenforceable contract are consistent with the bright line conception of the legal obligation qualification. It is unnecessary to rely on a 'flexible exception' to explain these cases. Moreover, the application of Burrows's 'policy' exception to these cases is unsustainable on principle. Sub-section 1 will outline the central cases. Sub-section 2 will then consider and reject Burrows's explanation for these cases and finally, (3) will defend an alternative approach.

1. The Cases

Interestingly, the cases relied on to support the 'unenforceable contracts exception'—*Deglman* and *Pavey*—were also the first decisions to recognise unjust enrichment as a unified legal concept in Canada[81] and Australia[82] respectively. However, the potential problem posed by the subsisting, albeit unenforceable contract passed by unnoticed in both cases. Indeed, the contract was often seen as supporting rather than detracting from the restitution claim.[83]

Consider *Deglman* first. There, the dispute arose from a period of 6 months during which the plaintiff lived with his aunt. During that time, she requested him to run errands and perform services for her. In return for this, she promised that she

[79] *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725 (Supreme Court of Canada).

[80] *Pavey & Mathews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221.

[81] GHL Fridman, *Restitution* (2nd edn, Carswell 1992) 303.

[82] Michael Bryan, 'Peter Birks and Unjust Enrichment in Australia' (2004) 28 Melbourne University Law Review 724.

[83] Peter Maddaugh and John McCamus, *The Law of Restitution* (looseleaf edn, Thomson Reuters 2016) [13-4]–[13-5]. Fridman (n 81) 303.

would make adequate provision for him in her will. In particular, she offered to leave him a piece of property that she owned. In the Supreme Court, it was admitted that this constituted a valid oral contract. It was also admitted that the contract was fully performed by the plaintiff. However, s 4 of the Statute of Frauds posed a problem. It provided that 'no action shall be brought' based on a contract in respect of 'any interest in or concerning' 'lands', unless 'the agreement… or some memorandum or note thereof' was 'in writing'. As a consequence, the oral contract although valid, was not enforceable.[84] This conclusion led to the second question: can the plaintiff seek a claim based on quantum meruit for the value of services he rendered?

The Court unanimously answered this question in the affirmative. Crucially, Rand J recognised that the plaintiff's claim was one for restitution of the defendant's unjust enrichment.[85] This was not an action based on the aunt's contractual promise. Consequently, to this claim, it was held, the Statute of Frauds did not pose an impediment. Importantly, and in consistence with the restitutionary basis of the claim, the plaintiff was not awarded a right to the defendant's property, or its value. Instead, he was held entitled to the amount that 'the deceased would have had to pay for [his services] on a purely business basis'.[86]

In *Deglman*, it was never suggested that the oral contract posed a hurdle for the restitution claim. Evidently, however, the claimant rendered the services in furtherance of a valid subsisting oral contract. As Duggan, Ziegel and Girgis put it,

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[84] On this point, the Supreme Court reversed the Ontario Court of Appeal. The Court of Appeal had found that 'the part-performance exception' took this case out of the purview of the Statute of Frauds: see, *Deglman v Guaranty Trust Co of Canada* [1953] OWN 665 (Ontario Court of Appeal) [3].

[85] *Deglman* (Supreme Court of Canada) (n 79) [7] (Rand J)

[86] Ibid [8] (Rand J).

'when the plaintiff did the work, he had a legal, contractual obligation to do so'.[87] In the language of the Canadian law of restitution, therefore, there was a valid 'juristic basis' for the defendant's enrichment. Why then did the legal obligation qualification not preclude the plaintiff's claim?

Pavey poses a similar puzzle. The facts are similar to *Deglman*. The claimants were builders. They had carried out building work for the defendant under an oral contract. The work was completed and the defendant took possession. Subsequently, the builders brought a claim for the balance they were due to be paid. The defendant argued that the oral contract was unenforceable as a consequence of s 45 of the New South Wales Builders Licensing Act 1971. S 45 provided that a 'building contract' was unenforceable unless it 'is in writing signed by each of the parties'. The central question for the court was whether s 45 also precluded the claimant from seeking quantum meruit for the value of services he rendered? The majority held that the plaintiff's claim had a 'different foundation in law'[88] from the oral contract between the parties. It did not depend on an implied contract between the parties. It turned instead on the need to reverse the unjust enrichment that the defendant derived from the claimant's services.

Deglman and *Pavey* are perhaps the most cited examples of restitution in respect of money paid or services rendered under an unenforceable contract. However, they are by no means the only examples of this trend. Numerous other decisions from both England[89] and America[90] have granted restitution for services

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[87] Anthony Duggan, Jacob S Ziegel and Jassmin Girgis, 'The State Of The Law of Unjust Enrichment in Common Law Canada' (2009) 59 Canadian Business Law Journal 39, 39.

[88] *Pavey* (n 80) 228.

[89] See *Mavor v Pyne* (1825) 3 Bingham 285, 130 ER 522; *Pulbrook v Lawes* (1876) 1 QBD 284; *Scarisbrick v Parkinson* (1869) 20 LT 175. See generally, David Ibbetson, 'Implied

rendered in furtherance of unenforceable contracts. *Scott v Pattison*[91] illustrates this. There, under a parol agreement with the defendant, the claimant worked as a farm labourer for a year. At the end of the year, the defendant refused to reimburse the claimant. The claimant then brought an action 'in assumpsit for services already rendered'.[92] In the King's Bench Division, the claim was granted. The Court's reasoning in granting this claim is rendered suspect as a consequence of its reliance on the implied contract fallacy. However, importantly, Salter J said:[93]

> If a party to a contract, which is unenforceable under the Statute of Frauds, has rendered services under that contract to the other party, and the other party has accepted and benefited by those services, then I think that the party who has rendered the services can sue the other party in debt on an implied contract to pay him according to his deserts. That is not enforcing the unenforceable contract but a different contract which is quite enforceable.

2. Burrows's Reasoning

As noted previously, according to Burrows, these cases were right in granting restitution despite the presence of a subsisting contractual relationship between the parties. That is because, in these instances, 'restitution does not conflict with the contractual allocation of risk given that the contract is unenforceable'.[94] With respect, it will now be shown that this reasoning does not withstand scrutiny.

Contracts and Restitution: History in the High Court of Australia' (1988) 8 OJLS 312, 319–325.

[90] See generally, George Palmer, *The Law of Restitution*, vol 3 (Little, Brown 1978) 326.

[91] *Scott v Pattison* [1923] 2 KB 723 (KB).

[92] Ibid 726.

[93] Ibid 727–728.

[94] Burrows, *The Law of Restitution* (n 76) 90. See also, Havelock (n 77) 484.

First, despite their unenforceability, contractual obligations remain valid. Unenforceability affects the remedy, not the right.[95] This view has been consistently affirmed judicially, both in the context of the Statute of Frauds,[96] and in relation to other reasons for unenforceability.[97] In fact, Birks goes so far as to say that 'the word "unenforceable" is by convention reserved for a good contract on which *no action can be brought*'.[98] Indeed, Burrows himself admits the validity of this proposition. He notes that 'an unenforceable contract is a valid contract but is simply unenforceable in the courts by one or both parties'.[99]

Secondly, contrary to Burrows's assertion, the unenforceability of a valid and subsisting contract does not undermine the contractual allocation of risks.[100] There are a number of reasons that vindicate this view. To begin with, none of the common reasons for unenforceability relate to the substance of the contract. Consider for example, a time-barred contractual debt. The Limitation Act 1980 bars claims based on a contract after the expiry of six years[101] from the cause of action. But the reasons for this rule are entirely policy-based. The unfairness associated with defendant's

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[95] HG Beale and AS Burrows, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [1-112]; Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [2-44]; Tariq A Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636, 643.

[96] *Leroux v Brown* (1852) 12 Common Bench Reports 801, 138 ER 1119.

[97] *Anthony McIntyre v Gentoo Group Limited* [2010] EWHC 5 (Admin).

[98] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 126 (emphasis added).

[99] Burrows, *The Law of Restitution* (n 76) 105.

[100] AT Denning, 'Quantum Meruit and the Statute of Frauds' (1925) 41 LQR 79, 81 ('The work was done under an express contract, and although that contract was not enforceable it was a valid, subsisting and unrescinded contract and, in accordance with the third proposition stated above, no action in those circumstances should have been allowed on an implied contract').

[101] Limitation Act 1980, s 5.

being harassed[102] with 'stale claims',[103] the dangers arising from deterioration in evidence over time,[104] and the need to incentivise claimants to bring their actions relatively quickly[105] are reasons often relied on in support of a limitation period. Evidently, these reasons have nothing to do with the parties' contractual allocation of risks. Indeed, it is difficult to see why the passage of time *after* a breach of contract should have any consequence for an otherwise valid, and voluntary, risk-allocation. Similarly, consider contracts that fall foul of the Statute of Frauds. There, again, it is commonly accepted that the purpose of the legislative provision is to 'protect against false claims'.[106] It is unsurprising therefore that both the Limitation Act and the Statute of Frauds only prohibit the *bringing of an action*[107] based on an obligation. They do nothing to invalidate the obligation itself.

Finally, there are a number of instances that unequivocally indicate that the validity of parties' risk allocation is unaffected by contractual unenforceability. A creditor's right to appropriate a debtor's undesignated payment to discharge a time-barred debt, is one example. Consider a debtor who owes a number of debts to the creditor. Let us assume that one of the debts is time-barred. If the debtor does not specify the debt that is intended to be discharged, the creditor is free to appropriate

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[102] Andrew McGee, *Limitation Periods* (7th edn, Sweet & Maxwell 2014) 14; Andrew Burrows, 'Some Recurring Issues in Relation to Limitation of Actions' in James Goudkamp, Andrew Dyson and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) 311–312.

[103] *AB v Ministry of Defence* [2012] UKSC 9, [2013] 1 AC 78 [164] (Lady Hale).

[104] Tang Hang Wu, 'Natural Obligations and the Common Law of Unjust Enrichment' (2015) 6 Oxford University Commonwealth Law Journal 133, 139; Andrew Burrows, 'Some Recurring Issues in Relation to Limitation of Actions' in James Goudkamp, Andrew Dyson and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) (n 30) 311–312.

[105] McGee (n 102) 14; Burrows, 'Some Recurring Issues in Relation to Limitation of Actions' (n 104) 311–312.

[106] Keith Turner QC, 'The Law of Restitution by George E Palmer' (1979) 9 Manitoba Law Journal 335, 339.

[107] Statute of Frauds 1677 (England), s 4; Statute of Frauds 1990 (Canada), s 4; Limitation Act 1980, s 5.

that payment to the time-barred debt.[108] Another similar example arises from the context of creditor's lien. A creditor who is entitled to exercise a lien on goods belonging to the debtor may exercise that right even though the underlying debt is no longer unenforceable.[109] These examples indicate that the underlying debt, and consequently, the parties' risk allocation, is preserved despite the contract's unenforceability. This is further buttressed by the fact that unenforceability resulting from non-compliance with many formality requirements may be cured by subsequent compliance. For example, although an oral agreement on its inception may be unenforceable on account of s 4 of the Statute of Frauds, a subsequent signed note or memorandum of that agreement can cure that defect.[110] As long as the note or memorandum is prepared before the action is brought, the agreement becomes enforceable.[111] The examples in this paragraph would be inexplicable if the consequence of unenforceability was to defeat the parties' contractual allocation of risks. In contrast, on the view that rules of contractual unenforceability are remedial restrictions, they are intelligible.

3. An Alternative Explanation

The previous section demonstrated that Burrows's explanation for cases such as *Deglman* and *Pavey* suffers from insuperable problems. This section will offer an alternative explanation. The explanation offered here is based on the conditional nature of the defendant's contractual entitlement in those cases.

[108] *Friend v Young* [1897] 2 Ch 421 (Ch); Beale and Burrows (n 95) [28-129].

[109] *Spears v Hartly* (1800) 3 Espinasse 81, 170 ER 545.

[110] *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1991] 3 WLR 330 (HL).

[111] Beale and Burrows (n 95) [45-053].

Briefly, the argument runs as follows. In cases such as *Deglman* and *Pavey*, the claimant was under a valid contractual obligation to render services to the defendant. As a logical corollary, the defendant had a valid contractual entitlement to the claimant's services. However, importantly, this was not an unconditional entitlement. The defendant's contractual right to the claimant's services was premised on the defendant's obligation to remunerate/reward the claimant. In *Deglman*, for instance, the defendant aunt's contractual right to the claimant's services was conditional on her obligation to make adequate provision for the claimant in her will. This is clear from the parties' oral contract. Both the Ontario Court of Appeal[112] and the Canadian Supreme Court[113] found that the claimant had rendered the services based on the aunt's promise to bequeath him property under her will. In *Pavey* similarly, the claimant builders provided services to the defendant on the basis that the defendant would remunerate them for their work.[114] Put differently, the defendant's contractual entitlement was not a right to gratuitous services from the claimant. It was an entitlement to the claimant's services subject to remuneration. In contractual terms, therefore, the defendant's obligation to remunerate was a condition-precedent for the defendant's entitlement to services. The defendant's failure to remunerate defeats that entitlement. As McInnes puts it, in *Deglman*, 'while [the claimant] initially intended to confer the benefit upon his aunt, her right to retain the value of that enrichment was ultimately premised upon her conveyance of the house'.[115]

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[112] *Deglman* (Ontario Court of Appeal) (n 84) [1].

[113] *Deglman* (Supreme Court of Canada) (n 79) [2].

[114] *Pavey* (n 80) 224–225.

[115] Mitchell McInnes, 'The Measure of Restitution' (2002) 52 The University of Toronto Law Journal 163, 204–205.

On this view, cases such as *Deglman* and *Pavey* are not, in fact, exceptions to the bright-line conception of the legal obligation qualification. They are cases where the defendant's entitlement was defeated by the underlying conditionality of the contractual obligation. In both cases, a condition precedent to the defendant's entitlement was not satisfied. The claimant's services were therefore, not properly 'earned' by the defendant.[116] There are a number of reasons for adopting the explanation offered here in preference to Burrows's reasoning.

First, there is some support in the academic literature for this view. For instance, Weinrib adopts the conditionality reasoning to rationalise *Deglman*. He says:[117]

> The relevant question is not whether the plaintiff was obligated to do certain acts, but whether he was obligated to transfer value—that is, to do those acts without receiving their quantitative equivalent in return. Although the nephew was contractually obligated to provide the services, he was not contractually obligated to provide them for nothing, as if he had made a gratuitous promise under seal.

To McInnes similarly, what was determinative in *Deglman* was the conditionality of the defendant's enrichment. 'Despite fully intending the defendant to receive an enrichment', he argues, 'the plaintiff may intend for him to retain it only if

[116] Robert Stevens, 'Is There a Law of Unjust Enrichment?' (n 26) 24–30; Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Peter Birks, Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 173–175; James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) ('There are a number of situations in which a defendant has a juristic reason for receipt, but no juristic reason to retain an enrichment… Consider the facts of the famous English case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*… the contract provided for a juristic reason for the receipt of the money, but once the contract had been terminated without the counter-performance upon which the payment depended, there was no accrued right to retain the payment. This is why Lord Wright said that the payment was conditional and the right to retain it fell away when the condition failed'); McInnes (n 115) 175 ('Despite fully intending the defendant to *receive* an enrichment, the plaintiff may intend for him to *retain* it only if a certain condition is met').

[117] Ernest Weinrib, 'Unjust Enrichment' in *Corrective Justice* (OUP 2012) 219.

a certain condition is met.'[118] That condition was never satisfied. Consequently, the plaintiff was entitled to relief.[119]

Secondly, Burrows's reasoning cannot reconcile the principle in *Deglman* and *Pavey* with decisions that deny restitution of enrichments conferred under valid but unenforceable contracts. Indeed, the general rule appears to be that enrichments conferred under unenforceable contracts are irrecoverable.[120] Interestingly, support for that view goes as far back as *Moses v Macferlan*.[121] There, Lord Mansfield specifically identified the mistaken 'payment of a debt barred by the Statute of Limitations'[122] as an instance where an action for recovery would fail. In *Bize v Dickason*[123] he reiterated this view. In that case, the defendant had underwritten insurance policies issued by the claimant insurer. After paying out the claims, the claimant sought reimbursement from the defendant. Overall, the claimant was owed £662. However, the claimant owed the defendant the much larger sum of £1,356 as insurance premiums. The claimant paid off the premiums owed to the defendant mistakenly believing that it was not entitled to deduct £662. Although, strictly, obiter on these facts, Lord Mansfield said,[124]

> [W]here a man has paid a debt, which would otherwise have been barred by the Statute of Limitations… though the law would not have compelled

[118] McInnes (n 115) 175.

[119] See also, Lionel Smith, 'Demystifying Juristic Reasons' (2007) 45 Canadian Business Law Journal 281, 292–293.

[120] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 144; Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson and Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 491.

[121] *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676.

[122] Ibid 680–681.

[123] *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097.

[124] Ibid 286–287.

> the payment, yet the money being paid, it will not oblige the payee to refund it.

This general rule finds support in German law. §214(2) of the BGB provides that:[125]

> Performance made in satisfaction of a claim that has become time-barred may not be reclaimed, even if made without knowledge of the time-bar.

The rule is also reflected in the American Third Restatement. Illustration 1 to §62 of the Restatement deals with this point. It reads:

> A owes B $5000, but (unknown to either party) the debt is no longer enforceable because the statute of limitations has run. A pays B, then learns that his payment could not have been legally compelled. A has a prima facie claim to restitution of the mistaken payment… but B is not unjustly enriched by A's payment of a valid but unenforceable debt. B is not liable to A in restitution.

On Burrows's analysis, the unenforceability of the contracts in these cases should have meant that there was no conflict between the restitution claim and the contractual allocation of risks. On that approach, the denial of the restitution is inexplicable. On the analysis preferred here, however, the result in these cases is unsurprising. In both *Moses* and *Bize*, the defendant was unconditionally entitled to the enrichment. The unenforceability of the underlying obligation does not detract from that conclusion.

Consider now, *Sweet v Lee*,[126] another instance where restitution was refused on the basis that the enrichments were conferred under an unenforceable contract. There, the claimant was a publisher and the defendant, an author. In consideration of the defendant's services in editing, revising, and preparing the new edition of a book, the

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[125] Gerhard Dannemann, 'Unjust Enrichment as Absence of Basis: Can English Law Cope?' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 369.

[126] *Sweet v Lee* (1841) 3 Manning & Granger 452, 133 ER 1220.

claimant agreed to pay an annuity for the defendant's life. In furtherance of this contract, the defendant supplied some portion of the manuscript to the claimant. The claimant created printed sheets of the manuscript copy. These were then sent over to the defendant for verification. The defendant failed to verify the printed copies in time. The claimant was consequently prevented from proceeding with the publication of the new edition. Among other reliefs, the claimant sought restitution of the annuities already paid. It was common ground that the contract was unenforceable due to s 4 of the Statute of Frauds. Despite the unenforceability of the contract however, Tindal CJ rejected the claimant's restitution claim. As with *Moses* and *Bize*, Burrows's analysis cannot explain the result in *Sweet*. Does the conditionality reasoning fare better?

At first blush, *Sweet* appears to resemble cases such as *Deglman* and *Pavey*. In all three cases, the claimant's performance, although due under the unenforceable contract, was conditional on the defendant's counter-performance. Why then did the Court in *Sweet* reach a result different from *Deglman* and *Pavey*? This is because in *Sweet*, unlike in *Deglman* or *Pavey*, the defendant had unconditionally earned the claimant's contractual performance. As noted previously, the defendant in *Sweet* had supplied some of the manuscript copies to the claimant. It is evident from the law report that the claim was based solely on the defendant's failure to verify and return the printed sheets. The formulation of that claim merits reproduction in full:[127]

> [A]lthough a reasonable time for the defendant to examine the print of the said sheets, and see that the same corresponded with the said copy, and correct the same… when [the defendant] did not do so, and otherwise revise and prepare the said sheets, that the same might be printed and carried through the press by the said [claimant] had elapsed, yet the defendant did not use due diligence in that behalf.

[127] Ibid 455.

This was a breach that entitled the claimant to contractual damages. Indeed, the claimant did seek damages for lost profits.[128] Arguably, however, the defendant's breach was not one that went 'to the root of the contract'.[129] Consequently, despite the defendant's breach, and subject to a potential claim for damages, the defendant had an unconditional entitlement to the sum agreed under the contract. The restitution claim would, if permitted, have the effect of reversing the defendant's contractual entitlement. That is impermissible.

Thirdly, the conditionality reasoning derives strong support from an analogous line of cases: those where claimants are granted restitution in respect of services rendered to the defendant in pursuance of a statutory duty. An example.

> *Example 4*: A statute imposes an obligation on all doctors to take reasonable steps to administer medical care to victims of road traffic accidents. D is injured in an accident. C, a doctor, passes by the site of the incident. C attends to D. D recovers, but refuses to remunerate C.[130]

D is enriched by C's services. But C was under a legal obligation to provide those services. Does this preclude C's restitution claim? The preferable view is that it does not. Although this is strictly a question of construction of the particular statute, in the absence of any indications to the contrary, it is likely that the legislation did not intend to impose an 'uncompensated obligation' on D.[131] Put differently, C's statutory

[128] Ibid 455.

[129] *Hoenig v Isaacs* [1952] EWCA Civ 6, [1952] 2 All ER 176.

[130] Based on Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991) 255.

[131] Ibid 254.

obligation to provide medical services to D is conditional on D's liability to remunerate C.[132]

The decision of the Manitoba Court of Appeal in *Matheson v Smiley*[133] illustrates the application of this principle. There, Mr Smiley was found lying on the floor in his house. His friends brought him to the hospital where he was referred to the plaintiff, a surgeon. Despite the plaintiff's best efforts, Mr Smiley succumbed to his injuries. The plaintiff then brought a claim against Mr Smiley's estate seeking remuneration for his professional services. Relying on the decision of the House of Lords in *Metropolitan Asylum District v Frederick Hill*,[134] the Manitoba Court held that those in charge of a sick person are under a common law obligation to 'do to the best of their ability what is necessary for their preservation'.[135] Thus, the plaintiff was acting in discharge of a legal obligation in providing medical services to the defendant. However, Robson JA held that this did not preclude the plaintiff from recovering the value of his services to the defendant.[136] As Friedmann suggests, these cases are best explained on the basis that 'the legal rule impose[d] a duty without intending to order the ensuing enrichment'.[137] Thus, the claimant's duty, and the defendant's corresponding entitlement are both conditional on the defendant's liability to remunerate the claimant. It is this conditionality underlying the defendant's

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[132] For legislative provisions that expressly provide for a similar rule see, Road Traffic Act 1972, ss 155–156; Merchant Shipping Act 1995, s 93(7); Public Health (Control of Disease) Act 1984, ss 46(1) and 46(5).

[133] *Matheson v Smiley* [1932] 2 DLR 787 (Manitoba Court of Appeal).

[134] *Metropolitan Asylum District v Frederick Hill* (1881) 6 App Cas 193 (HL).

[135] Ibid 204.

[136] *Matheson* (n 133) [18]. See also, *Gaudet v Brown* (1873-74) LR 5 PC 134.

[137] Friedmann (n 130) 255.

entitlement that ensures that there is no conflict between the restitution claim and the defendant's entitlement.[138]

Finally, the explanation offered here has the merit of ensuring coherence across a number of different areas. For instance, the conditionality explanation aligns cases that grant restitution within unenforceable contracts with the decision of the High Court of Australia in *Roxborough*. That decision was analysed in a previous section.[139] There, it was demonstrated that it is the conditionality of the retailer's contractual obligation that explains why the restitution claim succeeded within a subsisting contract. The invalidity of the license fee had the consequence that the corresponding sum was no longer due as between the retailer and the wholesaler. Put differently, the wholesaler's contractual entitlement was conditional on the validity of the license fee. The same analysis is determinative in cases where restitution is sought within an unenforceable contract. The relevant question is, does the defendant have an unconditional entitlement to the enrichment in respect of which restitution is sought? In *Deglman* and *Pavey*, that question would have been answered negatively. As Ibbetson puts it in his illuminating analysis of early cases in this area, for the purposes of a restitution claim, 'the fact that the contract might have been unenforceable is in the first place analytically irrelevant'.[140]

In sum, none of the three reasons considered here—the decision of the High Court of Australia in *Roxborough*, the House of Lords' decision in *DMG* and the law relating to restitution of mistaken benefits conferred under unenforceable contracts—

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[138] For the view that these decisions are best understood as not being concerned with unjust enrichment see, Robert Stevens, 'Is There a Law of Unjust Enrichment?' (n 26) 21–22.

[139] See Chapter 4(A), above.

[140] Ibbetson (n 89) 322.

support the idea that the legal obligation qualification is a flexible exception rather than a bright-line rule.

SECTION II

THE NEGATIVE CASE

Section II makes the negative case. It investigates the commonly offered explanations for the legal obligation qualification. It proceeds in two stages. Chapter 5 considers the academic contributions. Chapter 6 examines, what is arguably, the most significant judicial contribution to this debate so far: the recent decision of seven Justices of the Supreme Court in *International Energy Group v Zurich Insurance*.[1]

[1] *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471.

CHAPTER 5

THE SUBSIDIARITY OF UNJUST ENRICHMENT

This Section considers the academic literature that seeks to explain the legal obligation qualification. It will be suggested that almost all academic accounts rely on the subsidiarity of unjust enrichment (**Section A**). They presume that unjust enrichment claims are 'subsidiary' to other legal events and must therefore give way to those in cases of conflict. It will then be argued that a general doctrine according to which unjust enrichment claims are hierarchically inferior to other private law obligations is indefensible in English law (**Section B**).[2]

A. ACADEMIC EXPLANATIONS

Subsidiarity has only rarely been expressly articulated as an explanation for the relationship between unjust enrichment claims and countervailing legal obligations. However, many accounts of that relationship presume subsidiarity. Academic literature offers four prominent examples of this. I will call them the 'contradiction explanation', the 'circularity explanation', the 'absence of basis explanation' and the 'consent explanation'. They will now be examined in turn.[3]

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[2] See generally, Brice Dickson, 'Contract and Restitution: A Few Comparative Remarks' in Francis Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Hart 1997) 246; Stephen Swann, 'The Structure of Liability for Unjustified Enrichment: First Proposals of the Study Group on a European Civil Code' in Reinhard Zimmermann (ed), *Grundstrukturen eines Europäischen Bereicherungsrechts* (Mohr Siebeck 2005) 277; Daniel Visser, *Unjustified Enrichment* (Juta 2008) 57; Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) 170.

[3] Burrows has made a significant contribution to this debate: see Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013). His analysis has now been adopted by the Supreme Court in *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471. Burrows's approach will therefore be evaluated along with that decision in Chapter 6.

1. The Contradiction Explanation

> *Example 1:* C owes D £100. The debt is now time-barred. Intending to discharge the debt, although unaware of the fact that the debt is no longer enforceable, C pays £100 to D. Realising her mistake, C seeks restitution from D. C's claim will not succeed.[4]

On one view, the rule denying restitution in Example 1 is necessary to protect the integrity of D's legal entitlement. According to Friedmann, for example, C's claim is in 'direct conflict with the very concept that [C] was under an obligation to make the payment in the first place'.[5] Permitting restitution will therefore 'nullify'[6] that obligation. That is impermissible. Beatson echoes this view.[7] To Barker, similarly, it would be a 'self-contradiction'[8] for the law to permit restitution in cases like Example 1.

With respect, none of these claims withstand scrutiny. They raise the question, why is D's legal entitlement to the enrichment normatively superior to C's unjust enrichment claim? Consider Friedmann's reasoning. He fears that C's claim for restitution will 'nullify' D's legal entitlement. But would the denial of restitution not amount to D's legal entitlement 'nullifying' C's otherwise valid claim for restitution? It is unclear why that is thought to be less problematic.

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[4] *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676; *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097.

[5] Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991) 248.

[6] Ibid.

[7] Jack Beatson, 'The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 153.

[8] Kit Barker, 'Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement' [1999] RLR 75, 88.

Similarly, although Barker's fear of self-contradiction is well founded, there are two ways of untying that knot. The assertion that this must be done by prioritising the defendant's entitlement over the claimant's restitution claim requires serious justification. Beatson admits this difficulty when he observes, 'a restitution claim in this situation would *either* nullify the contractual obligation, *or* if subject to a contractual defence, be pointless'.[9] How do we make a defensible choice between these alternatives? That enquiry demands more work.

In sum, the contradiction explanation is by itself unpersuasive. It simply presumes that unjust enrichment claims are subsidiary to other legal events.

2. The Circularity Explanation

> *Example 2*: C owes £100 to both D and X. C intended to pay X but mistakenly paid D. C's claim for restitution from D will fail.[10]

Here, C seeks restitution of £100 from D. However, D may rely on the non-restitution obligation to demand £100 from C. That is the basis of the circularity reasoning. It suggests that the denial of restitution in Example 2 is 'required in order to break the circularity of holding a party contractually liable to confer a benefit which the law of restitution requires the other party to return'.[11] There are two potential objections to this reasoning. I will consider each of them in turn.

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[9] Beatson (n 7) 153 (emphasis added).

[10] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65. See also, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 32–33.

[11] Andrew Burrows, 'Solving the Problem of Concurrent Liability' (1995) 48 Current Legal Problems 103, 111. See also, Niamh Connolly, 'A Common Law Perspective on the Concurrence of Claims in Contract and Unjust Enrichment' (2014) 22 European Review of Private Law 1005, 1015.

First, as Stevens argues, the circularity reasoning 'does not explain at which point the circle should be broken'.[12] Webb adds, 'if the problem is merely one of circularity, it could just as well be solved by denying the initial obligation to make the transfer'.[13] However, is this analysis fatal to the validity of the circularity explanation? To answer this question, we must frame the circularity explanation more precisely.

Consider Example 2 again. There, the circularity argument may be made in one of two ways. One of them is as follows:

> *Proposition 1*: The restitution claim requires D to pay C £100. The non-restitution obligation requires C to pay £100 to D. Unless C's claim is denied, these claims will go on in endless circles.

Stevens's and Webb's rejection of proposition 1 is persuasive. The infinite circle of claims between C and D may equally be cut at the point where C receives restitution of £100 from D. Proposition 1 does not explain why the law must stop the circle by prioritising D's non-restitution obligation. Consider now, an alternative formulation of the circularity reasoning:

> *Proposition 2*: Even if C's claim for restitution of £100 from D succeeds, C will immediately be required to restore £100 to D by virtue of D's entitlement. C's claim is, therefore, pointless. Hence, it must be rejected.

According to proposition 2, there are no endless circles in Example 2. There are only two claims. Step 1 is a claim by C against D for restitution of £100. If this claim succeeds, step 2 is a claim by D against C for £100 based on D's entitlement. The existence of D's counter-claim renders C's claim redundant.

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[12] Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 23.

[13] Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 151–152.

Proposition 2 has the support of Lord Hope in *Deutsche Morgan Grenfell Group Plc*.[14] He said:[15]

> At what point can it be said that the payee has been unjustly enriched? The answer… will depend on the facts of the case. One can leave on one side cases where there is another ground on which the payee was entitled to be paid: *frustra petis quod mox restiturus es*.

'*Frustra petis quod mox restiturus es*' is the rule that one ought not to seek in vain that which one must immediately restore.[16] The decision in *Post Office v Hampshire County Council*[17] illustrates this rule. There, employees of the defendant council were engaged in draining water off the road. During this process, they plunged a crowbar into a grass-verge, damaging the claimant post office's underground cables. The claimant sought compensation for the damaged cables. The claim was based on the defendant's employees' negligence. In defence, the Council argued that its employees' decision to dig over the grass-verge was based on negligent advice from the claimant's employees. They had incorrectly informed the workers that the cables lay under the carriageway, not on the grass-verge. Rejecting the post office's claim, Ormrod LJ held:[18]

> I accept without hesitation… that on the authorities this is a classic example of the circuity of action situation and that consequently a defendant to a claim… can rely by way of defence on facts which indicate that <u>had he brought a counterclaim he would have been entitled in law to recover from the Post Office as damages for negligence the sum claimed against him by the Post Office</u>. Consequently I accept… that Hampshire County Council has not only a valid counterclaim but a valid defence to the claim in this case.

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[14] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 ('*DMG*').

[15] Ibid [65] (Lord Hope) (emphasis added).

[16] John Trayner, *Trayner's Latin Maxims* (4th edn, Sweet & Maxwell 1993) 232.

[17] *Post Office v Hampshire County Council* [1980] QB 124 (CA).

[18] Ibid 136 (emphasis added).

In the backdrop of this analysis, is Stevens's reasoning a persuasive objection to proposition 2? It is submitted that it is not.

Just as in *Hampshire County Council*, there is no possibility of an endless circle of claims in Example 2. Example 2 may be analysed in two simple steps. Step 1 is a claim by C against D based on C's mistake. Step 2 is a claim by D against C based on D's entitlement. There is no possibility of a further claim by C against D. This is because C's payment in step 2 was not mistaken. Consequently, there is no unjust factor grounding a further claim by C against D.

Although seemingly more difficult, this analysis is equally workable when the restitution claim is based on failure of consideration. Consider an illustration.

> *Example 3*: C contracted to buy 100 widgets from D. The price, £100, was to be paid in advance. C paid this sum. Subsequently, D failed to deliver the widgets. C seeks restitution of £100 from D.

As in Example 2, step 1 is a claim by C for restitution of £100 from D. In step 2 then, D claims £100 from C based on D's contractual entitlement.[19] There is no unjust factor justifying a further claim by C. One may be tempted to argue that failure of consideration subsists in favour of a third claim by C. But that analysis is incorrect. The 'consideration' for C's primary payment was C's expectation that D will deliver the widgets. However, that is not the basis for C's second payment. The second payment was made to fulfill C's contractual obligation to D. That basis never failed. Consequently, no further failure of consideration claim is available to C.

In response, it may be argued that proposition 2 can be turned on its head. Applying the *frustra petis* rule, can it be argued that D's entitlement is defeated by

[19] Whether £100 is due to D despite the non-delivery of the widgets is a question of contractual construction. For the present purposes, let us assume that it is.

C's potential claim for restitution? It cannot. This is because there is no unjust factor justifying a reversal of C's discharge of D's entitlement. Paying in furtherance of D's demand, C is not mistaken. Further, C's payment is made to fulfil her obligation to D. Consequently, as long as D's entitlement subsists, there is no failure of basis either.

Rover International[20] may appear to support the contrary view. There, T granted P a licence to exhibit its films. In return, P was liable to pay a licence fee. The licence fee was to be paid in installments, in advance of the release of the films. P paid all installments except the final one. T terminated the contract on this basis. T then brought a claim for the last installment. Rejecting the claim, Kerr LJ said:[21]

> In the present case it is entirely clear, in my view, that this instalment was payable in advance of any consideration for the payment which fell to be provided from the side of [P]. Indeed, when [P] declined to pay it, it was rightly pointed out on behalf of [T] that nothing in the way of performance was as yet due from their side. <u>This instalment would accordingly have been recoverable by [P] if it had been paid, and it is therefore irrecoverable by [T] for the same reason</u>.

This reasoning seemingly prioritises P's restitution claim over T's contractual entitlement. However, a closer analysis suggests otherwise. In a passage preceding the one set out above, Kerr LJ had cited with approval Dixon J in *McDonald v Dennys Lascelles Ltd* to hold as follows:[22]

> [T]he vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract.

Analogously, T may enforce P's payment of the license fees on the contractually stipulated dates. However, those payments are conditional upon T's subsequent

[20] *Rover International Salves v Cannon Film Salves* [1989] 1 WLR 912 (CA).

[21] Ibid 932 (Kerr LJ) (emphasis added).

[22] *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–478.

performance of the contract. Put differently, the license fees are only 'earned' when T performs her side of the bargain.[23] In *Rover*, T had failed to render contractual performance. This had the consequence that there was no countervailing legal obligation opposing P's claim for restitution.

In sum, although Stevens's and Webb's rejection of proposition 1 is correct, their reasoning does not withstand scrutiny as an objection to proposition 2. However, a second objection is persuasive, and fatal to both propositions 1 and 2. Neither formulation can explain why the rule denying restitution in Example 2 operates when D's legal entitlement is valid, but unenforceable.[24] Consider Example 1 again.

> *Example 1:* C owes D £100. The debt is now time-barred. Intending to discharge the debt, although unaware of the fact that the debt is no longer enforceable, C pays £100 to D. Realising her mistake, C seeks restitution from D.

Such authority as there is on this point suggests that C's claim will not succeed.[25] Evidently there is no possibility of an endless of circle of claims here. Neither can D assert a plausible counter-claim against C so as to attract the *frustra petis* rule. Thus, the circularity explanation fails to account for the application of the rule in Example 3. It must therefore be rejected.

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[23] Stevens (n 12) 24–30. See also, James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 135 ('There are a number of situations in which a defendant has a juristic reason for receipt, but no juristic reason to retain an enrichment… Consider the facts of the famous English case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*… the contract provided for a juristic reason for the receipt of the money, but once the contract had been terminated without the counter-performance upon which the payment depended, there was no accrued right to *retain* the payment. This is why Lord Wright said that the payment was conditional and the right to retain it fell away when the condition failed').

[24] Stevens (n 12) 23.

[25] *Moses* (n 1); *Bize* (n 1).

3. The Absence of Basis Explanation

It has sometimes been suggested that absence of basis is a necessary, though not sufficient, condition for restitution.[26] Thus, the presence of a valid basis is often offered as an explanation for the legal obligation qualification. Virgo for instance, observes:[27]

> [I]f there is a lawful basis for the defendant's receipt of an enrichment, restitution should be denied because there is no reason why the law of restitution should undermine a lawful transfer. It is consequently preferable to recognize that if there is a legally effective basis for the transfer of a benefit to the defendant a claim in unjust enrichment should be denied.

Virgo calls this the 'presence of basis' bar.[28] Basis, on his account, operates by denying a primary element that constitutes the defendant's unjust enrichment.[29]

Virgo's reasoning fails to resolve a fundamental issue. Assuming, as he does,[30] that the English law of unjust enrichment is organised on the basis of unjust factors, why is the presence of a basis normatively significant? With respect, Virgo's analysis neglects this issue entirely. Edelman and Bant consider this question in the latest edition of their commentary. They reason as follows:[31]

> There is a simple reason in principle why the law requires, in addition to an unjust factor, a lack of juristic reason for a plaintiff to retain an enrichment. That reason is the coherence of the law… [T]he law would be internally contradictory if one branch of the law held that a defendant

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[26] Whether a full-fledged absence of basis can explain the legal obligation qualification better is considered in Conclusion (B).

