UNJUST ENRICHMENT: VALUE, RIGHTS, AND TRUSTS

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I: Introduction

In recent years, arguments have been made that there are two types of enrichment in the law of unjust enrichment: value and rights. The two may overlap, as rights generally have value, but they are nonetheless distinct. The leading proponent of this view is Robert Chambers. This insight has led to arguments for proprietary rights[1] to restitution in cases where the enrichment received by the defendant consists of rights, such proprietary rights arising before judgment, when the cause of action is complete. The proprietary right in question is generally a trust arising by operation of law, though it might also be a power to rescind the transfer or rectify any document effecting the transfer. The purpose of this article is to assess the soundness of the arguments for the trust response; for reasons of space, the other proprietary rights will not be considered. The conclusion reached is that, even if it is correct to distinguish between value and rights as enrichments, such distinction provides no platform for the imposition of trusts. Instead, courts should in certain circumstances be able to order defendants to reconvey rights received as unjust enrichments, i.e., make orders at trial for specific restitution.

II: Enrichment as Value

For Peter Birks, claims in unjust enrichment always concerned the receipt of value, more specifically, monetary value. This led him to divide the cases between those concerned with the receipt of money, which generated no difficulties of valuation, and those involving non-money benefits, which did.[2] Non-money benefits included the discharge of debts, the performance of services, and the receipt of "things".[3] Non-money benefits were problematic because they raised issues as to the subjectivity of value, though various tests were devised by which they might be overcome. Ascertaining a monetary value for all enrichments was vital to Birks' scheme, because he saw unjust

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[1] Confusingly, many of these rights are not proprietary at all, e.g., the right of a beneficiary of a trust, which does not behave in the same manner as, say, a common law title to land. "Proprietary" here seems to be used as a label to describe all responses which do not comprise an order that the defendant pay the claimant money.

[2] P. Birks, *An Introduction to the Law of Restitution*, Rev. ed. (Oxford: Oxford University Press, 1989), 109-132; *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2004), 52-62.

[3] By "things", Birks meant land, goods, intellectual property, shares, and so on, which is immediately problematic. If A transfer "goods" to B by mistake, what he is in fact transferring is a property right (title) with respect to the goods, not the goods themselves. By failing to distinguish between rights and things, Birks introduced into the subject something which never was there, cases of what he called "ignorance": W. Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 O.J.L.S. 627.

enrichment claimants acquiring rights enforceable against defendants to be paid the value of what was received immediately the cause of action was complete.[4] Of course, courts make orders against defendants in litigation, but for Birks the judge's order merely "novates the rights that the claimant brings into court … [I]t replicates the right with which the defendant would not willingly comply".[5]

The notion that what might be termed "remedial" rights can arise before any court judgment is made in the claimant's favour, though seemingly orthodox, is controversial, and has been convincingly challenged by a number of commentators.[6] For the purposes of this article, however, it will be assumed to be correct.

Despite his focus on value, Birks also said that there were proprietary rights to restitution, which likewise arose when the cause of action was complete. For Birks, there were at least nine types of proprietary right: (i) powers to rescind transfers of rights at law; (ii) powers to rescind transfers of rights in Equity; (iii) powers to rectify documents transferring rights; (iv) rights to be subrogated to extinguished unsecured debts; (v) rights to be subrogated to extinguished secured

[4] This view was an extrapolation of Lord Diplock's, who, in the context of contracts, spoke of "original/primary" rights to performance and "substituted/secondary" rights to damages: *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd.* [1966] 1 W.L.R. 287, 341-E-G; [1966] 1 All E.R. 309, 346-7; *C Czarnikow Ltd v Koufos, The Heron II* [1966] 2 Q.B. 695, 731; [1966] 2 All E.R. 593, 604; *Ward (RV) Ltd. v Bignall* [1967] 1 Q.B. 534, 548; [1967] 2 All E.R. 449, 455; *Moschi v LEP Air Services Ltd.* [1973] A.C. 331, 350; [1972] 2 All E.R. 393, 403; *Photo Production Ltd. v Securicor Transport Ltd.* [1980] A.C. 827, 848-9; [1980] 1 All E.R. 556, 565-568. Although Lord Diplock's view was that such secondary rights were the product of the contract itself, Birks extended this thinking to torts and unjust enrichments: P. Birks, "Obligations: One Tier or Two?" in P. Stein & A. Lewis (edd.), *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* (London: Sweet & Maxwell, 1983), P. Birks, "Restitution and Wrongs" (1982) 35 C.L.P. 53, 76; P. Birks, "Restitution and the Freedom of Contract" (1983) 36 C.L.P. 141, 161; P. Birks, "Rights, Wrongs, and Remedies" (2000) O.J.L.S. 1. Indeed, Birks' whole taxonomy of rights arising from consent, wrongs, unjust enrichment, and other miscellaneous events, was dependent on there being rights to damages, to restitution, and so on, which arose before the making of any court order.

[5] P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2004), 166. What drove Birks' rejection of the language of remedies in favour of rights was an understandable reaction against discretionary remedialism, the idea that courts should have the discretion to create personal or property rights via the language of remedy, most notably the remedial constructive trust. His solution was to adopt the notion of personal and proprietary *rights* arising directly as responses to events in the world. These were rights, not remedies, and therefore not amenable to any discretion; the role of the judge was simply to give effect to pre-existing rights: P. Birks, "Proprietary Rights as Remedies", in P. Birks (ed), *Frontiers of Liability, Vol 2* (Oxford: Oxford University Press, 1994) 214; "Equity, Conscience and Unjust Enrichment" (1999) 23 M.U.L.R. 1-29, esp. 25-7.

[6] B. Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Georgetown L.J. 695; J. Goldberg, "The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs" (2005) 115 Yale L.J. 524; J. Goldberg & B. Zipursky, "Rights and Responsibility in the Law of Torts" in D. Nolan & A. Robertson (eds), *Rights and Private Law* (Oxford: Hart Publishing, 2011) 251; N. Oman, "Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law" (2011) 39 Florida State University L.R. 137; S. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019).

debts; (vi) rights to liens at common law; (vii) right to liens in Equity; (viii) rights to equitable charges; and (ix) rights to be beneficiaries of trusts.

Unfortunately, Birks did not develop in detail the reasons why such proprietary rights to restitution arose.[7] Of course, the grant, for example, of a lien over goods in the defendant's possession means that the claimant's personal right is more likely to be satisfied, but that could be said of any personal remedial right, and there is nothing inherent in the nature of unjust enrichment which elevates such rights over any other.[8]

III: Enrichment as Value or Rights

In an essay entitled "Two Kinds of Enrichment",[9] Chambers argues that Birks was wrong to see the law of unjust enrichment as concerned solely with the receipt of value. Enrichment, says Chambers, also includes the receipt of rights, for example, shares, copyright, patents, and titles to land or goods. Though rights generally have value, there can be enrichment by the receipt of valueless rights, such as a title to contaminated land, which might have a negative value, or to a child's painting, having only sentimental value to its parents.[10] In cases of enrichment by rights, says Chambers, where the right may or may not have value, the same unjust factors (reasons for restitution) should be available as in value cases. If we thought only in terms of value, such cases would have to be expelled from the subject.

Chambers gives, *inter alia*, the example of *Blacklocks v JB Developments (Godalming) Ltd.*,[11] where a mistake was made during a conveyancing transaction and a title to too much land transferred to the purchaser, who later sold it on to the defendant. The claimant vendor successfully sought rectification of the register so as to regain the mistakenly transferred title from the defendant. Chambers says that in a case such as *Blacklocks*, the court is not concerned with any question of value. Although the title to the land undoubtedly had value, that was irrelevant.

The idea that we should see enrichment as comprising both value and rights has been used to develop theories justifying a trust rights in the case of the latter. Three different arguments have

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[7] Apart from his thinking on resulting trusts, which was rejected by a unanimous House of Lords in *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669; [1996] 2 All E.R. 961.

[8] Although it is sometimes said of certain unjust enrichment claimants that they should have priority in the insolvency of the defendant's bankruptcy and that such priority should be facilitated by the award of a trust, such arguments are misconceived: W. Swadling, "Policy Arguments for Proprietary Restitution" (2008) 28 Legal Studies 506.

