

# Failure of Condition

Thesis submitted to the Faculty of Law at the University of Oxford  
for the degree of Doctor of Philosophy

by

Frederick Wilmot-Smith

*All Souls College*

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## Abstract

This thesis is an investigation of a doctrine generally known as ‘failure of consideration’, but which I term ‘failure of condition’. I have two principal aims. First, to clarify quite what the doctrine of failure of condition is. Secondly, to explain why it has the effects it does – in particular, why it justifies the response of restitution. The doctrine, at core, concerns conditional transfers: when a transfer is made conditionally, and the condition fails, the transfer can be recovered. For this reason, I term the doctrine ‘failure of condition.’ I investigate the nature of this relationship and argue that the reason why the transfer is conditional is that the agent’s intention to make the transfer was *itself* conditional. The justification of restitution is a more complex affair than is customarily accepted – but there is a valid justification lurking not far from the surface of orthodoxy.

A secondary concern of the thesis is to re-examine an old theory in the field of common mistake, frustration and termination following a breach of contract. It used to be thought that these doctrines could be explained by failure of condition. That theory has fallen out of favour – it seems that no one accepts it today. This rejection rests upon a confusion over the nature of the doctrine of failure of condition. Once the nature of this doctrine has been clarified, we can see how closely the various doctrines align with one another; we can also see where the true difficulty with the failure of condition explanation lies.

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# 1 Introduction

## 1.1 Setting the Scene

### 1.1.1 Where We Are

In *Moses v Macferlan*, Lord Mansfield said that where money is paid ‘upon a consideration which happens to fail’ the money ‘ought not in justice to be kept’.<sup>1</sup> In these circumstances, the claimant has an action for restitution of the money paid. At its core, this thesis is an inquiry into this proposition. It is an inquiry, first, into what it means to say that a transfer is made ‘upon a consideration which happens to fail’ (Chapters 2, 6 and 7); and, second, into why an enrichment received upon such a consideration ‘ought not in justice to be kept’ (Chapters 3-5).

This doctrine – commonly known as ‘failure of consideration’, but in this thesis termed ‘failure of condition’ – is ‘[p]erhaps the most significant of Lord Mansfield’s

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<sup>1</sup> *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 680 (KB). Compare *Johnson v Johnson* (1802) 3 Bos & P 162, 169; 127 ER 89, 93 (Court of Common Pleas) (Lord Alvanley CJ): the principles ‘are certainly too large’. The doctrine is visible in a number of earlier cases: see, eg, *Holmes v Hall* (1704) 6 Mod 161, 87 ER 918 (KB) *Straton v Rastall* (1788) 2 TR 366, 369; 100 ER 197, 199 (KB) (Ashhurst J).

instances'.<sup>2</sup> It has also been described as 'intensely difficult' and 'controversial'.<sup>3</sup> The perceived difficulty in understanding the topic can be seen by the fact that in the last fifteen years the principle has been the subject of three doctoral theses in Oxford alone.<sup>4</sup> Many of the difficulties concern classificatory controversies, for instance whether the doctrine is appropriately classified as part of the law of unjust enrichment or the law of contract. We can only begin to answer those questions once we have a good answer to the first and second questions: what failure of condition is and why it generates the legal response it does.

### 1.1.2 Why the Thesis was Undertaken

Many theses begin by stressing the originality of their field of research, claiming that their topic has not received sufficient scholarly attention. No such claim can be made here. Failure of condition has been of great interest to academics. It has also been much analysed. One might well wonder why the topic required yet another thesis.

This thesis was written to address two deficiencies in current scholarship. Previous accounts of failure of condition have asked different questions about the doctrine. Scholars have inquired into its historical intersection with the law of contract,<sup>5</sup>

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<sup>2</sup> S Waddams, 'The Relation Between Contract and Unjust Enrichment' in P Giliker (ed), *Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff 2007) 19.

<sup>3</sup> J Edelman and E Bant, *Unjust Enrichment in Australia* (OUP 2006) 242.

<sup>4</sup> T Krebs, 'Failure of Consideration: A Comparative Study' (DPhil thesis, 1998); T Baloch, 'Unjust Enrichment in the Contractual Context' (DPhil thesis, 2008); F Maher, 'Failure of Basis' (DPhil thesis, 2008).

<sup>5</sup> Baloch, 'Unjust Enrichment in the Contractual Context' (n 4).

## 1.1. SETTING THE SCENE

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the difference between English and German principles,<sup>6</sup> and the possible breadth of application of the doctrine.<sup>7</sup> Some of these inquiries, such as the historical inquiry, simply ask different questions from this thesis; the others are logically subsequent to my inquiry. The existing literature has had no substantial inquiry into the conceptual and normative foundations of the doctrine. The thesis was principally written to address that deficiency. This is the first such attempt in the doctrine's three hundred year history.<sup>8</sup>

That alone would be sufficient reason to pursue the research. However, the theoretical work done here has additional implications. My secondary investigation is into areas of doctrine customarily known as common mistake, frustration and termination. Chapter 6 will introduce these doctrines. Their introduction into the thesis might seem surprising. Although failure of condition is widely believed to be part of the law of unjust enrichment, these doctrines are generally to be found in textbooks on the law of contract – and many would classify them as part of that area of law. Although this classification might well be correct, it is not examined here. Instead, the doctrines are investigated from another angle. There used to be a debate over the interrelation between these doctrines and failure of condition. That debate is largely thought to be over. For instance, failure of condition was the second of five theories Lord Hailsham considered in *National Carriers Ltd v Panalpina (Northern) Ltd* as an explanation of frustration. His Lordship dismissed the explanation in a single sentence.<sup>9</sup> Similarly, Treitel says that it is 'plainly wrong' to claim that failure of

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<sup>6</sup> Krebs, 'Failure of Consideration: A Comparative Study' (n 4).