[27] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 133.

[28] Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson and Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 488–504.

[29] Virgo, *The Principles of the Law of Restitution* (n 27) 133.

[30] Ibid ch 6.

[31] Edelman and Bant (n 23) 134.

> had a right to an enrichment and another held that the defendant must give back the enrichment.

This reasoning suffers from the same flaw as the 'contradiction explanation' and the 'circularity explanation'. It is difficult to disagree with the merits of maintaining coherence in the law. However, what we need is a justification for why the internal contradiction is resolved by denying the restitution claim. It is equally possible to achieve coherence by prioritising the claim based on unjust enrichment. To rely on the need for consistency in the law to deny a restitution claim is, therefore, to presume the subsidiarity of unjust enrichment without justifying it.

4. The Consent Explanation

Smith offers an alternative explanation for the legal obligation qualification. On his account, consent plays a number of different roles within the law of unjust enrichment.[32] It plays a negative role when it impugns transactions that call for restitution. Sometimes, consent also plays a positive role. Example 1 is one such instance. Smith argues:[33]

> Mistake is about consent, and voluntarily assumed obligations are a way of freezing consent so that it cannot be withdrawn. My earlier voluntary promise to pay $100, so long as it stands, now debars me from deploying any argument based on voluntariness at the time of the payment. I cannot raise my mistake as showing that I did not mean to enrich you, when I have voluntarily and irrevocably bound myself to enrich you. In a case like this, the mistake would have to be one that undermines the earlier promise, a principle with which everyone is familiar.

This reasoning suffers from two flaws. First, Smith's explanation of Example 1 presupposes a crucial element: an antecedent positive manifestation of the claimant's

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[32] Lionel Smith, 'Unjust Enrichment: Big or Small?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Pyrmont 2008) 36–46.

[33] Ibid 39. See also, Webb (n 13) 152 ('in obligatory enrichments, the claimant no longer has a choice').

consent. This confines its explanatory scope to cases where the claimant voluntarily assumed the countervailing obligation. However, as will be demonstrated below,[34] the scope of the legal obligation qualification is not restricted in this way. It applies even when the defendant's legal entitlement has a non-consensual origin.

Secondly, Smith fails to address head on, the conflict between the voluntarily assumed countervailing obligation and the unjust enrichment claim. As Smith admits, the law of unjust enrichment is also concerned with protection of the claimant's consent. It protects the claimant against dispositions that are not supported by her fully effective consent. In substance, therefore, Smith is pitting one consent-based obligation (the restitution claim) against another (the defendant's entitlement). He then asserts the superiority of the latter. In doing so, he, like many other academic commentators relies on the subsidiarity of unjust enrichment without justifying that assumption.

B. SUBSIDIARITY IN THE ENGLISH LAW OF UNJUST ENRICHMENT

Section A demonstrated that most explanations for the legal obligation qualification presume the subsidiarity of unjust enrichment. This section will examine whether a general doctrine of subsidiarity is defensible in English law.

One of the most significant hurdles in the way of a clear examination of subsidiarity is terminological.[35] In the context of unjust enrichment, subsidiarity has

[34] See Chapter 5(B)(1) below.

[35] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [2-04]; Visser, *Unjustified Enrichment* (n 2) 57; Daniel Visser, 'Unjustified Enrichment' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2012) 951–952; Steve Hedley, 'Unjust Enrichment: A Middle Course?' (2002) 2 Oxford University Commonwealth Law Journal 181, 190.

been used in many different senses.[36] In particular, two distinct usages of that term are prominent in academic writing. Consider for instance, the influential work of Grantham and Rickett.[37] They define subsidiarity as:[38]

> the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out. At its weakest, subsidiarity denotes the subordination of one claim where another claim in fact offers the plaintiff a basis of recovery. At its strongest, subsidiarity denies the availability of a claim because another claim is in principle available, even though on the facts it does not avail the plaintiff.

Here, the authors appear to have in mind, cases where the claimant has two avenues for recovery, one of which is based on unjust enrichment. Consider an illustration.

> *Example 4:* C and D enter into a contract for the sale of widgets. C pays the full purchase price upfront. Subsequently, D fails to deliver widgets. The contract provides that C may reclaim the purchase price from D upon non-delivery. Instead, C seeks restitution of the purchase price based on D's unjust enrichment.

Here, C has a contractual claim against D. C may also seek restitution of the purchase price based on D's unjust enrichment. Importantly, there is at least one significant difference between Example 1 and Example 4. In Example 4, the competing claims—the contractual claim and the unjust enrichment claim—are both available to C against D. In Example 1, in contrast, the two potential claims oppose each other. C has an unjust enrichment claim against D whereas D has a non-restitution claim against C.

Confusingly, however, the terminology of subsidiarity has also been employed to characterise the relationship between opposing claims in cases resembling Example

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[36] John Dawson, *Unjust Enrichment: A Comparative Analysis* (William S Hein 1999) 106.

[37] Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 LQR 273.

[38] Ibid 273.

1. Goff and Jones, for example, uses subsidiarity in that sense.[39] Indeed, the instability that the terminology of subsidiarity brings with it is sometimes offered as a reason against its adoption in English law.[40] For the present purposes, we are only concerned with the second meaning of subsidiarity i.e. as a rule of priority applicable to opposing claims. The remainder of this section will therefore use subsidiarity in that sense.

From the academic literature, the positive case for subsidiarity seems to rest on two considerations: (a) the primacy of individual autonomy over unjust enrichment claims, and (b) comparative insights from other legal systems where unjust enrichment is a subsidiary doctrine. This section will now examine each of these themes.

1. Primacy of Individual Autonomy

To justify the subsidiarity of unjust enrichment in English law, Grantham and Rickett rely on the need to protect individual autonomy and choice. They argue:[41]

> The Anglo-American liberal democratic political tradition accords primacy to individual autonomy and choice. The fundamental consequence of that tradition, for the legal system, is that various interests are positively protected… while unjust enrichment is shown to be operative only in a negative sense… That distinction makes unjust enrichment necessarily a subsidiary legal standard.

This analysis is susceptible to two objections. First, this reasoning can only assist if the countervailing obligation arises out of a voluntary arrangement, for example, a

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[39] Mitchell, Mitchell and Watterson (n 35) [2-01]–[2-06].

[40] Ibid [2-04]; Hedley (n 35) 190.

[41] Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment' (n 37) 274 (emphasis added). See also, Joachin Dietrich, 'Quantum Meruit for Services Rendered in a Three-party Context: (Implied) Contract, Restitution, or Unjust Enrichment?' [2009] RLR 98, 102; Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Hart 2000) 52.

contract. However, it will be demonstrated below that the operation of the legal obligation qualification is not confined in this way. Secondly, even in the archetypal sphere of application of the personal autonomy reasoning—where the countervailing legal obligation arises out of a contract—subsidiarity faces insuperable problems.

Consider the second objection first. It is doubtful whether a notion of hierarchy among legal obligations accurately describes the relationship between contractual obligations and unjust enrichment.[42] As Waddams convincingly demonstrates, when they intersect, contract and restitution perform a complementary rather than a subsidiary role.[43] Cases awarding restitution within subsisting contracts vindicate this claim. The decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd*[44] is an example. There, the existence of an agreed regime of allocation of risks between the parties did not preclude restitution. That case is examined in greater detail elsewhere in this thesis.[45] Consider another illustration:

> *Example 5*: C contracts with D for the supply of oil. The contract provides that: (a) D will supply 10 barrels of oil each month at the rate of £10,000 for each barrel; (b) Payment is due on the 5th of each month; (c) Supply is to be completed by the 15th of each month. C made the payment on the 5th of September, but D failed to supply oil for that month. C wishes to recover the payment, but is keen to continue the contract for the coming months.[46]

The preferable view is that C's claim will succeed. The best explanation for this result is that, although X's payment was due on the 5th, Y did not earn an accrued right to

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[42] Mitchell, Mitchell and Watterson (n 35) [2-04].

[43] Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Peter Birks, Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 172.

[44] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516.

[45] See Chapter 5(A), above.

[46] Andrew Tettenborn, 'Subsisting Contracts and Failure of Consideration: A Little Scepticism' [2002] RLR 1, 3. See also, Stevens (n 12) 29.

that payment until she rendered counter-performance.[47] Indisputably, whether this is the case is a question of contractual construction. But, generally, Y's counter-performance will be a condition precedent for X's payment obligation.[48] Whether or not the contract is subsisting or terminated, it is this analysis that is determinative of the availability of restitution.[49] In sum, the notions of subsidiarity and primacy are too simplistic to capture the complex relationship between restitution and contractual obligations. As Smith observes:[50]

> It begins to appear that unjustified enrichment is not actually subsidiary to contract law… To say that there can be no claim in unjustified enrichment so long as there is a subsisting contract is to make a slightly inaccurate generalization by aiming at a false target.

In response to this analysis, proponents of subsidiarity may argue that the problems outlined above arise from a misguided attention to the contract as a whole. One must, it may be suggested, focus on the specific contractual obligation. Let us consider that possibility. Compare two examples.

> *Example 6.1*: C contracts to buy 1000 widgets from D. Under the contract, £1000, a part of the purchase price, was payable in advance. C paid this sum. Subsequently, before delivery, D repudiated the contract. C accepts D's repudiation and seeks restitution of £1000.[51]

> *Example 6.2*: C contracts to buy 1000 widgets from D. C pays £1000 as advance purchase price. Subsequently, before delivery could take place, C

47 Edelman and Bant articulate this point slightly differently. According to them, D may have a right to *receive* the payment, but not a right to *retain* it: see Edelman and Bant (n 23) 135.

48 For a contrary example see, *Ministry of Sound (Ireland) Limited v World Online Limited* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823 [33].

49 Stevens (n 12) 24–30; Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' (n 43) 173–175.

50 Lionel Smith, 'Property, Subsidiarity, and Unjust Enrichment' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2010) 615.

51 For a similar illustration see, Example 8 in Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 10) 34.

repudiated the contract. D refuses to accept C’s repudiation. D insists on keeping the contract open.[52]

Consider Example 6.1 first. There, C’s claim for restitution will succeed.[53] Indisputably, however, D’s termination does not retrospectively wipe away C’s contractual obligations. Then, why is C entitled to restitution of £1000 that was conferred on D in pursuance of C’s contractual obligation? In response, Burrows suggests that termination has the effect of rendering the contractual allocation of risks ineffective. Consequently, after termination in Example 6.1, he argues, there is no conflict between C’s restitution claim and the contract.[54] However, there is room for disagreement on this point. Carter, for example, doubts whether termination destroys pre-existing contractual allocation of risks. The legal consequences of termination are entirely prospective. According to Carter, this is part of law’s attempt to preserve the pre-existing allocation of risks.[55] He says, ‘[t]he ex ante risk allocation continues to bind the parties, even though the contract has been discharged, because the essential basis for the claim—breach—is a subsequent event’.[56] Except to note that Burrows’s analysis is not incontestable, I will not pursue this line of reasoning here.

For now, let us assume that Burrows’s reasoning is correct. Even on that view, Example 6.2 is inexplicable. C’s termination, unaccepted by D, is legally ineffective

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[52] Tettenborn (n 46) 2.

[53] *Giles v Edwards* (1797) 7 Term Reports 181, 101 ER 920; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

[54] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 90.

[55] John Carter, ‘Restitution and Contract Risk’ in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (LBC Information Services 1996).

[56] Ibid 157. For a contrary view, see Phillip Hellwege, ‘Unwinding Mutual Contracts: Restitutio in Integrum v. the Defence of Change of Position’ in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 264–265; Peter Birks, ‘Restitution after Ineffective Contracts: Issues for the 1990s’ (1990) 2 Journal of Contract Law 227, 232.

to terminate contractual obligations.[57] They remain on foot. However, should D be able to infinitely prolong C's claim for restitution of the advance by simply refusing to put an end to the contract? Surely not. In the end, therefore, we are forced to conclude that restitution must operate despite the subsistence of C's contractual obligations.

Consider the first objection now. It concerns the explanatory scope of the personal autonomy reasoning. The legal obligation qualification is not confined to cases where the countervailing obligation is voluntarily assumed. There is considerable support for that view in the authorities. Consider for instance, Lord Hope's dictum in *Kleinwort Benson*:[58]

> The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken… but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.

Lord Hope did not suggest that this analysis was confined to contractual entitlements. To the contrary, his subsequent reasoning in *DMG* confirms that he did not intend to restrict the application of this rule in that way. In *DMG*, he said:[59]

> At what point can it be said that the payee has been unjustly enriched? The answer to [this] question will depend on the facts of the case. One can leave on one side cases where there is another ground on which the payee was entitled to be paid: frustra petis quod mox restiturus es.

An earlier section of this chapter highlighted an important limitation of Lord Hope's reasoning based on the *frustra petis* rule.[60] However, his reliance on this analysis

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[57] *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA).

[58] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 408.

[59] *DMG* (HL) (n 14) [65].

[60] See Chapter 5(A)(2) above.

suggests that he did not intend to confine the application of the legal obligation qualification to countervailing legal obligations that have a consensual origin.

Burrows's Restatement also affords a wide scope to the rule. In his words, it extends to 'valid contractual, statutory or other legal obligations'.[61] Similarly, Friedmann considers the rule applicable 'irrespective of whether the obligation arises under a statute or was imposed by the common law or the rules of equity'.[62]

Unsurprisingly, there is ample support in authority for the view that the defendant's contractual right to receive the enrichment precludes restitution.[63] Statutory entitlements have the same effect.[64] On principle, the same must be true of obligations owed to the defendant that arise out of civil wrongs.[65] The decision of the South Australian Supreme Court in *Re Magarey Farlam*[66] confirms this. The claimants were partners in a solicitors' firm. One of the firm's employees had misappropriated funds from the firm's trust account. When the partners learnt of the defalcations, they paid $93,000 into the account. This was intended to replenish funds belonging to eight clients of the firm who were thought to be victims of the misappropriation. Subsequently, it turned out that the claimants had underestimated

[61] Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 10) 31. See also, Keith Mason, John Carter and Gregory Tolhurst, *Mason & Carter's Restitution Law in Australia* (2nd edn, LexisNexis Butterworths 2008) 439–440; Carter (n 55) 143.

[62] Friedmann (n 5) 248. See also, *David Securities v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 CLR 353, 388–389 (Brennan J) ('If a defendant has a right to receive a payment, whether under a statute, in discharge of a liability owing to him or pursuant to a contract a mistake by the plaintiff in making the payment does not convert the receipt into an unjust enrichment.')

[63] *Steam Saw Mills Company Ltd v Baring Brothers* [1922] 1 Ch 244 (CA); *Fairfield Sentry Ltd (In Liquidation) v Migani* [2014] UKPC 9.

[64] *Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2010] EWCA Civ 103, [2010] STC 1251 [181] (Arden LJ).

[65] The legal entitlements that may preclude a claim in restitution through the operation of the legal obligation qualification are considered in Chapter 9(C).

[66] *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337.

both the quantum of misappropriation as well as the number of its victims. Upon discovering this, they sought restitution of the amount that they had paid into the firm's account. It was argued that this payment was caused by a mistake as to the extent of the fraud. Among other grounds, the Court denied restitution on the basis that the payment was owed to the defendants. Importantly, the defendants' legal entitlement to the enrichment was said to be based on the claimants' vicarious liability for the defaulting employee's wrongdoing. Debelle J held:

> [A] payment cannot be recovered if, in fact, the payer is liable to the payee… Mr Howard submitted that the partners of Magarey Farlam were vicariously liable to the eight clients who had together lost $93,000.[67]
>
> [T]he partners are vicariously liable for the fraudulent activities of [the defaulting employee]. That liability is a further bar to the claim by the partners to recover the sum of $93,000.[68]

Debelle J's reasoning reveals an important insight. The legal obligation qualification operates even when the countervailing entitlement is not a contractual obligation. However, the explanatory scope of the personal autonomy reasoning is confined to cases where the defendant's entitlement has a consensual origin. Consequently, none of the other instantiations of this rule are explicable in terms of the parties' autonomy or choice. The personal autonomy reasoning is, therefore, an insufficient basis upon which to conclude that the English law of unjust enrichment is a subsidiary doctrine.

2. Subsidiarity in Other Jurisdictions

Subsidiarity of unjust enrichment has been expressly adopted in at least three legal systems: France, Italy and Scotland.[69] This section examines that trend. Broadly, there

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[67] Ibid [177].

[68] Ibid [183].

are two reasons why English law must not follow in their footsteps. First, in all three jurisdictions, subsidiarity is used in the first sense i.e. as a rule that prioritises between two alternative claims available to the claimant. Subsidiarity in that sense does not assist in explaining the legal obligation qualification. Secondly, the operation of subsidiarity in these jurisdictions is attributable to features of those legal systems that do not find parallels in English law.

Subsidiarity originated in France. There, it was a judicial creation. It was first adopted by the *Cour de cassation* in the *Clayette* case.[70] In that case, the Court held:[71]

> The action de in rem verso… should be allowed whenever the patrimony of one person is enriched at the expense of that of another person without legitimate cause and… that other person does not have at his disposal, to obtain what is due to him, any action arising from a contract, a quasi-contract, a delict or a quasi-delict.

Academic opinion in France largely mirrors this view. The subsidiary status of restitution is often justified on the basis of the need to prevent the 'subversion of the legal order'.[72] Unless tightly confined, it is feared, unjustified enrichment would undermine the 'normal legal rules' of the system.[73] Nicholas puts it particularly

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[69] For a general survey of the application of subsidiarity in Eastern Europe, see Ewa Łętowska, 'Unjust Enrichment in Eastern European Countries' in Ernst Caemmerer and Peter Schlechtreim (eds), *International Encyclopedia of Comparative Law*, vol X (Martinus Nijhoff 1995) 22–31.

[70] *Clayette case* S1918141, 12 May 1914 (French Court of Cassation).

[71] Ibid cited in J Beatson and EJH Schrage, *Cases, Materials and Texts on Unjustified Enrichment* (Hart 2003) 427.

[72] CM Jooste, 'Compensation for Improvements by Tenants in South African Law' in EJH Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer Law International 2001) 270. See also, Aimite Jorge, 'The Subsidiarity Rule: The Unjust Enrichment Doctrine in Construction Law' (2013) 5 International Journal of Law in the Built Environment 253, 253.

[73] Gerrit E Van Maanen, 'Subsidiarity of the Action for Unjustified Enrichment — French Law and Dutch Law: Different Solutions for the Same Problem' (2006) 14 European Review of Private Law 409, 414.

strongly when he argues that subsidiarity is necessary to prevent unjustified enrichment from perpetrating a 'fraud on the law'.[74]

Through a common law lens, this analysis seems unpersuasive. Why is unjustified enrichment treated as an external legal event? Why does it 'subvert' rather than contribute to the 'normal' rules of the legal system? As Smith points out, what is missing is an account of why other legal obligations receive precedence over unjustified enrichment.[75] For this, one must look elsewhere.

That search leads one to the 'extra-codal character' of unjustified enrichment in France.[76] Interestingly, there is no direct basis for a general doctrine of unjustified enrichment in the French civil code.[77] It was created and evolved almost entirely by the courts. This is quite remarkable in a civilian jurisdiction such as France, where, as a general rule judges are required to base their decisions upon legislation, not precedents.[78] This is especially so since almost all other private law obligations find their genesis in the Civil Code. Unsurprisingly, therefore, French judges felt that resort to unjustified enrichment must only be had if no remedy was available within

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[74] Barry Nicholas, 'Unjustified Enrichment in the Civil Law and Loiusiana Law' (1962) 36 Tulane Law Review 605, 610.

[75] Smith, 'Property, Subsidiarity, and Unjust Enrichment' (n 50) 609. See also, Daniel Visser, 'Concurrence of Enrichment and Contractual Claims' (2000) 117 South African Law Journal 173, 175.

[76] Hector MacQueen, 'Unjustified Enrichment, Subsidiarity and Contract' in Vernon Palmer and Elspeth Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University 2009) 323. See also, Nicholas (n 74) 639.

[77] Beatson and Schrage (n 71) 423.

[78] Albert Tate, 'The Loiusiana Action for Unjustified Enrichment: A Study in Judicial Process' (1976-1977) 51 Tulane Law Review 446, 457–458.

the Civil Code.[79] Thus, the real concern appears to have been that an action in unjustified enrichment would subvert the structure of the Civil Code.

This view is buttressed by an examination of the small pockets of the law of unjustified enrichment that are provided for in the French Civil Code. The 'action for a thing not due' is an example. It is a telling sign that subsidiarity is considered inapplicable to this category of cases.[80] In sum, subsidiarity in French law is best understood as a doctrine that stands for the 'superiority of the written law over the unwritten law'.[81] Clearly, this cannot justify subsidiarity of the English law of unjust enrichment.

There is a further reason why one must hesitate to transplant the doctrine of subsidiarity from France to England. Despite its apparently strong foundations in French law, its application in practice has led to numerous difficulties. French Courts' distinction between 'obstacles of law' and 'obstacles of fact' was one source of the problem.[82] There were, on the one hand, calls for the abolition of this distinction.[83] On the other hand, it was feared that unrestricted subsidiarity would completely undermine unjustified enrichment. This led French commentators to demand the abandonment of the doctrine of subsidiarity altogether. Viney, for instance, has argued:[84]

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[79] Ibid.

[80] Smith, 'Property, Subsidiarity, and Unjust Enrichment' (n 50) 622.

[81] George Challies, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (2nd edn, Wilson & Lafleur 1952) 125.

[82] Beatson and Schrage (n 71) 428–429.

[83] Ibid 429.

[84] 'Viney's Note' cited in ibid 438 (emphasis added).

> [S]hould one conclude that the principle of subsidiarity of this action has disappeared or that it survives in an attenuated form? If one opted for the second thesis, one would have to propose a new criterion, which might be inspired by the idea that the action de in rem verso should not be an obstacle to the application of the normal rules applicable to the situation envisaged. But what are these 'normal rules'? It would take the devil to answer that question. <u>It seems better simply to abandon this hazy notion of subsidiarity</u> which was only invented to reduce the scope of the innovation introduced by the *arret Boudier*.

In sum, even in the land of its origin, the validity of subsidiarity is a contentious issue today.[85]

In Italy, the doctrine of subsidiarity has followed a similar trajectory. The Italian Civil Code expressly provides for the subsidiarity of unjustified enrichment.[86] However, this is unsurprising since, on this issue, the draftsmen of the Italian Civil Code were heavily inspired by judicial developments in France.[87] Moreover, it appears that even in Italy, the doctrine of unjustified enrichment first evolved extra-codally.[88] Subsequently, when it was codified, it retained its subsidiarity nature. Subsidiarity in Loiusiana, which evolved in almost exactly the same way, is also susceptible to a similar analysis.[89]

Notably, the general trend in jurisdictions such as Italy and France is in stark contrast to the law in some other civilian jurisdictions. Germany and Netherlands are good examples. Germany does not adopt a notion of priority between unjust

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[85] Maanen (n 73) 416.

[86] Italian Civil Code, art 2042 cited in Beatson and Schrage (n 71) 452.

[87] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd rev edn, Clarendon 1998) 550; Francesco Giglio, 'A Systematic Approach to "Unjust" and "Unjustified" Enrichment' (2003) 23 OJLS 455, 464.

[88] Smith, 'Property, Subsidiarity, and Unjust Enrichment' (n 50) 622.

[89] Stewart McCaa Thomas, 'Conditions for the Application of Actio De In Rem Verso' (1975) 36 Louisiana Law Review 312, 313.

enrichment claims and other private law obligations.[90] Although the position is less clear in Dutch law, the predominant view rejects subsidiarity.[91] This trend is unsurprising. As demonstrated above, subsidiarity in France and Italy are premised on the extra-codal nature of unjustified enrichment. In contrast, in both Germany[92] and in Netherlands,[93] the respective Civil Codes do provide for a general action based on unjustified enrichment.

Courts in Scotland have also adopted subsidiarity. There, the leading decision is *Varney v Lanark Town Council.*[94] The claimants were building contractors. The defendant local authority was under a statutory duty to provide sewers for buildings. In breach of this duty, the defendant failed to construct a drainage system. The claimants constructed the sewers themselves and sued the defendants for recompense. Had the claimants not constructed them, it was argued, the defendant would have had to incur the expenditure for their construction. Thus, the defendants were enriched. The claim was rejected. It was held that the claimants should have first exercised their statutory remedy to compel the defendant to perform its duty. In reaching that conclusion two judges relied on subsidiarity. Interestingly, the subsidiarity of unjust enrichment was said to be based on its 'equitable' character:[95]

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[90] Reinhard Zimmermann and Jacques Du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' [1994] RLR 14, 37. See also, Beatson and Schrage (n 71) 424.

[91] Beatson and Schrage (n 71) 458, 459; Eltjo Schrage, '*Cellcorps v ETE*: A Dutch Perspective' (2014) 22 European Review of Private Law 1039, 1047.

[92] Bürgerliches Gesetzbuch (BGB) §812.

[93] Dutch Civil Code, art 6:212, paragraph 1.

[94] *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245 (Second Division).

[95] See also, Dietrich (n 41) 29; Douglas Laycock, 'The Scope and Significance of Restitution' (1988-1989) 67 Texas Law Review 1277, 1278; WDH Sellar, 'Unjust Enrichment' in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (Law Society of Scotland 1996) [68].

> [I]n principle, I cannot see how an equitable remedy can be invoked when another remedy given by statute or, indeed, by common law was available and was not used.[96]

> Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort… If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense.[97]

Subsequently, this reasoning was discredited in Scotland. In any case, unlike England, Scotland does not distinguish between legal and equitable obligations and remedies.[98] To justify the supplementary character of unjust enrichment based upon its 'equitable'[99] character is therefore, problematic. This analysis is also inconsistent with the understanding of unjust enrichment in English law. In England, unjust enrichment cuts across the boundary between common law and equity.[100] It is difficult, therefore, to justify the subsidiarity of unjust enrichment on its equitable nature.

In conclusion, most academic accounts of the relationship between unjust enrichment claims and countervailing legal obligations are based on the assumption that unjust enrichment is a subsidiary doctrine. However, on closer examination, no convincing reasons have been offered to support a general doctrine of subsidiarity in the English law of unjust enrichment.

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[96] *Varney* (n 94) 257 (Lord Kissen).

[97] Ibid 252–253 (Wheatly LJ).

[98] Beatson and Schrage (n 71) 470; MacQueen (n 76) 340; Niall Whitty, '*Transco plc v Glasgow City Council*: Developing Enrichment Law after *Shilliday*' (2006) 10 Edinburgh Law Review 112, 124.

[99] See, Mitchell McInnes, 'The Equitable Action in Unjust Enrichment: Ambiguity and Error' (2007) 45 Canadian Business Law Journal 253.

[100] Burrows, *The Law of Restitution* (n 54) 25–26; Edelman and Bant (n 23) 25–26.

CHAPTER 6

LEGAL OBLIGATION QUALIFICATION IN THE '*FAIRCHILD* ENCLAVE'[1]

Chapter 5 considered a number of academic accounts of the relationship between unjust enrichment claims and countervailing legal obligations. This chapter examines *International Energy Group Ltd v Zurich Insurance* ('*Zurich Insurance*').[2] In that decision, seven Justices of the Supreme Court considered this issue. *Zurich Insurance* is, arguably, the most significant judicial treatment of this question so far.

This chapter proceeds in three parts. **Section A** provides an overview of the decision. **Section B** briefly examines the defendant's equitable right of recoupment with an unjust enrichment lens. Finally and most importantly, **Section C** asks whether the right of recoupment ought to have been qualified by the insurance contract between the parties.[3]

A. THE DECISION: AN OVERVIEW

Alan Carré was employed by the Guernsey Gas Light Company Ltd ('GGCL'). His employment with GGCL lasted for a little more than 27 years. During that period, GGCL negligently exposed him to asbestos. This caused Mr Carré to contract

[1] This chapter is based on a case note published at (2017) 80 Modern Law Review 1150 which was cited with approval by the Court of Appeal in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 at [144] (Leggatt LJ).

[2] *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471.

[3] The tort and insurance issues arising from this case have been extensively examined elsewhere: Sarah Green, 'Between a Rock of Uncertainty and a Hard Case' (2016) 132 LQR 25; James Goudkamp, 'The Insurance Law Legacy of *Fairchild*' [2015] LMCLQ 443; Jonathan Morgan, 'Reinterpreting the Reinterpretation of the Reinterpretation of Fairchild' (2015) 74 Cambridge Law Journal 395; Rob Merkin, 'Insurance and reinsurance in the *Fairchild* enclave' (2016) 36 Legal Studies 302.

mesothelioma of which he died subsequently. As the successor to GGCL's liabilities, International Energy Group Ltd (the claimant) settled Mr Carré's claim.

The claimant then turned to GGCL's insurers. However, GGCL was only insured for eight of the 27 years during which it employed Mr Carré. Six of those years were covered by a policy from Midland Assurance. Zurich Insurance (the defendant) had succeeded to Midland's liabilities. The defendant contended that it could not be held liable for *all* of GGCL's liability to Mr Carré. It was only liable, it argued, for a part of GGCL's liability; a share reflecting the proportion of the period during which GGCL was insured to the total duration of Mr Carré's employment (roughly, 6/27).

At first instance, Cooke J accepted the defendant's argument.[4] The defendant's liability was governed by Guernsey law. The Compensation Act 2006[5] was therefore inapplicable. Consequently, Cooke J applied the special rule in *Fairchild v Glenhaven Funeral Services Ltd*[6] as interpreted in *Barker v Corus UK Ltd* ('*Barker*').[7] In *Barker*, the House of Lords had held that an employer in these circumstances is only liable for their aliquot contribution to the claimant-employee's risk of contracting mesothelioma. Cooke J held that the defendant-insurer's liability to the claimant-employer must similarly be proportionate.

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[4] *International Energy Group Limited v Zurich Insurance plc* [2012] EWHC 69 (Comm).

[5] Compensation Act 2006, s 3 provides for joint and several liability among employers who negligently expose their employees to asbestos resulting in the employees contracting mesothelioma.

[6] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

[7] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

On appeal, the Court of Appeal reversed this decision.[8] The Court of Appeal was bound by the Supreme Court's decision in *Durham v BAI (Run off) Ltd* ('*Trigger*').[9] That case had held that the 'weak' or 'broad' causal rule in *Fairchild* carries over to insurers' liability.[10] On that basis, the Court of Appeal concluded that Mr Carré's mesothelioma was 'caused' during the insurance period as long as he was negligently exposed to asbestos in that period, thereby materially increasing his risk of contracting the disease.

On further appeal, the Supreme Court restored Cooke J's decision. All seven judges agreed that the defendant's liability must be confined to reflect the period of Mr Carré's employment during which GGCL was insured. The Supreme Court's reasoning may be understood in three steps.

First, the Court considered GGCL's (the employer) liability to Mr Carré.[11] In result, this was uncontested. Mr Carré was never employed by anyone but GGCL.[12] Indisputably, therefore, GGCL was liable for all of Mr Carré's loss. However, the point of contention was whether GGCL's liability to Mr Carré is 'solidary' (each exposure resulting in GGCL's liability for all of Mr Carré's loss) or 'proportionate' (GGCL's liability being proportionate to the extent of its contribution to Mr Carré's exposure).[13] This was relevant because the defendant relied on GGCL's proportionate

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[8] *International Energy Group Ltd v Zurich Insurance Plc* [2013] EWCA Civ 39.

[9] *Durham v BAI (Run off) Ltd* [2012] UKSC 14, [2012] 1 WLR 867 ('*Trigger*'). *Trigger* was decided two months after Cooke J's decision.

[10] Ibid [66] (Lord Mance).

[11] *Zurich Insurance (UKSC)* (n 2) [25]–[35] (Lord Mance).

[12] Ibid [141] (Lord Sumption).

[13] This terminology is borrowed from Goudkamp (n 3) 445–446.

liability as the basis for a further submission. GGCL's proportionate liability, it was argued, means that the defendant-insurer's liability must also be proportionate.

On GGCL's liability, the defendant's contention was unanimously upheld. The Compensation Act 2006 was inapplicable in Guernsey. Therefore, this question was governed by the common law. The common law rule, as laid down in *Barker*, provided for proportionate liability of GGCL to Mr Carré.

That led to the 'second main question' i.e. the defendant-insurer's liability to GGCL. In principle, it may have been possible for the defendant to argue that, despite GGCL's solidary liability to Mr Carré, the defendant's liability to GGCL must be proportionate. The former is a question of tort law whereas the latter is a question of interpretation of the insurance policy. Interestingly, however, the defendant conceded this point. Despite being invited to withdraw this concession,[14] the defendant maintained that if GGCL's liability to Mr Carré was solidary, so must the defendant's liability to GGCL be.[15]

On the insurer's liability, the Court did not speak with one voice. Lord Mance with whom Lord Clarke, Lord Carnwath and Lord Hodge agreed, constituted the majority. According to Lord Mance, although GGCL's liability to Mr Carré was proportionate, the Court was bound by *Trigger* to hold that the defendant-insurer's liability to GGCL is solidary. Thus, even if GGCL was only insured for one year during Mr Carré's employment, GGCL's insurer would be liable for all of Mr Carré's claim. This result followed from the conclusion in *Trigger* that mesothelioma was 'caused' in the *Fairchild* sense during each policy period.

[14] *Zurich Insurance (UKSC)* (n 2) [147] (Lord Sumption).

[15] It appears that this concession was motivated by the insurers' apprehension of Parliamentary intervention: ibid [203] (Lord Neuberger and Lord Reed).

Lord Sumption, with whom Lord Neuberger and Lord Reed agreed, differed on this point. According to Lord Sumption, the defendant's liability to GGCL depended on the construction of the insurance policy. That exercise must account for a fundamental limitation on the scope of an insurer's liability, i.e. the period of insurance.[16] Lord Sumption therefore held that the defendant's liability to GGCL could not extend beyond the insurance period. Thus, the defendant's liability is proportionate to the period of GGCL's insurance.

Left as it is, the majority's conclusion on the second question would have led to an anomalous result: the defendant-insurer is liable for all of Mr Carré's claim against GGCL although GGCL was only insured for a part of Mr Carré's employment. Lord Mance sought to avoid this result by proposing a novel right of 'equitable recoupment'. In respect of the period of Mr Carré's employment during which GGCL was not insured, he held, GGCL must be treated as a 'self-insurer'.[17] The defendant-insurer is entitled to recoupment from GGCL in respect of that period. In effect, this meant that although the defendant-insurer is prima facie liable to GGCL in respect of all of Mr Carré's claim, the defendant may seek recoupment of a proportion of that sum from GGCL; a sum reflecting the period for which GGCL was not insured. The remainder of this chapter concerns this right of recoupment.

B. THE EQUITABLE RIGHT OF RECOUPMENT

Historically, rights of recoupment and contribution originated in equity.[18] However, today, they are best understood as generated by the need to reverse the defendant's

[16] Ibid [151] (Lord Sumption).

[17] Ibid [65] (Lord Mance).

[18] JH Baker, 'The History of Quasi-Contract in English Law' in William Cornish, Richard Nolan and Janet O'Sullivan (eds), *Restitution: Past, Present and Future* (Hart 1998) 48.

unjust enrichment. There is overwhelming support for this view in both judicial[19] and academic[20] authorities.

Further, there are hints of the recognition of the restitutionary basis of recoupment in Lord Mance's judgment itself. For example, consider his analysis of Lord Sumption's reasoning. Lord Sumption took the view that the contractual allocation of risks under the insurance policy precluded the defendant's recoupment claim. In response, Lord Mance relied on Burrows' methodology of reconciling unjust enrichment claims and countervailing legal obligations.[21] It appears therefore that Lord Mance did recognise the unjust enrichment genesis of the defendant's recoupment right. During oral argument, Lord Reed and Lord Neuberger also suggested that the proposed right of recoupment is best conceptualised through unjust enrichment.[22]

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[19] *Westdeutsche Landesbank Girozentale v Islington LBC* [1996] AC 669 (HL) 727 (Lord Woolf); *Societe Eram Shipping Company Ltd v Compagnie Internationale De Navigation* [2001] EWCA Civ 1317 [46] (Mance LJ); *Kuwait Oil Tanker Co SAK & Another v Qabazard* [2002] EWCA Civ 34 [5] (Longmore LJ); *Alan Robert Lumley v Melvin Edward Riddell Robinson* [2002] EWCA Civ 94 [12] (Aldous LJ). See also, *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2000] SLT 1123, 1141 (Lord Rodger) (Scotland); *Burke and Another v Lfot Pty Limited* [2002] HCA 17 [38] (Gaudron A-CJ and Hayne J) (Australia); *County of Carleton v City of Ottawa* [1965] SCR 663 [8]–[11] (Hall J) (Canada); *Cosmic Insurance Corp Ltd v Ong Kah Hoe* [1997] SGHC 237 [28]–[33] (Rubin J) (Singapore).

[20] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [19-17]; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ch 17; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 231; James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 293–298; Keith Mason, John Carter and Gregory Tolhurst, *Mason & Carter's Restitution Law in Australia* (2nd edn, LexisNexis Butterworths 2008) 228–229; Charles Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) [3.01]–[3.03]. See also, Law Commission, *Report on Limitation of Actions* (LC270, 10 July 2001, 2001) [2.49]; Law Commission, *Report on Contribution* (Law Com No 79, 1977) [13].

[21] *Zurich Insurance (UKSC)* (n 2) [68]–[72] (Lord Mance). The validity of this reasoning is examined in Chapter 6(C) below.

[22] See also, Merkin (n 3) 314.

Finally, characterising the recoupment right as 'equitable', as Lord Mance did, does not detract from its restitutionary nature.[23] Restitution of unjust enrichment cuts across the boundaries of common law and equity.[24] As Lord Woolf said, therefore, claims of contribution and recoupment are best understood as examples of the 'application of an equitable approach to restitution'.[25]

On the unjust enrichment approach, the injustice that generates restitution in the form of recoupment may be illustrated through an example.