[9] In R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 242-278. An expanded version of the thesis can be found in A. V. M. Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford: Hart Publishing, 2012).

[10] This does, however, call into question the use of the word enrichment, as a non-enriching enrichment would seem to be a contradiction in terms.

[11] [1982] Ch. 183; [1981] 3 All E.R. 392.

been made: that a power to obtain a right is a trust; that a duty to transfer a right is a trust; and that a trust will arise where a restitutionary money award is inadequate.

IV: Power to Obtain a Right is a Trust

The first argument for proprietary restitution in the case of enrichment by rights is that of Chambers himself, who says that in almost every case where rights are received as unjust enrichments, a proprietary right in the form, *inter alia*, of a trust will immediately arise in the claimant's favour. This seems to be so for a combination of two reasons. First, restitution in the case of the receipt of rights should be of the right itself because it gives the clamant "the most perfect form of restitution".[12] And second, the claimant will acquire a right to specific restitution through the imposition of a trust (and a power to rescind the transfer or a power to rectify any conveyance) because of the application of what is described as a "general principle" where the claimant has a power to obtain a specific rights. In such cases:

> "There is a general principle at work that applies both in and outside the law of restitution. If a claimant has the power to obtain title to a specific asset, then the claimant has a property right to that asset. In other words, the power to obtain title is itself a right *in rem*. Outside the law of restitution, this occurs when the claimant has a right to specific performance of a contract of sale, lease, or mortgage, or the power to complete an incomplete gift without the donor's help."[13]

Chambers does not, however, argue for a trust (or other proprietary right) in all cases involving the receipt of rights. No trust, he says, arises where rights are received on a basis which subsequently fails. Though in such cases the transfer of value is conditional, the transfer of the right is absolute.[14] Exceptionally, where the right received is ring-fenced, there will be a trust, for "the condition attaches to both the value and the rights received, and both become unjust when the condition fails."[15] In all other instances of enrichment by right, however, a trust will arise in the claimant's

[12] R. Chambers, "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 267, citing L. D. Smith, "Philosophical Foundations of Proprietary Remedies" in the same volume at 294, where it is described as "intuitive".

[13] R. Chambers, "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 257 (footnotes omitted). See also 268.

[14] R. Chambers, "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 273-5.

[15] As, e.g., in *Re Nanwa Goldmines Ltd* [1955] 1 W.L.R. 1080; [1955] 3 All E.R. 291 (application for subscriptions for a further issue of capital contained a statement that if certain conditions were not fulfilled "application moneys will be refunded and meanwhile will be retained in a separate account").

favour, even those which do not involve a vitiation or qualification of the claimant's decision to transfer.[16]

It is important to understand that when Chambers talks of a power to obtain a right, he cannot be talking of a power in the Hohfeldian sense, one to create or alter a legal relationship,[17] for example, to revoke a licence granted by a third party to occupy land and thereby make the occupier a trespasser,[18] or to rescind a fraudulently induced contract of sale of goods and thereby revest title in the seller.[19] For Chambers, the legal relationship is already present. What the claimant has, at least in the specific performance cases, is a power to go to court to enforce a duty to convey; exactly what the power comprises in the case of incomplete gifts is less easy to state, but it is certainly not one to immediately alter legal relations. Though a power to rescind a transfer and thereby cause the transferee to become a trustee for the transferor is an Hohfeldian power, Chambers' inclusion of cases involving non-Hohfeldian powers shows that he cannot be using the word in that sense.

The question then is whether it is correct to say that a person holding a non-Hohfeldian power to obtain a right is *ipso facto* the beneficiary of a trust of that right and thereby able to obtain perfect restitution. The argument, it is submitted, does not work, for three reasons. First, the notion of perfect restitution being available in virtually all cases of unjust enrichment is inconsistent with the general tenets of private law. Second, the availability of Chambers' power cannot generate a trust. And third, the imposition of a trust gives benefits far beyond perfect restitution, what might be called "proprietary overkill".

1. *Notion of perfect restitution inconsistent with general tenets of private law*

It will be recalled that part of Chambers' justification for proprietary restitution is that it provides perfect restitution, i.e., it allows claimants to recover rights transferred to defendants rather than their monetary equivalent alone. Though this is undoubtedly true, it does not accord with the way in which private law (including Equity) works in general. Thus, where a claimant has been dispossessed of land or goods and seeks to be restored to possession, specific relief is predicated on a money award being inadequate. In England and Wales, land is always thought of as unique,[20] and, since not available in the market, money awards will be inadequate. This is not, however, the position with goods, where money awards are the norm and orders for delivery up the exception.[21]

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[16] It would thus apply to a case like *Woolwich Equitable Building Society v I.R.C.* [1993] A.C. 70; [1992] 3 All E.R. 737.

[17] W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16, 44-54.

[18] *Clore v Theatrical Properties Ltd.* [1936] 3 All E.R. 483.

[19] *Car & Universal Finance Co Ltd. v Caldwell* [1965] 1 Q.B. 525; [1964] 1 All E.R. 290.

[20] No longer the position in Canada: *Semelhago v Paramadevan* [1996] 2 S.C.R. 415; 136 D.L.R. (4th) 1.

[21] The question whether a money award is adequate usually turns on whether the goods in question are unique, as in *Pusey v Pusey* (1694) 1 Vern. 272; 23 E.R. 465 (Pusey horn); *Duke of Somerset v Cookson* (1735) 3 P. Wms. 389; 24 E.R. 1114 (gold patera); *Fells v Read* (1796) 3 Ves. Jun. 70; 34 E.R. 814 (engraved silver tobacco

However, for Chambers, the unjust enrichment claimant obtains specific restitution whether or not the right transferred is one for which a money substitute is inadequate. This cannot be right. If in takings cases specific remedies are unavailable absent inadequacy of money awards, they should be equally unavailable absent inadequacy of money awards in the case of transfers adjudged unjust,[22] for otherwise, no consent cases will be treated less favourably than those which involve consensual transfers.[23]

2. Availability of the power does not generate a trust

The next question is how the existence of Chambers' power to obtain an order for the reconveyance of a right generates an immediate trust for the claimant. Unfortunately, we are not told explicitly and so must turn to the authorities he cites for an explanation. It will be recalled that Chambers relies in the main on two sets of cases, those where specific performance of a contract of sale, lease or mortgage is available, and certain cases of incomplete gifts.[24] Neither, however, provide a good explanation for the trust response.[25]

(a) Specific performance

Take first those cases in which the claimant has a right to specific performance of a contract of sale, lease, or mortgage. The so-called trust[26] in these cases arises through the application of a fiction, that Equity looks upon as done that which ought to be done, according to which the right contracted to be transferred is, in Equity's eyes, immediately vested in the obligee. The reality being that it is in the obligor, a trust is said to arise to resolve the conflict.

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box), though other factors may be relevant: *Howard E Perry Co. Ltd. v British Railways Board* [1980] 1 W.L.R. 1375; [1980] 2 All E.R. 579 (steel not readily available on the open market because of industrial action).

[22] Sir Peter Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, 416.

[23] Albeit one where consent may have been flawed, e.g., where mistake, duress and undue influence are concerned. Where the unjust factor is, in Birks' terminology, "policy-motivated", as, e.g., in *Woolwich Equitable Building Society v I.R.C.* [1993] A.C. 70, there is no flaw in the decision-making process; so too in the exceptional cases of failure of basis for which Chambers contends.

[24] Chambers also relies (R. Chambers, "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 257) on cases involving options to purchase, but these involve nothing more than an application of the case-law on specific performance: *London and South Western Railway Company v Gomm* (1881-2) L.R. 20 Ch. D. 562, 581; 51 L.J. Ch. 530 (Jessel MR).

[25] Although both lines of cases involve the finding of trusts, it is an oddity of Chambers' argument that he speaks mainly of powers to rescind and rectify, though providing no separate arguments for their availability.