<sup>7</sup> Maher, 'Failure of Basis' (n 4).

<sup>8</sup> For an early example of the principle, see *Martin v Sitwell* (1691) 1 Show KB 156, 89 ER 509. Compare JB Ames, *Lectures on Legal History* (Harvard University Press 1913) 92.

<sup>9</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 687 (Lord Hailsham).

condition can explain frustration.<sup>10</sup> Chapter 7 will revisit this argument, assessing it in the light of the clarifications of earlier Chapters. I argue that, although there is an important distinction between the cases, it is extremely attractive to explain these doctrines in terms of failure of condition. Whether this argument affects the classification of the doctrines depends on the classificatory commitments of each individual theorist. The proper approach to classification is not examined in this thesis.

## 1.2 Doctrinal Foundations

### 1.2.1 Introduction

In this section, I introduce the doctrine of failure of condition and describe its basic rules. Although I sometimes express them in unconventional terms, the majority of the claims I make are orthodox. I will signal any claims I make which are not widely accepted. This section is a crucial foundation to the work of the later Chapters. Although this thesis is chiefly an essay in the philosophical foundations of failure of condition, it is important to stress that it is in the philosophical foundations of *failure of condition* – as the doctrine actually is, not as we might hope it to be. We need a firm grasp of what the doctrinal rules actually are.

### 1.2.2 The Basic Principle: Conditional Transfers

The classic case of failure of condition concerns money paid to a defendant under an executory contract. If the defendant fails to perform, it is well established that

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<sup>10</sup> G Treitel, *Frustration and Force Majeure* (Sweet & Maxwell 2004) para 16.012.

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the claimant can claim restitution of the value she has paid.<sup>11</sup> Some judges have focussed closely upon the fact that here it is the failure of *performance* of a contractual obligation which leads to restitution. For instance, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* the claimants made an advance payment of \$1,000 towards the purchase of \$4,800 worth of machinery from the defendants.<sup>12</sup> When war broke out between England and Germany, the contract was frustrated and the claimants sought restitution of the money paid.<sup>13</sup> It was held that the money paid was in principle recoverable for a failure of condition. Viscount Simon LC said that:<sup>14</sup>

when one is considering the law of failure of consideration ... it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

The passage is well-known and extremely influential. Its influence has had some unfortunate effects, though, and it is important to guard against two possible inferences one might draw. Some have fallen into the trap of supposing that an initially valid contract is a precondition of a claim for failure of condition.<sup>15</sup> As Lord Goff ex-

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<sup>11</sup> *Giles v Edwards* (1797) 7 TR 181, 101 ER 920 (KB).

<sup>12</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

<sup>13</sup> The history of the case is explained in P Mitchell, '*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour, Limited* (1942)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).

<sup>14</sup> *Fibrosa* (n 12) 48. This idea might be traced to *Ellen v Topp* (1851) 6 Ex 424, 155 ER 609 (Exch), where Pollock CB referred to the *performance* of a covenant as key to the independent/ dependent construction of mutual promises. See, further, RG McElroy and GL Williams, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (The University Press 1941) 84.

<sup>15</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890

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plained, ‘the concept of failure of [condition] need not be so narrowly confined.’<sup>16</sup> A number of cases have employed the concept of failure of condition despite the lack of a contract.<sup>17</sup> For instance, in *Benedetti v Sawiris*, a claimant worked for a defendant facilitating a takeover deal. This work was, it was assumed in the Supreme Court, not governed by a contract.<sup>18</sup> The precise question the Supreme Court faced concerned the quantification of the enrichment bestowed; however, the case was accepted to be one of failure of condition.<sup>19</sup> Given this premise, the case must stand for the proposition that failure of condition can apply to extra-contractual cases.<sup>20</sup> Therefore, failure of condition can be analysed as an independent source of obligations – independent, that is, of *contractual* obligations.<sup>21</sup>

The second inference one might draw from Viscount Simon LC’s passage is that:<sup>22</sup>

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(QB) 924 (Hobhouse J); *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351 [175] (Lord Neuberger). This is the inverse of the view *Fibrosa* sought to displace, i.e. that failure of condition required a contract to be void *ab initio*: *Chandler v Webster* [1904] 1 KB 493 (CA) 499 (Lord Collins MR). For discussion, see T Krebs, *Restitution at the Crossroads: A Comparative Study* (Routledge Cavendish 2001) 161.

<sup>16</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 683 (Lord Goff). See, further, R Goff and G Jones, *The Law of Restitution* (Sweet & Maxwell 1966) 32: ‘There is ... no reason why [failure of consideration] should be so limited.’

<sup>17</sup> For an early example, see *Martin v Andrews* (1856) 7 El & Bl 1, 4; 119 ER 1148, 1149 (Lord Campbell).

<sup>18</sup> For some scepticism, see *Benedetti* (SC) (n 15) [85] (Lord Reed).

<sup>19</sup> *Benedetti* (SC) (n 15) [86] (Lord Reed), [175] (Lord Neuberger).

<sup>20</sup> See too *Chandler Brothers Ltd v Boswell* [1936] 3 All ER 179 (CA) 186 (Greer LJ); *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 [43] (Lord Scott).

<sup>21</sup> There are some complications to this view, dealt with at 4.4.2.1, 5.4.1 and 5.4.2.

<sup>22</sup> *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) [261] (Stadlen J). His Lordship’s objection seems extremely close to repeating that of authors such as EA Harriman, *The Law of Contracts* (2nd, Little, Brown 1901) §524, examined in F Wilmot-Smith, ‘§38 and the Lost Doctrine of Failure of Consideration’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 83.