> *Example 1*: C guarantees a debt of £100, owed by D to X. On D's default, X claims £100 from C. C pays and then seeks recoupment of £100 from D.

Here, as between C and X, C was liable to pay £100. C's guarantee dictates that conclusion. However, as between C and D, D is 'primarily' liable for the debt. The recoupment claim therefore shifts the liability from C, whose liability is 'secondary', to D.[26] Thus, C's recoupment right against D ensures that the burden of D's liability ultimately falls on D. This understanding of the justification for a recoupment right leads to two objections to Lord Mance's reasoning.

First, for the unjust enrichment justification for recoupment to operate, D must have been under a pre-existing 'liability'. It is the cost of that liability that the law seeks to shift from C to D. However, this was not the case in *Zurich Insurance*. In respect of the period during which the employer was uninsured, the employer was not

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[23] Mitchell, *The Law of Contribution and Reimbursement* (n 20) [3-03].

[24] Burrows, *The Law of Restitution* (n 20) 25–26.

[25] *Westdeutsche* (n 19) 727 (Lord Woolf).

[26] Burrows, *The Law of Restitution* (n 20) 436; Charles Mitchell, 'Unjust Enrichment' in Peter Birks (ed), *English Private Law* (3rd edn, OUP 2013) [18.114]; Mitchell, Mitchell and Watterson (n 20) [19-01]; Mitchell, *The Law of Contribution and Reimbursement* (n 20) [3.27]. For a different explanation based on 'powerlessness' see Edelman and Bant (n 20) 293.

under a liability to the defendant-insurer or indeed, to a third party. Lord Mance attempted to overcome this difficulty by treating the employer as a 'self-insurer'[27] in respect of the uninsured periods. As Lord Mance suggested, this may simply be an articulation of the fact that the employer is at risk for periods during which it was not insured.[28] However, characterising the employer as 'self-insured' does not meet the objection that, in respect of the periods during which the employer was uninsured, the employer was under no liability at all.[29] Therefore, as between the employer and its insurer, there was in fact no liability that called for re-adjustment.

Secondly, consider Example 1 again. There, the reasoning that justifies the existence of a recoupment right presumes that, as between C and D, there are good reasons why the burden must fall on D instead of C. What if C had contractually undertaken the burden of the debt from D? Surely, then, it is not 'unjust' for C to bear that liability. *Morris v Breaveglen Ltd*[30] illustrates this. Mr Morris was employed by B Ltd. Under a sub-contract, B had agreed to supply labour to S Ltd. Under that contract, Mr Morris was working under the instructions of S's foremen when he was injured. Although Mr Morris was working with S, he continued to be B's employee. Therefore, B was held liable. B sought contribution from S. B's claim failed because it was found to be inconsistent with the contract between B and S. Under that contract, B had agreed that S would not be liable for 'any claim arising out of an accident to an employee' of B. In the normal course, the primary liability for Mr Morris's injury would have fallen on S on whose instructions Mr Morris acted. But B

[27] *Zurich Insurance (UKSC)* (n 2) [65] (Lord Mance).

[28] Ibid [75] (Lord Mance).

[29] Merkin (n 3) 318–319.

[30] *Morris v Breaveglen Ltd* [1993] PIQR P294 (CA).

had contractually undertaken that liability from S. It is not 'unjust' for that burden to fall on B.[31]

Now consider *Zurich Insurance*. According to Lord Mance, the defendant-insurer was liable to GGCL (the employer) for all of Mr Carré's claim. Let us pause to ask why. The answer must be that this is the defendant-insurer's liability under the insurance policy. That the parties did not contemplate the decisions in *Fairchild* and *Trigger* at the time of conclusion of the insurance contract does not change this analysis. As Lord Mance said in *Trigger*,[32]

> The intention under the present insurances must be taken to have been that they would respond to whatever liability the insured employers might be held to incur within the scope of the risks insured and within the period in respect of which they were insured.

He went on to say, 'if the common law during or even after the currency of an insurance develops in a manner which increases employers' liability'—as it did in *Zurich Insurance*—'that is a risk which the insurers must accept'.[33] As Lord Collins said in *Wasa International Insurance Co Ltd v Lexington Insurance Co*, this is because 'an insurer under the original insurance takes the risk of changes in the law'.[34] In sum, on Lord Mance's analysis, the defendant-insurer had contractually undertaken solidary liability to GGCL. As the above analysis has revealed, and

[31] See, *Mawson v Cassidy* (CA, 26 January 1995); *Belger v Belger* (CA, 17 July 1989). See also, Merkin (n 3) 318 (convincingly critiquing the recoupment right based on insurance principles).

[32] *Trigger* (n 9) [69] (Lord Mance).

[33] Ibid [70] (Lord Mance).

[34] *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2009] UKHL 40, [2010] 1 AC 180 [110].

contrary to Lord Mance's suggestion in *Zurich Insurance*,[35] it is unnecessary to rely on the declaratory theory of judicial decision-making to reach that conclusion.

We now know that the defendant-insurer in *Zurich Insurance* had contractually undertaken to indemnify the employer against the whole of its liability to Mr Carré. Then, what 'injustice' is the right of recoupment responding to? Why is the imposition of solidary liability on the defendant-insurer—an obligation it voluntarily undertook—'unjust'? As Lord Sumption put it, it is difficult to understand 'by what standard it is said to be unjust when the parties have agreed that it should be so.'[36] In sum, the insurance contract under which the defendant voluntarily agreed to indemnify the employer removes the very basis upon which rights of recoupment operate.

C. THE COUNTERVAILING OBLIGATION

The insurance contract also poses a second, and for the present purposes more important, hurdle for the recoupment right. It shows that the enrichment in respect of which the insurer seeks recoupment, was owed to the employer under a valid legal obligation. This attracts the application of the legal obligation qualification.

The legal obligation qualification posed a significant hurdle for the defendant-insurer's recoupment right in *Zurich Insurance*. Lord Mance sought to overcome this difficulty in two ways. First, he suggested that the recoupment claim does not

[35] *Zurich Insurance (UKSC)* (n 2) [53] (Lord Mance).

[36] Ibid [183] (Lord Sumption).

contradict the insurance contract. Secondly, he denied that the legal obligation qualification is a bright-line rule.[37] I will consider each of these points in turn.

1. The 'No Inconsistency' Reasoning

According to Lord Mance, recognising a recoupment right in these circumstances 'does not involve contradicting or acting inconsistently with [the insurance contract]. On the contrary, it is accepting their implications, and relying on matters independent of them'.[38]

The evaluation of this claim requires a closer examination of the nature of 'inconsistency' or 'contradiction' that the legal obligation qualification responds to. What matters is an inconsistency or contradiction of *result*. The question is whether permitting restitution will undo the *effect* of the defendant's legal entitlement. The qualification applies when, as a result of the restitution claim, the defendant will be deprived of the benefit of his entitlement. Although the term 'nullify'[39] has sometimes been used to describe the relationship between restitution claims and the defendant's legal entitlements, it is clear that these two private law obligations cannot 'nullify' each other otherwise than in the sense described above. Consider an example.

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[37] Interestingly, Lord Mance also cited with approval Lord Mansfield's decision in *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676 as a 'cornerstone of common law restitution': see *Zurich Insurance (UKSC)* (n 2) [70]. That was a case where restitution was granted despite the defendant's valid entitlement to retain the enrichment. Thus, it contradicts the legal obligation qualification. However, on this point, *Moses v Macferlan* has been discredited both judicially and in academic writing: see, *Marriot v Hampton* (1797) 7 Term Reports 269, 101 ER 969; *Phillips v Hunter* [1795] 2 Hy Bl 402; *Brisbane v Dacres* 5 Taunt 160, 128 ER 641; Mitchell, Mitchell and Watterson (n 20) [2-33]–[2-34]; Daniel Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (2003) 36 Loyola of Los Angeles Law Review 831, 833–834; Ernest Weinrib, *Corrective Justice* (OUP 2016) 202.

[38] *Zurich Insurance (UKSC)* (n 2) [67] (Lord Mance).

[39] Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991) 248.

> *Example 2*: C owes £100 to both D and X under two separate contracts. C intends to pay X but mistakenly pays D. C seeks restitution from D. C's claim will fail.[40]

This is often treated as an archetypal instance of the operation of the legal obligation qualification.[41] Yet, it is materially indistinguishable from *Zurich Insurance* on this point. Just as in Example 2, the defendant-insurer in *Zurich Insurance* owed GGCL an amount equivalent to Mr Carré's claim. Even if that payment prima facie generated an unjust enrichment claim,[42] as C's mistake in Example 2 does, that claim is precluded by GGCL's contractual entitlement to the enrichment. Just as Lord Mance reasoned in *Zurich Insurance*, it is possible to argue in Example 2 that C's restitution claim is based on 'accepting [the] implications' of the contract between C and D i.e. D's entitlement to £100, and 'relying on matters independent of them' i.e. C's mistake. However, that does not justify C's claim in Example 2. With respect, it should not have justified the defendant-insurer's recoupment claim in *Zurich Insurance* either.

2. No Bright-Line Rule

In addition, Lord Mance also denied the existence of a bright-line rule precluding restitution claims that contradict contractually dictated results. On this point, he adopted Burrows's thesis. That approach consists of a general rule and flexible exceptions. The general rule denies restitution when the enrichment is owed by the claimant to the defendant under a valid legal obligation.[43] The exceptions operate

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[40] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65.

[41] Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 174.

[42] It was suggested in Section (B) of this chapter that it does not.

[43] Burrows, *The Law of Restitution* (n 20) 88.

when there is no 'policy inconsistency'[44] between the restitution claim and the defendant's entitlement. In determining the operation of the exception, the question 'at the root of the issue is whether the legal entitlement of D to the payment from C is outweighed by the injustice constituted by D receiving a payment that C mistakenly did not mean to make'.[45] When it is, C's restitution claim will succeed despite D's legal entitlement. There are two main objections to this approach.

First, Burrows's approach requires a weighing up against each other of the unjust factor grounding the restitution claim and the defendant's legal entitlement. According to Burrows, the exception applies when the legal entitlement is 'easily outweighed'.[46] This commits Burrows to the view that, in relation to restitution claims, some legal entitlements of the defendant are less secure than others. Yet, it is not clear what it is about these entitlements that render them more susceptible to reversal through restitution. Legal entitlements are conclusions reached by a legal system after a reconciliation of competing interests.[47] Indeed, Scott goes so far as to say that, for this reason, their normative force is 'not transparent'.[48] This raises serious questions about the possibility of concluding that some legal entitlements are normatively inferior to others.

In any case, it seems doubtful whether it was in fact the relative normative weights of the legal entitlements that motivated the result in Burrows's exceptions.

[44] Ibid 90.

[45] Burrows, 'Is There a Defence of Good Consideration?' (n 41) 177.

[46] Ibid 177.

[47] John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart 2001) 1–2; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 172.

[48] Helen Scott, 'Defence, Denial or Cause of Action? 'Enrichment Owed' and the Absence of a Legal Ground' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 59.

Consider for example, *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* (‘*DMG*’).[49] There, the Advance Corporation Tax in respect of which the claimant sought restitution, was due to the Revenue when it was paid.[50] Why did this not preclude restitution? According to Burrows, this is because,[51]

> [T]he statutory obligation was undermined by the <u>legislature’s failure contrary to EU law</u>, to provide a group income election for companies such as the claimants.

The legislature’s contravention of EU law may have two potential consequences: judicial ‘disapplication’[52] of the contravening primary legislation[53] or alternatively, the application of a principle of ‘EU estoppel’ precluding the Revenue from relying on an obligation procured by its own breach of EU law.[54] Either of these alternatives can explain the result in *DMG*. However, neither is based on an evaluation of the relative normative weights of the legal obligation and the unjust factor. ‘Disapplication’ renders the defendant’s legal entitlement inoperative. ‘EU estoppel’ precludes the Revenue from relying on the legal obligation and, consequently, on the entitlement that it generates. In effect, for the purposes of the restitution claim in *DMG*, therefore, there was no countervailing legal obligation at all. On this view, the result in that case is entirely consistent with the bright-line rule that Burrows and Lord Mance reject.

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[49] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 (‘*DMG*’).

[50] Robert Stevens, ‘Justified Enrichment’ (2005) 5 Oxford University Commonwealth Law Journal 141, 142–145.

[51] Burrows, *The Law of Restitution* (n 20) 91 (emphasis added).

[52] *Regina v Secretary of State for Transport, Ex parte Factortame Ltd & Others (No 2)* [1991] 1 AC 603 (HL).

[53] I am grateful to Frederick Wilmot-Smith for this point.

[54] This point is considered in greater detail elsewhere in this thesis: see Chapter 4(B), above.

Roxborough v Rothmans of Pall Mall Australia Ltd[55] ('*Roxborough*'), another exception case, is susceptible to a similar analysis.[56] Burrows's explanation of *Roxborough* relies on the fact that the tax component was fixed as a separate element from the price. Consequently, restitution of tax did not reallocate contractual risks. Notably, however, Burrows goes one step further. He says,[57]

> one might even say that, once the tax was held not to be owing, that part of the price was not, in substance, owing, albeit that no particular clause could be struck down as void.

This must mean that, in *Roxborough*, just as in *DMG*, there was no countervailing legal entitlement in respect of the tax component. The invalidity of the tax rendered the defendant-wholesaler's entitlement to that sum inoperative.[58]

A second objection relates to the indeterminacy of the 'weighing up' process that Burrows's approach involves. Scott's incommensurability objection focuses on this issue.[59] She argues that the unjust factor, a primary fact, and the legal entitlement, 'a purely legal institution',[60] are incommensurable considerations.

In general, incommensurability objections rely on the unavailability of a common metric to measure two values.[61] In the absence of a common measure, they

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[55] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516.

[56] This case is examined in greater detail elsewhere in this thesis: see Chapter 4(A), above.

[57] Burrows, 'Is There a Defence of Good Consideration?' (n 41) 177.

[58] Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Peter Birks, Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 174–175; Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 29.

[59] Scott (n 48).

[60] Ibid 59.

[61] Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Defences in Unjust Enrichment: Questions and Themes' in Andrew Dyson, James Goudkamp and Frederick

suggest, it is conceptually impossible to 'weigh' or 'balance' things against each other.[62] Admittedly, incommensurability does not deny the possibility of rational choice.[63] Waldron's distinction between 'weak' and 'strong' incommensurability illustrates this point. 'Strong incommensurability' arises when two considerations are 'genuinely incomparable'.[64] Neither overrides the other, nor are they of equal weight. In cases of 'weak commensurability', although there is no common metric to weigh up the competing values, they are linked by a 'priority rule'. Thus, there is an ordering between them that permits rational choice, although, that choice is not reached through commensuration.

This illustrates why Burrows's methodology is problematic in a way that the bright-line rule is not. The latter is explicable as a rule of priority. The legal obligation 'trumps'[65] the restitution claim. In contrast, an approach that requires the unjust factor and the legal entitlement to be 'balanced' or 'weighed' against each other demands, at the very least, the identification of a common benchmark against which they can be compared. No such criteria have been identified so far. This renders the weighing up exercise indeterminate. Some examples may illustrate this point further.

Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016). See also, Raz (n 47) 322; Webber Grégoire, *The Negotiable Constitution* (CUP 2009) 90.

[62] See, Robert Stevens, 'Contributory Fault—Analogue or Digital?' in Andrew Dyson, Frederick Wilmot-Smith and James Goudkamp (eds), *Defences in Unjust Enrichment* (Hart 2016) 259. For examples of commensurability objections in public law see, Grégoire (n 61) 90–91; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468.

[63] Francisco Urbina, 'Incommensurability and Balancing' (2015) 35 OJLS 575; Cass Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 Michigan Law Review 779.

[64] Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1993) 45 Hastings Law Journal 813, 816.

[65] Ibid 817.

Consider, first, restitution claims based on duress. According to Burrows, even duress claims are precluded by the defendant's entitlement.[66] This view is also consistent with authority.[67] For the bright-line rule, this result is unproblematic. However, it is difficult to see how it can be justified by weighing the unjust factor and the legal obligation against each other. On the balancing methodology, when, if ever, does the normative force of duress prevail over the legal obligation? Does the result differ depending on how objectionable the defendant's conduct is? Consider an example.

> *Example 3*: C owes £100 to D. D puts a gun to C's head and demands payment. Under threat, C pays. Is C entitled to restitution?

Another example of the indeterminacy of the balancing methodology may be found in claims for the restitution of performance rendered under valid but unenforceable contracts. According to Burrows, restitution is permissible in these cases despite the validity of the underlying contract.[68] He identifies this category of cases as an exception to the general rule.[69] Yet, it is unclear how the balancing methodology can account for this result. Notably, Burrows admits that obligations that are valid but unenforceable (for example, a time-barred debt) are capable of denying restitution generally.[70] Why, then, is the result different in cases involving restitution for money paid or services rendered under unenforceable contracts?

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[66] Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 33.

[67] *Flower v Sadler* (1882) 10 QBD 572 (CA); *Ward v Lloyd* (1843) 6 Man & G 785, 134 ER 1109. This point is considered in more detail at Chapter 9(B).

[68] See, *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725 (Supreme Court of Canada).

[69] Burrows, *The Law of Restitution* (n 20) 90.

[70] Ibid 88.

The indeterminacy of Burrows's approach is also evident from the majority's reasoning in *Zurich Insurance*. Lord Mance said:[71]

> [T]here is no policy inconsistency between recognising that the terms of the insurances… make [the defendant] answerable in the first instance for [the employer's] liability towards Mr Carré and recognising an equity, based on consideration of the wider circumstances—in particular GGLCL/IEG's exposure of Mr Carré for further periods when it was not insured by Midland—requiring IEG itself to contribute towards Zurich's cost of meeting such liability.

With respect, the assertion that there is no 'policy inconsistency' between the terms of the contract and the recoupment right is difficult to understand. As a matter of contractual construction, Lord Mance had found that the defendant-insurer was liable for all of Mr Carré's claim. That this included liability for periods during which the employer was uninsured was held to be irrelevant to that result. On this construction, the contract imposes solidary liability upon the insurer. The very purpose of the recoupment right is to modify that result. As Lord Sumption said, the recoupment right seeks to 'undo in part what the contract has done'.[72] Indeed, without acting inconsistently with the contract, the recoupment claim cannot achieve that purpose. Therefore, it is unclear why there is no 'policy inconsistency' between the restitution claim and the insurance contract.

In conclusion, this chapter raised three main arguments. All three concerned the equitable right of recoupment recognised by the majority in *Zurich Insurance*. First, it was suggested that the unjust enrichment justification underlying rights of recoupment did not support their operation in favour of the defendant-insurer in *Zurich Insurance*. Secondly, the defendant's contractual entitlement as an independent qualification on claims in unjust enrichment was considered. The majority's suggestion that there is no

[71] *Zurich Insurance (UKSC)* (n 2) [72] (Lord Mance).

[72] Ibid [184] (Lord Sumption).

inconsistency between contract and recoupment was, it was argued, incorrect. The final argument concerned the rule that denies restitution when the enrichment is owed to the defendant i.e. the legal obligation qualification. It was suggested that there are good reasons to not replace this bright-line rule with a flexible approach. The indeterminacy of the flexible methodology is evident from the majority's decision in *Zurich Insurance*.

SECTION III

THE POSITIVE CASE

Section I argued that the legal obligation qualification must be understood as a bright-line rule rather than as a flexible exception. Section II demonstrated that the commonly offered explanations for the legal obligation qualification do not withstand scrutiny. Section III advances the positive case. It aims to develop a defensible explanation for the legal obligation qualification. In Section II, it was shown that the crucial challenge lies in explaining why it is that the defendant's legal entitlement is afforded precedence over the claimant's restitution claim. Most accounts presume that these obligations are ordered hierarchically in favour of the defendant's entitlement. However, they fail to justify that conclusion.

This thesis takes the view that the process of explaining the legal obligation qualification must proceed in two steps. First, we must ask, what are the normative reasons that justify a claim based on unjust enrichment? This enquiry can then pave the way for the further question: does the presence of a countervailing legal obligation deny any of the reasons that motivate a restitution claim?

Unfortunately, there is no unanimity of views on the normative justification(s) for claims based on unjust enrichment. Furthermore, this thesis cannot devote itself to resolving that puzzle. Therefore, the strategy adopted here is to consider the two most prominent accounts of the normative bases for the law of unjust enrichment: the entitlement thesis and the corrective justice theory. It will then be examined whether the presence of a countervailing obligation denies the justification for restitution on either of these accounts.

Chapter 7 will attempt to account for the legal obligation qualification by using the framework of the entitlement thesis. As an alternative, Chapter 8 will offer a corrective justice-based explanation.

CHAPTER 7

AN ENTITLEMENT EXPLANATION

In this chapter, and in the thesis generally, the phrase 'entitlement thesis' is used to refer to a category of normative theories of unjust enrichment. Broadly, these theories suggest that, in order for an unjust enrichment claim to be normatively justifiable, the defendant's enrichment must be derived from a pre-existing entitlement of the claimant. Some entitlement theorists insist that the claimant's pre-existing rights must be proprietary. Some others do not. This thesis uses the terminology 'entitlement thesis' to refer to both categories of theories.

This chapter will investigate whether the entitlement thesis can provide a satisfactory explanation for the legal obligation qualification. It proceeds in three parts. **Section A** will outline the positive case for the entitlement thesis. **Section B** will develop an entitlement-based explanation for the legal obligation qualification. The explanation offered here is based on the need for equal protection of the claimant's and the defendant's interests. It is argued that the claimant cannot use the law of restitution to protect her entitlements while simultaneously denying similar protection to the defendant. **Section C** concludes by evaluating some objections to the entitlement thesis.

A. THE POSITIVE CASE FOR THE ENTITLEMENT THESIS

> *Example 1*: C mistakenly believed that she owed D £100. Intending to discharge the debt, she paid £100 to D. C is entitled to restitution from D.[1]

[1] *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

Birks considered this the 'core case' of unjust enrichment.[2] 'The law of unjust enrichment' he wrote, 'is the law of all events materially identical to the mistaken payment of a non-existent debt'.[3] But why does C have a claim in Example 1?

On one view, the answer lies in the claimant's defective consent. The unjust factors model in particular places a large share of its justificatory burden on the flaw in the claimant's consent.[4] Birks for instance, considered an enrichment unjust 'when the claimant had not intended the recipient to have it'.[5] According to Burrows, similarly, 'the reason why a mistaken payment… may be recoverable in unjust enrichment is because the claimant's mistake vitiates his or her intention to benefit [the defendant]'.[6] Virgo traces the basis for unjust enrichment claims to individuals' right to self-determination. According to him, restitution is appropriate when 'the claimant's decision to act can be considered to have been impaired in some way'.[7]

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[2] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) ch 1.

[3] Ibid 3.

[4] For an account based on the absence of basis scheme see, Robert Stevens, 'The Non-Existence of Unjust Enrichment' (unpublished manuscript; on file with the author) ('It follows as a matter of necessity that once the law has determined that a transfer the plaintiff has performed is invalid that it must be reversed, unless an exceptional reason why not can be adduced… Restitution simply follows from the conclusion of invalidity. There is no mystery to the subject that requires explanation, and no normative agenda of its own that it pursues').

[5] Birks, *Unjust Enrichment* (n 2) 105; Peter Birks, *An Introduction to the Law of Restitution* (Clarendon 1985) 140.

[6] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 87. See also, Lionel Smith, 'Unjust Enrichment: Big or Small?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Pyrmont 2008) 36, 45; Gerard McMeel, *The Modern Law of Restitution* (Blackstone 2000) 43.

[7] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 37.

In *The Law and Ethics of Restitution*,[8] Dagan offers a legal realist explanation for restitution. Even on that account, the claimant's autonomy occupies the centre-stage. Dagan argues:[9]

> [M]istaken payments… prompt restitution because, and to the extent that, the retention of the wealth by the recipient would undermine the claimant's autonomy and restitution would not unduly infringe on the autonomy of the recipient.

The entitlement thesis challenges the centrality of the claimant's consent. It suggests that, by itself, the claimant's defective consent is normatively inconclusive. It is only determinative in conjunction with a distinct element: the claimant's entitlement from which the defendant's enrichment is derived. The entitlement theory has a long pedigree. Following Stoljar's pioneering work in the 1960s,[10] Watts,[11] Jaffey,[12] Botterell,[13] Fitzgerald[14] and Webb[15] have all defended different versions of this central idea.

This chapter does not aim to defend the entitlement thesis. However, a brief outline of the positive case for the entitlement theory is necessary. As noted previously, the reasoning based on the claimant's defective consent is the orthodoxy among textbook writers. However, the theoretical writing on unjust enrichment

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[8] Hanoch Dagan, *The Law and Ethics of Restitution* (CUP 2004) 18. See also, Hanoch Dagan, 'Mistakes' (2001) 79 Texas Law Review 1795.

[9] Dagan, *The Law and Ethics of Restitution* (n 8) 9.

[10] SJ Stoljar, *The Law of Quasi-Contract* (Law Book Co 1964). See also, Samuel Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 Modern Law Review 603.

[11] Peter Watts, 'Restitution – A Property Principle and a Services Principle' [1995] RLR 49.

[12] Peter Jaffey, 'Two Theories of Unjust Enrichment' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004).

[13] Andrew Botterell, 'Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian Journal of Law and Jurisprudence 275.

[14] Brian Fitzgerald, 'Ownership as the Proximity or Privity Principle in Unjust Enrichment Law' (1994-1995) 18 University of Queensland Law Journal 167.

[15] Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016).

reveals a different trend. The entitlement analysis is, as Wilmot-Smith puts it, 'statistically, the theoretical orthodoxy'.[16] It is crucial therefore to understand how exactly the entitlement thesis differs from the consent analysis.

The positive case for the entitlement thesis may be advanced in two steps: (1) the argument from principle and (2) the argument from the cases.

1. The Argument from Principle

As suggested above, the entitlement thesis suggests that the claimant's vitiated consent is, by itself, normatively inert. That claim in turn depends on two distinct enquiries: (a) why is C entitled to 'reconstitution'[17]? ('The claimant-sided enquiry') and (b) why does D come under an obligation[18] to give up her enrichment? ('The defendant-sided enquiry').[19]

This chapter will not consider the defendant-sided enquiry in any detail. But briefly, the question is, why is the payee the appropriate person to provide reconstitution? As Wilmot-Smith points out,[20] there are other alternatives. A legal system could socialise the claim. For instance, the claimant could be reconstituted from a publically funded insurance pool. To answer the defendant-sided puzzle, what

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[16] Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37 OJLS 844, 849.

[17] Terminology borrowed from ibid 845. As Wilmot-Smith suggests, in this context, 'reconstitution' is preferable to 'restitution' because the latter pre-supposes relief *from the payee*.

[18] For the debate about whether the onus on D is better understood as a 'liability' or an 'obligation', see Stephen Smith, 'The Restatement of Liabilities in Restitution' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013). Both terms are used interchangeably in this thesis.

[19] For examples of other theoretical enquiries that pursue the methodology of splitting up these enquiries, see Jules Coleman, *Markets Morals and the Law* (OUP 2002) 185; AP Simester, 'Correcting Unjust Enrichment' (2010) 8 OJLS 579, 594.

[20] Wilmot-Smith, 'Should the Payee Pay?' (n 16) 845; Frederick Wilmot-Smith, *Unjust Enrichment: Philosophical Questions* (unpublished manuscript; on file with the author) 32.

is required is a justification for singling out the recipient of a mistaken enrichment as the bearer of the liability for restitution.

The focus of this chapter is on the claimant-sided enquiry. Is the claimant's defective intention a normatively sufficient justification for her right to reconstitution? Proponents of the entitlement thesis suggest that it is not.

It is common experience that all unintended benefits do not ground restitution claims. An example.

> *Example 2*: C opened a cinema hall adjacent to an ice-cream stall. The stall is owned by D. C dislikes D and would never want to benefit D. Had C known that the stall was owned by D, C would have chosen an alternative location for the cinema hall. But C's customers buy ice-cream from D's stall on their way to the movies. D's sales soar.[21]

Here, C made a 'mistake'.[22] Clearly, D is enriched too. There is also a causal connection between the two; 'but for' C's mistake, D would not have received the benefit. Yet, on these facts, it is inconceivable that C has a claim against D.[23] If it was indeed C's vitiated consent that justified the claim in Example 1, why is the result in Example 2 different? It begins to appear that C's defective consent is only a part of the principle that explains Example 1.

Now, let us ask, why does the claimant's mistake matter? On one view, mistakes are relevant because they infringe one's 'capacity to act in accordance with

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[21] Based on Daniel Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (2003) 36 Loyola of Los Angeles Law Review 831, 840. See also, Ernest Weinrib, 'The Normative Structure of Unjust Enrichment' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 30–31.

[22] It may be argued that C's state of mind is better described as a misprediction since it concerned a future state of affairs where a benefit would accrue to D. But that objection can be easily overcome. C believed that the ice-cream stall was owned by someone other than D. In fact, it was owned by D. C was therefore 'mistaken' in the relevant sense.

[23] Friedmann 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (n 21); Ernest Weinrib, 'Unjust Enrichment' in *Corrective Justice* (OUP 2012) 119.

one's own rationally determined norms'.[24] Put simply, mistakes infringe the claimant's interest in acting 'only for the reason she takes herself to have'.[25] Consider Example 1 for instance. There, on the orthodox view, C's intention is vitiated by her mistake.[26] That is to say, C's consent to the payment was deficient in some sense.[27] On an alternative view, C's intention is not 'vitiated', but it is 'conditional'.[28] At the time of making the payment, C *did* intend to transfer £100 to D. However, C intended to do so in order to achieve the goal of discharging a debt. Thus, C's intention was 'conditional' on the debt being due. C had no relevant intention in the event that the debt was not due.[29] C's payment was therefore not covered by her intention to pay.

On either view, mistakes are normatively relevant because they infringe one's capacity to be a 'self-legislating autonomous agent'.[30] But surely, one's capacity for self-legislation is only relevant with respect to the resources at one's own disposal. I cannot claim to have an interest in determining the disposition of someone else's wealth. In Example 1, C's interest in acting according to her own rationally determined norms is relevant because C had a prior entitlement to the £100. It is that entitlement that justifies C's right to determine the disposition of £100. Thus, on the

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[24] Aruna Nair, '"Mistakes of Law" and Legal Reasoning: Interpreting *Kleinwort Benson v Lincoln City Council*' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 389.

[25] Frederick Wilmot-Smith, 'Retrospective Mistakes of Law' in Paul Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015) 305.

[26] Burrows, *The Law of Restitution* (n 6) 87.

[27] Frederick Wilmot-Smith, 'Reasons? For *Restitution*?' (2016) 79 Modern Law Review 1116, 1125.

[28] Webb, *Reason and Restitution* (n 15) 129.

[29] Charlie Webb, 'Intention, Mistake and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 323–326. See also, Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 129.

[30] Duncan Sheehan, 'Mistake, Failure of Consideration and the Planning Theory of Intention' (2015) 28 Canadian Journal of Law and Jurisprudence 155, 165.

account that treats mistakes as normatively relevant because they infringe one's capacity to act for their own reasons, C's defective consent is an important part of the explanation for C's right to restitution. However, by itself, it is not a sufficient justification.

In sum, the claimant's defective consent is only a part of the explanation for restitution in Example 1. In order to be normatively defensible, it must be supplemented by an account of the claimant's pre-existing entitlements from which the defendant's enrichment is derived.[31]

2. The Argument from the Cases

The significance of the claimant's entitlement may be vindicated through an examination of three categories of cases: (i) cases where restitution is denied because C has no exclusive entitlement; (ii) cases where C has an exclusive entitlement that grounds a claim that C would otherwise not have had; (iii) cases concerned with the restitution of spill-over benefits.

i. C has no exclusive entitlement

> *Example 3*: X owns a water-tank. The tank is designed such that when a valve is opened, it irrigates D's neighbouring farmland. X charges D a fee for this service. C, a passer-by, mistakenly opens the valve. As a consequence, D's land is irrigated. C seeks restitution from D.

Just as in Example 2, here, C made a 'mistake' in the relevant sense. D was enriched as a consequence. There is also a clear causal link between the two. Nevertheless, C's

[31] See, Daniel Friedmann, 'The Protection of Entitlements via the Law of Restitution—Expectancies and Privacy' (2005) 121 LQR 400, 420 ('The law of restitution deals with the recovery of benefits derived from a legally protected interest that belongs to another when the benefit was acquired in a way that is not sanctioned by the law. Hence, the award of… restitution is predicated upon the existence of a legally protected interest').

claim should fail. That is because C had no prior entitlement to the water-tank or, indeed, to the water from the use of which D benefitted.

There is considerable support for this view in the cases. Consider for example, *Warman v Southern Counties Car Finance Corporation*.[32] There, the claimant entered into an agreement with the defendant for the hire-purchase of a motor-car. Three months later, the claimant discovered that the car did not belong to the defendant. The claimant returned the car to its real owner. He then sued the defendant for damages for breach of the hire-purchase agreement. The defendant counterclaimed for the value that the claimant derived from the use of the car until it was returned. The counterclaim was rejected. The Court's reasoning in reaching that conclusion was based on the fact that the defendant did not have title to the car. Finnemore J said:[33]

> This car was not, at any time, the property of the defendants. I do not think that the plaintiff in any circumstances could be called on to pay to the defendants hiring money for a car which belonged to somebody else.

The defendant's counterclaim was, presumably, based on failure of consideration. The basis—that the defendant would transfer use of the car to the claimant and that the claimant would pay for it—was shared between the claimant and the defendant. Clearly, that basis failed. Yet, the fact that the defendant did not have a prior entitlement to the car from which the claimant's benefit was derived precluded the claim.

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[32] *Warman v Southern Counties Car Finance Corporation* [1949] 2 KB 576 (KB). See also, Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) 18–19.

[33] *Warman* (n 32) 582–583.

This is also the best explanation for *Rowland v Divall*.[34] The facts were similar to *Warman*. The defendant sold a car to the claimant. The claimant used the car for a few months. Subsequently, it was discovered that the defendant did not have title to the car. The defendant claimed the value of the claimant's use of the car. The claim was denied. As Burrows observes, this is explicable on the basis that,[35]

> as between the defendant and the car's true owner, the enrichment comprising the use of the car was not at the expense of the defendant but rather at the expense of the true owner.

Eighty Second Vocation Pty Ltd v Parere Investments Pty Ltd is another illustration.[36] The claimants were Eighty Second Vocation Pty Ltd (ESV), a computer consulting company and Mr Fox, its owner and manager. ESV had a significant shareholding in H-W Vic, a Victoria incorporated company. Mr Fox was also the director of H-W Vic. Pursuant to a restructuring agreement, H-W Vic's business was taken over by the defendant company. According to the claimants, they consented to the restructure based on the defendant's promise that they would be compensated for the loss of H-W Vic's goodwill. In fact, they were not compensated for that loss. The claimants alleged that there was a failure of consideration. On that basis, the claimant sought restitution of the value of HW-Vic's goodwill, a benefit that the defendant enjoyed after the restructure. The claim was denied. Weinberg J said:[37]

> The short answer to this claim is that it is essentially misconceived… Any goodwill that existed through Mr Fox's endeavours on behalf of H-W Vic, belonged to that company, and to that company alone. It did not belong to the shareholders. If [the defendant] did "misappropriate" the goodwill of

[34] *Rowland v Divall* [1923] 2 KB 500 (CA). See also, *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106 [69].

[35] Burrows, *The Law of Restitution* (n 6) 75. See also, Virgo (n 7) 106.

[36] *Eighty Second Vocation Pty Ltd v Parere Investments Pty Ltd* [2005] FCA 844, (2005) 144 FCR 88. See, James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 93–94.

[37] *Eighty Second Vocation Pty Ltd* (n 36) [106] (Weinberg J) (emphasis added).

> H-W Vic, the only party that has standing to recover damages arising from that conduct in a claim for restitution is H-W Vic. However, that company is not a party to this proceeding.

Evidently, the defendant benefitted from the restructuring. The claimants' consent to that process was conditional on being compensated for their loss of goodwill. As things turned out, that condition was not satisfied. Consequently, the claimant's intention was impaired. However, that was considered insufficient to justify the restitution claim. What proved decisive was the fact that the claimants had no prior right to HW-Vic's goodwill, the entitlement from which the defendant's benefit was derived.

ii. C's exclusive entitlement performs an inclusive role

> *Example 4A*: C mistakenly believed that she owed X £100. Intending to discharge the debt, she paid X. Believing himself to be £100 better off, but unaware of C's mistake, X gifted a different £100 note to D. C seeks restitution from D.

C's claim will fail.[38] *Re Byfield*[39] illustrates this. There, a bankrupt instructed her bank to transfer £19,500 from her account to her mother's account. The bank, unaware of the bankruptcy order, made the transfer. The mother used a large part of that sum to pay off debts due to the bankrupt's creditors. Upon discovering the mistake, the bank sought to be subrogated to the discharged creditors' rights against the bankrupt. The bank's claim was denied. It was held that 'there was no immediate compelling nexus between [the mother's] payments and the bank's act'.[40]

Consider now, a modified version of Example 4A.

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[38] Burrows, *The Law of Restitution* (n 6) 70; Virgo (n 7) 110; Ben McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' [2009] RLR 37.

[39] *In Re Byfield* [1982] Ch 267 (Ch D).

[40] Ibid 276.

Example 4B: X stole £100 from C. X then gifted *the same* £100 note to D. C now seeks restitution from D.

This time, C's claim will succeed.[41] *Lipkin Gorman*[42] establishes this. Cass was a partner in the claimant firm of solicitors. Cass gambled away money belonging to the claimant at the Playboy Club. The claimant proceeded against the Club. The claim was granted. The Court's reasoning was premised on 'tracing'. It was held that the claimant continued to retain a proprietary interest in the money when it was received by the defendant Club. Consider for example, the following passage from Lord Goff's reasoning:[43]

> It is well established that a legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property.
>
> There is in my opinion no reason why the solicitors should not be able to trace their property at common law in that chose in action, or in any part of it, into its product, i.e. cash drawn by Cass from their client account at the bank. Such a claim is consistent with their assertion that the money so obtained by Cass was their property at common law.