[26] Time and again, courts shrink from giving this "trust" the same effect as one created by declaration. See, e.g., *Raynor v Preston* (1881) 18 Ch. D. 1; 45 J.P. 829; *Chang v Registrar of Title* [1976] HCA 1; 137 C.L.R. 177; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; 217 C.L.R. 315; *Jerome v Kelly* [2004] 1 W.L.R. 1409; [2004] 2 All E.R. 835; *Northern Territory of Australia v Griffiths* [2019] HCA 7; 93 A.L.J.R. 327, [349] (Edelman J.). See generally, W. Swadling, "The Fiction of the Constructive Trust" (2011) 64 C.L.P. 399, 409-410.

That Chambers is relying on the availability of specific performance is evident from his citation of the decision of the House of Lords in *Jerome v Kelly*,[27] where such thinking is endorsed, and his reliance on an article of his own, "The Importance of Specific Performance".[28] The argument, however, is weak. Reliance on a fiction is never a sound basis for an argument. Moreover, even on its own terms, the fiction does not work.[29] First, the application of the fiction does not always produce a trust.[30] Second, even where it does, the explanation does not work, for trusts do not involve contradictions as to the location of rights. As Maitland pointed out over a century ago when discussing the rule that where the common law and Equity are in conflict, the rules of Equity shall prevail:

> "An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the *cestui que trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction – one says that A is the owner, the other says that B is the owner …. That means civil war and utter anarchy. Of course the statement is an extremely crude one, it is a misleading and a dangerous statement. … Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here."[31]

We see the same thinking in *Schalit v Joseph Nadler*, where it was held that the beneficiary of a trust of the reversion of a lease had no right to distrain on the tenant's goods for unpaid rent; that was the preserve of the trustee. The right of the beneficiary was not to the rent "but to an account from the trustee of the profits received from the demise."[32] The rights of the beneficiary, therefore, are

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[27] [2004] 1 W.L.R. 25, cited in R. Chambers, "Two Kinds of Enrichment", in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 257, fn 63. Chambers cites [29]-[32] of *Jerome*, and in [32] itself, Lord Walker expressly says that the interest of the purchaser under a vendor-purchaser constructive trust is premised on the availability of specific performance.

[28] R. Chambers, "The Importance of Specific Performance", in S. Degeling and J. Edelman (edd.), *Equity in Commercial Law* (Sydney: Lawbook Company, 2005), 431, cited in R. Chambers, "Two Kinds of Enrichment", in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 257, fn 62.

[29] W. Swadling, "The Vendor-Purchaser Constructive Trust" in S. Degelman & J. Edelman (edd.), *Equity in Commercial Law* (Sydney: Lawbook Company, 2005), ch. 18.

[30] As, e.g., in the case of a contract to grant a lease: *Walsh v Lonsdale* (1882) L.R. 21 Ch. D. 9; [1881-85] All E.R. Rep. Ext. 1690.

[31] F. W. Maitland, *Equity: A Course of Lectures* (Cambridge: Cambridge University Press, 1909), 17.

[32] [1933] 2 K.B. 79, 83; 102 L.J.K.B. 334 (Acton and Goddard JJ). See also *Baker (Inspector of Taxes) v Archer-Shee* [1927] A.C. 844; 11 T.C. 749; *Parker-Tweedale v Dunbar Bank Plc (No 1)* [1991] Ch. 12; [1990] 2 All E.R. 577; *MCC Proceeds Inc. v Lehman Bros. International (Europe)* [1998] 4 All E.R. 675; [1998] 2 B.C.L.C. 659; *Atlasview Ltd. v Brightview Ltd.* [2004] EWHC 1056 (Ch); [2004] 2 B.C.L.C. 191.

of a different order to those held by the trustee, to an account of the exercise of the rights by the trustee, not an equitable version of the rights held by the trustee.

(b) Incomplete gifts

The second line of authority claimed by Chambers for his general principle concerns cases where a donee has the power to complete an incomplete gift without the donor's help. The only authority cited in this regard is the decision of the Court of Appeal in *Mascall v Mascall*,[33] However, it provides no authority at all.

A father wished to make a gift of his registered title to land to his son. He completed a land transfer form and handed it to the son, who, for tax purposes, sent it to the Stamp Duty office. Whilst it was there, the parties fell out and, after representations by the father's solicitors, the office wrongly sent the form to the father. The father sought a declaration that because the transfer had not yet been registered, the gift was incomplete, that he remained both legally and beneficially entitled to the title, and was not bound to transfer. Edward Nugee QC, sitting as a Deputy High Court judge, found the case indistinguishable from the decision of the Court of Appeal in *Re Rose*[34] and held that the moment the father handed the land transfer form to his son, he held the title for him on trust. This was because there was now nothing more the father needed to do to complete the transfer. He accordingly refused to grant the declaration sought. His decision was upheld by the Court of Appeal, which also applied *Re Rose*.[35] The case thus far would seem to be of little assistance to Chambers, for it is simply an orthodox application of *Re Rose*, which has nothing to do with any power in the intended transferee but asks instead whether the intended transferor has done everything necessary on his part to complete the transfer.[36] In *Re Rose* itself, which concerned shares in a private company, this happened when the transferor gave the transferee the completed transfer form.[37] Exactly why this turned him into a trustee, however, has never been satisfactorily explained.[38]

In his concurring judgment in *Mascall*, Browne-Wilkinson LJ, offered a different rationale of *Re Rose*, and it is perhaps this on which Chambers relies. He said:

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[33] (1984) 50 P. & C.R. 119.

[34] [1952] Ch. 499; [1952] 1 All E.R. 1217.

[35] (1984) 50 P. & C.R. 119, 125.

[36] In his earlier article ("The Importance of Specific Performance", in S. Degeling and J. Edelman (edd.), *Equity in Commercial Law* (Sydney: Lawbook Company, 2005), Chambers, at 459, relies on both *Mascall* and *Re Rose* for the same "general principle", along with *Re Amland Estate* (1975) 4 A.P.R. 285, *Macleod v Canada Trust Co.* (1980) 108 D.L.R. (3d) 424, *Corin v Paton* [1990] HCA 12; 169 C.L.R. 540, and *Pennington v Waine* [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075.

[37] [1952] Ch. 499, 506-7 (Evershed M.R.), 515-6 (Jenkins L.J.).

[38] Many argue that *Re Rose* is simply wrong, e.g., R. McKay, "Share Transfers and the Complete and Perfect Rule" [1976] Conv. 139; J. Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66.

> "The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle, which is laid down in *Re Rose*, that in equity it is held that a gift is complete as soon as the settlor or donor has done everything that the donor has to do, that is to say, as soon as the donee has within his control all those things necessary to enable him, the donee, to complete his title."[39]

Though this explanation for the *Re Rose* trust appears to chime with Chambers' general principle, it does not explain the decision in *Re Rose* itself, which involved a transfer of shares in a private company which required the approval of the company's directors, meaning that the transferee did not have the power to "complete his title" at the point when the trust arose.[40] Moreover, we still have no satisfactory explanation why this fact generates a trust; merely saying that the gift is complete in Equity begs the question.

Authority aside, it is difficult to see how a power to compel the transfer of a right is in itself a trust. The paradigmatic example of a trust, the express trust, involves the holding of rights for the benefit of persons or charitable purposes. An express trust cannot be seen as a situation in which persons have powers to obtain rights. Although the beneficiaries of some express trusts (clearly not charitable trusts, which have no beneficiaries)[41] can petition the court for orders that the trustee transfer to them the rights they hold,[42] not all trust beneficiaries can do so.[43] Moreover, where they do obtain such an order, the beneficiaries are not enforcing against the trustee obligations under the trust. As Harris put it, "[b]y breaking up the trust, the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end."[44] A power to obtain a right, therefore, is the antithesis of a trust.

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[39] (1984) 50 P. & C.R. 119, 126.

[40] The timing was crucial for tax purposes. The same misunderstanding of *Re Rose* is evident in the Privy Council decision of *Trustee of the Property of Pehrsson v von Greyerz* (unreported) 16 June 1999, where Lord Hoffmann said that *Re Rose* stands for the proposition that "a gift of shares will be regarded as completed even before registration when the donor has clothed the beneficiary with the power to obtain registration."

[41] *A.-G. v Cocke* [1988] Ch. 414, 419; [1988] 2 All E.R. 391, 394 (Harman J.).

[42] Under the rule in *Saunders v Vautier* (1841) 4 Beav. 115; 49 E.R. 282.