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Although the doctrine is commonly referred to as failure of consideration it ... appears [to be] based on a failure not of consideration but of performance[.]

Stadlen J here seems to have been misled by the fact that one word – consideration – is used in two distinct ways in this field.<sup>23</sup> In the law of contract, the word was sometimes used to express the need for a quid pro quo to be received in exchange for the promise.<sup>24</sup> In that sense, a promise was good consideration for the other promise; an exchange of promises gave rise to contractual obligations to perform those promises.<sup>25</sup> That is not, as Viscount Simon LC's quote makes clear, the primary sense in which the word 'consideration' is used in this field.

Another confusion in Stadlen J's claim – and this is the second inference one must guard against – is the suggestion that the fundamental basis of the failure of condition is the failure of the defendant's counter-performance, i.e. that failure of condition is coterminous with a failure of performance. While this view has some historical support,<sup>26</sup> it is increasingly accepted that '[f]ailure of [condition] is not limited to non-performance of a contractual obligation, although it may include that.'<sup>27</sup> Failure of counter-performance is, in this respect, one instance of a broader

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<sup>23</sup> Ibbetson has said that the word consideration was initially 'used in such a bewildering diversity of circumstances that any search for a settled technical meaning is completely hopeless': D Ibbetson, 'Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count' (1982) 41 CLJ 142, 152.

<sup>24</sup> Ibbetson (n 23) 154 ff. 75 and 76.

<sup>25</sup> For discussion, see AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press 1987) 465–66.

<sup>26</sup> For earlier examples, see Sir WR Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract* (3rd, Clarendon Press 1884) 127 and McElroy and Williams (n 14).

<sup>27</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 [16] (Gleeson CJ, Gaudron and Hayne JJ). See, further, *Roxborough* (n 27) [103] (Gummow J): 'the later emphasis ... on the performance of a promise is an unsatisfactory explanation of all the cases where repayment is made for failure of [condition].'

principle.<sup>28</sup>

The question is then what that principle actually is. The golden thread to failure of condition cases is increasingly recognised to be the concept of conditionality.<sup>29</sup> The doctrine demonstrates that transfers of value can be conditional.<sup>30</sup> The transfer of value is, therefore, valid – but it is, on failure of the condition, normatively invalid *inter se* such that the claimant is entitled to restitution.<sup>31</sup> That is why, on failure of the condition, the transferor can recover the enrichment.

This conceptual overview seems to have been clear to Sir William Evans, who described liability as arising where a transfer is made ‘under a condition which happens to fail’.<sup>32</sup> That analysis has been adopted by a number of judges. For instance, in *Fibrosa* Lord Wright reasoned that:<sup>33</sup>

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<sup>28</sup> A Skelton, *Restitution and Contract* (Mansfield Press 1998) 6; P Mitchell, ‘Artificiality in Failure of Consideration’ (2010) 29 *University of Queensland Law Journal* 191, 196–200.

<sup>29</sup> Failure of consideration is ‘another way of saying that [a transfer] is ... conditional’: AL Corbin, *Corbin on Contracts* (one volume, West Pub Co 1952) §658.

<sup>30</sup> There is some debate over whether there is a *transfer* in some or all of the cases under consideration: J Penner, ‘Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 306–13. That debate does not affect the conclusion of this section. If Penner is correct, one should describe the fact situation in distinct terms. However, one would still need the concept of a condition within that new description.

<sup>31</sup> The language of ‘validity’ is here perhaps insufficiently discriminating. We might instead say that the transfer becomes defeasible on failure of the condition. On the *inter se* aspect of conditionality, see 5.2.4.2.

<sup>32</sup> Sir William Evans, *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* (Liverpool, Merrit & Wright 1802) 25. (The essay is reprinted (1998) RLR 1.) Evans also analysed the concept in more specific terms, as an instance of the *condictio causa data non secuta*: 25. On the distinction, and for others analysing the concept in these terms, see Mitchell, ‘Artificiality in Failure of Consideration’ (n 28) 198; A Sanders, ‘Absence of Basis: A German Perspective’ in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart 2013) 215.

<sup>33</sup> *Fibrosa* (n 12) 65. See, further, *Roxborough* (n 27) [16] (Gleeson CJ, Gaudron and Hayne JJ); *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2011] Ch 23 [44] (Toulson LJ).

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The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail.

And, in an influential passage, Lord President Inglis claimed that:<sup>34</sup>

if money is advanced by one party to a mutual contract, on the condition ... that something shall be afterwards paid or performed by the other party, and the latter party fails ..., the former is entitled to repayment of his advance, on the ground of failure of [condition].

Almost all commentators, when pushed to explain the foundation of the doctrine, speak in terms of conditionality. For instance, Birks claimed that liability is justified because:<sup>35</sup>

the plaintiff specified the condition for retaining the enrichment; the condition has failed; in the events which have happened he did not mean the defendant to have the benefit.

In a similar manner, the new edition of *Goff and Jones* says that:<sup>36</sup>

The core underlying idea of failure of [condition] is simple: a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit.

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<sup>34</sup> *Watson & Co v Shankland* (1871) 10 M 142 (IH) 152 (affirmed 11 M (HL) 51). As an example of the influence of this dictum, see *Fibrosa* (n 12) 54 (Lord Atkin): 'a dictum of great weight'. Although Lord President Inglis does here appear to suppose that such cases are only contractual, the passage is important in its reliance on the concept of a condition in explaining liability.

<sup>35</sup> P Birks, 'Restitution and the Freedom of Contract' (1983) 36 CLP 141, 158.

<sup>36</sup> C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) para 12.01.