In *Lipkin Gorman*, it proved crucial that the claimant had a proprietary interest in the enrichment when it was received by the defendant. As Burrows puts it,[44]

> Provided C retains title it does not matter how many hands the £100 banknote or bicycle passes through before reaching D: C, by reason of his title to the property, can establish that D's gain was at C's expense.

Thus, in Example 4B, C's entitlement from which D's enrichment is directly derived performs an inclusive function. It confers on C, a claim that C would otherwise—for instance, in Example 4A—not have had. As McFarlane puts it,[45]

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[41] Burrows, *The Law of Restitution* (n 6) 75; Virgo (n 7) 110.

[42] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[43] Ibid 574.

[44] Burrows, *The Law of Restitution* (n 6) 76.

> D's acquisition of a factual gain, which could be said to come at C's expense, was insufficient to trigger any duty to D, even in the absence of a specific legal ground for the transfer of value from C to D. On the model proposed here, however, the absence of liability in such cases is easily explained: in each of those cases, C lost no right.

iii. Spill-over benefits

> *Example 5A*: D lives in the flat above C. C heats her flat during winter. The rising heat warms up D's flat. As a consequence, D saves on her fuel bill. C seeks restitution from D.[46]

C's claim should fail. This result is supported by authorities from England,[47] France[48] and the United States.[49] But why is C's claim denied? According to Birks, this is because D's enrichment was a 'gift' from C, 'although possibly not warmly wished'.[50] With respect, this reasoning is unsustainable. C's heating of her own flat is not accompanied by a donative intent,[51] least of all, towards D.[52] Birks's gift reasoning is 'conclusory'.[53]

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45 Ben McFarlane, 'Unjust Enrichment, Rights and Value' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 601.

46 Based on Birks, *Unjust Enrichment* (n 2) 158–159.

47 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275 [52]–[58] (Lord Reed). See also, *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99, 105; *Ruabon Steamship Co Ltd v London Assurance* [1900] AC 6 (HL); Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 8, 54. See also, Adam Kramer and Adrian Beltrami QC, 'A Note on Incidental Benefit and Multi-Party Situations' [2013] RLR 46.

48 See Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (n 21) 845–846.

49 *Ulmer v Farnsworth* 80 Me 500 (Supreme Judicial Court of Maine); *Pierson v Post* 3 Cai R 175 (Supreme Court of New York).

50 Birks, *Unjust Enrichment* (n 2) 158.

51 Zoë Sinel, 'The Methods and Madness of Unjust Enrichment' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart 2016) 196–197.

52 Burrows, *The Law of Restitution* (n 6) 111.

53 Peter Watts, 'Publication Review: Unjust Enrichment' (2005) 121 LQR 163, 166.

It has also been suggested that the denial of restitution in Example 5A is best explained by the fact that there is no unjust factor in that case.[54] This reasoning is also unconvincing. First, it is unclear why 'ignorance'[55] or 'powerlessness'[56] are inapplicable in Example 5A. Secondly, consider a modified version of Example 5A.

> *Example 5B*: D lives in the flat above C. C forgot to turn off her heater when she went away for Christmas. The heat from C's flat warms up D's flat. As a consequence, D saves on his fuel bill. C seeks restitution from D.[57]

Surely, the claim should be denied, as it was in Example 5A.[58] But the 'no unjust factor' explanation cannot account for this result. Unlike in Example 5A, in Example 5B, C was mistaken. C did not intend to heat her own flat. Neither did she intend to heat D's flat.

Example 5B also challenges the 'abandonment' explanation.[59] The abandonment explanation suggests that in Example 5A restitution is denied because C had 'freely given up the benefit received by the defendant'.[60] However, the principle of abandonment requires an intention to abandon. Did C intend to abandon the benefit of her heating in Example 5B? It is difficult to see how she did. In Example 5B, C did not even intend the primary act of heating her own flat. Alternatively, can C's intention to abandon be objectively presumed? Ball argues that where heating D's flat

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[54] Burrows, *The Law of Restitution* (n 6) 108; Virgo (n 7) 115; James Edelman, 'The Meaning of "Unjust" in the English Law of Unjust Enrichment' [2006] European Review of Private Law 309, 321.

[55] Tariq A Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636, 653.

[56] Eli Ball, 'Abandonment and the Problem of Incidental Gains in the Law of Restitution of Unjust Enrichment' [2011] RLR 49, 53.

[57] Based on Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 62.

[58] Stevens (n 4) 3.

[59] Ball (n 56).

[60] Ibid 49.

was a foreseeable consequence of C's own actions, it can.[61] But in Example 5B, it does not appear that C could foresee the consequence of heating D's flat either.

Thus, just like Example 2 and Example 3, Example 5B is yet another illustration that the claimant's vitiated consent is by itself not sufficient to trigger restitution. Why then is restitution denied in Example 5B? The entitlement thesis suggests that this result is explicable on the basis that D's enrichment was not derived from any of C's exclusive entitlements. C could attempt to premise a restitution claim based on a number of her entitlements. Let us consider them in turn.

Consider, first, C's entitlement to property. C may assert that the heat from which D benefitted was generated from her property. Indisputably, C has a legally protected entitlement to her property. However, the extent of that protection is limited. It does not extend to spill-overs from one's property that third-parties may derive benefits from. Consider an illustration.

> *Example 6*: C and D live across the street. When C switches on her light, it shines into D's study. Consequently, D can read without turning on her light. D thus saves on her electricity bill.[62]

C has no claim to reverse D's enrichment. This is because C does not have an exclusive entitlement to the light that spills-over from C's property.[63] As Meier puts it, the spill-over benefit 'belongs to no one'.[64]

Victoria Park Racing v Taylor[65] illustrates this point further. There, the claimant owned a racecourse. Spectators were charged for admission to the racecourse. The

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[61] Ibid 67.

[62] Sonja Meier, 'No Basis: A Comparative View' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 356.

[63] Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (n 21) 846.

[64] Meier (n 62).

defendant viewed the races from a raised platform built on a neighbouring land. The defendant also radio broadcasted the event. Consequently, attendance at the claimant's racecourse dropped and the claimant suffered a loss. The claimant sought an injunction to restrain the defendant's broadcasting. The injunction was denied. The Court recognised the claimant's exclusive interest in their property. It was also acknowledged that this includes the right to exclude others from the property. However, Dixon J reasoned:[66]

> So far as freedom from view or inspection is a natural or acquired physical characteristic of the site… it is a characteristic which is not a legally protected interest.

Further, he said:[67]

> the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected at law or in equity.

Alternatively, C may attempt to justify her claim by reference to an entitlement to 'value'. It may be suggested that D was enriched as a consequence of value that was derived from C. However, it is doubtful whether the law recognises an abstract entitlement to value in this way. Consider another illustration.

> *Example 7*: C and D each own one of only two specimens of a rare collectible stamp. C accidentally destroys her stamp. This causes D's stamp to double in value.[68]

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[65] *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* [1937] HCA 45, (1937) 58 CLR 479. See also, Charlie Webb, 'Property, Unjust Enrichment, and Defective Transfers' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 348–349.

[66] *Victoria Park Racing* (n 65) 508.

[67] Ibid 510.

[68] Based on Stevens (n 4) 4.

Surely, C's claim should fail. This result is explicable in terms of C's entitlements. Before its destruction, the stamp was C's property. Consequently, she had a valid entitlement to it. However, C's entitlement to the stamp does not extend so far as to protect her against market fluctuations resulting in a shift in its value. This is relevant because, in Example 7, 'the change in value occurs through the operation of a market'.[69] There is no direct transfer of a right or entitlement from C to D. As Friedmann reasons:[70]

> there is no unjust enrichment where property increases in value as a result of market fluctuation. This rule applies irrespective of whether the increase in value results from natural causes, from lawful transactions in property belonging to others, or from some other activity of the market participants.

Finally, can C attempt to premise her claim in Example 5B on the basis of her entitlement to her own labour? Can C argue that she mistakenly provided a service that benefitted D? Compare Example 5B with the following illustration.

> *Example 5C*: D lives in the flat above C. Under a contract, C agreed with D that C would leave her heater on when she goes away for Christmas. As agreed, C did so. The heat from C's flat warmed up D's flat. Later, it turned out that the contract was void for its failure to comply with a statutory formality requirement. C seeks restitution from D.

Unlike in Example 5B, here, C has a valid claim against D. Arguably, in Example 5C, the entitlement upon which C's claim is premised is her entitlement to her own labour.[71] Why, then, is C's entitlement to her own labour insufficient to support the restitution claim in Example 5B? The answer lies in the fact that in Example 5B

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[69] Frederick Wilmot-Smith, 'Taxing Questions' (2015) 131 LQR 531, 534.

[70] Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (n 21) 840.

[71] See, Botterell (n 13); Nicholas McBride and Paul McGrath, 'The Nature of Restitution' (1995) 15 OJLS 33; Fitzgerald (n 14).

(unlike in Example 5C), C did not render the performance of a service to D. As Stevens puts it,[72]

> Unless C can say that D's enrichment is his doing because of a transfer he performed the necessary connection between them is missing under the rationale for the claim. Nothing invalid has happened that requires reversal.

The decision of the Supreme Court of New York in *Pierson v Post*[73] illustrates this point further. There, the claimant was chasing a fox with his hounds. The defendant, knowing fully well that the claimant was pursuing the fox, killed it and carried it off. Although the defendant had benefitted from the claimant's prior pursuit, the Court held that the claimant had no valid claim against the defendant. This is explicable on the basis that, just as in Example 5B, in *Pierson* the claimant had not performed a service to the defendant. Like in Example 5C, the result in *Pierson* would have been different, if for instance, the defendant had engaged the claimant as his helper in hunting under a contract that later turned out to be void.

In sum, according to the entitlement thesis, the best explanation for the unavailability of restitution in cases concerning restitution of spill-over benefits is as follows: in these cases, the claimant did not have an exclusive entitlement from which the defendant's enrichment was derived. The leading practitioners' textbook affirms this view. In many of these cases, it is said, restitution is denied because 'the benefit received by the defendant was not one to which the claimant was exclusively entitled'.[74]

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[72] Stevens (n 4) 4.

[73] *Pierson* (n 49).

[74] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) [4–53]. See also, Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn,

B. THE ENTITLEMENT EXPLANATION

1. Webb's Explanation

Webb has advanced an entitlement-based explanation for the legal obligation qualification. According to him,[75]

> [A]ny claim in unjust enrichment is rightly foreclosed by the determination that that, or some such, transfer was obligatory. By designating an action as obligatory, it is made non-optional. When I have an obligation to transfer a particular asset to you, the option to deal with that asset in some other way is one no longer open to me. So the answer to my complaint that I did not properly authorize and so did not truly choose that transfer is that the law gave me no choice not to make that transfer.

With respect, this reasoning does not withstand scrutiny. This is because Webb's reasoning is based on an inaccurate conception of the nature of the claimant's obligation to the defendant. Consider the following example.

> *Example 8:* C owed £100 to both D and X. C intended to pay X but mistakenly paid D. C's claim for restitution from D will fail.[76]

Indisputably, C was under an obligation to pay £100 to D. However, that does not equate to an 'obligation to transfer a particular asset to [D]', as Webb claims. C was not obliged to transfer a particular £100 note to D. C may discharge her debt from *any* of her resources. Thus, contrary to Webb's assertion, 'the option to deal with that asset' i.e. the particular £100 note that C paid D, was indeed open to C.

Sweet & Maxwell 2016) [1-31]; Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (n 21); Webb, 'Property, Unjust Enrichment, and Defective Transfers' (n 65) 351, 352; Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 65; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 890; Watts, 'Publication Review: Unjust Enrichment' (n 53) 166.

[75] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 152.

[76] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65. See also, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 32–33.

Webb further suggests that '[i]f I am under an obligation to give you this laptop, I am no longer at liberty to dispose of it elsewhere'.[77] Here, again, Webb's reasoning appears to presume that a legal obligation attaches to particular assets of the claimant. In Example 8, for instance, there is no basis for this assumption. Indeed, the fact that C could discharge her debt out of any of her resources suggests otherwise. Webb appears to pre-empt this objection in the following passage:[78]

> If I am under an obligation to pay you £1,000, though this obligation doesn't attach to any specific fund or moneys I presently hold, when the time for payment comes, I must find that sum from the resources at my disposal. If I don't, and you obtain judgment against me, that judgment will be enforced by the sale of my assets. Indeed obligations such as these presuppose some such set of private holdings; my obligation to transfer this laptop or pay this money assumes that I have, or ought to have, such items to dispose of to you.

However, this reasoning fails to meet the objection. Webb is right in suggesting that as the claimant-debtor, I must satisfy the debt out of the 'resources at my disposal'. But surely, I am at liberty to decide which of my resources I devote to that purpose. Consequently, contrary to Webb's assertion, the fact that C owes a debt to D does not deprive C of her freedom to determine the disposition of any of her assets. In sum, Webb's analysis is premised on an inaccurate conception of how D's entitlement relates to C's freedom to deal with her resources.

2. The Equality Explanation

This section will consider an alternative entitlement-based explanation. It runs as follows. Let us assume that the entitlement thesis is correct. Then the normative justification for restitution depends, at least in part, on the claimant's pre-transactional entitlements. For a restitution claim to succeed, the defendant's enrichment must in

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[77] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 152.

[78] Ibid 153 (emphasis added).

some sense be derived from those entitlements. In effect, therefore, a restitution claim protects the claimant's entitlements from being transferred away otherwise than through her fully effective consent. Equality between the parties demands that the law must afford a similar protection to the defendant. Consider Example 8 now. There, the defendant has a valid entitlement to receive £100 from C. Granting C's restitution claim will deprive D of that entitlement otherwise than through D's consent. In Example 8, therefore, C can be granted restitution only by denying D the very right upon which C's claim depends. That is impermissible.

This reasoning derives support from a number of sources. The first among them is Kant's 'Universal Principle of Right' (UPR).[79] UPR stands for the idea that:[80]

> [A]n action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or… the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.

Put differently, one's exercise of free choice must be consistent with a similar choice by others.[81] Thus, Kant's principle forbids us from 'making exceptions of ourselves'.[82] In Example 8, by asserting a restitution claim against D, that is exactly what C does. On the entitlement analysis, C's claim is based on her freedom to choose the disposition of her entitlements. However, if C's claim were to succeed, that very freedom would be denied to D.

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[79] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, CUP 1996) 24. Rawls has proposed a similar idea in the context of liberties: see John Rawls, *A Theory of Justice* (OUP 1999) 53 ('Each person is to have an equal right to the most extensive scheme of equal liberties compatible with a similar scheme of liberties for others').

[80] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) 124 (emphasis in original). See also, George Fletcher, 'Law and Morality: A Kantian Perspective' (1987) 87 Columbia Law Review 533, 540.

[81] Matthew Doyle, 'Corrective Justice and Unjust Enrichment' (2012) 1 The University of Toronto Law Journal 229, 236–237.

[82] Klimchuk, 'Unjust Enrichment and Corrective Justice' (n 80); Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 472, 473.

Secondly, the equality explanation also derives support from a number of normative accounts of the law of unjust enrichment. The analysis adopted by McBride and McGrath is an example. Their thesis is premised on the idea that 'in invoking [a] right, one must concede it to everyone else similarly placed'.[83] Consider for example, a defendant who is the recipient of an asset that was mistakenly transferred to her. The defendant may invoke a right of ownership over that asset. However, in doing so, the defendant must afford the same right to the claimant. But the defendant's retention of the asset is not consistent with the claimant's right to autonomy in the disposition of her assets. Indeed, the fact that the claimant's transfer to the defendant was mistaken suggests that the claimant did not validly exercise her right to choose the disposition of her assets. Therefore, if the defendant were to deny the claimant's right to restitution, the defendant would be acting inconsistently. To McBride and McGrath, this puts the defendant in a position where she cannot legitimately deny the normative force of the claimant's restitution claim.[84]

Similarly, Drassinower and McInnes have also advanced views that buttress the equality reasoning. According to Drassinower, the normative basis for restitution claims is itself based on equality between the parties. In his view, the claimant and the defendant are both equally entitled to their resources until they part with them freely. He observes:[85]

> [T]he defendant cannot claim to retain what was not given to him as a gift because such a claim is simultaneously inconsistent with the defendant's own entitlement to what is his until he freely parts with it. In denying the other's

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[83] McBride and McGrath (n 71) 40.

[84] Ibid 38–40.

[85] Abraham Drassinower, 'Unrequested Benefits in the Law of Unjust Enrichment' (1998) 48 The University of Toronto Law Journal 459, 468.

> right, the defendant denies his own. In so doing, he undermines his own claim to retain the benefit.

McInnes makes a remarkably similar argument to justify restitution claims based on mistake. According to him:[86]

> By resisting liability, the defendant broadly asserts the right to retain his… enrichment until he freely chooses to part with it. Contrary to the Kantian imperative, however, he thereby claims for himself a right that he is unwilling to extend to others.

Thirdly, the principle of equal treatment of the parties to a restitution claim has been emphasised in a number of analogous contexts.[87] Consider, for example, Edelman's justification of the change of position defence. He defends the view that change of position protects the defendant's autonomy.[88] In determining the nature and extent of that protection, however, equality plays a crucial role:[89]

> The degree of protection that the courts have chosen [for the defendant] is the same protection as is given to the autonomy of the claimant. This ought to be the minimum protection given to a defendant. A claimant should not be entitled to insist upon a right to protection of his autonomy in a primary claim without affording the same protection to the autonomy of the defendant in a defence.

Ratan has adopted a similar view. In the context of the change of position defence, his enquiry concerns the baseline against which a change in the defendant's

[86] Mitchell McInnes, 'The Measure of Restitution' (2002) 52 The University of Toronto Law Journal 163, 188. See also, Mitchell McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' [2001] RLR 29, 36.

[87] See, Weinrib (n 23) 203 ('In dealing with the defectiveness of a transfer of value, the law has to observe a strict equality in its treatment of plaintiff and defendant').

[88] James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston University Law Review 1009.

[89] Ibid 1021. See also, Elise Bant, 'Change of Position: Outstanding Issues' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 144. For a similar argument in the context of restitution within subsisting contracts see, James Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010) 171, 173.

position must be assessed.[90] According to him, the right question to ask is, 'how would the defendant have fared if the claimant had not been mistaken'?[91] This is justified by reference to the idea that the claimant must take the 'rough with the smooth'. The claimant enjoys the 'upside' of her defective decision-making i.e. restitution from the defendant. Consequently, she cannot deny its 'downside' i.e. the risk of the defendant's causally related detriment.[92] But what is the moral justification for the 'rough with the smooth' principle?[93] In response, Ratan relies on a line of reasoning that mirrors the equality analysis. According to Ratan, this principle is justified by the need to prevent the claimant from relying on 'self-serving distinctions':[94]

> Why should the claimant be able to have the consequences of the defect in her decision making allocated to her by the law of unjust enrichment when it works to her advantage but not otherwise?... [T]he unjust enrichment claimant cannot justify distinguishing between the consequences of the defect in her decision making simply on the basis that this distinction furthers her own interests. Such self-serving distinctions are precisely what the 'rough with the smooth' principle rules out.

Analogously, in Example 8, the claimant asserts the integrity of her pre-transaction entitlements to justify the restitution claim. The claimant cannot be permitted to draw a self-serving distinction between her entitlements and those of the

[90] Ajay Ratan, 'The Unity of Pre-receipt and Post-receipt Detriment' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 87.

[91] Ibid 91.

[92] Ibid 111–112.

[93] See, Tony Honoré, *Responsibility and Fault* (Hart 1999) 134 ('its moral force can hardly be denied').

[94] Ratan (n 90) 112.

defendant. Consequently, she cannot assert a claim against the defendant that would deprive the defendant of the protection of his pre-existing entitlements.[95]

Finally, the equality analysis has been adopted by Weinrib in almost identical terms. Consider for instance, this passage from Weinrib:[96]

> Underlying the obligation-creating conditions is the idea that the parties each have an entitlement to what is one's own until one freely parts with it. As the owner of the value at the inception of the transfer, the plaintiff makes a claim that rests initially on not having freely parted with that value. However, the normative ground of this claim has equal validity for both parties. Accordingly, the plaintiff's entitlement to what is one's own until freely parted with has to co-exist with the similar entitlement of the defendant. <u>The plaintiff's claim not to have freely parted with the transferred value cannot create an obligation that usurps a pre-existing entitlement of the defendant's with which the defendant also has not freely parted</u>.

A potential objection to the equality explanation remains to be considered. The objection concerns cases where the defendant's enrichment consists in the receipt of an asset. In many such cases, title passes to the defendant despite the claimant's mistake.[97] When title does pass, the restitution claim is bound to deprive the defendant of an entitlement i.e. her title to the asset. It appears therefore that in every such restitution claim, the claimant asserts an entitlement that she then denies the defendant. If this reasoning is correct, then the equality explanation must be rejected. However, this analysis is incorrect.

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[95] See also, James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 147 ('If the distinction between actions and defences did not exist, so that the law of unjust enrichment consisted only in the elements of the actions, the claimant would be the only party placed under a burden… This would be contrary to a fundamental tenet of procedural justice. It is a basic principle of law that litigants in the civil sphere must be treated as even-handedly in terms of procedural justice as is reasonably possible').

[96] Weinrib (n 21) 29 (emphasis added).

[97] *Chambers v Miller* (1862) CBNS 125, 143 ER 50; *Barclays Bank* (n 1) 689.

As a preliminary point, it is not clear that this objection is really a challenge to the equality explanation offered here. It is better understood as an objection to the entitlement thesis itself. The crux of the objection is the suggestion that both the claimant and the defendant have legitimate claims to the enrichment. The claimant's interest is premised on her pre-existing entitlement whereas the defendant's, on her newly acquired title to the enrichment. By granting a claim, the law of restitution appears to prioritise the former over the latter.[98] Formulated in this way, it is clear that this objection questions why, on the entitlement analysis, a restitution claim arises in the first place.[99]

Furthermore, focusing on the defendant's title to the enrichment as an interest countervailing the claimant's pre-existing entitlement would be a mistake. Proponents of the entitlement thesis offer a convincing explanation for why this is the case. That explanation is based on the premise that the rules of title to property and the law of restitution do not work independently. They operate alongside each other.[100] Indeed, according to the entitlement thesis, the restitution claim is oriented to 'mitigate' the effect of the property rule that passes title to the defendant.[101] It is unsurprising therefore that the restitution claim countervails the defendant's title. That is the very purpose of the claim. What then justifies the rule that holds that title passes to the defendant? The answer is found in 'instrumental reasons'.[102] As Watts puts it,[103]

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[98] Wilmot-Smith, 'Should the Payee Pay?' (n 16) 849–850.

[99] See, Klimchuk, 'Unjust Enrichment and Corrective Justice' (n 80) 126–127.

[100] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 100.

[101] McFarlane (n 45) 607.

[102] Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 169.

> The best explanation for why many types of event that give rise to a restitutionary claim do not prevent title in the property passing to the defendant is not out of any concern for the defendant (who after all remains liable), but to avoid burdening more remote recipients with legal duties.

Therefore, as between the claimant and the immediate recipient of the claimant's property, 'the passage of title is largely irrelevant'.[104] Evidently, this is the relationship that the restitution claim is concerned with.

The reasons outlined above focus, principally, on the inequity of the claimant's position; the claimant asserts an interest while denying a similar protection to the defendant. There are also good systemic reasons that support the equality reasoning. Some of these have been explored in the literature on moral and political philosophy.[105] In Roman law, for instance, 'justice' was understood as 'the willingness to render what is due as a matter of right, to *each*'.[106] As the opening passage of the *Institutes* states, '[j]ustice is the stable and lasting willingness to give *to each his right*'.[107] From a systemic point of view, therefore, it is 'unjust' to allow the claimant her due while denying, simultaneously, the defendant's entitlements. Finnis's exposition of the principle 'treat like cases alike' reinforces this conclusion.

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[103] Peter Watts, '"Unjust Enrichment"—the Potion that Induces Well-meaning Sloppiness of Thought' (2016) 69 Current Legal Problems 1, 8.

[104] Ibid. See also, Weinrib (n 21) 29 ('Being unreciprocated, the transferred value of [an asset] thus has a double aspect. On the one hand, it is a component of the transferee's proprietary right in the shoes. As is the case with every owner, the transferee who becomes the owner of the shoes also thereby becomes the owner of the value of the shoes. This is an exclusive right that the transferee has against the whole world… On the other hand, the value of the shoes is also a component of the normative relationship, unshared by anyone else, between me as transferor and the transferee').

[105] I am grateful to Ajay Ratan for drawing my attention to this literature.

[106] John Finnis, 'Equality and Differences' (2011) 56 American Journal of Jurisprudence 17, 17 (emphasis in original).

[107] John Finnis, 'The Priority of Persons' in *Intention and Identity: Collected Essays* (OUP 2011) 22 (emphasis added).

One aspect of that principle, Finnis points out, is equality.[108] Following Rawls,[109] Finnis argues that all human beings who possess the capacity for moral personality are equal in some respects. To Finnis, therefore, moral personality is about 'what is needed to be a person who respects other persons, for their own sake, and who sees the need to give to *each* of them their due (*ius suum*: their right)'.[110] Protecting the claimant's interests alone would, on this account, be a denial of the defendant's moral personality. Dworkin has defended a similar view in the context of organisation of rights and responsibilities in a political community. In order to be morally defensible, he argues, the rights and responsibilities that flow from a political community's decisions must 'show not only concern but an *equal* concern for all members'.[111] This follows from the premise that 'each person is as worthy as the other, that each must be treated with equal concern'.[112]

C. OBJECTIONS TO THE ENTITLEMENT THESIS

Section A outlined the positive case for the entitlement thesis. In Section B, an entitlement-based explanation for the legal obligation qualification was offered. This concluding section is devoted to highlighting some shortcomings of the entitlement analysis. It will be suggested that, while the entitlement thesis does succeed in overcoming some of these criticisms, some others pose a significant hurdle. Admittedly, the validity of the entitlement explanation advanced in Section B depends entirely on the soundness of the entitlement thesis itself. Unfortunately, a resolution of that broader question—what is the normative justification for claims based on

[108] Finnis, 'Equality and Differences' (n 106) 17.

[109] Rawls (n 79) 504.

[110] Finnis, 'Equality and Differences' (n 106) 19.

[111] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 200.

[112] Ibid 213.

restitution of unjust enrichment—to which the entitlement thesis is a response, must remain outside the scope of this thesis.

Perhaps the most common criticism of the entitlement thesis arises from the fact that in most cases of unjust enrichment involving transfer of property, title passes to the defendant. For example, despite the claimant's defective consent, a mistaken transfer usually vests title in the defendant. How then can the claimant's right to restitution be premised on the claimant's entitlement to her property? After the transfer, she no longer has title.[113] Webb offers a plausible answer. According to him, title is not the only mechanism through which law regulates the use of property. For example, a legal title holder's rights in respect of land may be curtailed by a lease or an easement. Conversely, title is not exhaustive of an owner's rights to property either. Thus, when an asset is mistakenly transferred to the defendant, title may pass. This only signifies positive law's treatment of 'title' as a set of 'bottom-line legal entitlements'.[114] It does not deprive the owner of his normative *interest* in determining that asset's use and disposition.[115] It is this interest that grounds the claimant's right to restitution.

This response however leads to further problems. For instance, consider Examples 4A and 4B again.

> *Example 4A*: C mistakenly believed that she owed X £100. Intending to discharge the debt, she paid X. Believing himself to be £100 better off, but unaware of C's mistake, X gifted a different £100 note to D. C seeks restitution from D.

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[113] Burrows, *The Law of Restitution* (n 6) 30; Zoë Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31 OJLS 551, 551–552.

[114] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 72.

[115] Ibid 70–74.

> *Example 4B*: C mistakenly believed that she owed X £100. Intending to discharge the debt, she paid X. Believing himself to be £100 better off, but unaware of C's mistake, X gifted *the same* £100 note to D. C seeks restitution from D.

As suggested previously, C's claim will fail in 4A, whereas it will succeed in 4B.[116] Let us now assume, as Webb suggests, that C's claim is based on her 'interest' to the £100 note. On that premise, C's continued retention of the title to that note is not determinative of this interest. Why then, are Examples 4A and 4B different? Why does it matter whether C retains the title to the note when D receives it? Equally, if C's interest to the note is not extinguished by its mistaken disposition, can C assert a claim against its remote recipients? For instance, in Example 4A, let us assume that D passed on the note to E, and E then passed it on to F. Does C have a claim against E or F? The positive law suggests that C does not.[117] However, on Webb's reasoning, each of them must be amenable to a claim premised on C's pre-existing interest to the note. In this regard, the entitlement thesis appears to be over-inclusive.

Furthermore, most versions of the entitlement thesis are also equivocal as to the nature of the entitlement that the claimant must possess in order for a restitution claim to be sustainable. According to Webb, for instance, the justification for restitution is bound up with private property.[118] On some occasions, however, Webb permits claims that are based on a broader notion of entitlement. A mistaken transfer from the claimant's bank account is one example. According to Webb, my bank account 'represents funds that are... truly at my disposal'.[119] He claims that this is sufficient to bring such claims within the explanatory scope of his theory. However, the analogy

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[116] See Chapter 7(A)(2)(ii) above.

[117] Ibid.

[118] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 94.

[119] Ibid.

between Webb's central case i.e. restitution arising from the mistaken transfer of an asset, and a bank transfer, is inexact. In the latter case, the claimant owns a debt, not the property in the notes.[120] It appears therefore that Webb's thesis extends beyond proprietary entitlements. But how far? Consider the following illustration.

> *Example 9*: C mistakenly believed that she owed D £100. Intending to discharge the debt, she pays D £100. The payment is made from C's overdrawn bank account.[121] C seeks restitution from D.

Surely, C's claim should succeed. But the entitlement thesis struggles to explain this result. Proponents of the entitlement thesis may suggest that C had an entitlement to the bank's payment to D. Webb, for instance, argues that 'my bank account entitles me to call on my bank to put me in funds (at least) to the value of my credit balance'.[122] However, this reasoning breaks down when the customer's account is in overdraft. This is especially so when the bank had no contractual obligation to provide overdraft. Faced with this difficulty, Webb makes an alternative suggestion. He relies on the claimant's 'authority as account holder—as the person entitled to decide how this facility be exercised'.[123] This will not do either. In Example 9, the customer had no entitlement to the overdraft facility. As a corollary, she had no entitlement to choose the disposition of the payment that the bank made to D. This is because the overdraft is a loan from the bank to the customer.[124] Consequently, in Example 9, it is difficult to see how D's enrichment is derived from any of C's entitlements.

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[120] Wilmot-Smith, 'Reasons? For *Restitution*?' (n 27) 1131.

[121] Let us assume that there is no prior agreement that the bank would grant C an overdraft.

[122] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 98.

[123] Ibid.

[124] *Barclays Bank* (n 1) 699–700.

Finally, the entitlement thesis has also been criticised for its inability to account for restitution in services cases.[125] In cases concerning restitution following the provision of mistaken services, it is often argued that the defendant's enrichment is not derived from any of the claimant's pre-existing interests. The entitlement theorists' response to this objection has not been unanimous. Many, such as Stoljar,[126] Webb[127] and Watts[128] adopt a narrow view; they accept that services cases fall outside the explanatory scope of their theories. Burrows has criticised this as 'impairing the unity of the subject'.[129] However, others like Botterell,[130] McBride and McGrath,[131] Fitzgerald[132] and Tokawa[133] have defended the contrary view. Tokawa usefully summarises the broader view in this passage:[134]

> C's agenda-setting authority is not limited to X things; rather, it additionally provides to P authority over X where X is (a portion of) C's labour. This is supported by the Hegelian argument that P has ownership over his own labour where such labour is separable from C's personality generally: 'Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being' [citing TM Knox, *Hegel's Philosophy of Right* (Oxford: Oxford University Press, 1967) 54].

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[125] Burrows, *The Law of Restitution* (n 6) 30.

[126] Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (n 10) 613.

[127] Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (n 15) 104–111.

[128] Watts, 'Restitution – A Property Principle and a Services Principle' (n 11) 51.

[129] Burrows, *The Law of Restitution* (n 6) 9.

[130] Botterell (n 71) 292.

[131] McBride and McGrath (n 71) 37.

[132] Fitzgerald (n 71) 171, 178.

[133] Robert Tokawa, 'The Status Theory: A Corrective Justice Account of the English Law of Unjust Enrichment' (Master of Laws thesis, University of Toronto 2014) 48.

[134] Ibid.

This enquiry will not be pursued any further here. But this objection, if taken seriously, appears to highlight another respect in which the entitlement thesis is under-inclusive.

In conclusion, the entitlement thesis, if accepted, can provide a defensible explanation for the legal obligation qualification. That explanation is based on the need for equal protection of the claimant's and the defendant's interests. The claimant cannot be permitted to use the law of restitution to protect her entitlements while simultaneously denying similar protection to the defendant. However, some may find the entitlement thesis unconvincing. To those, the explanation offered here is of no consequence. Therefore, the next chapter will consider an alternative account of the legal obligation qualification. That explanation is based on the application of the corrective justice theory to unjust enrichment.

CHAPTER 8

A CORRECTIVE JUSTICE EXPLANATION

The previous chapter offered an explanation for the legal obligation qualification based on the entitlement theory. However, the entitlement thesis has not received unanimous approval. Therefore, many people may dismiss the work done in the last chapter on account of their objections to the entitlement thesis. This chapter will offer an alternative analysis. It will use Weinrib's corrective justice framework to account for the legal obligation qualification. The corrective justice theory has received wide approval, in the theoretical literature,[1] by textbook writers,[2] and, occasionally, from the courts.[3]

A preliminary terminological point merits attention at this stage. As a normative explanation for unjust enrichment, the phrase 'corrective justice' has been used in the literature in two different senses. In the first sense, the 'thin' version, corrective justice only explains the juridical structure of an unjust enrichment claim.[4] The injustice that underlies the claim is itself not a 'corrective injustice'.[5] One must look elsewhere for a normative account of that injustice. According to a second, 'thick'

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[1] Ernest Weinrib, *The Idea of Private Law* (Rev edn, OUP 2012); Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115; Jules Coleman, *Corrective Justice and Property Rights* (Rodney Roberts ed, Peter Lang 2002).

[2] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 68–69; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 4–5, 104, 664.

[3] *Kingstreet Investments Ltd v Province of New Brunswick* 2007 SCC 1; [2007] 1 SCR 3 [32]; *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2017] 2 WLR 1200 [43] (Lord Reed); *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [96]–[99] (Lord Reed).

[4] Dennis Klimchuk, 'On the Autonomy of Corrective Justice' (2003) 23 OJLS 49, 51.

[5] John Gardner, 'The Purity and Priority of Private Law' (1996) 46 The University of Toronto Law Journal 459, 470.

version,[6] corrective justice not only explains the form of justice that a claim in unjust enrichment takes, but also accounts for the injustice that motivates a restitution claim. Here, corrective justice functions as a 'substantive principle of liability and remedy'.[7] This chapter will use corrective justice in the second, 'thick' sense.

Weinrib's writings constitute the most sustained and comprehensive defence of the corrective justice account of the law of unjust enrichment. Therefore, that is primary model that this chapter will draw upon. The chapter will proceed in three parts. **Section A** will outline the barebones of Weinrib's corrective justice theory. **Section B** will develop a corrective justice explanation for the legal obligation qualification. Finally, in **Section C**, I will evaluate some common criticisms of the corrective justice theory.

A. WEINRIB'S CORRECTIVE JUSTICE ACCOUNT

The central features of Weinrib's corrective justice theory may be understood in two stages. I will begin by outlining its three overarching features. Then, I will show how these broad features crystallise into Weinrib's 'obligation creating conditions'.

1. The Overarching Features

Weinrib's account of corrective justice is characterised by three overarching features. I will now consider them briefly.

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[6] Zoë Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31 OJLS 551.

[7] Klimchuk, 'On the Autonomy of Corrective Justice' (n 4) 51.

i. Correlativity

In private law, the liability of a defendant is always a liability towards the claimant.[8] According to Weinrib, this means that one party's legal position is only intelligible in the light of the other. The parties to a private law claim are, in Weinrib's words, 'connected as doer and sufferer of the same injustice'.[9] This has significant implications for the kind of reasons that can justify private law liability.[10] In particular, a justification satisfies correlativity only if the reason for the claimant's right mirrors the reason for the defendant's liability.[11] This has sometimes been helpfully termed the 'coin conception of liability' i.e. the idea that the claimant's right and the defendant's duty are two sides of the same coin.[12]

ii. Structure of Corrective Justice

A second broad feature of Weinrib's thesis is his reliance on Aristotle's account of the forms of justice. In particular, Weinrib borrows the justificatory structure of unjust enrichment from Aristotle's conception of corrective justice.

According to Aristotle, corrective justice, as contrasted from distributive justice, concerns the 'bipolar'[13] justice between persons in their private transactions. In their pre-transaction positions, the parties to an unjust enrichment claim are situated in a

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[8] Ernest Weinrib, 'Correlativity, Personality and the Emerging Consensus on Corrective Justice' (2001) 2 The University of Toronto Law Journal 107, 110.

[9] Ibid.

[10] Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 350.

[11] Ernest Weinrib, 'Restoring Restitution' (2005) 91 Virginia Law Review 861, 868.

[12] Frederick Wilmot-Smith, *Unjust Enrichment: Philosophical Questions* (unpublished manuscript; on file with the author) 28–32.

[13] Matthew Doyle, 'Corrective Justice and Unjust Enrichment' (2012) 1 The University of Toronto Law Journal 229, 234.

relationship of equality.[14] Corrective justice responds to a disruption of that equality. Usually, this consists of a gain to the defendant and a loss to the claimant. The purpose of the remedial act—restitution—is to restore the equilibrium. The defendant is asked to give up the gain and the claimant is compensated for her loss.[15]

Not all forms of private law liability fit neatly into the conceptual structure outlined above. For instance, when D's negligent driving injures C, it is not immediately apparent how D has acquired a gain. Weinrib's response to this problem is to recast gains and losses as being 'normative' rather than 'material'. Under the normative conception, 'gains and losses refer to discrepancies between what the parties have and what they should have according to the norm governing their interaction'.[16] Therefore, given the norm against negligent driving, Weinrib says, D has more than what she ought to have. Thus, D has acquired a normative gain.

iii. Kantian Right

Aristotle's conception of corrective justice presumes a state of 'equality' between the parties. But that raises the question, what is this an equality of? In response, Weinrib turns to Kant. According to Kant, the parties' equality lies in their status as 'self-determining agents'.[17] This aspect of Weinrib's thesis is explored in greater detail in a later section.[18]

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[14] Ernest Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 292.