[43] The object of a discretionary trust cannot, e.g., bring the trust to an end unless they co-opt the other objects and all are of sound mind and *sui juris*: *re Smith* [1928] Ch. 915; 97 L.J. Ch. 441. Even in the case of a fixed trust, an order to convey will not be granted to a sole beneficiary where there is more than one beneficiary and the other beneficiaries will suffer prejudice: *Stephenson v Barclays Bank Trust Co. Ltd.* [1975] 1 W.L.R. 882, 889-890; [1975] 1 All E.R. 625, 637-8 (Walton J).

[44] J. W. Harris, "Trust, Power and Duty" (1971) 87 L.Q.R. 31, 63.

3. Imposition of trust gives benefits far beyond 'perfect restitution'

Not only is it difficult to see how a power in the claimant to obtain a right, either by obtaining an order for specific performance from the court or presenting a completed transfer form to the relevant authority, turns the right-holder into a trustee for the claimant, but the imposition of a trust gives the claimant benefits he would not have were he only entitled to an order at trial for monetary or even specific restitution. Some of these benefits[45] include:

> (a) Insolvency protection: since the right is held on trust, it will be unavailable for distribution to creditors should the defendant become insolvent. As is well known, rights held on trust do not pass to the trustee in bankruptcy in the event of the trustee's insolvency and so do not form part of the estate available for liquidation and distribution.[46] No such result obtains, however, in claims for monetary restitution, or for damages for breach of contract or the commission of wrongs. Nor would it apply where the claim was for specific restitution alone, for there would be no trust taking the right out of the insolvent's estate.[47] No explanation is provided by Chambers why the claimant who seeks specific restitution and is awarded a trust in the process should fare better than these other claimants;
>
> (b) Compound interest: until the decision of the House of Lords in *Sempra Metals Ltd. v I.R.C.*,[48] the finding of an interest under a trust was the only route to awards of compound interest. Indeed, this was the sole reason why the claimants, unsuccessfully as it turned out, sought a trust in the leading case of *Westdeutshce Landesbank Girozentrale v Islington L.B.C.*.[49] However, now that *Sempra* has been overruled,[50] the focus will once again shift to

[45] There is also the possibility of evading the defence of change of position, for if a trust arises immediately the cause of action is complete, it is difficult to see how it can disappear or change because of the happening of subsequent events. This is denied by Chambers in "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 275-6), but his argument is brief and unconvincing. There is a more detailed treatment in a subsequent paper: R Chambers, "Proprietary Restitution and Change of Position" in J. Goudkamp, A. Dyson, & F. Wilmot-Smith (edd.), *Defences in Unjust Enrichment* (Oxford: Hart Publishing, 2016), 115-131. See also A. Burrows, "The Relationship between Unjust Enrichment and Property: Some Unresolved Issues" in J. Edelman & S. Degeling (edd.), *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Company, 2008), 333, 352-357.

[46] Insolvency Act 1986, s. 283.

[47] Although there no English authority on this point, in jurisdictions which treat the constructive trust as a remedy, i.e., as nothing more than a vehicle for specific restitution, there is no "priority" in bankruptcy because the "trust" only arises at the point of judgment: *Bedard v Schell* (1987) 59 Sask. R. 71; [1987] 4 W.W.W. 699; *Re Omegas Group Inc* 16 F. 3d 1443 (1994); *Re Dow Corning Corp* 192 B.R. 428 (1996). If, however, a right to specific restitution arises as the facts happen, this will presumably be an "equity" and so binding on the trustee in bankruptcy/liquidator: *re Scheibler, ex p. Holthausen* (1874) L.R. 9 Ch. App. 722; 44 L.J. Bcy. 26; *a fortiori* if a trust arises pre-judgment.

[48] [2007] UKHL 34; [2008] 1 A.C. 561.

[49] [1996] A.C. 669.

trusts as vehicles for compound interest. Those with only a monetary restitution claim or even those claiming specific restitution *simpliciter* will have no such entitlement;

(c) Availability of traceable substitutes: suppose a parcel of shares is mistakenly transferred from A to B, which shares are exchanged with C for a title to a painting worth twice as much. Without a trust, A's claim will be limited to the value of the shares. A will have no claim to the increase of B's wealth by receipt of the title to the painting, for that is an enrichment received at the expense of C, not A. However, if B holds the shares on trust at the point of receipt, A can also claim that B holds the title to the painting for him on trust and thereby gain the benefit of the profitable substitution. But what sort of claim is this? It is certainly not one in unjust enrichment, for, as seen, B's enrichment comes not from A but from C.[51] The effect of awarding a trust, therefore, is to take us completely outside the law of unjust enrichment, and in the process give a windfall to A;

(d) Liability for breach of trust: on the assumption that a trustee of a constructive trust has the duties of a trustee, the possibility is opened up of claims being brought for their breach. Although the duties of a constructive trustee are not yet fully enumerated,[52] Chambers would no doubt say that they at least include a duty not to transfer away the rights to a third party.[53] Such liability, which would usually accrue on a later date to the claim in unjust enrichment and so will have limitation advantages for the claimant, would not exist absent a trust. Moreover, it would be a liability in wrongs, not unjust enrichment;

(e) Liability of remote recipients: the imposition of a trust on the unjust enrichment defendant also potentially creates liabilities outside the law of unjust enrichment with regard to transferees of the right. It will be recalled that Chambers says that were we not to think of enrichments as including rights, cases such as *Blacklocks v JB Developments (Godalming) Ltd.*[54] would have to be excluded from the subject. But is *Blacklocks* really a case of unjust enrichment? Take the case where A pays B £100 in cash by mistake. B then makes a gift of the very same notes to C. If we thought only in terms of value, there is no unjust enrichment claim by A against C, for the obvious reason that the value received by C

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[50] In *Prudential Assurance Co. Ltd. v Revenue and Customs Commissioners* [2018] UKSC 39; [2018] 3 W.L.R. 652.

[51] P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press), 82, says that it comes from the claimant's "property", but this is to once again confuse right and thing.

[52] This assumes that a constructive trust is a genuine trust. If it is nothing more than a remedy, then talk of the duties of a constructive trustee are nonsensical. We would never, e.g., talk of the "duties" of a person against whom a damages award had been made and entertain claims for their breach.

[53] R. Chambers, "Two Kinds of Enrichment" in R. Chambers, C. Mitchell & J. Penner (edd.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 273 appears happy with the idea of a recipient who knows of the reason why the claim might succeed as having duties of loyalty and of care. A duty not to dissipate in breach of trust is less onerous and so assumed to be within Chambers' trust.

[54] [1982] Ch. 183.

was B's, not A's. In other words, C's enrichment was not at A's expense.[55] Yet now interpose a trust, so that the effect of B being unjustly enriched at the expense of A is that B holds his title to the £100 on trust for A. If B now makes a gift of the title to the £100 to C, C, not being 'Equity's darling',[56] will also hold the title on trust for A, meaning that A can successfully petition the court for an order compelling C to transfer the title to A. This is arguably not a claim in unjust enrichment. There is no vitiation or qualification of consent on the part of B, nor any policy-motivated reason for restitution; nor is there any absence of basis, assuming we lived in such a world. The only possible claim in unjust enrichment would be under the highly contentious head of "ignorance", but even if it could be made out, it would be the product of the trust, not its cause;

(f) Liability of third parties for assisting a breach of trust: if a trust arises at the point when the cause of action is complete, it may be possible to hold third parties liable for assisting a breach of this trust if the rights are later dissipated in "breach". We see an attempt to utilize this device in *Fitzalan-Howard v Hibbert*,[57] though ultimately failing on the ground that the payment of money by mistake was held not to create a trust.

It should be stressed that none of these advantages obtain were a claimant limited to an award at trial of monetary restitution or even "perfect" restitution of the right *simpliciter*. Moreover, it is important to remember that in three of the six instances detailed above, we move out of the law of unjust enrichment completely, something again not possible where claimants are limited to monetary or specific restitution awards.