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Such formulations are almost universal in the academic treatments of failure of condition.<sup>37</sup>

This analysis provides the conceptual abstraction required for an intelligible liability principle. If the transfer of a benefit is conditional, then on failure of the condition the transferor may recover the benefit. The failure of counter-performance is, on this analysis, simply one instance of failure of condition; it is not placed in a separate category from conditions with other facts as their object. The core aim of this thesis is to understand the nature of this principle: what it means for transfers to be conditional, why the law recognises such conditions, and how broadly the principle can be applied.

Before turning to a few detailed questions concerning failure of condition, two prefatory remarks are worth making. First, these reflections prompt me to label the doctrine in question ‘failure of condition’.<sup>38</sup> The traditional language of failure of consideration has proved problematic in the false parallels it draws with the law of contract.<sup>39</sup> Most commentators have accepted that the old language should

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<sup>37</sup> P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 219; PA Butler, ‘Mistaken Payments, Change of Position and Restitution’ in PD Finn (ed), *Essays on Restitution* (Law Book Co 1990) 87 ff 121; R Chambers, *Resulting Trusts* (OUP 1997) 143; S Smith, ‘Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement’ (1999) 115 LQR 245, 249; Krebs, *Restitution at the Crossroads: A Comparative Study* (n 15) 299; R Grantham, ‘Restitutionary Recovery *Ex Aequo et Bono*’ [2002] Singapore Journal of Legal Studies 388, 390; M McInnes, ‘Enrichment Revisited’ in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (2004) 210; G Virgo, *The Principles of the Law of Restitution* (2nd, OUP 2006) 304; F Maher, ‘A New Conception of Failure of Basis’ [2004] RLR 96, 100; A Burrows, *The Law of Restitution* (3rd, OUP 2011) 319; A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 86; Sanders (n 32) 215.

<sup>38</sup> I have discussed this at greater length: F Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (2011) 127 LQR 610, 617–20; F Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 CLJ 414, 416.

<sup>39</sup> The point is often made in the literature. See, for instance, Mitchell, Mitchell and Watterson (n 36) paras 12.12–12.13.

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be abandoned. Many have suggested the term failure of *basis* as a replacement.<sup>40</sup> That terminology is sound enough; nevertheless, failure of condition remains the clearest expression of the conceptual foundations of the doctrine in question.<sup>41</sup> To maintain consistency, I will – when I am sure that they refer to failure of condition – amend references to ‘failure of consideration’ and ‘failure of basis’ in judges’ and commentators’ quotes accordingly.<sup>42</sup>

Secondly, failure of condition is generally considered to be part of the law of unjust enrichment.<sup>43</sup> In this thesis, the proper classification of the doctrine – that is, whether failure of condition is part of the law of unjust enrichment, the law of contract, or some other body of law – is not examined. Engaging with this kind of classificatory question would require a stance to be taken on the best system of classification, a substantial inquiry in itself. There is not space for that inquiry here. Nevertheless, in its conceptual and normative work, this thesis may assist and feed into classificatory projects.

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<sup>40</sup> W Swadling, ‘Restitution for No Consideration’ [1994] RLR 73, 79; P Birks, ‘In Defence of Free Acceptance’ in A Burrows (ed), *Essays on the Law of Restitution* (OUP 1991) 114; G McMeel, *The Modern Law of Restitution* (Blackstone Press 2000) 173; P Birks, ‘Mistakes of Law’ [2000] CLP 205, 228 and 234; L Smith, ‘Restitution: The Heart of Corrective Justice’ (2001) 79 Texas Law Review 2115, 2143; Krebs, *Restitution at the Crossroads: A Comparative Study* (n 15) 161–62; K Barker, ‘Coping With Failure – Re-Appraising Pre-Contractual Remuneration’ (2003) 19 JCL 105, 114; P Birks, *Unjust Enrichment* (2nd, OUP 2005) 119; Edelman and Bant (n 3) 250–52; J Taylor, ‘“Total” Failure of Consideration and *Roxborough v Rothmans*’ (2004) 120 LQR 30, 31; Maher, ‘A New Conception of Failure of Basis’ (n 37) 87–100; Maher, ‘Failure of Basis’ (n 4) 15–6; T Baloch, *Unjust Enrichment and Contract* (Hart 2009) 93–4; Mitchell, Mitchell and Watterson (n 36) para 12.10; Sanders (n 32) 215. Further, see *Roxborough* (n 27) [104] (Gummow J).

<sup>41</sup> For some doctrinal support, see *Anderson v McPherson (No 2)* [2012] WASC 19 [235] (Edelman J).

<sup>42</sup> In some cases, it will be unclear whether the word ‘consideration’ is used in the contractual sense. In such cases, I will not tamper with the text.

<sup>43</sup> This classification is disputed, as we shall see below – in particular at 4.4.2.1.

### 1.2.3 Failure of Condition in Detail

#### 1.2.3.1 *Total* Failure of Condition?

It is well established that the condition must totally fail; a ‘partial failure of [condition] gives rise to no claim for recovery’.<sup>44</sup> The House of Lords has upheld this requirement relatively recently.<sup>45</sup> The meaning of the rule is shrouded in controversy.<sup>46</sup> For the most part, this controversy need not concern us in this thesis. However, in Chapters 6 and 7 some of my claims will depend upon my own interpretation of this rule.<sup>47</sup> I should briefly state, therefore, my own interpretation of the rule – and acknowledge that it is controversial.

I have argued that the total failure rule should be understood in these terms:<sup>48</sup>

*The Total Failure Rule:* When C transfers an enrichment to D subject to a condition, C can only recover from D if a substantial part of the condition is unsatisfied.