[15] Mitchell McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' [2001] RLR 29, 34.

[16] Weinrib, 'The Gains and Losses of Corrective Justice' (n 14) 282–283.

[17] McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' (n 15) 36.

[18] See Chapter 8(B)(3)(ii), below.

2. Weinrib's Obligation-Creating Conditions

The three overarching features noted above, in the context of unjust enrichment, crystallise into three obligation-creating conditions. They will now be examined.

i. Transfer of Value

According to Weinrib, value is 'quantitative' and 'relational'. It abstracts from particular uses of things.[19] Thus, it permits the quantitative comparison of qualitatively heterogeneous things.[20] For Weinrib, a 'transfer of value' from the claimant to the defendant is a necessary component of the normative justification for unjust enrichment claims.[21]

For an unjust enrichment claim to arise, though, a transfer of value needs to be accompanied by two 'obligation-creating conditions'. The common focus of these conditions is on how the parties are situated with respect to the gratuitousness of what one gave and the other received.[22]

ii. Claimant-Oriented Condition

The claimant-oriented condition is that 'the benefit was non-donatively transferred'.[23] This subsumes two separate requirements, first, that the claimant did not intend to make a gift to the defendant, and secondly, that the claimant did intend to transfer

[19] Ernest Weinrib, 'Unjust Enrichment' in *Corrective Justice* (OUP 2012) 190, 191.

[20] Ernest Weinrib, 'The Normative Structure of Unjust Enrichment' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 27.

[21] For a criticism of the idea of 'transfer of value' see Chapter 8(C)(1) below.

[22] Doyle (n 13) 242.

[23] Weinrib, 'Unjust Enrichment' (n 19) 205.

value to the defendant. In Weinrib's words, this means that the claimant must have intended to give the defendant 'something for nothing'.[24]

iii. Defendant-Oriented Condition

The corresponding defendant oriented condition is that the defendant must have 'accepted' the benefit as 'non-donatively given'.[25] Importantly, the defendant's acceptance (just as the claimant's non-donative intent) is judged objectively: 'What matters is not the defendant's inner psychological state, but the judgments and assumptions that can reasonably be made against the background of the legal structure in which they operate'.[26]

B. CORRECTIVE JUSTICE EXPLANATIONS

Consider an example of the operation of the legal obligation qualification.

> *Example 1:* C owes D £100. The debt is now time-barred. Intending to discharge the debt, though unaware of the fact that the debt is no longer enforceable, C pays £100 to D. Realising her mistake, C seeks restitution from D. C's claim will not succeed.[27]

This section considers whether the denial of restitution in Example 1 can be explained using Weinrib's corrective justice thesis. Three possible corrective justice based explanations will be considered. It will be seen that the first two, although attractive at first blush, do not stand up to scrutiny.

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[24] Sinel (n 6) 557.

[25] Ernest Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 43.

[26] Weinrib, 'Unjust Enrichment' (n 19) 208; Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 43.

[27] *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676; *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097.

1. The Normative Gain Explanation

As outlined in the previous section, Weinrib's corrective justice thesis relies on a conception of normative gains and losses. The central premise of the 'normative gain explanation' is the suggestion that in Example 1, D does not acquire a normative gain. Neither does C suffer a normative loss. A normative gain or loss denotes a discrepancy between what a party has, and what she ought to have. In Example 1, D had a valid (although unenforceable) pre-transaction entitlement to £100. Therefore, on the receipt of £100 from C, albeit through a mistaken transfer, D received nothing more than what she was entitled to. Since D did not acquire a normative gain, it is argued, it is unsurprising that C's claim is denied. Hershovitz appears to affirm this view. He says:[28]

> [I]f I pay money in satisfaction of a debt, then I have less money than I did before but not less money than I ought to have. Likewise, one can obtain a material gain without sustaining a normative gain; this happens every time you get your paycheck.

The normative gain explanation suffers from insurmountable problems. To begin with, Weinrib's conception of 'normativity' in gains and losses is circular. Consider an illustration.

> *Example 2*: C mistakenly believed that she owed D £100. Intending to discharge the debt, she paid D £100. C is entitled to restitution from D.[29]

Here, why is D's receipt of £100 a *normative* gain? Put differently, why does D have more than what she ought to have? This question can only be answered by invoking

[28] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107, 113.

[29] *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

D's liability to provide restitution of £100 to C.[30] Given the norm against benefitting from mistaken payments, Weinrib might say, D has more than what she ought to have. But that is the very norm that Weinrib's thesis set out to explain. To rely on D's restitutionary liability to explain why D's gain is normative is, therefore, circular reasoning.[31]

Furthermore, the normative gain explanation prioritises D's legal entitlement over C's right to restitution. However, it provides no convincing reasons for doing so. Consider Example 1 again. Here, relying on D's entitlement to £100, the normative gain explanation suggests that D received no more than what she was entitled to. But that assertion disregards D's restitutionary liability to C. Given C's right to restitution, one may argue, D received more than what she ought to have. The priority between D's legal entitlement and C's restitutionary right is the crux of the explanatory puzzle in cases that deny restitution by applying the legal obligation qualification. The normative gain explanation offers no assistance in untying that knot.

2. The Correlativity Explanation

As noted above, the correlativity of the parties' positions is a central feature of Weinrib's corrective justice thesis. The obligation-creating conditions that justify restitutionary liability also reflect the structure of correlativity. Thus, according to Weinrib, an unjust enrichment claim is normatively justified when value is

[30] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 472, 483.

[31] Dennis Klimchuk, 'The Structure and Content of the Right to Restitution for Unjust Enrichment ' (2007) 53 University of Toronto Law Journal 661, 676; Wilmot-Smith (n 12) 48–49.

transferred by the claimant non-donatively, and it is *accepted* by the defendant as being given non-donatively.[32]

However, the criterion of 'non-donativeness' has not met with unmitigated approval. Penner, for instance, has argued that this requirement is unhelpful. He relies on restitution of mistaken gifts to establish this claim. In those cases, he notes:[33]

> Both transferor and transferee had the genuine intention to give on the one hand and to receive the payment as a gift on the other. The donative intent was on both sides. What was wrong about the transaction, and which justified the recovery, was that the gift was not the one [the claimant] intended to make.

With respect, this criticism is unconvincing. Let us assume, as Penner does, that the gift was not one the claimant intended to make. That must mean that the donor's gratuitous intent did not cover the transfer in respect of which she demands restitution. Consider for instance, the case of *Lady Hood of Avalon*.[34] There, Lady Hood sought restitution of a gift she had made to her eldest daughter. The claim was based on the fact that Lady Hood was mistaken in making the gift. Had she been aware of a previous gift, it was argued, the impugned gift would not have been made. Penner argues that despite Lady Hood's mistake, there was donative intent on both sides. But this reasoning overlooks the fact that Lady Hood's donative intention was conditional on an important assumption. That assumption was falsified by the earlier bequest. To suggest that the claimant's donative intention is unaffected by this mistake is analogous to suggesting that the claimant's autonomy in respect of a unilateral payment is not breached despite the fact that it was a mistaken transfer.

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[32] Weinrib, 'Unjust Enrichment' (n 19); Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 35–37.

[33] JE Penner, 'We All Make Mistakes: A 'Duty of Virtue' Theory of Restitutionary Liability for Mistaken Payments' (2018) 81 Modern Law Review 222, 239.

[34] *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 (Ch D).

A limited, although more convincing, point may be made about the criterion of 'non-donativeness'. Weinrib's insistence that the non-donativeness of the transfer must be reflected on both sides of the transaction is indicative of a broader principle. Let us begin by asking, why must be defendant accept the value as being given non-donatively? The answer must be that, this defendant-oriented condition is necessary to protect the defendant's autonomy. As Weinrib puts it:[35]

> If the plaintiff's lack of donative intent were to suffice for liability, defendants in turn would be deprived of what belongs to them without their having freely parted with it. The principle of justice in transfer, that one is entitled to what one owns until one freely parts with it, would thereby be inconsistently asserted for plaintiffs and denied for defendants.

Thus, the non-donativeness of the transfer on both sides of the transfer ensures that neither party will be deprived of their holdings against their will. Seen in this light, it is clear that non-donativeness is only one instantiation of a more fundamental principle: the idea that 'the transferee cannot retain the value on terms other than those on which it was given and accepted.'[36] The primary condition for liability in unjust enrichment must therefore be that, 'the defendant accepted the… transfer on the same basis that the plaintiff made it'.[37] Non-donativeness is only one example of the application of that broader principle.

Now consider an example.

> *Example 3A*: C owes £100 to both D and X under two separate contracts. C intends to pay X but mistakenly pays D. C seeks restitution from D. C's claim will fail.[38]

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[35] Weinrib, 'Unjust Enrichment' (n 19) 202–203.

[36] Ibid 222.

[37] Ernest Weinrib, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067, 1072.

[38] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63.

Here, did D accept the payment on the same basis as it was made by C? If D did, on Weinrib's analysis, C has a claim for restitution. The answer to that question must however, be in the negative. In transferring £100 to D, C did not intend to discharge the debt owed to D. C made the transfer intending to discharge a debt owed by C to X. However, C's transfer was accepted by D on the condition that it would constitute the discharge of a debt owed by C to D. Evidently, therefore, C's transfer was not accepted by D on the same basis as it was made by C. Thus, Weinrib's obligation-creating conditions are not satisfied in Example 3A. Consequently, there is no normative justification for restitution in this case. At first blush, the mismatch between the conditions of C's transfer and D's acceptance provides an explanation for the denial of restitution in Example 3A, and consequently, for the legal obligation qualification.

On closer examination however, this reasoning does not withstand scrutiny. Consider a variation of Example 3A.

> *Example 3B*: C owes £100 to X. C intends to pay X but mistakenly pays D. D believes, mistakenly, that C also owes £100 to D. D purports to accept the payment in discharge of the non-existent debt. C seeks restitution from D.[39]

Clearly, unlike in Example 3A, C's claim should succeed here. Despite D's mistaken belief, there is no countervailing legal obligation that ought to prelude C's claim. However, the correlativity explanation reaches the opposite result. Just as in Example 3A, there is a mismatch between the parties' 'bases' in this case. C made the payment intending to discharge a debt owed by C to X. However, in accepting that payment D intended to provide the discharge of a debt that D believed C owed D. Regardless of the fact that D's belief was mistaken, it is clear that the payment from C to D was not

[39] Based on Doyle (n 13) 244–245.

'made and accepted on the same basis'. As Doyle puts it, on Weinrib's account, 'acceptance [cannot] be imputed where the defendant accepts the transfer of value (for instance) in the mistaken belief that it is made in discharge of a (non-existent) obligation owed to him'.[40] Thus, just as in Example 3A, Weinrib's obligation-creating conditions are not met in Example 3B either. This is incorrect. The correlativity explanation must therefore be rejected.

3. The Equality Explanation

The last two sub-sections examined two commonly offered corrective justice-based explanations for the legal obligation qualification. It was shown that neither withstands scrutiny. This sub-section will offer and defend an alternative, preferable, justification. Briefly, that explanation runs as follows. Weinrib's corrective justice thesis and the entitlement theory share a significant, but often-overlooked feature: the normative relevance of the claimant's pre-transaction entitlements. On close examination, it is evident that the claimant's pre-transfer rights constitute an inescapable component of Weinrib's account of the law of unjust enrichment. This is also true of most other allied corrective justice theories. The primary task of this section is to bring this aspect of corrective justice to light. Once this is accomplished, it can be seen that the corrective justice explanation for the legal obligation qualification largely aligns with the entitlement explanation offered in the previous chapter.

[40] Ibid.

i. Why Return to the Past?

Most corrective justice accounts are, unsurprisingly, replete with references to the normativity of re-establishing a prior state of affairs.[41] Weinrib's account is no exception. Consider, for instance, a passage that captures an idea that permeates Weinrib's writings:[42]

> Corrective justice features the maintenance and restoration of the notional equality with which the parties enter the transaction… Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party.

Leaving aside the details for now, it appears from this passage that, the 'correction' that Weinrib contemplates is, inevitably, the re-establishment of a pre-existing state. But why return to the past? Wilmot-Smith calls this, 'the Idealist's Objection'. As he puts it,[43]

> The Idealist holds that we should not go backwards without, at the very least, an inquiry into whether the pre-transfer state was a just one. The pre-transfer state is on this view an inappropriate normative benchmark against which to establish our reasons or around which to sculpt our remedies.

Evidently, an enquiry into the normative defensibility of the pre-transaction state of affairs is absent in the law of unjust enrichment. How then can we answer the Idealist's Objection? Academic literature offers a number of potential responses.[44] For the present purposes, I will confine myself to examining Weinrib's own response. That is based on the need to maintain 'equality' between the parties.

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[41] Wilmot-Smith (n 12) chs 3 and 4.

[42] Ernest Weinrib, 'Correlativity and Personality' in *Corrective Justice* (OUP 2016) 16. See also, Weinrib, 'Corrective Justice in a Nutshell' (n 10) 349; Weinrib, 'The Gains and Losses of Corrective Justice' (n 14) 280; Doyle (n 13) 234.

[43] Wilmot-Smith (n 12) 41.

[44] Ibid ch 4; Coleman (n 1) 63.

ii. Equality, of What?

Aristotle's conception of corrective justice, upon which Weinrib builds his theory, relies on the notion of 'transactional equality'.[45] The parties' pre-transfer positions are, on Aristotle's account, analogous to 'two equal lines'.[46] The defective transfer upsets that equality. Hence, corrective justice requires its reversal. However, this account leaves an important void. As Weinrib puts it, Aristotle 'does not tell us what the equality is an equality *of*'.[47] Despite the image that the metaphor 'two equal lines' paints, Aristotle could not have meant that the parties' material holdings must be equal.[48] Furthermore, any attempt to conceptualise equality through *normative* losses and gains must also fail. As demonstrated previously, Weinrib's normativity reasoning is circular.[49] What, then, does 'equality' in the context of corrective justice mean?

It will now be argued that the 'equality' of corrective justice consists in the parties' equal entitlement to their pre-transaction entitlements. I draw support for this view from three different sources.

First, the application of Aristotle's corrective justice (or 'commutative justice'[50] as it was often called) by the Scholastics provides useful insights. For instance, Aquinas conceptualised restitution as 'nothing else but restoring someone to the

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[45] Weinrib, *The Idea of Private Law* (n 1) 57.

[46] Weinrib, 'Corrective Justice in a Nutshell' (n 10) 349. See also, Weinrib, 'The Gains and Losses of Corrective Justice' (n 14) 280 ('From the standpoint of corrective justice, the two parties are equals, and justice consists in vindicating their equality').

[47] Weinrib, *The Idea of Private Law* (n 1) 57 (emphasis added).

[48] Wilmot-Smith (n 12) 71–72.

[49] See Chapter 8(B)(1), above.

[50] Ernest Weinrib, 'Corrective Justice' (1992) 77 Iowa Law Review 403, 414.

possession or ownership of his goods'.[51] What is striking is that the possessive pronoun, 'his', is only a broad approximation of Aquinas's terminology. Aquinas's original language subsumed not just 'his' goods, or 'his' belongings, but anything that was 'coming to him' or 'due to him' 'either because of the law or by reason of justice'.[52] Read in this light, Aquinas's definition comes very close to recognising the claimant's pre-transaction entitlements as a necessary condition for restitution. This becomes clearer from Aquinas's later work in which he said that corrective justice is violated either by: (a) interfering with another's property (*acceptio rei*) or (b) by having what belonged to another (*ipsa res accepta*).[53] Further, it appears that the entitlement-based understanding also influenced the Scholastics' conceptualisation of the 'equality' of corrective justice. As Hallebeek puts it,[54]

> From the viewpoint of moral theology [of the Scholastics], what matters is that someone has been deprived of his belongings. This is the inequality which according to justice should be nullified.

Gordley's examination of the evolution of unjust enrichment through the age of the late Scholastics and the early natural lawyers reaches strikingly similar conclusions.[55] The reasons for the initial recognition of unjust enrichment were, he argues, inextricably related to the recognition and preservation of private property and resources. While 'distributive justice gives each citizen a fair share of whatever resources the state has to divide', the role of commutative justice was, it was thought,

[51] Jan Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (Gerard Noodt Instituut 1996) 47.

[52] Ibid 48.

[53] James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 424.

[54] Hallebeek (n 51) 48.

[55] Gordley (n 53) 419.

to 'preserve the share of each citizen'.[56] On this view, a violation of commutative justice only occurs when benefits are derived from 'another's resources'.[57] Furthermore, that the defendant's enrichment must derive from the claimant's 'resources' is clear from the context in which the Scholastics and natural lawyers spoke about unjust enrichment. Gordley notes,[58]

> We should note the context in which they spoke of unjust enrichment. Resources, from which one party had the exclusive right to benefit, had been used to confer on someone else the very benefit to which the first party had the exclusive right. Commutative justice forbad the second party to keep the benefit. That is a quite different and much more defensible claim than to say that no one should benefit as the result of a loss or cost suffered or incurred by someone else.

The 'equality' that Aristotle, the Scholastics and the natural lawyers had in mind therefore, was, as Wright put it, 'an equality of entitlement to their respective pre-interaction goods'.[59]

Secondly, there is overwhelming support for this conception of equality in the modern literature on corrective justice. Smith has considered this issue in some detail.[60] He affirms Aristotle's understanding of justice as a 'mean'. On this view, justice consists in not having too much or too little of something. But the question remains, 'too much' or 'too little' with reference to what? In the context of distributive justice, the answer depends on the criteria of distribution. Equality in distributive justice is achieved when everyone receives an equal proportion of the

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[56] Ibid 424.

[57] Ibid.

[58] Ibid 425.

[59] Richard Wright, 'Susbtantive Corrective Justice' (1992) 77 Iowa Law Review 625, 641–642.

[60] Smith (n 1).

distributed good. Corrective justice, however, is different. The concern here is, as Smith says,[61]

> [N]ot with equality of proportions but equality of entitlement to pretransaction holdings... Corrective justice requires that pretransaction holdings be respected, and it is achieved when they are. If D takes ten units from P, then corrective justice is violated and requires that the units be returned.

Consequently, Aristotle's 'mean' in the context of corrective justice is, as Benson says, 'nothing other than [the parties'] initial holding conceived and validated as an entitlement'.[62]

In an article entitled 'The Protection of Entitlements via the Law of Restitution',[63] Friedmann develops this thesis further. He makes a convincing case for the view that the law of restitution serves to vindicate and protect the claimant's pre-existing rights. He says,[64]

> The causes of action and the rights of recovery in torts and restitution presuppose the existence of some initial entitlement which they are meant to protect against certain events. They operate to redress an injury or imbalance between the parties with regard to their initial entitlements.

Predictably, this reasoning has significant implications for the corrective justice analysis. The equality that corrective justice guarantees is, on this analysis, the parties' equal entitlement to their pre-transaction holdings. However, neither corrective justice nor the law of restitution can, by themselves, conclusively determine the content to these entitlements. They are, Friedmann argues, derived from

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[61] Ibid 2118. See also, Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 Michigan Law Review 138, 140 ('Unjust Enrichment studies cases in which A holds a resource that B appropriates, to her own advantage and to A's harm').

[62] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 541.

[63] Daniel Friedmann, 'The Protection of Entitlements via the Law of Restitution—Expectancies and Privacy' (2005) 121 LQR 400.

[64] Ibid 401.

other facilitative branches of the law.[65] For the same reason, Waluchow also recognises corrective justice's 'parasitic'[66] character. On his view, similarly, the equality of corrective justice demands 'equal treatment with respect to [the parties'] independently definable just holdings'.[67] He elucidates,[68]

> [Corrective justice] presupposes an independently definable just status quo; a status quo of equality in which each party has, by law, his due – his entitlements – and which owing to the actions of the defendant, has been distributed.

Coleman goes one step further. He uses the terminology of 'transactional rights' (i.e. rights generated by corrective justice), and 'underlying rights' (i.e. the parties' pre-transfer entitlements). With Smith and Friedmann, Coleman recognises that transactional rights are conditional on the parties' underlying rights. Furthermore, he argues, there is an undeniable link between the two. The underlying rights condition the nature of the transactional rights. Thus, it is impossible to 'disassociate the duty to make repair from the status of the underlying entitlements and treat the latter as if it had no bearing on the grounds or content of the former'.[69]

Finally, Weinrib has, in his own writing, affirmed this conception of equality. Consider these passages for instance,

> Corrective justice… features the maintenance and restoration of the notional equality with which the parties enter the transaction. <u>The equality</u>

[65] Ibid 400. See also, Mark Gergen, 'What Renders Enrichment Unjust?' (2001) 79 Texas Law Review 1927, 1930 ('Consent by a person with power to allocate a resource will always bar a claim that the resource's allocation to D rather than to P was unjust').

[66] WJ Waluchow, 'Professor Weinrib on Corrective Justice' in Panagiotou S (ed), *Justice, Law and Method in Plato and Aristotle* (Academic Printing & Publishing 1987) 156.

[67] Ibid.

[68] Ibid.

[69] Coleman (n 1) 63. See also, Steven Walt, 'Eliminating Corrective Justice' (2006) 92 Virginia Law Review 1311, 1321 ('the duty of repair arises upon the violation of legal entitlements, whether or not the entitlements are morally legitimate').

> consists of persons having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss.[70]
>
> Equality consists in persons' having what belongs to them. The parties do not have the same quantity of holdings, but they are equal as the owners of whatever they do have.[71]

In an examination of the scope of Weinrib's thesis, Cane examines this aspect of Weinrib's theory. Weinrib's corrective justice is, Cane argues, 'more easily explained in terms of protection of an existing distribution of resources'.[72] Similarly, Barker considers it 'an immensely important insight' of Weinrib's work that 'corrective justice restores prior legal *entitlements*, not simply prior *factual positions*'.[73]

Inevitably, this conception of equality has important implications for a corrective justice-based account of the law of unjust enrichment. It means that, for its normative defensibility, corrective justice is reliant on the pre-transfer entitlements of the claimant. Weinrib admits this. In providing a normative explanation for unjust enrichment, he notes, 'of course corrective justice presupposes the existence of entitlements'.[74]

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[70] Weinrib, 'Corrective Justice in a Nutshell' (n 10) 13 (emphasis added).

[71] Weinrib, *The Idea of Private Law* (n 45) 63 (emphasis added).

[72] Cane (n 30) 476. See also, Martin Hevía, *Reasonableness and Responsibility: A Theory of Contract Law* (Springer 2013) 13 ('The purpose of corrective justice is the protection of entitlements: interferences with them are wrongful to entitlement holders, and justice requires the correction of the injustices that those interferences entail').

[73] Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) 100. See also, Kit Barker, 'Theorising Unjust Enrichment Law: Being Realist(ic)?' (2006) 26 OJLS 609, 618.

[74] Weinrib, *The Idea of Private Law* (n 1) 80. There is a substantial body of literature that examines whether corrective justice's reliance on pre-transaction entitlements breaks down the distinction between corrective justice and distributive justice. For that debate see, ibid 80 ('As an autonomous function of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution. Even if corrective justice works against a distributive background, it accepts the distribution as given and does not incorporate the justification of the distribution into its own structure. Therefore, the existence of a distribution

iii. Entitlements, to What?

The recognition that the claimant's pre-transaction entitlements are a necessary component of the corrective justice account leads to further questions. What are these entitlements? What is their content? In the context of the entitlement thesis, it was seen that the academic literature does not answer these questions unanimously. Most entitlement theories equivocate between two alternatives: confining the scope of their accounts to proprietary entitlements on the one hand, and reasoning by analogy to recognise that non-proprietary entitlements may similarly ground a restitution claim on the other.[75] In comparison, the literature on corrective justice has made more progress in answering this puzzle. One encounters two broad approaches on this issue. Although, for the present purposes, it is unnecessary to choose between them, I will consider them briefly.

On one view, pre-transfer entitlements that ground restitution claims are derived from other areas of the law.[76] Although these are not exhaustive,[77] three examples are commonly offered. The first among them concerns proprietary entitlements. An example.

> *Example 4*: C owes £100 to D1. C mistakenly pays the money to D2, D1's twin brother. D2 believes, in good faith, that he is entitled to the payment. C seeks restitution from D2.

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in no way implies that the equality of corrective justice is identical to the equality embodied in the distribution'); Klimchuk, 'On the Autonomy of Corrective Justice' (n 4); Benson (n 62); Stephen Perry, 'On the Relationship between Corrective Justice and Distributive Justice' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (OUP 2000) 237.

[75] See Chapter 7(C), above.

[76] Gordley (n 53) 425.

[77] For the view that restitution claims may also be justified by reference to other, less common entitlements, see Friedmann (n 63); Daniel Friedmann, 'The Creation of Entitlements Through the Law of Restitution' in Peter Birks, CEF Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart 2008) 189.

C's claim will succeed. On Weinrib's analysis, C's claim is based on the fact that the mistaken payment—a defective transfer of value—was made, and received non-donatively. However, a significant part of that normative justification consists of C's right to the £100 note. As Friedmann puts it, 'the source of the plaintiff's [restitutionary] right lies in his primary entitlement, namely his ownership of the £100 paid under mistake'.[78]

Secondly, and by analogy, restitution claims may also be justified by reference to non-proprietary entitlements. Consider, for instance, a mistaken transfer from the claimant's bank account.[79] The claimant has no proprietary right to the notes in his account. The claimant's entitlement is 'a contractual right vis-à-vis the bank'.[80] Although non-proprietary in nature, C's contractual right completes the corrective justice justification for C's claim. Lord Goff's treatment of this issue in *Lipkin Gorman*[81] lends considerable support to this view. There, the claimant firm of solicitors sought to recover a sum of money from the defendant club. This sum had been unauthorisedly withdrawn from the claimant's bank account by one of their partners. He then used it to place bets at the defendant club. Lord Goff recognised that,[82]

> there was of course no question of the solicitors having any legal property in any cash lying at the bank. The relationship of the bank with the solicitors was essentially that of debtor and creditor.

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[78] Friedmann, 'The Protection of Entitlements via the Law of Restitution—Expectancies and Privacy' (n 63) 403–404.

[79] It was noted in the previous section that the entitlement thesis struggles to explain these cases: see Chapter 7(C), above.

[80] Friedmann, 'The Protection of Entitlements via the Law of Restitution—Expectancies and Privacy' (n 63) 189.

[81] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[82] Ibid 573–574.

That much seems straightforward. Having found that the claimants could not base their claim on their property in the notes, Lord Goff then relied on a different entitlement. He said,

> [S]ince the client account was at all material times in credit, the bank was the debtor and the solicitors were its creditors. Such a debt constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the solicitors at common law.[83]
>
> [T]he solicitors [were] owners of the chose in action constituted by the indebtedness of the bank to them in respect of the sums paid into the client account.[84]

It appears, therefore, that although strictly non-proprietary in nature, Lord Goff considered the claimants' ownership of the debt as a significant part of their claim in unjust enrichment.

Finally, a similar analysis may be offered for cases where the defendant benefits from the claimant's mistaken provision of services. In those instances, the claimant's pre-transfer entitlement consists in her right to her own labour. As Friedmann puts it, '[t]hese services "belong" to the plaintiff who is ordinarily entitled to "sell" them'.[85]

Notably, Weinrib adopts a different methodology in response to the question, what entitlements does the claimant have? In contrast to the analysis considered above, he relies on a monolithic conception of the claimant's pre-transfer rights. He frames this in terms of the claimant's entitlement to value.[86] As noted above, a defective 'transfer of value' is one of the three obligation-creating conditions that

[83] Ibid 574.

[84] Ibid.

[85] Friedmann, 'The Protection of Entitlements via the Law of Restitution—Expectancies and Privacy' (n 63) 409.

[86] For the broader role that the conception of 'value' plays in Weinrib's account, see Chapter 8(A)(2)(i), above.

trigger restitution on Weinrib's account. The idea of a 'transfer of value' from the claimant, he reasons, presumes the claimant's initial entitlement to value:[87]

> [B]ecause one can transfer only that to which one has a right, the notion of a transfer of value recognizes that the transaction enriched the defendant with what was initially within the plaintiff's entitlement.

What is the basis of the claimant's entitlement to value at the beginning of the story? In response, Weinrib relies on the Hegelian notion that value is an incident of rights. 'As full owner of the thing', Hegel says, 'I am *eo ipso* owner of its value as well as of its use'.[88] Similarly, Weinrib argues, the claimants' pre-transfer right to value is an incident of their right to their own labour or property.[89] Seen in this light, it is clear that Weinrib's analysis and the methodology considered above do not lead to drastically different results. Weinrib simply re-characterises entitlements derived from other branches of the law in terms of the claimant's right to value. In fact, on Weinrib's analysis, the claimant's entitlement to value arises as a consequence of the claimant's rights to property, labour and or indeed, other rights. What is significant, however, is Weinrib's unmistakable recognition that the claimant's pre-transfer right to value is an indispensable component of a claim in unjust enrichment. He notes,[90]

> The plaintiff's right to the value at the inception of its transfer is the precondition of the claim that the value should be retransferred to the plaintiff once the transfer is shown to be defective.

[87] Weinrib, 'Unjust Enrichment' (n 19) 199.

[88] GWF Hegel, *Outlines of the Philosophy of Right* (OUP 2008) 75.

[89] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 43.

[90] Weinrib, 'Unjust Enrichment' (n 19) 199.

If the claimant did not have a legitimate entitlement to value, Weinrib notes, she 'would have no standing to have the value returned'.[91]

In summary, one body of literature on corrective justice understands the claimant's entitlements as derived from other legal interests such as property, labour and contractual entitlements. Weinrib, in contrast, sees the claimant's 'right to value' as a common thread that runs across all restitution claims.[92] It is unnecessary, for the present purposes, to pick between these two approaches. What is relevant is their point of convergence. On either view, the claimants' pre-transaction entitlements are an essential part of the corrective justice justification for unjust enrichment.

iv. The Equality Explanation

The previous section demonstrated that the claimant's pre-transfer rights are a necessary component of the corrective justice account of unjust enrichment. If this is accepted, then it can be seen that the corrective justice explanation for the legal obligation qualification aligns itself with the entitlement explanation offered in the previous chapter. The claimant cannot use the law of restitution to protect her entitlements while simultaneously denying similar protection to the defendant. Granting restitution in respect of an enrichment to which the defendant has a valid legal entitlement would amount to exactly this. Consequently, restitution must be denied in such cases. This is the function that the legal obligation qualification performs. Indeed, the equality explanation stands on an even stronger footing in the corrective justice context than it does with reference to the entitlement thesis. This is

[91] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 30–31.

[92] For an evaluation of the criticisms of this reasoning, see Chapter 8(C)(1) below.

because the corrective justice explanation for an unjust enrichment claim is itself based on a line of reasoning that mirrors the equality explanation.

Consider the familiar defendant-centred puzzle, why must the defendant provide restitution? Take a mistaken payment case for instance. The defendant is not a wrongdoer. Neither is she at fault in relation to the claimant's mistake. Nor is it necessary that the claimant's mistake was induced by the defendant. Why then is the defendant liable for restitution? Weinrib conceptualises this problem as a concern about the equality of parties. Holding the defendant liable based solely on the claimant's unilateral mistake, he argues, would amount to treating the parties inconsistently:[93]

> The basis of the plaintiff's claim is that, in the absence of donative intent on her part, the transfer… has deprived her of value that belonged to her without her having freely parted with it. If the plaintiff's lack of donative intent were to suffice for liability, defendants in turn would be deprived of what belongs to them without their having freely parted with it. The principle of justice in transfer, that one is entitled to what one owns until one freely parts with it, would thereby be inconsistently asserted for the plaintiffs and denied for defendants.

Weinrib's reasoning in this passage is analogous to the equality explanation offered above. Weinrib's concern appears to be this: if a non-consensual transfer of value is thought to be problematic from the claimant's perspective, why is it unobjectionable to ask the defendant, through an order of restitution, to give up value otherwise than through her consent? This reasoning applies with added force in the context of the legal obligation qualification. Through the claim in restitution, the claimant seeks protection of his entitlements. The claimant suggests that the defendant's benefit was derived from his resources otherwise than through his fully effective consent. On the flipside, however, when the enrichment is owed to the

[93] Weinrib, 'Unjust Enrichment' (n 19) 203.

defendant under a valid legal obligation, granting restitution would deprive the defendant of her legitimate entitlement. Permitting restitution would, therefore, amount to treating the parties inconsistently.

Weinrib appears to conceptualise the defendant-oriented puzzle as a concern about equality. Interestingly, some corrective justice accounts also rely on the equality reasoning as an *answer* to this enquiry. The crux of their analysis lies in the suggestion that the defendant cannot, without contradiction, deny the claimant's right to restitution. As McInnes argues,[94]

> By resisting liability, the defendant broadly asserts the right to retain his… enrichment until he freely chooses to part with it. Contrary to the Kantian imperative, however, he thereby claims for himself a right that he is unwilling to extend to others. Since the plaintiff's intention in conferring the benefit was vitiated by error, her payment was not truly an instance of self-determining agency. Consequently, if the defendant cannot be forced into an involuntary transaction, the plaintiff cannot be held to hers.

This reasoning, again, mirrors the equality explanation. The defendant cannot, McInnes argues, assert a right to the enrichment while simultaneously denying that very right to the claimant. Equally, neither should the claimant be permitted to do that. The claimant should not be at liberty to protect her resources through the law of restitution while denying similar protection to the defendant.

Indeed, Weinrib's and McInnes's analyses affirm the bilaterality of corrective justice. Maintaining strict equality between the claimant and the defendant is on this view, a significant imperative of corrective justice. As Drassinower puts it,[95]

[94] Mitchell McInnes, 'The Measure of Restitution' (2002) 52 The University of Toronto Law Journal 163, 188. See also, McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' (n 15) 36.

[95] Abraham Drassinower, 'Unrequested Benefits in the Law of Unjust Enrichment' (1998) 48 The University of Toronto Law Journal 459, 468.

> [S]trictly formulated, the principle at the heart of the law of unjust enrichment is not the principle that a person is entitled to what is his until he freely parts with it. Rather, it is the bilateral principle that plaintiff and defendant are each equally entitled to what is theirs until they freely part with it. The import of this equality is that a denial of the one's entitlement must eo ipso amount to a denial of the other's.

All that the equality explanation for the legal obligation qualification requires is that the principle of equality should similarly take account of the defendant's pre-existing entitlements. Indeed, there is significant support for that view from Weinrib. In his latest contribution on the application of corrective justice theory to the law of unjust enrichment, he says:[96]

> "One cleans another's shoes; what can the other do but put them on?" In this graphic example, the benefit has been so completely entangled in the recipient's property, that the cleaning of the shoes cannot be treated as an object of choice that is independent of his use of them.
>
> Nor can the mere wearing of the shoes count as acceptance, <u>for this would derogate from the pre-existing entitlement of the owner</u>, as having exclusive dominion over the shoes, to owe nothing to anyone else through their lawful use.

C. EVALUATING CORRECTIVE JUSTICE

Weinrib's account of the justification for unjust enrichment claims has evolved substantially over the years. In *The Idea of Private Law*,[97] Weinrib defended an account of restitution that is motivated by the idea that 'the conferral of a benefit is literally within the free gift of the donor as a self-determining agent.'[98] On that view, a mistaken payment is problematic because it violates one's right to make free choices in relation to the conferral of gifts.[99] In his later writings,[100] Weinrib has advanced a

[96] Weinrib, 'Unjust Enrichment' (n 19) 204, 205.

[97] Weinrib, *The Idea of Private Law* (n 1).

[98] Ibid 140–141.

[99] Prince Saprai, 'Weinrib on Unjust Enrichment' (2011) 24 Canadian Journal of Law and Jurisprudence 183, 188.

more nuanced version of corrective justice. That approach depends centrally on a defective 'transfer of value' and its acceptance by the defendant under 'obligation creating conditions'. This reasoning has also brought Weinrib's account under a number of criticisms. This section will evaluate some of them.

1. Transfer of Value

A defective transfer of value from the claimant to the defendant is, on Weinrib's account, one of the central features that justify an unjust enrichment claim. However, the accuracy of the 'transfer of value' language has been doubted. Consider two examples:

> *Example 4A*: C mistakenly transferred a car worth £10,000 to D. Realising the mistake, C seeks restitution of £10,000 from D.
>
> *Example 4B*: Under a contract, C cleaned D's windows. It turned out later that the contract was void. C seeks restitution of the value of C's services from D.

In both cases, C's claim will succeed. However, it is doubtful whether 'transfer of value' accurately captures that result in either case. Consider Example 4A first. Did C *transfer* value to D in that case? For C to have transferred value, C must have owned the value of the car at the pre-transaction position. C owned the car. Did C also own its value? Penner suggests that C did not. He observes:[101]

> Accept as we may the right to realize the value of our property, we also all appreciate that exchange values do not sit in our pockets like cash, but must actually be realized. The price of things rises and falls, but our property rights do not… the idea that one 'owns' the value of one's property is incoherent. One owns the property, not its exchange value.

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[100] See, Weinrib, 'Correctively Unjust Enrichment' (n 25); Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20); Weinrib, 'Unjust Enrichment' (n 19).

[101] James Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 309.

> When one realizes the exchange value, what one must relinquish is one's property. One never has the two of them at the same time, as anyone who has ever bought high and was forced to sell low will tell you.

On Penner's account, therefore, in Example 4A, D received the exchange value of the car. But that was not 'transferred' from C.

Example 4B is susceptible to a similar analysis. There, D received value in the form of clean windows. But again, was that value transferred *from* C? It is arguable that it was not. Just as in Example 4A, in Example 4B, C did not possess the value that constitutes D's enrichment in the post-transaction position. It may be suggested that, in some sense, C owned her own capacity for labour.[102] For now, let us admit this claim. However, C's capacity for labour is not the value, the receipt of which constitutes D's enrichment. Admittedly, the value in respect of which D is enriched may be characterised as a product of C's labour. But even that does not establish that there was in fact a *transfer* of value from C to D.