V: Duty to Transfer a Right is a Trust

Arguments for court-imposed trusts in the case of enrichment by right are also made by McFarlane and Stevens.[58] Their thesis is difficult to pin down, as the article in which it is contained is concerned with a more general discussion of something confusingly called "Equitable Property", a label used to describe the situation where one person has what is described as a "right against a right held by another",[59] with trusts arising to reverse unjust enrichment forming only a small part of that larger

[55] *Prudential Assurance Co. Ltd. v Revenue and Customs Commissioners* [2018] UKSC 39, [68]– [80].

[56] *Pilcher v Rawlins* (1872) L.R. 7 Ch. App. 259; 41 L.J. Ch. 485.

[57] [2009] EWHC 2855 (QB); [2010] P.N.L.R. 11.

[58] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1. The same theme is later pursued by Stevens alone ("When and Why Does Unjust Enrichment Justify the Recognition of Proprietary Rights?" (2012) 92 Boston Univ. L.R. 919), though adding nothing to the 2010 argument on why a trust arises, merely asserting that "the duty to transfer the right back is a trust" (at 926) and, in discussion of the vendor-purchaser constructive trust, explaining the existence of the trust on the ground that "when the seller is obliged to hold the right to the land for the buyer who has paid, a trust arises because that is what a trust is by definition (at 925)." The latter proposition is, of course, hopelessly circular.

[59] Examples include the right of a beneficiary of a trust, equitable leases of land, equitable easements, equitable charges, and restrictive covenants over land (B. McFarlane & R. Stevens, "The Nature of Equitable

picture.[60] "Equitable Property" rights, they say, do not involve rights against physical things, i.e., land or goods, as do legal property rights, and do not give their holders the ability to exclude the world at large.[61] They are instead rights against other rights, be those other rights property rights or personal rights. Thus, the beneficiary of a trust does not have an equitable version of the right held for them in trust, but a right against that right. This, of course, is nothing new; as we have seen, the same idea was expressed over a century earlier by Maitland,[62] and is also reflected in the case-law.[63] It is what the authors do with the insight that is contentious, for they claim, *inter alia*, that whenever a person has a right against another's right, they have this generic thing called "Equitable Property". The thesis is then applied to the law of unjust enrichment so as to generate "Equitable Property" where the enrichment consists of rights.

Like Birks and Chambers before them, McFarlane and Stevens start from the premiss that rights to restitution of unjust enrichment arise pre-judgment and, further, that those rights can be personal or proprietary. The proprietary right could be a trust but might also be a power to rescind a transfer. What generates a trust in the case of rights received as a result of unjust enrichment is the application of yet another general principle, viz., that where A is under a duty to transfer a particular right to B, B acquires a right against A's right. The authors seem undecided as to how this generates a trust, for we are variously told that a right against a right is a trust, that in such circumstances A comes under a duty to use the right for B's benefit, and that is a trust, and, finally, that in such circumstances A comes under a duty not to use the right for his own benefit, and that is a trust.[64]

Like Chambers, McFarlane and Stevens also rely on cases involving contracts for the sale of titles to land, where constructive trusts undoubtedly arise.[65] They also cite *A-G for Hong Kong v Reid*,[66] a case of restitution for wrongs, where the Privy Council held that a trust of a bribe arose the

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Property" (2010) 4 J. Eq. 1, 6) and the right acquired after the exercise of a power to rescind a fraudulently induced contract to transfer (ibid, 8).

[60] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 18-20.

[61] As had been wrongly asserted by R. Nolan, "Equitable Property" (2006) 122 L.Q.R. 232, 233.

[62] F. W. Maitland, *Equity: A Course of Lectures* (Cambridge: Cambridge University Press, 1909), 17, cited above at text to n. 31.

[63] As, e.g., in *Schalit v Joseph Nadler* [1933] 2 K.B. 79, discussed above, text to n. 32.

[64] In his later article, Stevens adds the rider that the trust will only arise when the defendant acquires knowledge of the unjust factor and a demand has been made for repayment: R. Stevens, "When and Why Does Unjust Enrichment Justify the Recognition of Proprietary Rights?" (2012) 92 Boston Univ. L.R. 919, 933. In saying this, he is seemingly not attempting to provide a rationale for his trust, merely removing the objection that it would be "contrary to the rule of law" for a legal system to conclude that an obligation was owed before it could be performed.

[65] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 15.

[66] [1994] 1 A.C. 324; [1994] 1 All E.R. 1. The result in *Reid* was later adopted by the United Kingdom Supreme Court in *FHR European Ventures L.L.P. v Cedar Holdings* [2014] UKSC 45; [2015] A.C. 250, though there is

moment it was received. However, differently from Chambers, they disavow any link to the availability of specific performance and the maxim Equity looks upon as done that which ought to be done, despite the fact that this forms the backbone of the reasoning in both sets of cases. Speaking, for example, of the vendor-purchaser constructive trust, they say:

> "The answer is that where A makes a binding promise to transfer his or her freehold to B, equity does *not* regard A as having already transferred the freehold. That would be absurd: it is clear that no transfer has occurred. Rather, A, by making the binding promise, comes under a duty to transfer his or her freehold to B. As a result, A is under a duty to use a specific right (his or her freehold) for B's benefit."[67]

Their general principle does not, they say, apply to rights received on bases which subsequently fail, for the same reason given by Chambers, viz., that while the transfer of value is conditional, the transfer of the right is absolute.[68] And like Chambers, it would seem to be applicable not only to the unjust factors of mistake, duress and undue influence, but also those policy-motivated grounds where applicable, for example, cases of taxes not due under the *Woolwich* principle.

Are any of these arguments for a trust convincing? It is of course important to note that none of them meet the first and third objections set out above with regard to Chambers' thesis. The notion of the unjust enrichment defendant being under a duty to make specific restitution regardless of the nature of the right is inconsistent with the sparse availability of specific remedies in tort, and the award of a trust gives the claimant benefits beyond those available should only monetary or specific restitution orders be available at trial. These apart, the thesis is open to four objections. First, the claimed duty to convey does not exist. Second, if it did exist, it would not *ipso facto* make the obligee a trustee. Third, such duty would not mean that A must use the right for B's benefit, thus giving rise to a trust. Fourth, such duty would not mean that A must not use the right for his own benefit, thus giving rise to a trust.

1. *No duty to convey*

It will be recalled that McFarlane and Stevens' claim depends on there being a duty on the part of a person unjustly enriched by the receipt of a right to reconvey it to the claimant. No authority, however, is cited for such a proposition, which is unsurprising, as there appears to be none. All that is relied on is an endorsement of Chambers' views concerning perfect restitution.[69]

2. *Duty to convey does not generate a trust*[70]

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nothing in that case which shows the court adopting its reasoning. Indeed, *FHR* is almost completely devoid of reasoning.

[67] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 16 (emphasis in original).

[68] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 19.

[69] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 19.

[70] Although the relevant passage only talks of a duty to transfer giving rise to a right against a right, McFarlane and Stevens go on to say that this means the right is not available in the bankruptcy of the transferee, which

Even if there were such a duty, it is difficult to see how it would turn the transferee into a trustee. It is certainly not the case that all duties to convey specific rights create trusts. Thus, if A executes a voluntary deed promising to transfer his title to his Picasso painting to B but fails to do so, though A will be liable to pay B the value of the promised title in a claim at law for breach of covenant, he will not hold it for B on trust.[71] Likewise, if A contracts with B to sell him the parcel of shares he presently holds in X Ltd., a publicly quoted company, though A will again be liable in damages should he fail to convey, there will be no trust. In both cases, the lack of a trust is not due to the absence of a duty to convey; if there were no such duty, there would be no claim for damages for its breach. The reason there is no trust is that neither example involves specifically enforceable duties. The relevance of the availability of specific performance, as has been seen, is that it triggers the maxim Equity looks upon as done that which ought to be done, and it is the application of this maxim which generates the trust.[72]

We also saw that the notion that the availability of specific performance giving rise to a trust is deeply flawed,[73] and McFarlane and Stevens unsurprisingly place no reliance on it. However, they put nothing in its place, seemingly being content to say that Equity takes the view that there is a right against a right in such cases and therefore a trust. There are, however, a number of problems with this thinking.