This interpretation is – as an academic matter – unorthodox. It is difficult to find any support amongst academics for the view. In that respect, it is a deeply controversial interpretation. Nevertheless, my interpretation has two merits when compared with its competitors. Every other interpretation of the rule cannot explain large

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<sup>44</sup> *Fibrosa* (n 12) 77 (Lord Porter).

<sup>45</sup> *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 590 (Lord Goff); see also *Goss v Chilcott* [1996] AC 788 (PC) 797 (Lord Goff).

<sup>46</sup> See F Reynolds, ‘Warranty, Condition and Fundamental Term’ (1963) 79 LQR 534, 551; E McKendrick, ‘Total Failure of Consideration and Counter-Restitution: Two Issues or One?’ in P Birks (ed), *Laundering and Tracing* (OUP 1995); P Birks, ‘Failure of Consideration’ in F Rose (ed), *Consensus Ad Idem: Essays in the Law of Contract in Honour of G Treitel* (Sweet & Maxwell 1996).

<sup>47</sup> See 7.2.2.4 and 7.2.3.2.

<sup>48</sup> See Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 38), in particular 422-432.

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numbers of cases (or must accuse judges of ‘a covert manipulation of’ the rule).<sup>49</sup> My interpretation fits the vast majority of cases and need not accuse judges of bad faith.<sup>50</sup> Furthermore, every other interpretation renders the total failure rule either irrational<sup>51</sup> or an epiphenomenon.<sup>52</sup> My interpretation demonstrates how the total failure rule is integral to the liability regime failure of condition instantiates.<sup>53</sup>

Therefore, although I concede that my interpretation is unorthodox, it is the best way to understand the law. I will assume in the course of this thesis that the interpretation is correct.

### 1.2.3.2 The Range of Conditions

There is no conceptual limit to the range of facts upon which a transfer can depend.<sup>54</sup> Corbin, analysing conditions in the law of contracts, gives a helpfully broad definition. He argues that a transfer can be conditional upon:<sup>55</sup>

an act of one of the two ... parties [to the transfer], an act of a third party, or any other fact of our physical world. It may be a performance that has been promised or a fact as to which there is no promise.

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<sup>49</sup> See Virgo, *The Principles of the Law of Restitution* (n 37) 320, 251; Burrows, *The Law of Restitution* (n 37) 324.

<sup>50</sup> I suggest that the only cases which seem to be inconsistent are *Van der Garde* (n 22) and *John Grimes Partnership Ltd v Gubbins* (County Court (Exeter), 16th March 2012); see Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 38) 429.

<sup>51</sup> e.g. K Barker, ‘Restitution of Passenger Fare: *The Mikhail Lermontov*’ [1993] LMCLQ 291, 293 and Maher, ‘A New Conception of Failure of Basis’ (n 37) 105–06.

<sup>52</sup> Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 38) 420–21.

<sup>53</sup> Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 38) 429–31.

<sup>54</sup> For attempts to delimit the conditions, see e.g. Birks, *An Introduction to the Law of Restitution* (n 37) 223–26; Baloch, *Unjust Enrichment and Contract* (n 40) 142–46; Maher, ‘Failure of Basis’ (n 4) 20.

<sup>55</sup> AL Corbin, ‘Conditions in the Law of Contract’ (1918–19) 28 Yale Law Journal 739, 743. This analysis is endorsed by Baloch, *Unjust Enrichment and Contract* (n 40) 142.

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I will here give a few examples of conditions recognised in law. My analysis will be far from comprehensive. However, it aims to give some flavour of the nature of the cases to which the doctrine applies.

The most widely recognised condition in law is counter-performance.<sup>56</sup> It is a question of construction quite what constitutes performance in an individual case. For instance, close attention to the terms of the transaction will distinguish an obligation simply to deliver goods<sup>57</sup> from an obligation to manufacture and deliver goods.<sup>58</sup> Despite the tendency to align counter-performance with *contractual* counter-performance, counter-performance can be *extra-contractual*. This is clearest where there are dealings between two parties who do not have the power to contract: the transfers are nevertheless made in the expectation of some kind of reciprocation. For instance, in *Haugesund Kommune* the claimant paid the defendant money under a swap transaction. The public authority never had the *vires* to enter into the swap; so, the contract was void *ab initio*. The claimant was awarded restitution of the money paid.<sup>59</sup> The Court of Appeal was clear that the reason for restitution was failure of condition.<sup>60</sup> The failure of condition arose because of a failure of expected counter-performance – even though the claimant and defendant were never parties to a contract.

Beyond performance, a number of distinct possibilities have been recognised.

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<sup>56</sup> *Fibrosa* (n 12) 48 (Viscount Simon LC).

<sup>57</sup> *Fibrosa* (n 12).

<sup>58</sup> *Stocznia Gdanska SA v Latvian Shipping Co* (n 45); *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 (HL) 1134 (Viscount Dilhorne): ‘to build, launch, equip and complete’ a vessel and ‘to deliver and sell her.’

<sup>59</sup> *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] QB 549.

<sup>60</sup> e.g. *Haugesund Kommune* (n 59) [110] (Aikens LJ).

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For instance, a transfer can be made for a purpose; when the purpose fails restitution is ordered.<sup>61</sup> Here, the fulfilment of the purpose forms the condition of the transfer. In *Nockels v Crosby* a scheme for establishing a tontine was put forth.<sup>62</sup> Money was paid in but before any interest was paid out the directors decided to abandon the project. The subscribers sought restitution because, they argued, '[t]he consideration upon which it was paid failed'.<sup>63</sup> The question in the case was whether the directors could deduct the expenses they had incurred.<sup>64</sup> The directors' deduction was rejected. However, restitution was granted – and the best understanding of the case is that the claimant's contention was upheld. In a similar case, Patteson J, delivering the judgment of the Exchequer Chamber, argued that:<sup>65</sup>

the plaintiff, having paid his money for shares in a concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a [condition] which has failed[.]