Notably, however, the objection outlined above is not fatal to Weinrib's thesis. Wilmot-Smith has offered a potential solution. He suggests re-characterising C's pre-transaction entitlement as a right to realise the 'potential value' of C's property. In his words, C had the 'the potential to realise value… prior to the event giving rise to the impugned benefit'.[103] Now consider Example 4A again. Here, C's ownership of the car entitles C to realise its value through exchanges in the market. Put differently, C has an entitlement to realise the 'potential value' of her property. A similar analysis may explain Example 4B. C has an entitlement to her own labour. This enables her to

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[102] Andrew Botterell, 'Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian Journal of Law and Jurisprudence 275; Nicholas McBride and Paul McGrath, 'The Nature of Restitution' (1995) 15 OJLS 33; Brian Fitzgerald, 'Ownership as the Proximity or Privity Principle in Unjust Enrichment Law' (1994-1995) 18 University of Queensland Law Journal 167.

[103] Wilmot-Smith (n 12) 61.

realise the value of her services by exchanging her labour for other valuable things. In fact, Weinrib appears to affirm this view himself when he says,[104]

> from the juridical perspective, value is an incident of one's rights. Having a right gives the right-holder an entitlement to realise that value through exchange and to receive that value as the quantitative equivalent of the right's infringement.

2. Acceptance

According to Weinrib, a transfer of value is defective in the relevant sense when it is accompanied by two 'obligation-creating conditions'. This section is concerned with the defendant-sided condition i.e. acceptance. Notably, Weinrib gives the content of this requirement, an extended meaning. It is said that:[105]

> the idea of acceptance draws on the public meaning of the parties' interaction. What matters is not the defendant's inner psychological state, but the judgments and assumptions that can reasonably be made against the background of the legal structure in which they operate.

On this basis, Weinrib isolates three circumstances when it may be said that the defendant has accepted the enrichment: (a) when the defendant knows that the enrichment is given non-gratuitously, but acquiesces in it by foregoing the opportunity to refuse it; (b) when the nature of the defendant's activities is such that the defendant has no reason to not accept the enrichment; and (c) when the defendant's enrichment consists in the receipt of money.

This extended meaning of the idea of acceptance is open to a number of objections. One of them poses a temporal problem. Necessarily, the defendant's acceptance of the enrichment must succeed its receipt. Furthermore, in many cases,

[104] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 27.

[105] Weinrib, 'Unjust Enrichment' (n 19) 208. See also, Weinrib, 'The Normative Structure of Unjust Enrichment' (n 20) 43.

the defendant can realistically be said to have accepted something only if the defendant had an opportunity to reject it. This makes it difficult to square Weinrib's requirement of acceptance with the proposition that liability for unjust enrichment arises upon receipt.[106]

Weinrib may attempt to overcome this objection by suggesting that, although acceptance succeeds receipt, its effect is retrospective to the point of receipt.[107] But why is that the case? The answer can only be that the law imputes an acceptance to the defendant which is effective at the point of the defendant's receipt of the enrichment. As Botterell argues, this reasoning involves 'a kind of legal fiction'.[108] 'Acceptance' is *imputed* to the defendant at the moment of the receipt of enrichment although the defendant may, at that moment, have been unaware of the enrichment.

Further, at least in some cases, imputing acceptance to the defendant also results in internal inconsistency. Consider, for example, cases that fall within Weinrib's second category of acceptance cases. Here, acceptance is presumed because 'the defendant has no reason to not accept' the enrichment. However, the suggestion that 'the defendant has no reason to not accept' the benefit sits uneasily with the requirement that the benefit must be accepted by the defendant non-gratuitously i.e. on the basis of an acknowledgement that the defendant is not entitled to that benefit.[109] If the defendant was aware of her non-entitlement to the benefit, then why is it relevant that it accords with her activities and purposes? The basis of the defendant's receipt impliedly concedes an obligation to return it to the claimant.

[106] Andrew Botterell, 'Book Review: Corrective Justice' [2014] Mind 1, 3.

[107] Weinrib, 'Unjust Enrichment' (n 19) 209.

[108] Botterell, 'Book Review: Corrective Justice' (n 106).

[109] Doyle (n 13) 247.

3. The Scope of Weinrib's Account

Another criticism of Weinrib's corrective justice thesis relates to its scope. Consider, for example, Cane's argument.[110] He argues that Weinrib's thesis can only explain those aspects of private law that are oriented to prevent departures from an existing distribution of resources. For example, Weinrib's theory offers no guidance on the justification for property rights. Further, even in the context of the law of contract, Weinrib focuses on breach. Surely, however, any account of the law of contracts must also be capable of providing an explanation for how and why contractual obligations are created in the first place. In Cane's words,[111]

> What Weinrib has offered us, then, is not an account of the structure of private law but an account of those parts of private law which are concerned with protecting the existing distribution of resources from disturbance. His theory is a theory about the resolution of private law disputes.

In another passage, Cane confirms that his objection is better understood as a 'clarification' as to the scope of Weinrib's thesis rather than as a 'criticism. In any event, it is clear that, even conceding Cane's claim, the cases that this chapter is concerned with fall within the explanatory scope of Weinrib's account.

To conclude, a large part of this chapter was tasked with bringing to light an often overlooked aspect of Weinrib's corrective justice theory: the significance of the claimant's pre-transfer entitlements. Once this aspect is uncovered, it is easy to see where the legal obligation qualification fits within the scheme of corrective justice. The claimant cannot be permitted to use the law of restitution to protect her entitlements while simultaneously denying similar protection to the defendant. Thus,

[110] Cane (n 30).

[111] Ibid 476.

the legal obligation qualification is necessary to guarantee equal treatment of the parties to an unjust enrichment claim. Furthermore, although Weinrib's account has come under a number of criticisms, none of them are fatal. Most of them point to the need for fine-tuning. In particular, the 'transfer of value' and 'acceptance' components of Weinrib's theory may require more refinement. That is a project for another day.

CHAPTER 9

CONSEQUENCES OF THE EQUALITY EXPLANATION

What implications do countervailing legal obligations have for claims based on unjust enrichment? That is the central question that this thesis set out to answer. The last two chapters advanced the equality explanation. The rule that denies restitution on the basis that the enrichment was owed to the defendant is, it was argued, best explained on the basis of the need to maintain equality between claimants and defendants. This conclusion stands whether one adopts the entitlement thesis or the corrective justice account. This chapter will examine the doctrinal consequences that follow from the equality thesis. It will be seen that they are largely in line with the prevalent judicial and academic thinking on the operation of the legal obligation qualification.

The equality explanation offers many useful insights. Key among them is the following understanding that it is the defendant's entitlement to the enrichment that determines the operation of the legal obligation qualification. The remainder of this chapter will proceed in three parts. **Part A** will point out that the legal obligation qualification is a bar on primary liability in unjust enrichment. **Part B** will examine the operation of the legal obligation qualification in the context of unjust factors other than mistake. Finally, **Part C** will consider how the legal obligation qualification functions in the context of different countervailing legal obligations.

A. QUALIFICATION ON PRIMARY LIABILITY

The equality explanation helps identify where the legal obligation qualification fits within the unjust enrichment analysis. Unjust enrichment claims are oriented to protect the claimants' pre-transfer interests. Consequently, they cannot be used to deprive defendants of their own pre-existing entitlements. To permit a restitution claim in these circumstances would violate equality between the parties. That is the reason why the legal obligation qualification bars restitution when the enrichment is owed to the defendant. Put differently, the normative reasons underlying a restitution claim are not satisfied when the defendant can assert a valid entitlement to the enrichment. Consequently, the legal obligation qualification denies the defendant's primary liability for restitution.

This analysis is consistent with a number of academic and judicial authorities that affirm the view that a defendant's enrichment is not 'unjust' if the defendant can rely on a valid legal entitlement to the enrichment.[1] As Lord Hope said in *Kleinwort Benson,*[2] 'the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him'.[3] In the High Court of Australia, the same view was reiterated in *David Securities*.[4] In that case, Brennan J reasoned:[5]

> [T]o say that a defendant has been unjustly enriched by the receipt of a payment is to say that the defendant has no right to receive it... If a defendant has a right to receive a payment, whether under a statute, in discharge of a liability owing to him or pursuant to a contract, a mistake by the plaintiff in making the payment does not convert the receipt into an unjust enrichment.

Admittedly, to assert that the defendant's receipt of a benefit is not 'unjust' when the defendant has a valid entitlement to the enrichment is unconvincing. The

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[1] Andrew Burrows, 'Is There a Defence of Good Consideration?' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 167; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 133; Sonja Meier, 'Unjust Factors and Legal Grounds' in David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 53.

[2] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

[3] Ibid 408 (Lord Hope). See also, *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [85] (Lord Scott) ('*DMG*').

[4] *David Securities v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 CLR 353.

[5] Ibid 392 (Brennan J).

difficult question is *why* that is the case. The merit of the equality thesis lies in providing a defensible explanation for why the defendant's enrichment ought not to be reversed: to do so would be to treat the claimant and the defendant dissimilarly. Thus, according to the equality thesis, the legal obligation qualification operates by denying a primary element of the unjust enrichment cause of action.[6] Recently, this idea was affirmed by the Privy Council in *DD Growth Premium 2X Fund*.[7] In that case, Lord Sumption said,[8]

> It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right.

Some support for this view may also be derived from the fact that the Roman law rule of 'suum recepit'—a rule analogous to the legal obligation qualification—was also commonly understood as a qualification on primary unjust enrichment liability.[9]

Understanding the legal obligation qualification as a restriction on primary unjust enrichment liability has significant practical implications. The most important among these is on the burden of proof.[10] Generally, the burden of establishing that the defendant's enrichment is 'unjust' falls on the claimant. As a logical corollary, the

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[6] In the taxonomy proposed by Goudkamp and Mitchell, the legal obligation qualification is a 'denial', not a 'defence': James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 133. See also, Burrows 'Is There a Defence of Good Consideration?' (n 1) 167.

[7] *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36.

[8] Ibid [62].

[9] Scottish Law Commission, *Diligence Against Land* (Discussion Paper No 107, 1998) [2.27]; Niall R Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2004) 716.

[10] See, James Goudkamp, *Tort Law Defences* (Hart 2016) 138–139.

burden of proving that the enrichment was not owed to the defendant must similarly fall on the claimant.[11] Thus, if the defendant was entitled to the benefit, a claim for restitution will fail unless the claimant can establish that the defendant was unjustly enriched despite the defendant's entitlement.[12] As Lord Millet held in *Tribe v Tribe*,[13] 'the burden lies on the plaintiff to prove that the money was not paid by way of gift or pursuant to an enforceable contract'.[14]

There are strong reasons of justice that support this view. If it appears that the defendant received nothing more than what he was entitled to, it is only fair that the burden of disproving that fact must fall on the claimant. As Burrows says:[15]

> D is merely receiving what it was, on the face of it, entitled to receive from C… Why should D be put to the burden of proving that the obligation was valid rather than putting the burden on C, who after all is bringing the claim, to prove that the prior obligation is not as it seems?

However, it would be impractical to impose an obligation on the claimant to negate all entitlements that the defendant may conceivably rely upon. Consequently, the preferable view is to impose the burden of proof on the claimant once an entitlement has been pleaded by the defendant.[16] This approach imposes an evidential burden on the defendant. However, the legal burden remains on the claimant. Scott

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[11] Burrows, 'Is There a Defence of Good Consideration?' (n 1) 182–183.

[12] *National Mutual Life Association v Walsh* (1987) 8 NSWLR 585 (NSWSC).

[13] *Tribe v Tribe* [1995] Ch 107 (CA).

[14] Ibid 125.

[15] Burrows, 'Is There a Defence of Good Consideration?' (n 1) 183. See also, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 31. For a contrary view, see, Virgo, *The Principles of the Law of Restitution* (n 1) 173.

[16] Virgo, *The Principles of the Law of Restitution* (n 1) 133.

has proposed a useful scheme for the operation of the legal obligation qualification. The model she proposes is as follows:[17]

> a) the claimant begins by pleading (and proving) that he made the payment by mistake;
>
> (b) the defendant pleads that the payment was in fact due under a valid contractual, statutory or other obligation;
>
> (c) it then falls to the claimant to prove that no such valid contract or other obligation exists.

This scheme is consistent with the equality explanation and has the merit of practical convenience.

B. UNJUST FACTORS

According to the explanation offered in this thesis, the legal obligation qualification ensures that the parties to an unjust enrichment are offered equal protection in respect of their pre-transfer interests. This view suggests that the legal obligation qualification ought to apply regardless of the specific unjust factor upon which the restitution claim is based.

Accordingly, the legal obligation qualification is not restricted to claims based on mistake. For example, it has been applied in the context of duress. Consider, for instance, *Flower v Sadler.*[18] There, the claimant employee sought to set aside some bills of exchange drawn in favour of the defendant. Allegedly, those bills were

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[17] Helen Scott, 'Defence, Denial or Cause of Action? 'Enrichment Owed' and the Absence of a Legal Ground' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 65.

[18] *Flower v Sadler* (1882) 10 QBD 572 (CA). For the contrary view, see, *Clark v Woods* (1848) 2 Ex 395, 154 ER 545.

procured as a consequence of the defendant's threat to prosecute him. Even if that were true, it was held, the payment would be irrecoverable. This is because,[19]

> [A] debt was actually due from [the claimant], and there is nothing illegal in a creditor endeavouring to obtain payment of his debt… if a debt really exists, the right to sue for it must be upheld even although there may have been a threat by the creditor of criminal proceedings.

In *Ward v Lloyd*[20] similarly, a claim for restitution based on duress was rejected on the basis that the claimant did nothing more than demand what was legitimately owed to him. *Astley v Reynolds*[21] offers another illustration. There, the claimant had pawned his plate with the defendant for £20. The defendant threatened not to return the plate unless an additional amount of £10 was paid. Though the claim based on duress succeeded, the claimant was only allowed to recover the surplus of £10. One explanation for this result is based on the legal obligation qualification.[22] The sum of £20 was legally due to the defendant. Consequently, there could be no restitution in respect of that portion.

Australian Courts have also affirmed the view that the legal obligation qualification is not restricted to claims for the restitution of mistaken enrichments. For example, three judges of the Supreme Court of Western Australia affirmed the view that a claim based on duress will not succeed if the disputed payment was owed to the defendant.[23] Giles J endorsed a similar approach in *Equiticorp Financial Services*.[24]

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[19] *Flower* (n 18) 575.

[20] *Ward v Lloyd* (1843) 6 Man & G 785, 134 ER 1109.

[21] *Astley v Reynolds* (1731) 2 Str 915, 93 ER 939.

[22] Graham Virgo, 'Demolishing the Pyramid: the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 495.

[23] *Scolio Pty Ltd v Cote* (1992) 6 WAR 475 (SCWA) 482 (Ipp J & Seaman J), 484 (Rowland J).

There, a duress claim was denied because the defendant was in fact, owed a greater sum.[25]

Finally, the legal obligation qualification is also capable of denying restitution claims based on policy-motivated unjust factors. The decision of the New Zealand Supreme Court in *Stiassny*[26] illustrates this. There, the claimant partnership firm brought a claim against the Revenue seeking to recover mistakenly paid Goods and Services Tax (GST). The claim was based on the *Woolwich* principle, a policy-motivated unjust factor. Restitution was denied on the basis that 'the partnership did owe the Crown the amount of GST which it paid to the Commissioner'.[27] Although the Court resorted to the language of 'good consideration' in some of its reasoning, the result is explicable as an application of the legal obligation qualification.

C. COUNTERVAILING LEGAL OBLIGATIONS

This section will examine the operation of the legal obligation qualification in the context of different countervailing legal obligations. In particular, it will consider: (1) Contracts (2) Statutes (3) Judgments (4) Other Legal Entitlements (5) Natural Obligations and (6) Gifts.

1. Contracts

Contractual regimes have a wide range of implications for claims based on unjust enrichment. For instance, parties may have contractually excluded a restitutionary

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[24] *Equiticorp Financial Services Ltd v Equiticorp Financial Services Ltd* (1992) 29 NSWLR 260 (NSWSC).

[25] Ibid 300–301. See also, James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 346.

[26] *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106.

[27] Ibid [65].

remedy, either expressly or impliedly.[28] Similarly, the contractually agreed price may influence the valuation of a restitution claim.[29] The existence of a contractual regime between one of the parties to the restitution claim and a third party may also influence the unjust enrichment analysis.[30] This section will not survey all of these contractual effects on restitution. The focus here will be on the operation of countervailing contractual obligations.

i. Valid Contracts

In the context of valid contracts, the operation of the legal obligation qualification depends upon the following enquiry: did the defendant have a valid contractual entitlement to the enrichment in respect of which the claimant seeks restitution? If this question is answered affirmatively, restitution will be denied.

Steam Saw Mills v Baring Bros Co Ltd[31] illustrates this. The claimant held a licence from the Russian government to import timber. As a condition of the licence, the claimant was required to deposit the purchase price with the defendant in advance. The dispute concerned payments made by the claimant on 9 November 1917. By then, the Russian government had been overthrown by revolution. The claimant argued that

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[28] See, Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [3-27]; Virgo, *The Principles of the Law of Restitution* (n 1) 141.

[29] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 348–350.

[30] See *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL); *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244. See also, Mitchell, Mitchell and Watterson (n 28) [3-62]–[3-66]; Virgo, *The Principles of the Law of Restitution* (n 1) 142.

[31] *Steam Saw Mills Company Ltd v Baring Brothers* [1922] 1 Ch 244 (CA).

had it been aware of this fact, it would not have made the advance payment. Lord Sterndale rejected the claim for restitution. He said:[32]

> [I]f a man pays money under a mistake of fact, there being a liability to pay it, if the fact of which he was ignorant does not discharge him from that liability, he cannot recover it back.

Despite the claimant's mistake, the defendant had a valid contractual entitlement to the 9 November payment. That was the reason why restitution was denied.

Bell v Lever Bros[33] is explicable similarly. There, the defendants had been employed by the claimant companies. Pursuant to a corporate restructuring, their employment had to be terminated prematurely. Two separate compensation agreements were entered into with the defendants offering them compensation for the early termination of their services. Subsequently, it turned out that the employees had entered into private, unauthorised transactions on behalf of the company. This was against a breach of the terms of their service agreement. Consequently, this would have entitled the employer to terminate their services without compensation. Upon realising their mistake, the employers sought restitution of the benefits paid out under the compensation agreements.

The claim was denied. Here again, the employees' valid contractual entitlements to the benefits paid out under the compensation agreement proved

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[32] Ibid 250. See also, *DMG* (n 3) [85] (Lord Scott); *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [177]; Virgo, *The Principles of the Law of Restitution* (n 1) 134.

[33] *Bell v Lever Bros* [1932] AC 161 (HL).

decisive. These entitlements subsisted despite the claimant's mistake. Consequently, there was no possibility of a restitution claim. As Lord Atkin reasoned:[34]

> A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price.

Steam Saw Mills and *Bell* are explicable as straightforward examples of the operation of the legal obligation qualification. The defendant had a valid contractual entitlement to the enrichment in both cases. The restitution claims were consequently denied.

In some cases, however, the nature of the defendant's entitlement is less straightforward. For example, the defendant's entitlement may be conditional on a prior event. If that condition is not satisfied, the entitlement will be rendered inoperative. In effect, this would mean that the defendant has no entitlement countervailing the restitution claim. Then, there is no objection to the success of the restitution claim if the other elements of unjust enrichment are satisfied.

Often, the condition underlying the defendant's contractual entitlement is counter-performance by the defendant. *Deglman v Guaranty Trust Co* illustrates this scenario.[35] In that case, there was an oral contract between the plaintiff and his aunt. Under the contract, the plaintiff performed certain services for his aunt. In return for this, she promised him that she would provide for him in her will. The contract was found to be unenforceable (although valid) as a consequence of the Statute of Frauds. The aunt's promise was therefore, unenforceable. Consequently, the plaintiff sought

[34] Ibid 224. See also, *Kwei Tek Chao v British Traders and Shippers* [1954] 2 QB 459 (QB); *RJ Brady Contracting Pty Ltd v Kellyville Christmas Tree Farm Pty Ltd* [2005] NSWCA 22.

[35] *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725 (Supreme Court of Canada).

quantum meruit for the value of services he rendered. The Supreme Court of Canada granted the claim.

At first blush, it appears that the aunt had a valid contractual entitlement to the plaintiff's services. Why then did the legal obligation qualification not preclude the restitution claim in respect of those services? It was demonstrated in a previous section of this thesis that the best explanation for this result is based on conditionality.[36] The aunt's contractual right to the plaintiff's services was conditional on her counter-performance. She failed to honour her promise to make provision for the plaintiff in her will. As a consequence, a necessary pre-condition for her contractual entitlement was not satisfied.

Importantly, however, the defendant's entitlement may be conditional on events other than the provision of counter-performance. *Barnes v Eastenders Cash & Carry plc*[37] exemplifies this. There, the Crown Prosecution Service (CPS) applied to have the claimant appointed as the receiver for the assets of a group of companies. The order to this effect was accordingly made. The claimant rendered his services on the basis that he would be remunerated out of the companies' assets. That was the agreement between the claimant and the CPS.[38] Subsequently, the order of appointment was quashed. This meant that the claimant could no longer make a claim over the companies' assets. The claimant therefore sought restitution of the value of his services from the CPS. His claim was based on failure of consideration. The basis upon which the services were rendered was, it was argued, that the claimant would be remunerated through a lien over the companies' assets.

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[36] See Chapter 4(C), above.

[37] *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26; [2015] AC 1.

[38] Ibid [98].

Prima facie, the legal obligation qualification might be seen as an impediment for this claim. There was a valid agreement between the claimant and the CPS.[39] Under that agreement, the claimant was under an obligation to render his services. The CPS had a corresponding right to receive these services. But, in *Barnes*, the Supreme Court granted restitution.

The best explanation for this result is based on the conditional nature of the defendant's entitlement under the agreement. Unlike in *Deglman*, however, CPS's entitlement to the claimant's services was not conditional on counter-performance. It was conditional on the existence of a state of affairs. As Lord Toulson put it,[40]

> [T]he receiver agreed to accept the burden of management of the companies on the basis that he would be entitled to take his remuneration and expenses from the companies' assets, and that state of affairs which was fundamental to the agreement has failed to sustain itself.

Put differently, the claimant's obligation to provide services and the defendant's entitlement to receive them were both conditional on the claimant's right to remunerate himself from the companies' assets. When that condition failed, the entitlement was rendered inoperative. In effect, therefore, the defendant had no contractual entitlement to the claimant's services.[41]

Whether the defendant has earned an unconditional entitlement to the enrichment is a question of contractual construction. The fact that the contract provides that a sum has fallen 'due' does not necessarily mean that it has been

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[39] Virgo, *The Principles of the Law of Restitution* (n 1) 139–140 ('The difficulty with this conclusion is that there was a contract between the claimant and the CPS and the claimant had accepted the risk that he would not be fully remunerated for his services').

[40] *Barnes* (n 37) [114].

[41] For another example where the defendant's entitlement was conditional on the existence of a state of affairs, see *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516. For a detailed examination of that decision see, Chapter 4(A), above. See also, *Clifton v Coffey* [1924] HCA 35, (1924) 34 CLR 434.

unconditionally earned. *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd*[42] illustrates this. There, the claimant sellers were contractually entitled to invoice the defendant buyers for quantities of oil that were not taken up by the buyer. Clause 15 provided:

> Sellers have the right at any time to invoice to buyers the due quantities of oil not taken up, and to demand payment of the invoice amounts, and such quantities (or a proportionate quantity of the bulk) shall be at the buyer's risk and expense, or the sellers may, at their option, instead of invoicing, cancel such undelivered balance.

Payment for the quantities not taken up by the buyers is, it was held, 'due' upon the receipt of the seller's invoice. However, the seller's right to demand payment was held to be conditional on actual delivery. Wright J held:[43]

> What is invoiced under clause 15 is still the price payable under the contract, which includes the sellers' services in actually delivering the goods to the buyers' works. <u>The sellers have never earned the price as such</u>, and can only claim damages because they have been prevented from fulfilling their contract.

As a corollary, there are also a number of instances where the defendant's entitlement is unconditionally earned despite flaws in counter-performance. In these cases, the legal obligation qualification will operate to deny the restitution claim. *Wuhan Guoyu Logistics v Emporiki Bank*[44] is an example. This was a tripartite dispute between the buyer and seller in a shipbuilding transaction, and the defendant bank. The bank had provided an 'on-demand performance guarantee' on behalf of the buyer. On 11 May 2009, the seller demanded payment of the second instalment. The buyer refused to pay contending that the instalment was not yet due. In June 2011, the seller made a demand against the bank relying upon the guarantee. The bank complied. Subsequently, the dispute between the buyer and the seller was referred to

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[42] *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39.

[43] Ibid 45 (emphasis added).

[44] *Wuhan Guoyu Logistics Group Co v Emporiki Bank of Greece SA* [2013] EWCA Civ 1679, [2014] 1 All ER (Comm) 870.

arbitration. The tribunal found that the second instalment was in fact not due. The bank subsequently sought restitution of the instalment payment. This claim was rejected.

What proved decisive was the fact that the bank's obligation and the seller's corresponding contractual entitlement were unconditional. As Tomlinson LJ said:[45]

> [O]n making its demand of the bank… the Seller acquired a complete and immediately enforceable cause of action against the Bank. The Bank was obliged to pay immediately, as paragraph 4 of the Payment Guarantee spells out in terms. Thereafter the Seller's right to payment from the Bank was indefeasible, and it is of no relevance that the Seller subsequently discovers that his demand, although made in good faith, was in fact made upon an incorrect premise.

On its correct construction, the Court concluded that the bank's obligation under the guarantee was *not* conditional on the buyer's obligation.[46] Consequently, regardless of the fact that there was no liability as between the buyer and seller, the bank remained contractually liable to honour the guarantee. As a corollary, the seller was contractually entitled to the bank's payment.

Howes Percival LLP v Nicolas Page[47] is another example. In *Howes*, however, the reason why the payment was unconditionally earned by the defendant was different. Here, the claimants were a firm of solicitors. The defendants were the owners of a family company. The claimant had provided legal services to the defendants on the basis of a 'Conditional Fee Agreement' (CFA). Subsequently, disputes arose between the parties regarding their mutual compliance with the CFA.

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[45] Ibid [20].

[46] See also, *Ministry of Sound (Ireland) Limited v World Online Limited* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823 [33].

[47] *Howes Percival LLP v Nicolas Page* [2013] EWHC 4104 (Ch).

The agreement was finally terminated. After termination, the claimant sought restitution of the value of their services from the defendants. This claim was rejected.

This result is seemingly inconsistent with the decisions in *Deglman* and *Barnes*. Like in both those cases, in *Howes*, the claimant's services were rendered on the basis that they would be remunerated. Superficially, this makes it possible to argue that the defendants' contractual right to the claimant's services was conditional. However, there is an important difficulty with this analysis: the claimant's right to remuneration was itself conditional. Behrens J emphasised this point. He said,[48]

> The cases cited by [counsel for the claimant] are distinguishable because none of them involved a conditional right to payment. Suppose for example it had become clear that [the defendants] were going to lose. In that event [the claimant] would be entitled to no fee.

In *Howes*, therefore (unlike in *Deglman* or *Barnes*), it was difficult to say that the claimant's services were conditional on remuneration. The claimant's contractual right to remuneration was contingent on an entirely distinct fact: the possibility of the defendants' success in the litigation. In sum, therefore, the claimant's services had been unconditionally earned under the contract. This is a sufficient basis to attract the application of the legal obligation qualification.

There is another important takeaway from the decision in *Howes*. This arises from the fact that, in that case, the legal services agreement had been terminated before the claim in restitution was brought. Despite contractual termination however, the restitution claim failed. This should be unsurprising. Termination does not wipe away accrued contractual entitlements.[49] If the defendant's entitlement has

[48] Ibid [310].

[49] *Odfjfell Seachem A/S v Continentale des Petroles et d'Investissements* [2004] EWHC 2929 (Comm); Edwin Peel, *Treitel, The Law of Contract* (13th edn, Sweet & Maxwell 2011) [18-011].

unconditionally accrued before contractual termination, the restitution claim will fail.[50] Termination is inconclusive. *Bank of Boston v European Grain*[51] illustrates this further. There, the dispute between the charterers and the ship owners turned on the construction of the following contractual provision:

> Clause 16: Freight shall be prepaid within five days of signing and surrender of final bills of lading, full freight deemed to be earned on signing bills of lading, discountless and non-returnable, vessel and/or cargo lost or not lost and to be paid to [a named bank in the Piraeus].

The charterers argued that they had lawfully terminated the agreement by accepting the owner's repudiation. Consequently, it was argued that no payment was due under Clause 16. Relying on the phrase 'full freight deemed to be earned on signing bills of lading' in Clause 16, Lord Brandon rejected this contention. Bills of lading had been signed before termination. That was held to be a sufficient condition for freight to fall unconditionally due under the agreement.[52] The restitution claim was, therefore, rejected despite contractual termination. Equally, termination is not a pre-condition for the success of the restitution claim either. *Roxborough*[53] illustrates this. That decision was examined in detail in an earlier section of this thesis.[54]

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[50] Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 24–30; Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Peter Birks, Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 172. See also, Edelman and Bant (n 25) 167 ('restitution will be permitted notwithstanding the existence of a juristic reason to *receive* the benefit if considerations of coherence of the law have the effect that the juristic reason is not one which continues to permit the *retention* of the benefit') (emphasis added).

[51] *Bank of Boston v European Grain and Shipping Ltd* [1989] AC 1056 (HL).

[52] Ibid 1098. See also, *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL).

[53] *Roxborough* (n 41).

[54] See Chapter 4(A), above.

ii. Voidable Contracts

A voidable contract gives rise to valid contractual entitlements until it is rescinded. Until rescission, therefore, the defendant may rely on a voidable contract in support of his entitlement to the enrichment in respect of which restitution is sought.[55] Thus, before rescission, the legal obligation qualification operates in exactly the same way as it does in the context of a valid contract.[56] Upon rescission, however, contractual obligations created under a voidable contract are wiped away retrospectively. Unlike in the context of a terminated contract, therefore, the defendant cannot rely on rights accrued under a voidable contract.[57] Rescission takes away those rights. Thus, after rescission, there is no scope for the legal obligation qualification to operate.

There is considerable support for this view in the authorities. The notion that a voidable contract must first be rescinded before restitution can be sought was affirmed in the 18th century decisions in *Towers v Barrett*[58] and *Weston v Downes*.[59] Subsequently, in *Load v Green*,[60] Baron Parke adopted this view. In *Load*, the defendant had obtained goods from the claimant through fraudulent misrepresentation. Subsequently, the claimant sought to recover the goods. It was held that rescission is a necessary pre-condition for the claim to succeed.

In cases where rescission is unavailable, therefore, the defendant's contractual entitlements stand undefeated. As a consequence, restitution is barred by the legal

[55] Edelman and Bant (n 25) 146.

[56] Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [3.17].

[57] Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) 154.

[58] *Towers v Barrett* (1786) 1 Term Reports 133; 99 ER 1014.

[59] *Weston v Downes* (1778) 1 Douglas 23; 99 ER 19.

[60] *Load v Green* (1846) 15 M&W 216; 153 ER 828.

obligation qualification. *Clarke v Dickson*[61] illustrates this. There, the claimant was induced through fraudulent misrepresentations to subscribe to shares in a company. The company was subsequently wound up. During the winding up proceedings, the claimant discovered that the earlier representations were false. He sought restitution of the deposits that he had paid to subscribe to the shares. It was held that the remedy of rescission is not available to the claimant. This is because *restitutio in integrum* was said to be impossible. The shares had changed their nature in the course of the claimant's subscription. Therefore, it was impossible to restore parties to their original positions. Consequently, the claimant's restitution claim was denied. It is doubtful whether a modern court would come to the same conclusion on whether rescission is available in these circumstances.[62] However, *Clarke v Dickson* illustrates the point that rescission is a necessary pre-condition for the restitution of benefits conferred under a voidable contract. This result is entirely consistent with the equality explanation for the legal obligation qualification.

What has been said so far relates to the restitution of benefits conferred under a voidable contract. This process is indisputably restitutionary. However, on one view at least, rescission is itself generated by unjust enrichment.[63] It operates by reversing the defendant's enrichment. In the context of voidable contracts, the enrichment is the defendant's contractual entitlement. On that view therefore, rescission and the restitution of benefits conferred under a voidable contract, are both restitutionary in

[61] *Thomas Clarke v Samuel Dickson* (1858) EB & E 148; 120 ER 463.

[62] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.

[63] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 126; Stevens (n 50) 24. For the contrary view, see Lionel Smith, 'Unjust Enrichment: Big or Small?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Pyrmont 2008) 20.

nature. Even this view is not inconsistent with the equality explanation for the legal obligation qualification. As Birks said,[64]

> where a contract is voidable *ab initio*, as for instance for misrepresentation, pressure, or undue influence, it is the voidability of the contract that shows that the basis of the enrichment has failed.

Admittedly, Birks spoke in terms of the absence of basis methodology. However, the voidability of a contract is, on Birks' view, a reason why the defendant cannot rely on the entitlements created under that contract. That explains why, even under the equality explanation, the defendant's contractual entitlement is not a sound basis upon which the legal obligation qualification can operate.

iii. Void Contracts

The legal obligation qualification has no scope for application in the context of void contracts.[65] They do not create contractual obligations. Correspondingly, there are no contractual entitlements that the defendant can rely on either. Thus, the legal obligation qualification does not offer a reason why restitution in the context of void contracts ought to be denied. There is, however, an important qualification to this proposition.

The inapplicability of the legal obligation qualification to void contracts does not mean that restitution follows automatically.[66] Unsurprisingly, the availability of restitution depends on whether the other elements of unjust enrichment can be established. This is particularly clear in cases where restitution is sought on the basis

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[64] Birks, *Unjust Enrichment* (n 63) 129.

[65] Edelman and Bant (n 25) 142. See also, Anne Sanders, 'Absence of Basis: A German Perspective' in Steven Elliot, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart 2014) 229.

[66] For a criticism of the view that it does see, Burrows, *The Law of Restitution* (n 29) 385–386.

of failure of consideration. Consider, for example, the Privy Council's decision in *Linz v Electric Wire Co.*[67] The claimant had applied for preference shares in the defendant company. After the allotment was made, the claimant sold off the shares. Subsequently, it turned out that the initial allotment was void. On discovering this, the claimant sought restitution from the company. The claim was based on failure of consideration. Although the contract between the claimant and the company was void, her claim was denied. Lord Simonds reasoned that,[68]

> having been duly registered as a shareholder and having parted for value with her shares by a sale which the company recognized by issue of a share certificate to, and registration of, her transferee, she got exactly that which she bargained to get.

In other words, there was no failure of consideration. The claimant had received what she had bargained for.[69] This result is not based on the legal obligation qualification. It is based on the fact that one of the elements of the unjust enrichment analysis—the unjust factor—could not be established in this case.

Linz illustrates that restitution does not always follow from the invalidity of the contract. However, in some cases, the invalidity of the contract may itself amount to a failure of consideration. There, restitution follows from invalidity. Typically, these are cases where the parties bargained for legally enforceable promises. The invalidity of the contract means that they did not get what they bargained for. On one view, that is the best explanation for the swaps cases. In *Guinness Mahon*,[70] for instance,

[67] *Linz v Electric Wire Company of Palestine* [1948] AC 371 (PC).

[68] Ibid 377.

[69] See also, *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23.

[70] *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA).

restitution was permitted to reverse a fully performed swap.[71] In that context, why was the claim not rejected on the basis that the parties got what they bargained for? Stevens and McFarlane offer a plausible answer:[72]

> [W]hatever happened, the local authority could always recover money it paid out on the ground of its lack of capacity. It was never on risk and could never lose under the bet. The other party bargained for the opportunity to win under the bet and it never could. Receiving counter-performance is of little comfort if the local authority is always entitled to get it back.

Put differently, what the parties bargained for was a legally enforceable promise. They never got it. There is, therefore, a failure of consideration despite the fact that the transaction ran its full course.

2. Statutes

The operation of the legal obligation qualification in the context of statutory entitlements is relatively straightforward. As the equality explanation suggests, if the defendant has a valid entitlement to an enrichment under a statute, restitution is impermissible in respect of that enrichment.[73]

The decision of the Court of Appeal in *FII Test Claimants*[74] illustrates this proposition. In that case, certain aspects of the United Kingdom's corporation tax regime were challenged. It was argued that they contravened European Union law. This contention was upheld. Consequently, some of the tax that had been collected

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[71] Ibid 230 (Morrit LJ).

[72] Robert Stevens and Ben McFarlane, 'In Defence of Sumpter v. Hedges' (2002) 118 LQR 569, 577. See also, Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 Cambridge Law Journal 414, 434.

[73] Mitchell, Mitchell and Watterson (n 28) [2-08]; Virgo, *The Principles of the Law of Restitution* (n 1) 146.

[74] *Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2010] EWCA Civ 103, [2010] STC 1251.

from the claimants in 'Year 1' was found to be unlawful. Incidentally, the claimants had used up some of their available tax reliefs to offset this levy. This paved the way for the claimants to raise a novel argument. Had they not used their lawful reliefs to offset the unlawful exaction of tax in Year 1, they argued, those reliefs would now have been available to them. They could have used these reliefs to reduce their tax liability in Year 2. By depriving the claimants of their opportunity to use their reliefs to reduce their tax liability in Year 2, the Revenue had been enriched. Arden LJ rejected this contention. She said:[75]

> The short answer to the claim is that the tax paid in year 2 or subsequent years was lawfully due and so cannot be the subject of recovery under Woolwich or as a payment under a mistake: see *Kleinwort Benson v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349 at 408B (Lord Hope).