First, why would Equity take the view in such cases that there a right against a right? It can only be the availability of specific performance, for in a case where specific performance is not forthcoming, there is no *equitable* (as opposed to common law) duty to convey, and therefore no equitable right against a right, and no "Equitable Property". We are thus driven back to specific performance, which, however, is said to be irrelevant. Of course, the authors now use it for a different purpose, but even so, it will still only give a right against a right/trust in the case of rights for which the remedy of specific performance is forthcoming, whereas the authors' thesis draws no distinction in this regard.

Second, even where the claimant does have an Equitable right with respect to a right held by the defendant, we are still in the dark as to why a trust arises. Even if it were correct to say that beneficiaries of express trusts have rights against rights (as opposed to rights against things), it does not follow that there is a trust in all cases where one person has a right against a right. In this respect, McFarlane and Stevens appear to commit the formal fallacy of affirming the consequent. Their argument takes the following (invalid) form:

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would seem to indicate they are speaking of trusts. This impression is reinforced by the later discussion of *Chase Manhattan v Israel-British Bank* [1981] Ch. 105 and *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, where a trust solution seems to be advocated using their reasoning: B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 20.

[71] *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 444, 450; 27 E.R. 1132, 1138; *Jefferys v Jefferys* (1841) Cr. & Ph. 138; 41 E.R. 443; *Cannon v Hartley* [1949] Ch. 213, 217; [1949] 1 All E.R. 50, 53.

[72] Above, text to n. 26.

[73] Above, text to nn. 29-32.

If X is a trust, then X is a right-against-a-right

X is a right-against-a-right

Therefore, X is a trust.[74]

Moreover, the authors themselves admit that there are different forms of "Equitable Property", that not all rights against rights are trusts. So, for example, they describe the restrictive covenant over land as a right against a right, but make no claim to it being a trust. So too with equitable charges. Why then should it be a trust here?

Third, if beneficiaries of express trusts have rights against rights, it is only because there is a trust; their rights are its product, not its cause. In any case, not all trusts involve persons having rights against rights, as witness the charitable trust,[75] meaning their initial premise is unsound.

Fourth, and finally, we saw that Chambers' power to obtain a right could not itself be a trust because though beneficiaries of some trusts can petition the court for an order that the trustee convey to them the rights held for them on trust, this is not because the trustees owe a duty *qua* trustees so to do.[76] For similar reasons, a duty to convey a right to another cannot be a trust, for trusts do not involve duties on trustees to convey rights to their beneficiaries.

3. *Duty to convey does not mean that A must use the right for B's benefit, so giving rise to a trust*

Recall that one of the alternative arguments put forward by McFarlane and Stevens is that whenever A is under a duty to convey a right to B, a trust arises in B's favour because A is duty-bound to use that right for B's benefit. Does this provide an explanation for a trust in the case of rights received as a result of unjust enrichment? Two questions must be asked. First, is it correct to say that the existence of the duty means that the transferee must use the right for the benefit of the transferor? Second, if it is, does it follow that he holds it on trust for the transferor?

As to the supposed duty to use the right for the claimant's benefit, the authors rely on *Neville v Wilson*,[77] where A, the beneficiary of a trust, contracted to assign his right to B. They state: "As A was thus under a duty to use his or her right, in a particular way, for B's benefit, B acquired a right against A's right: A held their right under the trust on constructive trust for B."[78] That was not, however, how the Court of Appeal saw it; nowhere is there talk of a duty on the part of A to use his right for the benefit of B. Instead, the court adopts the view that the trust arose because of the

[74] A non-legal example: If it is raining, then the streets are wet. The streets are wet. Therefore, it is raining.

[75] Above, text to n. 41.

[76] Above, text to n. 44.

[77] [1997] Ch. 144; [1996] 3 All E.R. 171.

[78] B. McFarlane & R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1, 10.

application of the maxim Equity looks upon as done that which ought to be done.[79] Further, there is no reported case in which the recipient of a right which was unjustly received has been held under an obligation to exercise that right for the benefit of the transferor. Once again, therefore, their proposition lacks authority.

Moreover, even where A holds a right on express trust for B, it is not the case that he is always duty-bound to exercise it for B's benefit. In the case of a bare trust, for example, the trustee's only duty is to hold the right to the order of the beneficiary. Even in the case of a special trust, where the trustee has active duties to perform, it is an over-simplification to think in terms of trustees having to use the rights they hold for the benefit of beneficiaries. They may have to choose between beneficiaries, for example, between the objects of a discretionary trust, benefiting some at the expense of others.[80] And once again, charitable trusts do not fit the McFarlane/Stevens model for, as we have seen, they have no beneficiaries,[81] making talk of a duty on the trustee to exercise rights for the benefit of beneficiaries a nonsense.

Finally, even if there were such a duty, it is again the consequence of A being a trustee, not its cause. In this respect, McFarlane and Stevens seem to see trusts as responses to pre-existing obligations, but this mistakes the way in which they arise, at least where an express trust, the archetypal trust, is concerned. Where A conveys rights to B which B agrees to hold on trust for C, the obligation to hold on trust does not arise because of any antecedent obligation on B to use the rights for C's benefit, but from the agreement itself. There are no obligations unless and until the trust is created.

4. *Duty to convey does not mean that A must not use the right for his own benefit, so giving rise to a trust*

As already seen, McFarlane and Stevens talk alternatively of A's coming under a duty to transfer a specific right to B bringing A under a further duty not to use the right for his own benefit, which in turn makes him a trustee for B.[82] However, even if it were true that a duty to convey a right means that the right-holder comes under the further duty not to use that right for his own benefit, this second duty does not turn the duty-holder into a trustee. True it is that express trustees cannot use

[79] [1997] Ch. 144, 157.

[80] Another example is pension trusts, where one class of beneficiaries may be preferred over another: *Edge v Pension Ombudsman* [2000] Ch. 602; [1999] 4 All E.R. 546.

[81] Above, text to n. 41.

[82] The same view is expressed by McFarlane alone (B. McFarlane, "The Centrality of Constructive and Resulting Trusts" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010)), where (at 185) the decision of the Privy Council in *A-G for Hong Kong v Reid* [1994] 1 A.C. 324 is cited as an example: "The existence of that trust depends on A's duty to B not to use the bribe received by A for A's own benefit; it is possible to see that duty as depending on A's fiduciary duty to B not to make a profit from his position." This is not, however, accurate. According to Lord Templeman, there was a duty on the corrupt prosecutor to hand over the bribe to his employer *in specie* and the trust arose because of the application of the rule that Equity looks upon as done that which ought to be done: [1994] 1 A.C. 324, 331.

the rights they hold for their own benefit,[83] but this is once again the consequence of them being trustees, not its cause.[84] Moreover, there are other persons who the legal system recognises as being under such duties who are not trustees. One is the executor of a deceased's estate, who commits the wrong of *devastavit* should he apply the rights to his own use.[85] Yet it is well established that an executor is not *ipso facto* a trustee.[86] Likewise, insolvency officials cannot use the rights they receive from the insolvent for their own purposes, yet they too do not occupy the position of trustees. The same prohibition attaches to mortgagees of rights, who hold them only as security for the performance of the obligation secured, and who can use the rights for the satisfaction of the secured obligations but not otherwise.[87] Yet mortgagees are not trustees.[88] It does not follow, therefore, that by identifying a person as being under a duty not to use a right for his own benefit, we have necessarily found a trust. Although trustees have such duties, many non-trustees do as well.

The conclusion, therefore, is that the arguments of McFarlane and Stevens for trusts in the case of rights received as a result of unjust enrichment, like those of Chambers before them, do not stand up to scrutiny.

VI: Pre-judgment Trust where Money Award is Inadequate

A third argument for a pre-judgment trust is made by Edelman, a former academic and now Justice of the High Court of Australia.[89] Like Chambers and McFarlane and Stevens, Edelman argues that restitution of rights should in principle be allowed because it is the "most perfect form of restitution"[90] and that the "mechanism" by which it can be achieved is the "recognition of a trust of the rights held by the defendant or by recognition that a plaintiff has a power of rescission".[91] As

[83] But even this is not true, as witness the fact that they can in certain circumstances indemnify themselves for expenses from the rights they hold.

[84] This is, in other words, the same logical error as identified above: text to n. 74.