A transfer can also be conditional upon the creation of legal rights<sup>66</sup> or the imposition of and release from legal obligations.<sup>67</sup> This possibility was recognised by

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<sup>61</sup> See *Martin v Andrews* (1856) 7 El & Bl 1, 4; 119 ER 1148, 1149 (Lord Campbell).

<sup>62</sup> *Nockels v Crosby* (1865) 3 B & C 814, 107 ER 935 (KB). Named after Lorenzo de Tonti, a Neapolitan banker, a tontine is an investment plan closely resembling an annuity. The twist is that the interest payment increases as annuitants die.

<sup>63</sup> *Nockels v Crosby* (1865) 3 B & C 814, 818; 107 ER 935, 937 (KB).

<sup>64</sup> Now, the question would probably be: 'do the directors have a change of position defence?'

<sup>65</sup> *Ashpitel v Sercombe* (1865) 5 Exch 147, 162; 155 ER 63, 70 (Exch).

<sup>66</sup> *Stokes v Twitchen* (1818) 8 Taunt 492, 129 ER 475 (Court of Common Pleas) as interpreted in *Whincup v Hughes* (1870) LR 6 CP 78 (Court of Common Pleas) 82 (Bovill CJ); *Knowles v Bovill* (1870) 22 LT 70; *Rowland v Divall* [1923] 2 KB 500 (CA); *Fibrosa* (n 12) 56 (Lord Russell) and 82 (Lord Roche); *Guinness Mahon Co Ltd v Chelsea and Kensington Royal London Borough Council* [1999] QB 215 (CA); *Haugesund Kommune* (n 59); *Van der Garde* (n 22).

<sup>67</sup> *Air Canada v British Columbia* (1989) 1 SCR 1161 (SCC) [13] (Wilson J); *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353, 381–3 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

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Keener in 1897. He said that ‘[a] failure of [condition] ... may consist in a failure to obtain contract rights in exchange for the money paid’.<sup>68</sup> Although the category was not discussed in detail for a long time, it is increasingly widely recognised.<sup>69</sup>

A related but distinct set of cases is where a transfer is conditional upon the transfer of a legal right. For instance, in *Rowland v Divall* the claimant paid money to the defendant towards the purchase of a car.<sup>70</sup> The defendant transferred possession in the car to the claimant, but he did not have the best title to it. After four months, the car was repossessed. The Court of Appeal awarded the claimant restitution because there was a ‘total failure of [condition]’.<sup>71</sup> The condition of the claimant’s payment was that the defendant would transfer best title to the car.<sup>72</sup> When the defendant failed to do so, there was a failure of condition.<sup>73</sup>

### 1.2.3.3 Multiple Conditions

The assumption that only a single condition attaches to transfers is rarely voiced. Nevertheless, one can infer the assumption from the fact that almost no account

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<sup>68</sup> WA Keener, *A Treatise on the Law of Quasi-Contracts* (Baker, Voorhis 1893) 112. See, further, the discussion of *Bond v Aitkin* 6 Watts & Serg 165 (Supreme Court of Pennsylvania 1843) 327.

<sup>69</sup> B Kremer, ‘Recovering Money Paid Under Void Contracts: “Absence of Consideration” and Failure of Consideration’ (2001) 17 JCL 37, 43–5; Maher, ‘Failure of Basis’ (n 4) (Chapter 2); J Edelman, ‘Liability in Unjust Enrichment where a Contract Fails to Materialise’ in A Burrows and E Peel (eds), *Contract Formation and Parties* (OUP 2010) 167–68; Mitchell, ‘Artificiality in Failure of Consideration’ (n 28) 200–08.

<sup>70</sup> *Rowland v Divall* (n 66).

<sup>71</sup> *Rowland v Divall* (n 66) 503 (Bankes LJ), 506 (Scrutton LJ), 506 (Atkin LJ).

<sup>72</sup> Instead of, for instance, the title obtained by taking possession of the car. Similar reasoning lies behind *Newsome v Graham* (1829) 10 B & C 234, 109 ER 437 (KB). For treatment of *Newsome* as an instance of failure of condition, see SM Leake, *The Elements of the Law of Contracts* (Stevens & Sons 1867) 61.

<sup>73</sup> *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.

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has ever referred to the possibility of multiple conditions.<sup>74</sup> I have argued that we have good reason to accept that multiple conditions can attach to a transfer.<sup>75</sup> This recognition allows us to understand a number of decisions which have proved controversial. The clearest example comes from the ‘closed’ swaps litigation. In *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal LBC*, a bank entered into a swap transaction with a local authority which was void *ab initio*.<sup>76</sup> The legal status of the contract was not established till the transaction had run its course.<sup>77</sup> The swap was ‘closed’, meaning that full performance had been rendered. If the (only) condition of the transfer was that the defendant would perform its obligations, it is clear that there was no failure of condition. Nevertheless, the Court of Appeal granted restitution for a failure of condition. The only explanation for this result is that the Court of Appeal accepted an argument made at first instance in *Westdeutsche*, that ‘the bank bargained for ... payments which would discharge a legal obligation’.<sup>78</sup> As Morritt LJ said: ‘the [condition] for each swap was the benefit of the contractual obligation’.<sup>79</sup> Suppose instead that the swaps contract had been legally valid. If the bank had performed its part of the bargain, but the public authority

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<sup>74</sup> Compare Birks, *An Introduction to the Law of Restitution* (n 37) 219: ‘the *conditions* on which [the work] was done.’ (emphasis added); Mitchell, ‘Artificiality in Failure of Consideration’ (n 28) 209–10; C Mitchell, ‘Unjust Enrichment’ in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) paras 18.87–18.88.