Arden LJ's reasoning is a clear application of the legal obligation qualification to statutory entitlements. The Revenue's apparent enrichment is the receipt of tax in Year 2. Admittedly, this levy was unmitigated by reliefs that would have been available to the claimant had it not been for the unlawful collection of tax in Year 1. Nevertheless, the Revenue had a valid entitlement to the tax in Year 2. That is decisive is precluding the restitution claim. Consider an analogous example:[76]

> *Example 1*: C's liability for inheritance tax is in dispute. Had C made an election in a deed of variation, C's inheritance tax liability could have been avoided. C made a mistake of law in failing to exercise the election. C seeks restitution from the Revenue of tax already paid.

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[75] Ibid [181].

[76] See *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch) [257]. See also, Burrows, *The Law of Restitution* (n 29) 89–90.

C's claim will fail. Just as in *FII Test Claimants*, the Revenue has a valid entitlement in respect of C's inheritance tax liability. Despite C's mistake, therefore, there is no valid claim for restitution on these facts.[77]

Lord Scott's dissent in *DMG*[78] is another example of the application of the legal obligation qualification in a statutory context.[79] There, the restitution claim related to a timing advantage obtained by the Revenue. However, the Advance Corporation Tax (ACT) in respect of which the claimant sought restitution was owed to the Revenue when it was paid. Despite the claimant's mistake, Lord Scott would have denied restitution. He reasoned as follows:[80]

> [I]f the legal obligation under which the money was paid cannot be, or has not been, invalidated, then, in my opinion, whether or not it can be shown that 'but for' the mistake in question the money would not have been paid, a restitutionary remedy for the recovery of the money would not be available.

The majority of the House of Lords, however, reached the opposite result. It has been demonstrated elsewhere in this thesis that the majority's conclusion does not contradict the conception of the legal obligation qualification defended here.[81]

Finally, consider the decision of the New Zealand Supreme Court in *Stiassny v Commissioner of Inland Revenue.*[82] The dispute in that case related to the liability of a partnership to pay Goods and Service Tax (GST). GST was finally paid only because the claimant receivers believed that the firm's failure to pay would result in their

[77] Mitchell, Mitchell and Watterson (n 28) [2-58].

[78] *DMG* (n 3).

[79] For a detailed analysis of this decision, see Chapter 4(B), above.

[80] *DMG* (n 3) [85].

[81] See Chapter 4(B), above. For the view that the majority is wrong on this point, see Stevens, 'Is There a Law of Unjust Enrichment?' (n 50) 17–20.

[82] *Stiassny* (n 26).

personal liability. In fact, this fear was misplaced. Upon discovering their mistake, the restitution of mistakenly paid GST was sought. The Court rejected this claim. In reaching that conclusion, the Court's reasoning was based almost entirely on the 'good consideration rule' as formulated by Goff J in *Barclays Bank*.[83] Blanchard J said:[84]

> The partnership did owe the Crown the amount of GST which it paid to the Commissioner. Therefore the Commissioner gave good consideration in accepting its payment in discharge of the debt.

In the light of what has been said above, it may have been preferable to analyse this case as an example of the legal obligation qualification. The Revenue had a valid entitlement to the GST payment. The partnership firm's payment discharged that debt. This offers a complete answer to the restitution claim. As Burrows has argued:[85]

> The decision [in *Stiassny*] should have been simple. There was no unjust enrichment because the Revenue was entitled to the tax paid by (or on behalf of) [the partnership firm]… Unfortunately the court saw all this, with respect incorrectly, as an aspect of a 'good consideration' defence.

In relation to the application of the legal obligation qualification to statutory entitlements, two further points remain to be considered.

First, the claimant may choose to contest the validity of the defendant's purported statutory entitlement.[86] If the claimant's challenge succeeds, the legal obligation qualification will be of no assistance to the defendant. *Woolwich Equitable Building Society v Inland Revenue Commissioners*[87] illustrates this. There, the

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[83] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

[84] *Stiassny* (n 26) [65].

[85] Burrows, 'Is There a Defence of Good Consideration?' (n 1).

[86] Charles Mitchell and Monica Chowdry, 'Tax Legislation as a Justifying Factor' [2005] RLR 1, 10–18.

[87] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

question before the House of Lords was whether the claimant could recover tax paid to the Revenue on the basis that it was an ultra vires exaction. Importantly, in prior proceedings, the claimant had challenged the validity of the statutory regulation that authorised the Revenue's collection of tax from the claimant.[88] The claimant was a building society. As a consequence of the Income Tax (Building Societies) Regulations 1986, building societies had been asked to comply with a new taxing regime. The Regulations were challenged on the basis that they were ultra vires s 343(1A) of the Income and Corporation Taxes Act 1970, the parent legislation. The House of Lords upheld the challenge. Thus, even before the House of Lords heard the restitution claim, the statutory regulation that entitled the Revenue to exact the impugned tax had been declared invalid. Clearly, therefore, the Revenue had no statutory entitlement countervailing the claimant's restitution claim.[89]

Secondly, the legal obligation qualification is not the only basis upon which a statutory regime may defeat restitution claims. There are at least two other statutory bars that operate against claims based on unjust enrichment.[90] For instance, statutes may deny restitution claims through express or implied exclusion. Section 7(3) of the Civil Liability (Contribution) Act 1978 is an example of the former. It provides that the statutory regime,

> supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances.

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[88] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1991] 4 All ER 92.

[89] For an example of a similar challenge, see *British Sky Broadcasting Group Plc v C & E Commissioners* [2000] BVC 2067.

[90] Mitchell, Mitchell and Watterson (n 28) [2-07].

Monro v HMRC[91] exemplifies implied statutory exclusion. There, the Court of Appeal held that the statutory recovery regime provided in s 33 of the Taxes Management Act 1970 impliedly suggested that the Parliament intended to exclude the common right of recovery based on unjust enrichment. Furthermore, restitution claims may also be denied on the basis that, if permitted, they would stultify statutory policy.[92] For example, in *R Leslie Ltd v Sheill*,[93] a restitution claim was denied on the basis that, permitting recovery would be contrary to the policy enacted in the Infants Relief Act 1874. This is as a distinct policy bar on unjust enrichment claims.

3. Judgments

The defendant may resist restitution by relying on an entitlement to the enrichment that is derived from court judgments. Permitting restitution will, in those cases, deprive the defendant of her entitlement. Here, the equality analysis suggests that restitution ought to be denied by applying the legal obligation qualification. The legal obligation operates to protect the integrity of the entitlement derived from the judgment.

There is near unanimity among academic commentators that there can be no restitution in respect of benefits conferred in furtherance of judgments.[94] *Huffer v Allen*[95] is an illustration of this principle. There, the claimant owed £28 to the

[91] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 206, [2009] Ch 69. See also, *Sevastopoulos v Spanos* [1991] 2 VR 194 (Supreme Court of Victoria).

[92] Edelman and Bant (n 25) 160; Mitchell, Mitchell and Watterson (n 28) [2-21].

[93] *R Leslie Ltd v Sheill* [1914] 3 KB 607 (CA). See also, *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498.

[94] Birks, *Unjust Enrichment* (n 63) 139–140; Edelman and Bant (n 25) 165; Stevens, 'Is There a Law of Unjust Enrichment?' (n 50) 17; Virgo, *The Principles of the Law of Restitution* (n 1) 147.

[95] *Huffer v Allen* (1866-67) LR 2 Ex 15.

defendant. The defendant had commenced proceedings to recover this sum. Before judgment was entered, however, the claimant paid the defendant £10 in partial discharge of the debt. Regardless, the defendant sought a judgment for £28 in its entirely. Judgment was entered for that sum. Subsequently, the judgment was executed against the claimant; he was compelled to pay £28 in discharge of the debt owed to the defendant. The claimant sought restitution on the basis that, on the date of judgment, the claimant only owed the defendant £18. The claim was rejected. It was held that the claimant's argument was precluded by the existence of the judgment entitling the defendant to £28 from the claimant. Kelly CB said,[96]

> But he cannot make this averment, and therefore cannot maintain this action, whilst the judgment, against which no averment can be admitted, stands as evidence that when judgment was signed the debt which the then defendant owed was 28l., and not 18l.

On remarkably similar facts, this principle was reiterated in *Sophia de Medina v Grove*.[97] There, again, the claimant was seeking restitution in respect of a sum that was paid to the defendant in execution of a valid judgment. Rejecting the claim, Lord Denman said,[98]

> If there was any fraud in the case, that might be a ground for the interference of the Court to set aside the judgment or the execution: but, whilst both remain unreversed, it would be contrary to principle to reverse them in effect by an action to recover back the amount levied.

Needless to say, prior to seeking restitution, the claimant may apply to set aside the judgment.[99] Once the judgment is quashed, the legal obligation qualification no longer applies.[100]

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[96] Ibid 18.

[97] *Sophia de Medina v Grove* (1846) 10 QBR 152; 116 ER 59.

[98] Ibid 67.

[99] *Huffer* (n 95) 18–19; *Sophia de Medina* (n 97) 67.

Interestingly, *Moses v Macferlan*,[101] a formative decision on the principle of unjust enrichment in England, contradicts the legal obligation qualification. There, Moses indorsed four promissory notes to Macferlan. This was subject to an agreement between the parties that Moses would not be held liable on these notes. In breach of the agreement, Macferlan sued Moses in the Court of Conscience. The Court refused to receive evidence of the collateral agreement. Moses was therefore held liable on his indorsement. Subsequently, Moses brought an action for money had and received. Through this claim, Moses was effectively seeking to reverse the money paid out to Macferlan under the earlier judgment. Clearly, Macferlan had a valid entitlement to receive that sum. The judgment against Moses had not been reversed or set aside. On principle, therefore, Moses's claim ought to have failed. However, Lord Mansfield reached the opposite conclusion.

Faced with the argument that granting Moses's claim would contradict the earlier judgment, Lord Mansfield said:[102]

> The ground of this action is not, 'that the judgment was wrong:' but, 'that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money.'

With respect, Lord Mansfield's reasoning on this point does not withstand scrutiny. Macferlan had a valid entitlement to receive the sum in respect of which Moses sought restitution. On what basis can it then be said that he 'ought not in justice to keep the money'?

Unsurprisingly, Lord Mansfield's decision to side step the subsisting judgment has attracted unanimous criticism from academic commentators.[103] For the same

[100] Edelman and Bant (n 25) 165; Virgo, *The Principles of the Law of Restitution* (n 1) 147.

[101] *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676.

[102] Ibid 679.

reason, the authoritative value of *Moses* on this point has also been doubted repeatedly. In *Marriot v Hampton*,[104] for example, Lord Kenyon expressly rejected *Moses*. He said:[105]

> If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person.

Grose J went to the extent of stating that he would have no difficulty 'in disregarding the whole authority of [*Moses*]'.[106] In *Phillips v Hunter*[107] similarly, Lord Eyre said that he could not 'subscribe to the authority of [*Moses*]'[108] as it seemed to 'unsettle foundations'.[109] On the whole therefore, the preferable view is that *Moses v Macferlan* is wrongly decided on this point.[110]

4. Other Entitlements

It was seen that entitlements arising from contracts, statutes and court judgments attract the operation of the legal obligation qualification. On principle, the same must be true of obligations owed to the defendant that arise out of civil wrongs.

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103 Mitchell, Mitchell and Watterson (n 28) [2-33]–[2-35]; Stevens (n 94) 17; Daniel Friedmann, 'Unjust Enrichment, Pursuance of Self-Interest and the Limits of Free Riding' (2003) 36 Loyola of Los Angeles Law Review 831, 833–834; Ernest Weinrib, 'Unjust Enrichment' in *Corrective Justice* (OUP 2012) 202.

104 *Marriot v Hampton* (1797) 7 Term Reports 269, 101 ER 969.

105 Ibid.

106 Ibid.

107 *Phillips v Hunter* [1795] 2 Hy Bl 402.

108 Ibid 414.

109 Ibid 416. See also, *Brisbane v Dacres* 5 Taunt 160, 128 ER 641.

110 It may be that *Moses* can be justified by re-interpreting the claim as one for breach of contract. For that view, see Stevens (n 50) 17; *Phillips* (n 107) 625.

The decision of the South Australian Supreme Court in *Re Magarey Farlam*[111] confirms this. The claimants were partners in a solicitors' firm. One of the firm's employees had misappropriated funds from the firm's trust account. When the partners learnt of the defalcations, they paid $93,000 into the account. This was intended to replenish funds belonging to eight clients of the firm who were thought to have been victims of the misappropriation. Subsequently, it turned out that the claimants had underestimated both the quantum of misappropriation as well as the number of its victims. Upon discovering this, they sought restitution of the amount that they had paid into the firm's account. It was argued that this payment was caused by a mistake as to the true extent of the fraud. Among other grounds, the Court denied restitution on the basis that the payment was owed to the defendants. Importantly, the defendants' legal entitlement to the enrichment was said to be based on the claimants' vicarious liability for the defaulting employee's wrongdoing. Debelle J said:

> [A] payment cannot be recovered if, in fact, the payer is liable to the payee… Mr Howard submitted that the partners of Magarey Farlam were vicariously liable to the eight clients who had together lost $93,000.[112]
>
> [T]he partners are vicariously liable for the fraudulent activities of [the defaulting employee]. That liability is a further bar to the claim by the partners to recover the sum of $93,000.[113]

What about customary entitlements? *Brisbane v Dacres*[114] has sometimes been relied on to support the view that a defendant may rely on customary obligations to deny restitution claims.[115] However, on close examination, *Brisbane v Dacres* does not support this proposition. The dispute in that case arose from a regular practice in

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[111] *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337.

[112] Ibid [177].

[113] Ibid [183].

[114] *Brisbane* (n 109).

[115] Ben Kremer, 'The Action for Money Had and Received' (2001) 17 Journal of Contract Law 93, 112.

the navy. According to this practice, captains of government ships conveying public money would pay one-third of their freight to the Admiral under whose command they were. Acting in furtherance of this custom, the claimant paid £2500 to Admiral Dacres. Subsequently, the claimant discovered that the Admiral had no legally enforceable right to this payment. A claim for restitution was consequently brought. The claim was rejected by Gibbs J, Heath J and Mansfield CJ. Chambre J dissented. None of the judges relied on the defendant's customary entitlement in support of this conclusion.

Consider, first, Gibbs J's reasoning. He relied on the proposition that no restitution could be had for payments made on account of mistakes of law. As long as the claimant was aware of all the *facts* relating to the payment, a misjudgment as to the law is inconclusive. He said,[116]

> I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is made has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a difference opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise; there are many doubtful questions of law.

Finally, rejecting the claim, he said, 'money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back'.[117] It is telling that he relied on *Bilbie v Lumley*[118] in support of this proposition. In his dissent Chambre J challenged the mistake of law bar. He said,[119]

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[116] *Brisbane* (n 109) 645 (Gibbs J).

[117] Ibid (Gibbs J).

[118] *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448.

[119] *Brisbane* (n 109) 647 (Chambre J).

> [I]t seems to be a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it.

Heath J agreed with Gibbs J. He too denied the claim. However, his reasoning did not rely on a notion of customary entitlement either. In his view, there was no relevant mistake upon which the claim could be based. He said,[120]

> [I]t is very difficult to say that there is any evidence of ignorance of the law here; an officer is sent on a profitable service, the admirals are in the habit of receiving a proportion of the officer's recompense, and it is very likely the officer should acquiesce in the demand. He might not like to contest the point with his superior officer.

So far, *Brisbane v Dacres* appears like a case that solely concerns the mistake of law bar. Now, consider Mansfield CJ's judgment. He reasoned as follows:[121]

> The admiral and captain each thinking that their rights continue as before, the admiral, that he has his contractual right, the captain, that it is his duty to pay the accustomed share, the one pays, and the other receives it. This then being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? …So far from its being contrary to æquum et bonum, I think it would be most contrary to æquum et bonus, if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it?

Mansfield CJ's reasoning in this passage appears to mirror the modern change of position defence. Notably, no part of his reasoning relies on the status of the prevalent practice. Indeed, it would have been surprising if Mansfield CJ relied on this custom at all. That is because, two years before *Brisbane v Dacre* was decided, in *Montagu v*

[120] Ibid 648 (Heath J).

[121] Ibid 648–649 (Mansfield CJ).

Janverin,[122] Mansfield CJ had denied that this practice had the status of a custom. In *Montagu*, he had said:

> It is very difficult to conceive how there can be a custom to divide money given by way of bounty. For this money, paid to the captain as a gratuity for carrying bullion, is a gratuity which they have no right to demand.[123]
>
> It seems to me quite impossible that such a custom should exist in law, or that the practice should be known to the lords of the admiralty.[124]

In sum, although on principle, the legal obligation qualification may base itself on enforceable customary entitlements, *Brisbane v Dacres* sheds no light on this issue.

5. Discharge

In relation to each of the legal obligations considered above, namely, contractual entitlements, statutes, judgments and other obligations, the operation of the legal obligation qualification is contingent on the 'discharge' of the defendant's entitlement. Put differently, it is not the existence of a countervailing legal obligation but its discharge upon the receipt of a benefit by the defendant that attracts the application of the legal obligation qualification.[125] A comparison of the decisions in *Aiken v Short*,[126] *Barclays Bank v WJ Simms*[127] and *Lloyds Bank v Independent*

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[122] *Montagu v Janverin* (1811) 3 Taunt 442.

[123] Ibid 453 (Mansfield CJ)

[124] Ibid 454 (Mansfield CJ).

[125] Graham Virgo, 'Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson and Tang Wu (eds), *The Goals of Private Law* (Hart 2009) 493–497.

[126] *Aiken v Short* (1856) 1 Hurl & N 210, 156 ER 1180.

[127] *Barclays Bank* (n 83).

Insurance[128]—although, strictly, these cases were reasoned in terms of the good consideration rule[129]—vindicates this point.

In *Aiken* and *Lloyds Bank*, the enrichment was received by the defendant in discharge of a debt owed to the defendant. In both cases, restitution was denied. In contrast, in *Barclays Bank*, the claimant bank had acted in contravention of a countermand order in making the impugned payment. Consequently, the payment did not have the effect of discharging the defendant's debt. That is why, although the defendant had a valid entitlement to receive the benefit, restitution was ultimately allowed. Goff J (as he then was) distinguished *Aiken* from *Barclays Bank* on this basis. He said, '[in *Aiken v Short*] it is a crucial fact that the payment… was effective to discharge the debt… owed to the defendant'.[130] In *Barclays Bank*, in contrast, 'the payment was not effective to discharge the drawer's obligation on the cheque; from this it follows that the payee gave no consideration for the payment, and the claim cannot be defeated on that ground'.[131] The centrality of discharge as a pre-requisite was also emphasised by Lord Sumption in the Privy Council in *Fairfield Sentry v Migani*.[132] He said, 'to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered'.[133]

What about premature payments? Consider the following example:

[128] *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 (CA).

[129] For the view that these fact patters must now be analysed in terms of the legal obligation qualification, see section A of Conclusion, below.

[130] *Barclays Bank* (n 83) 687–688.

[131] Ibid

[132] *Fairfield Sentry Ltd (In Liquidation) v Migani* [2014] UKPC 9.

[133] Ibid [18].

> *Example 2*: C owes D £100 due on 1 April. C does not intend to discharge the debt at all, but mistakenly pays D £100 on 25 March. On 1 April, D notifies C that her payment is accepted in discharge of the debt. On 5 April, C brings a claim to recover £100 from D on the basis that it was a mistaken payment.

Here, the legal obligation qualification will operate from the date of discharge i.e. 1 April. Notably, however, the legal obligation qualification will not preclude C from bringing a claim seeking restitution against D in respect of the time value of money between 25 March and 1 April. This is confirmed by the decision of the New South Wales Court of Appeal in *Equiticorp Financial Services*.[134] There, Gyles J said,[135]

> It could be argued that any enrichment of Bank of New Zealand lay not in receipt of the $44,460,976.85 in the liquidity reserve, since undoubtedly it was owed a sum greater than that, but in receipt of that amount some two months before the Uruz Pty Ltd debt was strictly repayable.

In the light of the recent decision of the Supreme Court in *Prudential Assurance Company Ltd v Commissioners for Her Majesty's Revenue and Customs*,[136] it may be that C no longer has a valid claim for restitution in respect of the time value of money. But that issue will not be considered here.

6. Natural Obligations

We know, by now, that countervailing legal obligations deny restitution. Do 'natural obligations' have a similar effect? That question will now be considered. The

[134] *Equiticorp Financial Services* (n 24).

[135] Ibid 322.

[136] *Prudential Assurance Company Ltd v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39, [2018] STI 1499.

academic literature offers remarkably divergent views on this point.[137] This section will examine whether the equality explanation can offer any insights on this debate.

Before making more progress, it is necessary to ask, what are natural obligations? A precise answer is difficult, not least, because of the divergences among the legal systems that employ this doctrine. There is, however, agreement on some common features. Natural obligations are, it is said, not fully recognised and enforceable legal obligations.[138] Thus, they cannot form the basis of a positive claim. They do impose moral duties on the defendant. In the phraseology commonly used, they 'bind the obligor's conscience'.[139] Thus, natural obligations have certain legal consequences. Central among them is that they form the basis of a valid performance. Therefore, money paid, or performance rendered in furtherance of a natural obligation cannot be recovered through restitution.[140]

This section will examine the natural obligation bar in the context of three historical phases. The first consists of decisions from the late 18th century. This period marks the highpoint of the natural obligation doctrine.[141] By the beginning of the 19th century the trend had changed. By then, *Bilbie v Lumley*[142] had adopted the 'mistake of law' bar. Most cases to invoke the natural obligation bar thus far had been claims

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[137] See, Duncan Sheehan, 'Natural Obligations in English Law' [2004] LMCLQ 172; Birks, *Unjust Enrichment* (n 94) 257–258; Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 15) 35; Virgo, *The Principles of the Law of Restitution* (n 1) 147.

[138] Pedro F Entenza-Escobar, 'Natural and Moral Obligations' (2016) 8 The Catholic Lawyer 308, 311.

[139] Mitchell McInnes, 'Natural Obligations and Unjust Enrichment' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 176; Peter Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 215.

[140] RW Leage and AM Prichard, *Leage's Roman Private Law: Founded on the Institutes of Gaius and Justinian* (3rd edn, Macmillan 1961) 432.

[141] Sheehan (n 137) 178.

[142] *Bilbie* (n 118).

based on mistakes of law. Thus, *Bilbie* had the consequence of rendering the natural obligation doctrine largely redundant. It was only in the late 20th century that the mistake of law bar was finally abolished.[143] In theory, this makes the natural obligation bar relevant again. However, modern judicial reasoning offers sparse support for this doctrine.

This section will make two claims. First, the 18th century jurisprudence on the natural obligation bar is consistent with the equality reasoning. Secondly, should the modern law of unjust enrichment recognise a defence based on natural obligations? Strictly, this issue falls outside the purview of this thesis. Nevertheless, for the sake of completeness, it will be suggested that it is preferable to answer this question in the negative.

i. Natural Obligations in the 18th Century

Some decisions from the late 18th century offer emphatic support for the natural obligation bar. The first among them is *Moses v Macferlan*.[144] Although it was strictly unnecessary for the resolution of the case, Lord Mansfield said:[145]

> This kind of equitable action, to recover back money, which ought not in justice to be kept… lies only for money which, ex æquo ot bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.

[143] *Kleinwort Benson* (n 2).

[144] *Moses* (n 101).

[145] Ibid 680–681.

Through this passage, Lord Mansfield effectively transplanted the Roman-civilian doctrine of natural obligations into English law.[146] His reliance on Vinnius's edition of Justinian's Institutes in support of his reasoning in *Moses* is a telling indication of the origins of this doctrine.[147] Two decades later, *Bize v Dickason*[148] was decided. There, again, the natural obligation doctrine did not influence the final decision. However, Lord Mansfield reiterated his support for this doctrine in identical language.[149]

In the meantime, *Farmer v Arundel*[150] had been decided. *Farmer* was unlike *Moses* and *Bize*. Here, the Court may have reached a different result had it not been for the natural obligation bar. This was a dispute between two parishes. The defendant-parish had maintained a pauper for several years. In truth, it was the claimant's obligation to do so. The defendant sought to reimburse their expenses from the claimant. Unaware that the claimant was not under a legal obligation to pay, the claimant obliged. Later, the claimant sought restitution. The Court proceeded on the basis that there was no countervailing legal obligation. 'This money could not have been demanded by the defendant',[151] it was found. Yet, the claim was denied. De Grey CJ was of the view that the claimant did nothing more than discharge an 'honest debt'.[152] Adopting Lord Mansfield's language, he said:[153]

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[146] Peter Birks, 'English and Roman Learning in Moses v Macferlan' (1984) 37 Current Legal Problems 1, 15.

[147] Sheehan (n 137) 176.

[148] *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097.

[149] Ibid 286–287.

[150] *Farmer v Arundel* (1772) Blackstone W 824; 96 ER 485.

[151] Ibid 826.

[152] Ibid.

[153] Ibid 825–826 (De Grey CJ).

> Money due in point of honour or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back.

This view was affirmed in *Munt v Stokes*.[154] There, the defendant had borrowed money from the claimant. The transaction was prohibited by law. The loan was hence, void. Unaware of this, the claimant repaid the loan. Upon discovering the true position, the claimant sought restitution. Can a natural obligation be founded on a contract prohibited by law? The Court answered this question affirmatively. The loan contract was, it was held, 'not malum in se, but malum prohibitum'.[155] Having found that the contract was inherently unobjectionable despite the legal prohibition, Lord Kenyon denied restitution. He reasoned that:[156]

> There was nothing contrary to conscience in the defendants receiving the money which they had advanced; the plaintiffs therefore are not intitled either in law or in equity to recover it back again.

Thus, at the turn of the 18th century, there was judicial support for the natural obligation doctrine as a bar on restitution claims.

It will now be argued that this position is consistent with the equality explanation advanced in this thesis. The point of departure is the enquiry, why were natural obligations considered as qualifications on restitution claims? There is ample evidence in support of the following view: despite the inability of natural obligations to ground positive claims, they were conceptualised as reasons why the defendant had a valid right to retain the enrichment.

First, the Roman law understanding of natural obligations supports this view. Consider for instance, the action in *condictio indetibi*. '*Indebiti*' connotes something

[154] *Munt v Stokes* (1792) 3 Term Reports 561; 100 ER 1176.

[155] Ibid 564.

[156] Ibid (Kenyon CJ).

that is not due. Thus, *condictio indebiti* reverses payments or performances made under the belief that they are due under valid obligations whereas the obligation is in fact non-existent.[157] The Roman explanation for the natural obligation qualification is simple: the payment is not *indebitum*.[158] As Hume puts it,[159]

> To make way for the *condictio indebiti* it seems to be necessary, that the payment have been absolutely and utterly *indebitum*, not due to that party, by any even natural bond of obligation.

For these purposes, Roman law equated a 'natural' debt to a real one.[160] This is particularly evident from Evans's examination of the Roman law on this issue. He finds that:[161]

> [W]hat is due according to natural justice is considered as being really due; and, although the payment of it could not be enforced, yet if it is actually paid, though by a person who supposes himself to be liable in point of law, it cannot be reclaimed.

In the 18th century, restitution was often conceptualised as an equitable action. This appears to have strengthened the natural obligation bar. Erskine, for instance, argues that since the claim is premised on equity, the defendant's 'equitable' right suffices to defeat it.[162] Kremer offers a similar analysis. He focuses on the fact that

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157 JAC Thomas, *Textbook of Roman Law* (Philip McDonald 2013) 327.

158 Leage and Prichard (n 140) 385.

159 David Hume, *Baron David Hume's Lectures*, vol 3 (George Paton ed, Stair Society 1939) 172.

160 Vinnius's Commentary on the Institutes of Justinian, 3.27.6 cited in Birks, 'English and Roman Learning in Moses v Macferlan' (n 146) 17–18.

161 William Evans, 'An Essay on the Action of Money Had and Received' in *Essays: On the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (1802) (reprinted in [1998] Restitution Law Review 1) 5.

162 Erskine Institute III cited in Scottish Law Commission, *Recovery of Benefits Conferred Under Error of Law* (Discussion Paper Number 95, Vol 2, 1993) [2.70]. For a similar justification in the context of civilian jurisdictions, see Meier (n 1) 37.

restitution claims were pleaded as actions for 'money had and received'. Procedurally, this was a liberal action. This meant that,[163]

> any circumstance the defendant could point to which showed some valid legal, equitable or moral claim to be entitled to the money and hence to retain it would repel the plaintiff's claim.

Thus, on the Roman law understanding of the natural obligation bar, it appears to have been the defendant's natural *right* to the enrichment that precluded restitution. It is a particularly telling validation of this claim that, in Roman law and in many civilian legal systems, natural obligations only act as a defence to actions based on *condictio indebiti*.[164] Other actions for restitution did not rely on the benefit not being due to the defendant. They were, consequently, unaffected by countervailing natural obligations.

Secondly, the 18th century case law often resorted to the opaque language of 'unconscionability' to justify the natural obligation bar. It is necessary, therefore, to closely examine what this language really stood for. It appears that the central issue was a slightly different defendant-centred concern. It was whether the defendant has a valid right to retain the enrichment. In *Moses* itself, Lord Mansfield was worried by the 'iniquity of [the defendant] *keeping* that money'[165] 'which ought not in justice to be *kept*'.[166] In *Clarke v Shee*[167] similarly, restitution was granted because it was found that the defendant 'cannot in conscience retain the enrichment'.[168] *Dale v Sollet*[169]

[163] Kremer, 'The Action for Money Had and Received' (n 115) 109.

[164] Sheehan (n 137) 188.

[165] *Moses* (n 144) 679.

[166] Ibid 680.

[167] *Clarke v Shee and Johnson* (1774) 1 Cowper 197; 98 ER 1041.

[168] Ibid 1042.

[169] *Dale v Sollet* (1767) 3 Burrow 2133; 98 ER 112.

makes this point clearer. There, in response to the claim for money had and received, the defendant asserted a set-off in respect of certain sums that were due to him. The defendant's argument was upheld. The plaintiff's right to restitution, it was held,[170]

> can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded.

Kremer's comprehensive study of the 'money had and received' cases from this era confirms this view. He notes:[171]

> [T]he notion of 'conscience' did not operate at large… the rule to which it gave rise to was that the plaintiff had to show that the defendant had no 'right to retain' that which he received. The rule meant that any valid reason the defendant could adduce in evidence – 'any equity' to keep it – would 'rebut the action'.

The natural obligation doctrine, when rationalised on the basis of the defendant's right to retain the enrichment, is consistent with the equality explanation. Consider the core legal obligation qualification case, the two-creditor example, for a moment. There, the equality explanation suggests that the claimant cannot rely on the law of restitution to protect her pre-transaction interests while depriving the defendant of his legal entitlement to the enrichment. Notably, the claimant's pre-transfer interests, although legally recognised, are not necessarily enforceable legal claims. In fact, more often than not, they are protected legal interests, not claim rights. Analogously, the defendant's interests that the legal obligation qualification accords protection to, may similarly be legally recognised interests, albeit not enforceable legal rights. That is, in fact, the import of the natural obligation bar when conceptualised as a qualification based on the defendant's right to retain the enrichment.

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[170] Ibid 113.

[171] Kremer, 'The Action for Money Had and Received' (n 115) 22. See also, Ben Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 LQR 188, 190.

ii. A Modern Natural Obligation Bar?

The previous section demonstrated that the 18th century natural obligation doctrine is consistent with the equality explanation offered in this thesis. But does the modern law of unjust enrichment recognise a natural obligation bar? Should it? This section will argue that these questions should be answered negatively. There are four main reasons that may be offered in favour of this view.

a. Judicial Support

By the turn of the 18th century, the tide had turned against the recognition of natural obligations as qualifying restitution claims.[172] In fact, there is almost no support in modern judicial reasoning for the doctrine of natural obligations. This should be surprising because two decades have now passed since the abolition of the mistake of law bar in *Kleinwort Benson*.[173]

Two decisions are often relied on in support of the natural obligation qualification. Both Sheehan[174] and an earlier edition of Goff & Jones[175] rely on *Tootal Clothing v Guinea Properties*.[176] That was a dispute between Guinea, the landlord and Tootal, the tenant. Under a lease agreement, Guinea had agreed to lease a commercial property to Tootal. Tootal was to carry out shop-fitting works on the premises. In return, the first three months of Tootal's tenancy were to be rent-free. In a supplemental agreement, Guinea had also agreed to pay Tootal a sum of £30,000.

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[172] Sze Ping-fat, '*Obligatio Naturalis*: A Concept or a Fallacy ' (2007) 28 Business Law Review 209, 209–210.

[173] *Kleinwort Benson* (n 143).

[174] Sheehan (n 137) 189.

[175] Robert Goff and Gareth Jones, *The Law of Restitution* (6th edn, Sweet & Maxwell 2002).

[176] *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452 (CA).

Tootal carried out the works and demanded payment. Guinea refused to pay. Guinea argued that the supplemental agreement did not comply with the formality requirements set out in s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and was, therefore, void. This argument was rejected. Scott LJ said:[177]

> [S]ection 2 is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2.

This reasoning is relied on to support the view that money paid under a contract that is void for reasons of informality cannot be recovered. That in turn, it is argued, supports the natural obligation bar. With respect, *Tootal Clothing* does not support either of these propositions. In *Tootal*, the claimant was seeking to enforce Guinea's promise to pay £30,000. It is clear that natural obligations cannot form the basis of a positive claim. At best, they may justify Tootal's retention of £30,000, once paid. But that was not the nature of the claim in *Tootal*. Furthermore, the Court in *Tootal* found that Guinea's supplemental promise to pay £30,000 was enforceable as a separate contract despite the statutory formality requirement. Scott LJ said,[178]

> If parties choose to hive off part of the terms of their composite bargain into a separate contract distinct from the written land contract that incorporates the rest of the terms, I can see nothing in section 2 that provides an answer to an action for enforcement of the land contract, on the one hand, or of the separate contract on the other hand. Each has become, by the contractual choice of the parties, a separate contract.

Thus, the supplemental agreement was a valid and subsisting contract. Even if Guinea had mistakenly paid £30,000 to Tootal therefore, that sum would have been irrecoverable. It is unnecessary to rely on natural obligations to reach that conclusion.

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[177] Ibid 455.

[178] Ibid 456.

The standard legal obligation qualification suffices. It is unsurprising, therefore, that natural obligations formed no part of the Court's reasoning.

The decision of the South Australian Supreme Court in *Re Magarey Farlam*[179] is another instance. There, the claimants were partners in a solicitors' firm. One of the firm's employees had misappropriated funds from the firm's trust account. When the partners learnt of the defalcations, they paid $93,000 into the account. This was intended to replenish funds belonging to eight clients of the firm. They were thought to be victims of the misappropriation. Subsequently, it turned out that the claimants had underestimated both the quantum of misappropriation as well as the number of its victims. Upon discovering this, they sought restitution of the amount that they had paid into the trust account. It was argued that the payment was caused by a mistake as to the extent of the fraud. The claim was rejected. Debelle J's reasons for reaching that conclusion are, however, hard to discern. On the one hand, relying on *Farmer v Arundel*[180] he said:[181]

> The claim by the partners of Magarey Farlam concerns money due in point of honour and conscience. It was money paid when there was no compulsion to do so.

This passage appears to support the natural obligation bar. In a later passage, however, Debelle J relied on the defendants' *legal* entitlement to the enrichment. He reasoned:[182]

> There is no criterion by which it can be said that the eight clients were not entitled to be reimbursed for the loss each had suffered. The payment was not unjust.

[179] *Re Magarey Farlam Lawyers* (n 32).

[180] *Farmer* (n 150).

[181] *Re Magarey Farlam Lawyers* (n 32) [166] (Debelle J).

[182] Ibid [168] (Debelle J).

The claimants had been found vicariously liable for the employee's wrongdoing. This meant that they were liable to reimburse the defendants for their loss. Based on this finding, Debelle J said, 'a payment cannot be recovered if, in fact, the payer is liable to the payee'.[183] This analysis suggests that he was merely applying the legal obligation qualification. In any case, it is tolerably clear that having found in favour of the defendant's legal liability to the enrichment, the natural obligation bar was unnecessary to dispose off the case. Thus, *Re Magarey Farlam* at best offers equivocal support for the natural obligation bar.

b. Lord Mansfield's Categories

In *Moses*, Lord Mansfield identified four instances of the application of the natural obligation doctrine. They are: time-barred debts, payments due under a usurious contract, debts contracted during minority, and gambling debts.[184] Subsequent legal events have rendered the operation of the natural obligation bar redundant in all four contexts.

Consider time-barred debts. In English law, passing of the limitation period does not render legal obligations void.[185] Despite their unenforceability, therefore, time-barred debts are valid legal obligations. As seen previously therefore, a mistaken payment that discharges an unenforceable obligation is irrecoverable.[186] This result is dictated by the legal obligation qualification. The natural obligation bar performs no

[183] Ibid [177].

[184] *Moses* (n 144) 680–681.

[185] Tang Hang Wu, 'Natural Obligations and the Common Law of Unjust Enrichment' (2015) 6 Oxford University Commonwealth Law Journal 133, 141.

[186] See Chapter 4(C).

useful function in this context.[187] The confusion in *Moses* is evidently a consequence of the transplant from Roman law. Roman law did not recognise obligations that are valid but unenforceable. According to Gaius, for example, there were only two categories of obligations: those enforceable by action and natural obligations.[188] Pothier similarly adopted a three-fold classification: obligations that have no legal effect, natural obligations (not enforceable, but producing some legal effects), and civil obligations.[189] The notion of an unenforceable but valid legal obligation is conspicuously absent from both these frameworks. Many civilian jurisdictions have followed this lead. In Germany for example, as a general rule, lack of form renders a contract void, not unenforceable.[190] There are two takeaways from this discussion. First, Lord Mansfield's first category is redundant in present day English law. Further, there are significant divergences between the Roman-civilian context, from which natural obligations are sought to be borrowed, and the present day English law.

Lord Mansfield's second category tells a similar story. At the time when *Moses* was decided, usurious contracts were subject to a special regulatory regime. In response to the lender's demand for repayment, it was open to the borrower to plead usury. If successful, this rendered the contract void.[191] However, contracts in this category no longer raise special issues.[192] Their legal status is determined in just the same way as other contracts.

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[187] Virgo, *The Principles of the Law of Restitution* (n 1) 147.

[188] Leage and Prichard (n 140) 313.