[85] *Devastavit* = he has wasted. An example is *Marsden v Regan* [1954] 1 W.L.R. 423; [1954] 1 All E.R. 475, where an executrix made gratuitous transfers of the deceased's titles to furniture to non-entitled third parties.

[86] *Attenborough v Solomon* [1913] A.C. 76; *Re Ponder* [1921] 2 Ch. 59; 90 L.J. Ch. 426.

[87] *White v City of London Brewery Co* (1889) 42 Ch. D. 237; 58 L.J. Ch. 855.

[88] *Colson v Williams* (1889) 58 L.J. Ch. 539; [1886-90] All E.R. Rep. 1040; *Kennedy v De Trafford* [1897] A.C. 180; 66 L.J. Ch. 413.

[89] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013) 37. See also J. Edelman & E. Bant, *Unjust Enrichment* (Oxford: Hart Publishing, 2016), 38-42.

[90] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 38.

[91] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 38. See also 42-3, and 50.

authority for the trust response, Edelman relies on cases involving transfers where the transferor had "no intention to benefit the recipient".[92] Examples include trusts in favour of settlors where rights are transferred on trusts which fail (the automatic resulting trust of *Vandervell v I.R.C.*),[93] and the trust which arose in the mistaken payment case of *Chase Manhattan v Israel-British Bank*.[94]

There is, however, an important qualification. "Perfect restitution", says Edelman, should only be available where it is "necessary to restore the plaintiff to his or her previous condition". It will not issue "where the rights transferred concern a good easily obtainable in the market". Drawing an analogy with the availability of specific performance of a contract of sale, Edelman says the question is whether there is some "other means to quell the controversy".[95]

Edelman's thesis is superior to those of Chambers and McFarlane and Stevens in that it is at least consistent with the law concerning orders for the delivery up of converted goods.[96] Nevertheless, his argument for a trust is problematic. The other more general objection discussed above still applies, viz., that the award of a trust goes beyond what is needed for specific restitution.[97] Beyond this, there are three specific problems. First, since an exercise of judgment is required, Edelman's trust cannot, as he asserts, arise as the facts happen; the case at least needs to come to trial. Second, no satisfactory explanation is provided as to why a trust arises. And third, there is no authority for such a trust.

1. Since an exercise of judgment is involved, trust cannot arise as facts happen

Given that Edelman's trust only arises where a money award is inadequate, it cannot be the case that it arises immediately the cause of action is complete, for there will at that point be no way of

[92] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 43.

[93] [1967] 2 A.C. 291; [1967] 1 All E.R. 1.

[94] [1980] Ch. 105; [1979] 3 All E.R. 1025.

[95] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 38.

[96] See the discussion above, text to nn. 20-1.

[97] In rejecting the idea that the court should only have a power to order reconveyance, Edelman asks "if the well-established terms such as 'trust' or 'power to rescind' should be eschewed in favour of the cumbersome expression 'power to obtain conveyance' then it is necessary to explain why it is an error to describe a power to obtain a conveyance as a trust or a power or rescission": J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 48. The answer is the point made above (text to nn. 45-57), that the language of "trust" brings in its train consequences which go beyond allowing the court to make orders for specific restitution. Although Edelman asserts that his "trust" involves no administrative duties and fiduciary obligations being cast on the "trustee", he singularly fails to justify its insolvency and other consequences, such as the ability to trace into substitute rights, and is therefore wrong to say that the mechanism "has almost no meaningful consequence": (ibid). Moreover, if it has no meaningful consequence, it is not clear why it is being used.

knowing whether a court will later decide that a money award does not suffice. Edelman cites with approval the Canadian Supreme Court case of *Kerr v Baranow*,[98] where Cromwell J. held that in claims for proprietary remedies in unjust enrichment the claimant has to establish that "a monetary award would be insufficient in the circumstances" and that "in this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights."[99] Cromwell J. clearly sees the court as having a judgment to make on these issues, something which can only be done at trial.[100] Yet for Edelman, the trust arises before judgment. How this is to happen is nowhere explained.

2. No satisfactory explanation why a trust arises

There is also difficulty seeing why a trust arises. Edelman merely tells us that the "trust is recognition that the recipient receives the rights subject to a liability to reconvey them to the plaintiff",[101] but if the liability to reconvey is already present, the trust mechanism is redundant. Moreover, there are many cases where liabilities to convey exist but there is no trust. Two examples have already been given: the voluntary deed by which A promises to transfer his title to a Picasso painting to B, and the contract where A promises to transfer to B the parcel of shares he presently holds in a publicly quoted company.[102] Even in cases of contracts for the sale of unique rights, where trusts do arise, it is the availability of specific performance which causes the trust to arise; no trust is needed to empower the court to order a conveyance. The same is true of cases of proprietary estoppel, an example being *Dillwynn v Llewellyn*,[103] where the court ordered the conveyance of a fee simple title because of the claimant's detrimental reliance on a void conveyance of the same right and not because of some pre-existing trust.[104] It is also bizarre to think that a trust has to be

[98] 2011 S.C.R. 10; [2011] 1 S.C.R. 269.

[99] [2011] 1 S.C.R. 269, [52]. That an exercise of judgment is necessary is also illustrated by another case Edelman cites, *Giumelli v Giumelli* [1999] HCA 10; 186 C.L.R. 101, [10], where the imposition of a constructive trust was said to be only available as a last resort, when a monetary award was inadequate.

[100] Another question might be the application of laches, which is again unknowable until a decision of the court is made.

[101] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 43.

[102] Above, text to nn. 71-2.

[103] (1862) 4 De G.F. & J. 517; 31 L.J. Ch. 658. Other examples are *Pascoe v Turner* [1979] 1 W.L.R. 431; [1979] 2 All E.R. 945 (order to convey a fee simple title); *Crabb v Arun D.C.* [1976] Ch. 179; [1975] 3 All E.R. 865 (order to grant an easement); *Thorner v Major* [2009] UKHL 18; [2018] 1 W.L.R. 776 (order to convey a fee simple title).

[104] Interestingly, the word "trust" appears nowhere in the judgment. And though Nourse L.J. in *Sen v Headley* [1991] Ch. 425, 439; [1991] 2 All E.R. 636, 646, said that "where an application of that doctrine gives the promisee a right to call for a conveyance of the land no doubt it could be said … that that right is the consequence of an implied or constructive trust which arises once all the requirements of the doctrine have been satisfied", this is to put the cart before the horse.

constructed only for it to be immediately collapsed. If there ever was a "formula for equitable relief",[105] this would be it.

3. Lack of authority

Finally, there is no authority for Edelman's trust. As seen, he relies on the automatic resulting trust case of *Vandervell v I.R.C.* and the mistaken payment case of *Chase Manhattan v Israel-British Bank*. Though rightly rejecting the reasoning in both, which is based on the flawed notion of the transferor "retaining" equitable property,[106] he says that, unless these decisions are to be overturned, their reasoning must be "refined". The better view, says Edelman, is that the trust in each case was imposed as a "legal response to prevent the recipient having the use and enjoyment of rights for his own benefit where that use and enjoyment was not intended."[107]

However, even if Edelman's "refinement" of the reasoning in *Vandervell* and *Chase Manhattan* was permissible,[108] the argument does not work. The notion that a trust arises because of a lack of intention on the part of the transferor that the transferee take beneficially, though perhaps having purchase in cases of transfers on declared trusts which fail, was held by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington L.B.C.*[109] to have no application to cases of unjust enrichment. Moreover, it is not the case that a person who, for example, transfers money to another by mistake in order to discharge a non-existent debt does not intend that other to have the use and enjoyment of the money for their own benefit, i.e., to take beneficially, for how else could the debt be discharged?[110]

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[105] *Selangor United Rubber Estates v Craddock (No 3)* [1968] 1 W.L.R. 1555, 1582; [1968] 2 All E.R. 1073, 1095 (Ungoed-Thomas J.).

[106] "A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the [transferor] 'retaining' its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the [transferee]. If so, an equitable interest arose for the first time under that trust": *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 706 (Lord Browne-Wilkinson).

[107] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 44, 45. Edelman also cites cases involving innocent misrepresentation, fraud, undue influence, and failure of consideration, all but one decisions at first instance, where a trust arose as a response to unjust enrichment. However, no account of the reasoning in any of these cases is either given or relied on.