<sup>75</sup> For fuller argument to this effect, see Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 38) 433–34.

<sup>76</sup> *Guinness Mahon* (n 66).

<sup>77</sup> All swaps were effected by 22 September 1987, and the swap transactions were not found to be ultra vires until *Hazell v Hammersmith & Fulham London Borough Council* [1990] 2 QB 697 (QB), upheld by the House of Lords in *Hazell v Hammersmith & Fulham London Borough Council* [1992] 2 AC 1 (HL).

<sup>78</sup> Submission of Jonathan Sumption QC, cited *Westdeutsche* (DC) (n 15) 928 (Hobhouse J).

<sup>79</sup> *Guinness Mahon* (n 66) 227 (Morritt LJ) (emphasis removed). See, also, *Westdeutsche* (HL) (n 16) 710 (Lord Browne-Wilkinson).

made no payments, there would obviously be a failure of condition for the failure of the contractual reciprocation.<sup>80</sup> Given that the performance of the swap was a condition of the transfer, too, it follows that at least two conditions attached to the transfer: that the performance would be legally due and that the performance would be rendered.

This doctrinal claim is more contentious than the others I have made. It is important as it helps to clarify the nature and breadth of the doctrine under consideration. This is particularly important when it comes to establishing the conceptual foundations of the doctrine, the topic of the next Chapter.<sup>81</sup> But the bulk of my arguments can be accepted even if this claim is rejected.

### 1.2.3.4 The Conditions are Objective

It is almost universally accepted that a claimant cannot unilaterally impose a condition upon a transfer merely by privately qualifying her intention.<sup>82</sup> This proposition has been expressed in a number of ways: that the condition must be shared, agreed, assessed objectively, or that the claimant must not take the risk of the condition failing. I will later suggest that this phenomenon is crucial to our understanding of the nature of liability. For that reason, it is worth dwelling on the point at some length.

The first of these expressions claims that the parties must share the condition attaching to a transfer.<sup>83</sup> For instance, in *Burgess v Rawnsley*, a man and a woman

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<sup>80</sup> *Giles v Edwards* (n 11).

<sup>81</sup> See, in particular, 2.2.2.

<sup>82</sup> The only writer who thinks otherwise appears to be Chambers, *Resulting Trusts* (n 37) 170.

<sup>83</sup> *Morley v Attenborough* (1849) 3 Ex 500, 514; 154 ER 943, 949 (Parke B): ‘the understanding of both parties’; *Gilbert & Partners v Knight* [1968] 2 All ER 248 (CA) (claim denied because C did

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bought a house together.<sup>84</sup> The man intended eventually to marry the woman; the woman had no such intention. The Court of Appeal held, by a majority, that there was no failure of condition in such circumstances, and Browne LJ claimed that:<sup>85</sup>

it seems ... impossible to say that there has been a total failure of [condition] ... where there is a failure of [a] purpose ... which [one party] did not communicate to the other party and which the other did not share.

By implication, a purely private condition, unshared with the other party, could never suffice for a failure of condition. Academics have endorsed this claim.<sup>86</sup> For instance, Benjamin claimed that ‘there is no failure of [condition] ... where a state of things fails which the buyer alone contemplated as his motive in contracting’.<sup>87</sup> Similarly, Virgo claims that:<sup>88</sup>

it is not sufficient that the claimant simply imposed this condition in his or her own mind, since the condition for the transfer of the benefit must have been communicated to the defendant.

The second way the claim is formulated is similar to the first. It is the idea that the condition in question must be agreed upon by the parties. For instance, Mee

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not ‘expressly tell’ D the condition of the work); *Muschinski v Dodds* (1985) 160 CLR 583, 620 (Deane J): ‘joint relationship or endeavour’; *R (on the application of Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd’s Rep 418 [14](Lightman J); *Sharma* (n 33) [26] (Toulson LJ) ‘the parties’ expectations’ (emphasis added); *Benedetti* (SC) (n 15) [86] (Lord Reed) ‘in the knowledge’. Further, see Corbin, *Corbin on Contracts* (n 29) §1257: ‘a purpose that the other party had reason to know’.

<sup>84</sup> *Burgess v Rawnsley* [1975] Ch 429 (CA).

<sup>85</sup> *Burgess* (n 84) 442. See also 445 (Sir John Pennycuick).

<sup>86</sup> Grantham (n 37) 390 (‘understood by the defendant’).

<sup>87</sup> JP Benjamin and WCA Ker, *A Treatise on the Law of Sale of Personal Property with References to the French code and Civil Law* (6th, Sweet & Maxwell 1920) 483.

<sup>88</sup> Virgo, *The Principles of the Law of Restitution* (n 37) 307. Further, 306 where the requirement of communication is referred to as being ‘at the very least’.

asserts that:<sup>89</sup>

for a state of affairs to constitute a '[condition]' in the relevant sense, that state of affairs must be agreed upon by both parties as constituting the legal basis of their actions.

The third way the bilaterality of the conditions is expressed is by claiming that the condition attaching to a transfer must be determined objectively. For example, *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* arose out of the class action brought by tobacco retailers against tobacco wholesalers after the High Court of Australia's decision in *Roxborough*.<sup>90</sup> The wholesaler argued that the inquiry into the condition of the transfer was fact sensitive, as different retailers and wholesalers could have contemplated different conditions. The Court of Appeal rejected this submission, holding that the inquiry is into the 'common, objectively discernible [condition] of the earlier transaction.'<sup>91</sup> A number of academics agree with this formulation. For instance, Edelman, endorsing *Fostif*, is explicit that that 'the [condition] must be determined objectively'.<sup>92</sup> In his last work, Birks agreed. He said that 'there is no need to communicate [the condition] to a recipient to whom it is

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<sup>89</sup> J Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (Hart 1999) 257–58. See, further, E O'Dell, 'Bricks and Stones and the Structure of the Law of Restitution' (1998) 20 *Dublin University Law Journal* 101, 139–40; Birks, *Unjust Enrichment* (n 40) 144; S Meier, 'No Basis' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 253; JE Stannard, *Delay in the Performance of Contractual Obligations* (OUP 2007) 12.13, fn 39; HW Tang, 'An Unjust Enrichment Claim for the Mistaken Improver of Land' [2011] *Conv* 8, 24; Mitchell, Mitchell and Watterson (n 36) paras 13–02.