[189] Fontaine Martin Jr, 'Natural Obligations' (1941) 15 Tulane Law Review 497, 505.

[190] Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 27.

[191] Warren Swain, *The Law of Contract 1670–1870* (CUP 2015) 162.

[192] Virgo, *The Principles of the Law of Restitution* (n 1) 148.

The third category in *Moses*—minority—is less straightforward. Within this category, contracts to supply necessary goods or services to minors are relatively unproblematic. They are valid.[193] Restitution is therefore denied by the legal obligation qualification. In other cases, the contract is either void, or voidable at the instance of the minor. In either case, the natural obligation doctrine is of no assistance. This is because, as Sheehan admits,[194]

> The fact that the contract is void for lack of capacity often means that there can be no natural obligation. The reason we render the contract void for lack of capacity is to protect the party which lacks capacity.

A residual category remains upon which proponents of the natural obligation bar rely:[195] contracts affirmed by the minor after attaining the age of majority. Here, restitution is unavailable after affirmation. The denial of restitution is explicable without relying on natural obligations. Upon ratification during majority, the contract becomes enforceable.[196] No fresh consideration is necessary for this purpose.[197] Thus, affirmation creates a valid subsisting contract entitling the defendant to retain the enrichment. The result is, as before, explicable as an operation of the legal obligation qualification.

Finally, consider gambling debts. Ever since 1845, this issue has been subject to a clear legislative solution. The Gaming Act 1845 affirmed the rule that gaming and wagering contracts are void. However, recovery of sums paid in furtherance of

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[193] *Ryder v Wombwell* (1868) LR 4 Ex 32; Peel (n 49) [12-003].

[194] Sheehan (n 137) 191.

[195] Ibid.

[196] *Williams v Moor* (1843) 11 M & W 256; 152 ER 798.

[197] Peel (n 49) [12-029].

gaming or wagering was expressly prohibited.[198] In 2005, a new legislative scheme came into force. The Gaming Act 2005 renders gaming contracts enforceable. For the purposes of restitution therefore, they must now be treated at par with other valid contractual arrangements.[199]

c. The Doctrine of Moral Consideration

The late 18th century also witnessed the development of a parallel doctrine based on natural obligations: it was suggested that moral obligations could constitute the ‘consideration’ that would render a bare promise enforceable as a contract.[200] As with the natural obligation bar, this move was spearheaded by Lord Mansfield. In *Hawkes v Saunders* he said,[201]

> Where a man is under a moral obligation, which no Court of Law or Equity can inforce, and promises, the honesty and rectitude of the thing is a consideration.

This proposition had garnered some judicial support in the late 18th century.[202] By the first half of the 19th century, however, it suffered the same fate as the natural obligation bar. In *Eastwood v Kenyon*, the moral consideration doctrine was decisively rejected. It was held that, if accepted, it would:[203]

> annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

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[198] Gaming Act 1845, s 18 (‘no Suit shall be brought or maintained in any Court of Law or Equity for recovering any Sum of Money or valuable Thing alleged to be won upon any Wager’).

[199] Virgo, *The Principles of the Law of Restitution* (n 1).

[200] Sheehan (n 137) 178–180.

[201] *Hawkes v Saunders* (1782) 1 Cowper 289; 98 ER 1091.

[202] See *Atkins v Hill* (1775) 1 Cowper 284; 98 ER 1088; *Trueman v Fenton* (1777) 2 Cowper 544; 98 ER 1232.

[203] *Eastwood v Kenyon* (1840) 11 A&E 438; 113 ER 482, 486.

There have been no significant attempts to revive the doctrine of moral consideration thereafter. Indeed, the present day contract law textbooks unequivocally reject the proposition that an antecedent moral or natural obligation can constitute good consideration for the obligor's promise.[204]

The decline of the moral consideration doctrine provides a powerful reason for the rejection of the natural obligation bar in the modern law of unjust enrichment. This is because the natural obligation bar and the moral consideration doctrine are logical corollaries. This is evident from Lord Mansfield's reasoning in *Hawkes*, where the moral consideration doctrine was first affirmed. Referring to the restitution claim, which was then understood as quasi-contractual, he said:[205]

> Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made.

It appears that this proposition served as the basis for the recognition of the moral consideration doctrine. In the very next sentence of his speech, Lord Mansfield said:[206]

> A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise.

The proposition that the moral consideration doctrine and the natural obligation bar are logical corollaries also attracts significant support in the academic literature. Atiyah describes these rules are 'mutually complementary'.[207] Baloch has suggested that 'theoretical consistency' demands the recognition of both, or neither.[208] Further,

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[204] HG Beale and AS Burrows, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [4-033]; Peel (n 49) [3-021].

[205] *Hawkes* (n 201) 1091.

[206] Ibid.

[207] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1985) 181.

[208] Tariq A Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636, 641–642.

in his examination of Lord Mansfield's contract law decisions from the 18th century, Oldham confirms this view. He notes:[209]

> [Lord Mansfield's] belief that courts should honor promises prompted by legal or equitable duty was only half the formula. The other half was what came to be known as quasi-contract, in which 'the honesty and rectitude of the thing' generated an equitable obligation to pay, customarily described as a promise implied by law.

This also appears to have been the accepted understanding in Roman law. Pothier, for instance, has said:[210]

> If, upon the result of a fair inquiry it should appear that money paid under a mere mistaken idea of legal obligation, without any purpose of gratuitous donation or liberality, and for the payment of which there was no moral duty, is subject to repetition, it seems to follow, as a necessary consequence, that a promise of payment founded merely upon such mistake cannot be obligatory.

It is unsurprising, therefore, that even the strongest proponents of the natural obligation bar recognise this connection. Sheehan, for instance, has admitted that:[211]

> It is after all logically necessary, as Lord Mansfield saw, that, if the obligation provides consideration for a future promise, fulfilment of the obligation is irreversible.

Thus, the decline of the related moral consideration doctrine provides yet another reason why the modern law of unjust enrichment must refuse to recognise a natural obligation bar.

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[209] James Oldham, 'Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes' (1988) 76 Georgetown Law Journal 1949, 1962–1963; See also, James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press 1992) 225.

[210] Joseph Pothier, *A Treatise on the Law of Obligations, Or Contracts* (William Evans tr, Joseph Butterworth 1806) 379.

[211] Sheehan (n 137) 179.

d. Natural Obligations and Bilateral Transactions

One of the most common charges against the natural obligation bar is that of vagueness.[212] This is not a new problem either. Even under Roman law, natural obligations were notoriously difficult to define.[213] In response to this criticism, Sheehan has proposed a modern, well-defined variant of the natural obligation doctrine. In my reading, he offers a broad version and a narrow version of the doctrine. The broad version is formulated in these terms:[214]

> The defence should arise where the claimant has undertaken to do an act, but the contract, under which he undertook the duty, is void. Nonetheless, we see the undertaking of the duty as worthy of some recognition. However, the reason why the contract, or agreement is void ought not indicate a disapproval of the act itself, or a need to protect the claimant.

The account set out in the passage above suggests that there is a moral obligation behind every promise; a view Sheehan ascribes to Fried.[215] However, Sheehan ultimately resiles from that position. This is apparently motivated by Lord Mansfield's rejection of this very proposition in *Lee v Muggeridge.*[216] Sheehan then adopts a narrower version of the natural obligation bar. On that view,[217]

> The reason why we deny recovery in the void contract cases is exactly the same as the reason we deny recovery where there is an enforceable contract; we cannot destroy bargains… even if Fried's arguments are unsatisfactory on some level, there must be something that justifies our giving effect to the promises that make up a contract.

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[212] Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 137) 35; Virgo, *The Principles of the Law of Restitution* (n 1) 148; Ping-fat (n 172) 215.

[213] Scottish Law Commission, *Recovery of Benefits Conferred Under Error of Law* (n 162) [2.72].

[214] Sheehan (n 137) 185.

[215] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981) ch 2.

[216] *Lee v Muggeridge* (1813) 5 Taunton 36; 128 ER 599.

[217] Sheehan (n 137) 185.

On this account, it is not the normative weight of a promise that justifies the natural obligation bar. It is the need to protect bargains. Notably, on Sheehan's account, this is the only category of case where a natural obligation bar to restitution claims ought to be recognised. Thus, restitution in respect of performance rendered under a contract that is subsequently found to be void for informality is the 'central case'[218] for the application of the natural obligation bar. An illustration:[219]

> *Example 3*: C wanted to buy a black car. She entered into a contract with D for this purpose. The purchase price, £10,000, was paid upfront. When the car was delivered, C realised that it was a red car. The contract contained no term as to the colour of the car. Therefore, C continued to be bound by the contract. Later, C realised that the contract was void for non-compliance with a formality requirement. C seeks restitution from D. She relies on her mistake.

Will C's claim succeed? Had C's claim been for failure of consideration, the answer may have been easier. One could have said, as Toulson LJ did in *Sharma v Simposh*, that C 'got what she paid for'.[220] Consequently, there is no failure of consideration. But C's claim is based on mistake. There is a plausible argument for the view that C's claim should, nevertheless, fail.[221] Sheehan concurs with that result. He also argues that the denial of restitution is best explained as an illustration of the natural obligation bar.

But let us pause to ask, why is there a natural obligation in Example 3 in the first place? In response, Sheehan would turn to the 'bargain' between C and D. It appears therefore that, in this context, the natural obligation bar is a good candidate

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[218] Ibid 188.

[219] Loosely based on *Sharma v Simposh* [2011] EWCA Civ 1383, [2013] Ch 23.

[220] Ibid [26] (Toulson LJ).

[221] See, James Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010) 171.

for the Occam's razor. If C's claim is to be denied in Example 3, it is preferable to rely directly on the reason that justifies that result: the need to protect the integrity of the bargain between C and D. Edelman advocates this approach. He says:[222]

> [W]here the claimant labours under a unilateral mistake when entering into a bilateral contract with the defendant... recovery is not generally possible… this principle is based on the need for respect for mutual autonomy in bilateral arrangements. In bilateral exchanges, a claim for unjust enrichment (whether expressed as mistake or as failure of consideration) is only possible where the objective condition of the claimant's transfer to the defendant has failed. The conditionality means that the autonomy of both parties to the bilateral arrangement is protected. This is true even if the bilateral arrangement is a void contract.

Thus, even if restitution is to be denied in Example 3, it is possible, and indeed preferable, to do so without importing the amorphous notion of natural obligations into English law.

This claim stands vindicated by the fact that the original examples of natural obligations in Roman law—obligations contracted by slaves, children and women in power, and debts owed to such persons[223]—were not necessarily linked to bilateral bargains. Even in the present day, in many civilian jurisdictions, natural obligations are not oriented around bilateral transactions. In Germany for instance, the two central examples of the natural obligation doctrine are the promise of a fee to a marriage broker, and betting and gaming.[224]

In sum, the 18th century case law offers some support for a natural obligation bar to restitution claims. These cases are consistent with the equality explanation offered in this thesis. It is a different question whether the modern law of restitution

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[222] James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston University Law Review 1009, 1024–1025.

[223] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 7.

[224] Ibid 8.

should recognise a natural obligation qualification. It is preferable to answer that question in the negative. That the enthusiasm for natural obligations has been steadily declining even in jurisdictions such as Germany[225] and South Africa[226] lends credence for this view. By the turn of the 18th century, the tide had turned against the recognition of natural obligations as qualifications on restitution claims.[227] In fact, there is almost no support in modern judicial reasoning for a doctrine of natural obligations. If there existed a modern natural obligation bar, this should be surprising two decades since the abolition of the mistake of law bar in *Kleinwort Benson*.[228]

7. Gifts

It was in 1979 that 'causative mistake' was first adopted as the standard for restitution of mistaken payments.[229] This standard, applied on the basis of 'but for' causation, has received consistent judicial approval ever since.[230] In 2013, however, seven Justices of the Supreme Court confirmed that a distinct, higher standard applied for the restitution of mistaken gifts.[231]

The claim in *Pitt v Holt* arose from a road traffic accident that Mr Derek Pitt suffered in 1990. The accident left Mr Pitt mentally incapacitated. Mrs Pitt was appointed as his receiver. Subsequently, Mr Pitt's damages claim was compromised.

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225 Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 268; Zimmermann (n 223) 10.

226 DJ Joubert, *The General Principles of the Law of Contract* (Juta 1987) 15.

227 Ping-fat (n 172) 209–210.

228 *Kleinwort Benson* (n 143).

229 *Barclays Bank* (n 83).

230 *Nurdin & Peacock Plc v DB Ramsden* [1999] 1 WLR 1249 (Ch D); *Kleinwort Benson* (n 143).

231 *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108. Whether the higher standard applies to all mistaken gifts, or to some sub-specie thereof remains a point of contention. On that debate, see sub-sections (a) and (b), below.

The proceeds were invested in a discretionary trust. Mrs Pitt's decision to create the trust was based on advice from her solicitors and financial advisers. However, subsequently, Mrs Pitt became aware that the settlement would attract significant inheritance tax liability. The inheritance tax could have been avoided had the trust been structured differently. But Mrs Pitt had mistakenly not been advised of the inheritance tax consequences. She commenced proceedings seeking to set aside the Derek Pitt Trust on the basis of her mistake.[232]

Lord Walker delivered the unanimous judgment. He granted Mrs Pitt's claim. Although setting aside the Derek Pitt Trust was not strictly the same as seeking restitution of a mistaken gift,[233] he proceeded on the basis that the standards applicable were identical. He said,[234]

> I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.

In addition, he said, the Court will conduct an evaluation of the 'injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected', with 'an intense focus on the facts'.[235]

The circularity of the 'causative mistake of sufficient gravity' language[236] and the indeterminacy of the unconscionableness criterion[237] have both been subject to

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[232] Mrs Pitt's first ground, 'the Hastings-Bass rule', will not be examined here.

[233] Andrew Burrows, 'Inner Temple Lecture on Unjust Enrichment' (February 17, 2014) <https://wwwinnertempleorguk/downloads/members/lectures_2014/lecture_burrows_2014pdf> accessed 5 September 2017.

[234] *Pitt* (n 231) [122].

[235] Ibid [126].

searching criticism. However, for the present purposes, I will leave them to one side. What is amply clear is that, for the restitution of mistaken gifts, the Court unequivocally affirmed a standard higher than the simple causative mistake test. Can the equality explanation offer useful insights on the rationale for this distinction? That is the question that the remainder of this section will consider.

The true scope of the holding in *Pitt v Holt* is not easy to discern. As Burrows has pointed out, part of the difficulty arises from the Court's failure to place the issues in their legal context.[238] As a consequence, there are at least two interpretations of the reasoning in *Pitt v Holt*. On the narrow reading, the higher 'serious mistake' standard only applies to 'formal gifts'. A structured formal settlement, like the one in *Pitt v Holt*, is an example. So is a gift made under a deed. On a broader reading on the other hand, the higher standard in *Pitt v Holt* applies to all mistaken gifts regardless of their formality.[239] Both possibilities will now be examined.

a. Pitt v Holt: The Narrow Reading

On one view, the serious mistake standard in *Pitt v Holt* was based on the formality of the transaction. Consequently, that higher standard only applies to the restitution of

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236 Frederick Wilmot-Smith, 'Taxing Questions' (2015) 131 LQR 531, 534 (in the context of the 'at the expense of' requirement).

237 Graham Virgo and Paul Davies, 'Relieving Trustees' Mistakes' [2013] RLR 74, 82; Burrows, 'Inner Temple Lecture on Unjust Enrichment' (n 233) 7 ('[The Court] suggests that something more serious than a mere 'but for' test is required to rescind gifts and voluntary dispositions but it does not explain what that more serious test is other than by a resort to the justice of the case on the facts').

238 Burrows, 'Inner Temple Lecture on Unjust Enrichment' (n 233) 7.

239 A third reading of *Pitt v Holt* based on the proprietary consequences of Mrs Pitt's claim for rescission has also been proposed: see, Terence Etherton, 'The Role of Equity in Mistaken Transactions' (2013) [27] Trust Law International 159. For a contrary view see, Mitchell, Mitchell and Watterson (n 28) [9-151]. This enquiry will not be pursued any further.

formal gifts such as those made under a deed. Virgo and Davies adopt this view. They note:[240]

> [I]f a claimant transfers property to a defendant by mistake, whether or not the claimant can recover the value of his property will depend upon precisely how that property was transferred: if by contract, a fundamental mistake will be required; if by deed, a serious mistake will be necessary to rescind it in Equity; if by gratuitous transfer without a deed, a mere 'but for' mistake appears to suffice.

The idea that, for the purposes of restitution, there is a hierarchy among gifts depending on the formality of the transaction, has also been approved by other commentators. For example, Krebs has suggested that the restrictions in *Pitt v Holt* 'may well be explained on the basis [of] the formality of the transaction'.[241] Edelman and Bant similarly note that 'a deed of gift constitutes a juristic reason to retain the enrichment'.[242]

Through the lens of the equality explanation, application of a higher standard to the restitution of gifts made under deed are relatively easy to explain. In English law deeds have an obligatory effect.[243] Even when they are unsupported by consideration, gifts made under deed bind the donor.[244] More importantly, they create valid entitlements in favour of the donee. For instance, the donee may bring a claim for damages for the breach of a covenant contained in a gift deed.[245] It is readily understandable therefore, why the deed must be set aside before the restitution of a

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[240] Virgo and Davies (n 237) 83.

[241] Krebs (n 225) 80.

[242] Edelman and Bant (n 25) 151 (emphasis added). See also, Stephen Watterson, 'Reversing Mistaken Voluntary Dispositions' (2013) 72 Cambridge Law Journal 501, 503–504.

[243] Birke Häcker, 'Mistaken Gifts after *Pitt v Holt*' (2014) 67 Current Legal Problems 333, 370.

[244] *Hall v Palmer* (1844) 3 Hare 532; 67 ER 491. See also, Peel (n 49) [3-170].

[245] *Cannon v Hartley* [1949] Ch 213 (Ch D).

gift made under it can follow. As long as the deed subsists, the donee has a valid entitlement to the gift.

This analysis is consistent with the equality explanation. Granting the donor's restitution claim while the deed subsists would deprive the donee of her right to the gift, while affirming the donor's pre-transaction entitlements. As Häcker puts it, therefore, 'a mistake-based claim to recover the gift or its value cannot succeed before the deed of promise has been avoided'.[246] Setting aside the gift deed is a necessary pre-condition for restitution.[247] On this view, the higher, serious mistake standard in *Pitt v Holt* is the threshold for setting aside the formal deed at equity.

b. Pitt v Holt: The Broad Reading

On the broad reading, the serious mistake standard in *Pitt v Holt* applies to mistaken gifts in general regardless of their formality.[248] This appears to have been the view adopted by Mackie J in *Pagel v Farman*.[249] That was a dispute between the partners of a hedge fund. Following the hedge fund's collapse, the claimant gifted a sum of money to the defendant. This was meant to help the defendant tide over his financial difficulties. Subsequently, the claimant realised that the defendant's declarations of financial trouble were exaggerated. He sought restitution of the gift. The gift was not made under a deed. Yet, the Court held that the applicable standard was the serious mistake threshold.[250]

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[246] Häcker (n 243) 371. See also, Keith Mason, John Carter and Gregory Tolhurst, *Mason & Carter's Restitution Law in Australia* (2nd edn, LexisNexis Butterworths 2008) 153.

[247] O'Sullivan, Elliott and Zakrzewski (n 56) [29.25].

[248] Ibid [29.30].

[249] *Scott Pagel v Ivor Farman* [2013] EWHC 2210 (Comm).

[250] Ibid [40].

Is the broad reading of *Pitt v Holt* explicable through the equality analysis? At first blush, it appears that it is not. Informal gifts, such as the one in *Pagel*, do not impose legal obligations on the donor. Conversely, neither do they create entitlements in favour of the defendant. Admittedly, a gift, even an informal one, conveys title to the defendant.[251] But so does a simple mistaken payment: the core case of unjust enrichment. The defendant cannot rely on the title transferred through a mistaken transaction to defeat the claimant's unjust enrichment claim.[252] The same must be true of a mistaken gift.

Is there a good justification for adopting a higher threshold in respect of mistaken gifts in general? The academic literature offers two divergent approaches. On one view, there is no reason why the reversal of mistaken gifts ought to be held to a higher standard. The causative mistake approach tempered by the change of position defence offers sufficient protection for the donee.[253] Etherton adopts that view. He argues:[254]

> [I]t is not easy to see why, in principle, there should be any different policy as regards personal restitution claims in respect of mistaken gifts and other mistaken non-contractual transactions.
>
> [T]he true principal distinction is between, on the one hand, upsetting contracts, which should be very difficult… and upsetting other non-contractual transactions, whatever their character or subject matter.

Krebs adopts a similar position. Applying the serious mistake standard to mistaken gifts in general, he argues, 'would be raising the status of gifts onto a higher

[251] Ben McFarlane, *The Structure of Property Law* (Hart 2008) 311.

[252] For an explanation of this point see Chapter 7(B)(2), above.

[253] Etherton (n 239) 171.

[254] Ibid 167.

plane which would be almost contractual'.[255] According to him, the crucial criterion ought to be the allocation of risks. As gifts and other voluntary dispositions do not allocate risks, they do not merit special protection.[256]

Contrarily, it has also been suggested that the higher threshold ought to apply to gifts in general, regardless of their formality. For instance, Virgo has argued that gifts are legal transactions that should not be undermined by restitution.[257] Many others have gone one step further to justify the protection of gifts as a separate legal category. Stoljar was a pioneer in this respect. He argued that English law recognises a promissory theory that protects reliance upon promises, even when they are rendered gratuitously.[258]

The broader reading of *Pitt v Holt*, and the general application of a higher standard to mistaken gifts is also supported by the law on setting aside testamentary gifts. It is well established that a threshold higher than the usual unjust enrichment standard needs to be met before a testamentary disposition can be successfully challenged.[259] A common example of the application of this rule may be found in cases that consider challenges to wills on the basis of undue influence.[260] In these cases, the probate doctrine of undue influence displaces the equitable doctrine.[261] The former requires a higher threshold than the latter in three ways. First, 'presumed'

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[255] Krebs (n 241) 79.

[256] Ibid.

[257] Virgo, *The Principles of the Law of Restitution* (n 1) 148. See also, Meier (n 1) 52.

[258] Samuel Stoljar, 'Enforcing Benevolent Promises' (1989) 12 Sydney Law Review 39. See also, SJ Stoljar, 'A Rationale of Gifts and Favours' (1956) 19 Modern Law Review 237.

[259] John McGhee, Stuart Bridge and and others, *Snell's Equity* (32nd edn, Sweet & Maxwell 2015) [8-012].

[260] See Law Commission, *Making A Will* (Consultation Paper 231 2017) [7.50]–[7.56].

[261] Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 LQR 617, 622.

undue influence is inapplicable in the testamentary context. The claimant must prove actual undue influence.[262] Secondly, the authorities suggest that challenges to testamentary dispositions ought to be judged on the basis of a higher variant of the civil standard of proof.[263] Finally, the nature of undue influence that can successfully impugn a testamentary gift is also limited. Usually, evidence of 'coercion' or 'fraud' is a pre-requisite.[264] 'Influences' falling below this standard will usually be considered insufficient to set aside a will on the basis that the testator was acting under undue influence.

In my view, the disagreement as to whether a higher standard applies to the reversal of gifts, testamentary or otherwise, is best understood as a debate about whether English law recognises gifts as a protected legal category. In particular, does English law recognise the donee's interest in the retention of a gift? Wu answers this question affirmatively.[265] In substantiating that claim, he relies on the social functions that gifts perform. He argues:[266]

> [J]ust as it is important to protect the market economy from being subverted by the law of restitution by recognising the sanctity of contracts, it is equally essential to protect the moral economy by defending the completed gift from an overzealous application of the law of restitution. The gift is an important social practice meant to generate trust so as to form the basis of future action.

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[262] *Edwards v Edwards* [2007] EWHC 1119, [2007] WTLR 1387 (Ch) [47](i); *Boyse v Rossborough* (1857) VI House of Lords Cases (Clark's) 2, 10 ER 1192, 1212.

[263] *Edwards* (n 262) [47](iii).

[264] Ibid [47](iv).

[265] Tang Wu, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1.

[266] Ibid 24.

Harding and Hickey have similarly justified protecting gifts on the basis of three values that they advance: a sense of obligation, reciprocity and altruism.[267] However, they admit, rightly in my view, that 'donative values never ground conclusive reasons for action'.[268] They are weighed against, and often overridden by, other considerations.

This section does not aim to express a conclusive view on the extent to which gifts are protected as a legal category. As Harding's and Hickey's exploratory study demonstrates, English law's treatment of gifts is characterised by remarkable plurality.[269] However, hopefully, the right questions to ask are evident from what has been said above. To what extent does the law treat gifts as protected interests? In particular, does the donee recipient of a completed gift have an interest protected by law? If these questions can be answered affirmatively, then there is a good justification for extending the operation of the legal obligation qualification beyond strictly *legal* entitlements.

It was seen that the legal obligation qualification protects the defendant's entitlements in cases where the enrichment is owed to the defendant. This result is warranted by the need to maintain strict equality between the parties. Similarly, it may be argued that permitting a restitution claim will deprive a donee of her legal interest in the gift. Admittedly, the success of this argument depends on the extent to which gifts are treated as protected legal interests in English law. That question requires further examination.

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[267] Matthew Harding and Robin Hickey, 'Equity and the Value of Gifts' (2014) 8 Journal of Equity 1, 2–3.

[268] Ibid 25.

[269] Ibid 24.

CONCLUSION

This thesis examined the relationship between unjust enrichment claims and countervailing legal entitlements of the defendant. In particular, it considered the cases that deny restitution on the basis that the benefit was owed to the defendant under a valid legal obligation.

The thesis began, in Chapter 1, by suggesting that, from a doctrinal standpoint, there are two distinct rules that deny restitution claims on the basis that the defendant was entitled to a benefit: 'the good consideration rule' and 'the legal obligation qualification'.

Part I considered the good consideration rule. In Chapters 2 and 3, it was argued that the good consideration rule is best explained as an enrichment qualification. The 'consideration' provided by the defendant offsets the enrichment received. In net terms, this leaves the defendant in an enrichment-neutral position.

Part II examined the legal obligation qualification. Chapter 4 argued that this principle ought to be conceptualised as a bright-line rule rather than as a flexible exception. The commonly offered explanations for the legal obligation qualification were then considered. Chapter 5 surveyed the academic accounts. It was shown that most of them presume the subsidiarity of unjust enrichment without justifying that conclusion. Chapter 6 critiqued the judicial treatment of this rule by the Supreme Court in *Zurich Insurance*.[1]

[1] *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471.

Finally, Chapters 7 and 8 set out the positive case. It was argued that the process of explaining the legal obligation qualification must proceed in two steps: first, what are the normative reasons that justify an unjust enrichment claim? Second, does the presence of a countervailing legal entitlement deny any of these reasons? In view of the uncertainty relating to the normative bases for restitution, the strategy adopted in this thesis was to use two prominent accounts as a framework: the entitlement thesis and the corrective justice theory. It was shown that, on both accounts, the normative justification for unjust enrichment relies on the claimant's pre-transaction entitlements. On that basis, it was suggested that the legal obligation qualification is best justified by the need to maintain equality between the claimant and the defendant. The claimant cannot use the law of restitution to protect her entitlements while denying similar protection to the defendant.

Two issues, however, remain to be examined: (a) in view of the justifications offered in this thesis, what ought to be the relationship between the good consideration rule and the legal obligation qualification? (b) how does the absence of basis model treat the relationship between restitution claims and the defendant's legal entitlements? These questions will now be considered.

A. GOOD CONSIDERATION AND LEGAL OBLIGATION: A RE-EVALUATION

Chapter 1 argued that the cases, albeit often impliedly, distinguish between the good consideration rule and the legal obligation qualification. The operation of the good consideration rule is subject to the requirements set out by Goff J (as he then was) in *Barclays Bank*.[2] These include the requirement that the payment must have been

[2] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

made ‘to discharge’ the debt and the restriction that the payee must not have been aware of the payor’s mistake. In contrast, as demonstrated in Chapter 1, the legal obligation qualification is not subject to either of these constraints.

However, an important question relating to the relationship between the good consideration rule and the legal obligation qualification remains to be asked: does the legal obligation qualification operate even when the countervailing entitlement is owed to the defendant by a third party other than the claimant? The equality explanation suggests that it does. The crux of the equality explanation lies in the suggestion that the claimant cannot use the law of restitution to protect her pre-transaction entitlements while denying the same protection to the defendant. This reasoning is ambivalent as to whether the defendant’s entitlements are owed by the claimant or, indeed, by a third party whose obligation the claimant discharges.

This has important implications for the relationship between the good consideration rule and the legal obligation qualification. Crucially, it suggests that, the scope of the legal obligation qualification is wide enough to subsume the good consideration rule. Going forward, therefore, it is submitted that the ‘good consideration rule’ as formulated in *Barclays Bank* ought to be abandoned. If a benefit is owed to the defendant under a valid legal obligation and is received by the defendant in discharge of that obligation, restitution ought to be denied in respect of that enrichment. For these purposes, it is irrelevant whether the obligation was owed by the claimant or by a third party.

B. ABSENCE OF BASIS

It has sometimes been suggested that the absence of basis framework can offer easy and elegant solutions to the central problems that this thesis concerns. The defendant's entitlement to the enrichment constitutes a valid legal basis. Therefore, there can be no restitution; or so, it is argued.[3] In my view, however, the reality is far more complex. I will use the German law of unjustified enrichment—an archetypal absence of basis system—to substantiate this point.

In Germany, the general unjustified enrichment action is codified in §812(I)(1) of the BGB. That provision reads:[4]

> A person who obtains something by performance [*Leistung*] by another person or in another way at the expense of this person without legal ground is bound to give it up to him.

Two aspects of this formulation have proved particularly controversial in German law: the distinction between enrichment through 'performance' and 'in another way', and the meaning of the phrase 'without legal ground'. For the present purposes, it is the latter question that matters.

The crux of an unjustified enrichment action in Germany consists in the defendant's receipt of an enrichment 'without legal ground'. But what is a 'legal ground'? Ever since Grotius and Savigny,[5] German law has offered two potential answers to this question.[6] On one view, legal ground is an objective idea.[7] It may be

[3] Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008).

[4] Translated in Helen Scott, 'Restitution of Extra-contractual Transfers: Limits of the Absence of Legal Ground Analysis' [2006] RLR 93, 95.

[5] For an account of the historical evolution of this concept, see Anne Sanders, 'Absence of Basis: A German Perspective' in Steven Elliot, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart 2014) 218.

[6] Jacques Du Plessis, 'Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions' (2005) 122 South African Law Journal 142, 150.

[7] Sanders (n 5) 224.

understood as consisting of a valid legal obligation,[8] or as 'a relationship of indebtedness'.[9] On this view, the conception of a legal ground is detached from the subjective intentions and purposes of the parties. The more dominant view however, suggests that legal ground is a subjective notion.[10] It consists of the subjective purpose that underlies a transaction.[11] If that purpose is achieved, there is a valid legal basis; otherwise not. Consider the following example:[12]

> *Example 1*: C transfers his house to his estranged wife, D. The transfer is made on the basis that D would return to C. On this basis, D returns. C's claim for restitution from D will fail.

Clearly, there is no legal obligation underlying this transaction. Nevertheless, the subjective understanding suggests that there is a valid basis for C's transfer. On this conception, the legal basis performs a function similar to the unjust factor of failure of basis.[13]

Now consider the two-creditor example.

> *Example 2*: C owes £100 to both D and X. C intended to pay X but mistakenly paid D. C's claim for restitution from D will fail.[14]

Is there a valid basis for D's receipt of the £100? Here, the objective and subjective notions pull apart. On the objective conception, there is a valid basis. The basis consists in C's indebtedness to D. Subjectively, however, there is a failure of basis in

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[8] Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 41.

[9] Du Plessis (n 6) 173; Scott (n 4) 98.

[10] Sanders (n 5) 224.

[11] Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 218.

[12] Scott (n 4) 99.

[13] Sanders (n 5) 219.

[14] Based on dicta in *Platt v Bromage* (1854) 24 LJ Ex 63, 65. See also, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 32–33.

Example 2. The purpose underlying C's transfer was to discharge C's debt to X. C failed to achieve that purpose. The fact that C succeeded in discharging a separate debt owed to D ought to be irrelevant. That was not the purpose C intended to achieve.

In the absence of basis model, how can the denial of restitution in Example 2 be explained? It appears that the only solution is to prioritise the objective conception of legal ground over its subjective variant. Put differently, to arrive at a satisfactory resolution to Example 2, we need to arrive at a defensible hierarchy between the two notions of basis; one that prioritises the objective meaning over the subjective one. However, no convincing reasons have been offered for why such a rule of hierarchy must be adopted. This is doubly puzzling as most German commentators agree that the subjective notion of basis represents the dominant view in Germany.[15]

Most attempts to provide a justification for the hierarchy among the two conceptions of legal ground are unconvincing. Consider, for example, Krebs's reasoning. He writes:[16]

> [I]n German law, it is first of all the contract which governs the relationship between the parties. If the failure of purpose relied on for the restitutionary claim is not due to a circumstance which vitiates the contract rendering it void or voidable, it is thus of no restitutionary relevance and cannot lead to restitution. Thus it is always the outer, as opposed to the inner purpose of a *Leistung* whose failure has restitutionary consequences. It is only in situations where no outer purpose (such as the discharge of a liability or a creation of an underlying contract) exists, that such purposes as referred to above come to the fore, that is, in the cases of the *datio ob rem*.

[15] Sanders (n 5) 224.

[16] Krebs (n 11).

With respect, this analysis is conclusory. What we need is an account of why there appears to be a rule of priority that operates between what Krebs calls the 'outer' and 'inner' purposes of a transaction. Krebs offers no justification for this hierarchy.

In his commentary, Dannemann identifies this problem in the context of an action called *condictio causa data causa non secuta*.[17] This action arises from the second part of the second sentence in §812(1) which provides for restitution:[18]

> if the result does not occur which the performance had been aimed at to produce according to the content of the legal transaction.

In this context, the legal ground analysis depends on 'the result… which the performance had been aimed to produce'. Evidently, this is a purpose-centered, subjective idea. As Dannemann explains, this provision is typically utilised in cases where the claimant renders performance for a particular purpose and 'both parties have agreed that this purpose was the reason for the performance'.[19] But what happens if the subjective purpose fails, yet the performance was rendered to the defendant under an objective legal ground, for example, a valid legal obligation?

That question came up before the Bundesgerichtshof in 2008.[20] In that case, an unmarried couple had pooled their resources to build a family home. However, the property was only registered in one of their names. Subsequently, the couple fell out and the disappointed partner sought restitution. It was suggested that he had invested €83,806.25 and 1,000 hours of work into building the family home. The Bundesgerichtshof referred the case back to the Appeal Court with two directions.

[17] Dannemann (n 8).

[18] Translated in ibid 45.

[19] Ibid 45.

[20] BGH 9.7.2008, NJW 2008, 3277 (non-marital property) translated in ibid 290.

The first among them was to examine whether there was a shared purpose between the parties. It was said:[21]

> A claim in unjustified enrichment for failure of this expectation requires that the recipient has consented to this expectation; one-sided expectations are not sufficient. However, a tacit agreement in this sense can be assumed if one party intends its performance to achieve a particular result, and if the other party recognises this and accepts this performance without objection.

The Bundesgerichtshof also instructed the Appeal Court to consider the possibility of a claim under §313. Such a claim is grounded on the premise that the basis of a contract has significantly changed since it was entered into (a scenario akin to frustration). But what if the Appeal Court were to find that the parties' subjective purpose had failed, yet the contract remained open? What ought to happen if the claimant's intended purpose failed, but the performance was owed to the defendant under the contract? The Bundesgerichtshof did not answer that difficult question.

As Dannemann observes, in these circumstances, allowing an action based on *condictio causa data causa non secuta* would cause difficulties in the German law of unjustified enrichment. As he puts it, if allowed, a claim of this nature would 'distort the harmony between contract and unjustified enrichment by allowing a person to claim back what was performed under a valid obligation'.[22] Therefore, Dannemann concludes:[23]

> As a minimum, the *causa data causa non secuta* should no longer be allowed for a claim in unjustified enrichment where the enrichment is supported by a valid legal ground.

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[21] Ibid 293.

[22] Ibid 49.

[23] Ibid.

However, Dannemann reaches this result by definitional fiat. He offers no reasons for why it is that there ought to be a hierarchy between these two claims. Indeed, this solution is no better than the views of academic commentators who assume the validity of 'subsidiarity' to explain the relationship between unjust enrichment claims and legal obligations.[24] The difficult question is, why is unjust enrichment subsidiary to other legal entitlements?

Does the Birksian absence of basis model offer a more satisfactory solution? Birks divides enrichments into two classes: participatory and non-participatory. Within the participatory category, he examines 'obligatory'[25] and 'voluntary'[26] enrichments. As Baloch puts it, Birks adopts a 'mixed' approach to understanding legal grounds.[27] For obligatory enrichments, Birksian basis is objective.[28] For voluntary enrichments, however, basis is a subjective notion.[29] Seemingly, this scheme offers an easy answer to Example 2. There, C owed £100 to D. C's payment to D was, therefore, obligatory. Thus, what matters is the existence of an objective basis i.e. a valid legal obligation.

But the difficulty lies in justifying Birks' scheme. In effect, it suggests that, in every case where there is a valid objective basis, subjective failure of basis is irrelevant. Evidently, however, at least some absence of basis claims are grounded on a subjective notion of failure of basis. Why does the presence of an objective basis exclude these claims? Birks' model sidesteps this difficult question by simply

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[24] For a critique of this view, see Chapter 5.

[25] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 130.

[26] Ibid 142.

[27] Tariq A Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636, 641.

[28] Birks (n 25) 130.

[29] Ibid 142.

asserting that subjective basis is irrelevant for obligatory enrichments. This is no more than a re-assertion of Krebs's reasoning: the idea that when there exists an 'outer purpose' (such as a contract), 'inner purpose' (subjective failure of basis) is irrelevant. What is required, in order for the absence of basis explanation to be defensible, is an account of why such a rule of priority is adopted. On that difficult question, for better or worse, the absence of basis scheme does no better than the unjust factors model.

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