[108] The cases would cease to be authority, for what is binding about a case is its *ratio decidendi*, the reason for the decision; its result, through the doctrine of *res judicata*, binds only the parties.

[109] [1996] A.C. 669.

[110] Lord Millett, "Resulting Trusts" [1998] R.L.R. 283, 284. See also Sir Peter Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, 412; B. Haecker, "Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model" [2009] C.L.J. 324, 344-5.

The same is also true of the other unjust factors. For example, though the novice nun in *Allcard v Skinner*[111] was under the undue influence of her Lady Superior when transferring across all her wealth, there is no doubt that she intended the latter to take beneficially, for how else could the Lady Superior apply it for the purposes of the order as the novice intended? Put another way, if the novice nun did not intend to give beneficially, what was the influence the Lady Superior had over her? Thus, even if non-beneficial transfers generated trusts, unjust enrichment transfers are not of that kind.

Finally, Edelman's argument proves too much, for his concept of non-beneficial transfers cannot be confined to rights having some special value, but would give trusts in all cases. Yet, as we have seen, inadequacy of a money award is for Edelman a precondition of the trust.

VII: Liability to be Ordered to Reconvey

The ultimate aim of all the protagonists in this debate is to empower claimants to obtain perfect restitution, either in all cases of the receipt of rights (Chambers; McFarlane and Stevens) or where monetary restitution is inadequate (Edelman). The mechanism by which this is done is, *inter alia*, the imposition of an immediate trust on the defendant. This trust, however, is simply a means to an end, one only ever intended to be collapsed. Moreover, it involves "proprietary overkill" in that it is heavy-handed, bringing a host of other undeserved benefits to the unjust enrichment claimant.

It is, however, possible for courts to award perfect restitution and avoid the untoward benefits of a trust though the simple expedient of equipping them with a power at trial to order specific restitution. According to Edelman, this is not possible without a pre-existing trust,[112] though we saw that the idea underlying his trust, that it was the "recognition that the recipient receives the rights subject to a liability to reconvey them to the plaintiff", itself assumes the prior existence of such a power.[113] In any case, we saw how judges can order defendants to convey particular rights in cases of specifically enforceable contracts of sale and proprietary estoppel without the need for pre-existing trusts.[114] If no trust is needed in such cases, it is not clear why one has to be conjured up for unjust enrichment claimants.

The question then is when courts should make orders for specific restitution. In this regard alone, Edelman is correct to argue that the finding that a money award is inadequate is a necessary condition, which in this instance will generally mean that unique goods are involved.[115] It is submitted that courts should here apply the same reasoning they use in cases concerning orders for

[111] (1887) L.R. 36 Ch. D. 145; 56 L.J. Ch. 1052.

[112] J. Edelman, "Restitution of (Property) Rights" in E. Bant & M. Bryan (edd.), *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013), 48.

[113] Text to n. 101.

[114] Text to nn. 103-4.

[115] But not always: c.f. in the context of the specific delivery up of chattels, *Howard E Perry Co. Ltd. v British Railways Board* [1980] 1 W.L.R 1375.

the delivery up of converted chattels.[116] Thus, a mistakenly transferred title to land, a family heirloom, or a Van Gogh painting should, all things being equal, be ordered to be retransferred, for a money award will not give the claimant perfect restitution. But where shares in a public company are mistakenly transferred, a money award will suffice, for now a substitute is available in the market. So far as failure of basis cases are concerned, a court should rarely order reconveyance of a right, whatever its nature. This is not because, as Chambers and McFarlane and Stevens assert, the value alone was given conditionally, but because the claimant was *ex hypothesi* happy to part with the right (albeit conditionally), showing that they attached no specific value to the right in question.[117] Detailed work on when specific restitution should be ordered will need to be done,[118] and the writings of Bant and Bryan in this regard are to be commended.[119] One point which should, however, be stressed is that the insolvency of the defendant should never be a relevant consideration for a court ordering specific restitution.[120]

There is one final point. Might it be said that claimants can already achieve specific restitution through the law of rescission? The short answer is, No. First, rescission is too blunt an instrument as it is not confined to unique goods. Second, it is not available for all unjust factors.[121] And third, as *Blacklocks* demonstrates, it opens up the possibility of third parties being bound.

VIII: Conclusion

Birks' focus on enrichment as value gave no ground for the imposition of trusts as responses to the event of unjust enrichment. The question we have asked is whether arguments built on Chambers' notion of enrichment as both value and rights are valid. The answer is in the negative, with the theses put forward by Chambers himself, McFarlane and Stevens, and Edelman providing no justification for the imposition of trusts on rights received as unjust enrichments.

Chambers' idea of a power to obtain a right generating a trust of the right is supported by neither authority nor principle and gives far more to the restitutionary claimant than perfect restitution. The same is true of McFarlane and Stevens' various notions of a duty on a right-holder to convey creating a trust. As for Edelman, the authorities he relies on are, as he admits, demonstrably wrong, and his reinterpretation does not square with unjust enrichment cases, which

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[116] Detail in J. D. Heydon, M. J. Leeming, & P. G. Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th ed (Sydney: LexisNexis, Australia, 2014), ch. 22, "Specific Restitution".

[117] *Legh v Lillie* (1860) 6 H. & N. 165; 158 E.R. 69; *Dowling v Betjemann* (1862) 2 Johns. & Hem. 544; 26 J.P. 531.

[118] For example, the defendant may have used the right received as security or improved the physical thing to which the right relates, which may lead the court to conclude that a monetary remedy is more appropriate.

[119] E. Bant & M. Bryan, "Specific Restitution Without Trusts" (2012) 6 J. Eq. 181.

[120] Where a defendant is insolvent, an order to pay money is inadequate for the reason that it will not be met in full, not because, if paid in full, it will not give perfect restitution.

[121] An unjust factor to which it can have no application is recovery under the principle in *Woolwich Equitable Building Society v I.R.C.* [1993] A.C. 70.

do not involve non-beneficial transfers. Further, his thesis would give trusts in cases in which even he thinks they are undeserved, where "perfect restitution" can be achieved by a money award. Finally, all approaches are avowedly instrumental, seeing the trust as necessary only to enable the court to order a conveyance. This notion is false, as the specific performance and proprietary estoppel cases demonstrate.

This not to say that courts should never award specific restitution; it should simply not be through the mechanism of the trust. As Scott wrote over half a century ago:

> "The court does not give relief because a constructive trust has been created; but the court gives relief because otherwise the defendant would be unjustly enriched; and because the court gives this relief it declares that the defendant is chargeable as a constructive trustee."[122]

We see the same thinking in the High Court of Australia decision of *Giumelli v Giumelli*, a proprietary estoppel case, where it was said that the constructive trust "is a remedial response to the claim to equitable intervention" which "obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties."[123] Such a trust, said the court:

> "does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests. Rather, the order made by the Full Court is akin to orders for conveyance made by Lord Westbury L.C. in *Dillwyn v Llewelyn* …."[124]

In *Dillwyn v Llewelyn*, it will be recalled, there was no mention of any trust.

It is high time the courts eschewed the language of trusts altogether. Just as they can make orders for specific performance in contract and specific delivery in tort, they should likewise be able to make orders for specific restitution in cases of unjust enrichment. As to when they should do so, and in agreement with Edelman, it should only be where money awards are inadequate. But the critical difference between Edelman's view and that presented here is that there is no need for any intervening trust and the untoward insolvency and other effects which come in its train.

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[122] A. W. Scott, "Constructive Trusts" (1955) 71 L.Q.R. 39, 40-41. Likewise, Sir Peter Millett, writing extra-judicially, said: "The expression 'constructive trustee' is used to describe the defendant who is liable to be subjected to an equitable proprietary remedy. The court declares the defendant to be a constructive trustee and orders him to transfer the trust property *in specie* to the plaintiff. But to say that he is a constructive trustee of the property is only another way of saying that he is liable to transfer it *in specie* to the plaintiff": "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, 402.

[123] *Giumelli v Giumelli* [1999] HCA 10, [3].

[124] *Giumelli v Giumelli* [1999] HCA 10, [5].