<sup>90</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 218 ALR 166 (NSWCA); *Roxborough* (n 27).

<sup>91</sup> *Fostif* (n 90) 212 (Mason P, with whom Sheller JA and Hodgson JA agreed).

<sup>92</sup> Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialise' (n 69) 159. See, also, Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialise' (n 69) 165. Further, Edelman and Bant (n 3) 246–47; Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (n 38) 620.

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*or appears to be* manifest.<sup>93</sup> In a similar, but distinct, fashion, Stevens has claimed that:<sup>94</sup>

For [failure of condition] to be made out it is necessary for the conditionality of the transfer to be objectively apparent to and shared by the recipient.

The requirement of objectivity is most sensibly understood to refer to a perspective from which to interpret the transfer. An objective viewpoint, in this sense, is detached from an individual party. The claimant's secret conditions are not discernible from the detached viewpoint; thus, they will not suffice.

The final way in which courts and commentators express the idea that the condition cannot be unilaterally imposed is by referring to a concept of risk. For example, in *DMG*, Lord Hoffmann considered the limits of a claimant's ability to recover for a mistake, and said that '[if] the person who made the payment took the risk that he might be wrong..., then he cannot recover the money.'<sup>95</sup> This analysis can be modified so as to apply to failure of condition cases. Thus, one might say that a claimant takes the risk that she will not recover if she does not share the condition. For instance, Maher asserts that:<sup>96</sup>

the *requirement* is that the claimant did not take the risk of the [condition] failing ... To have restitution, the claimant must not knowingly

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<sup>93</sup> Birks, *Unjust Enrichment* (n 40) 142 (emphasis added). Further, Birks, 'In Defence of Free Acceptance' (n 40) 115, 123; Meier (n 89) 353.

<sup>94</sup> R Stevens, 'Why Do Agents Drop Out?' [2005] LMCLQ 101, 117. Stevens is explicit that the objectivity requirement is cumulative upon the shared condition requirement: '[m]ere knowledge of the condition under which the payment has been made is insufficient.'

<sup>95</sup> *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2006] 1 AC 558 [26].

<sup>96</sup> Maher, 'Failure of Basis' (n 4) 39. Compare Chambers, *Resulting Trusts* (n 37) 169, who suggests that the requirement of a shared understanding may be an evidentiary caution against claimants inventing conditions *ex post*.

take the risk that the [condition] for his transfer does not exist or will come into existence[.]

Although this idea is not always clearly spelt out, it is implicit in the thinking of other theorists as well.<sup>97</sup>

We need not adjudicate upon these formulations here as the four formulations are all *ad idem* on the key conceptual aspect of the condition. A condition cannot be unilaterally imposed. For ease of reference, so long as we have no need to discriminate between these views, I will refer to the conditions as ‘objective’.<sup>98</sup>

## 1.3 A Basic Overview of the Thesis

In this section I will give an overview of the claims of the thesis – which are both critical and constructive in their nature. Of course, one might accept my criticisms without endorsing my proposed solutions. In the body of the thesis, I have tried to separate out these claims as clearly as possible. For instance, Chapter 4 is unremittingly critical; Chapter 5 contains only constructive claims. Nevertheless, it is inevitable that these claims are at times mixed together.

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<sup>97</sup> See 4.4.2.2 for an analysis of the views.

<sup>98</sup> In Chapter 5, I argue that the objective condition rule is the sensible one for the law to adopt, if it has not done so already.

### 1.3.1 Orthodoxy and its Problems

#### 1.3.1.1 Failure of Condition

There has never been any sustained theoretical analysis of failure of condition.<sup>99</sup> What analysis there has been often begins *in medias res*, with an analysis of whether failure of condition is part of the law of unjust enrichment or contract.<sup>100</sup> That question is not dealt with in detail in this thesis. Instead, my primary concern is to understand the doctrine itself: only when that work is done can these further classifications be made.<sup>101</sup> There are a number of theoretical orthodoxies embedded in scholars' writings on the topic. The normal justification offered for the doctrine is in terms of qualified intention.<sup>102</sup> That is, in general terms, the correct analysis. However, there are a number of questions it leaves unanswered.<sup>103</sup> These problems are detailed in Chapter 4; my solutions to those problems are detailed in Chapter 5.

The response to a failure of condition is widely assumed to be restitution. But there is an important mistake in the orthodox rationale for that response. It is often assumed that the link between the failure of condition and the response of restitution is conceptual. That is, it is suggested that no other response would be *coherent*,

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<sup>99</sup> However, see recently D Sheehan, 'Mistake, Failure of Consideration and the Planning Theory of Intention' (Unpublished Paper, SLS Annual Conference, University of Edinburgh, 2013).

<sup>100</sup> See, in particular, 3.4.1.

<sup>101</sup> To take a stand on the classification question – whether failure of condition belongs to the law of contract or the law of unjust enrichment – would require more analysis of what these categories concern. This would take more space than we have here: see 4.4.2.1.

<sup>102</sup> See 4.2.2.1.

<sup>103</sup> See 4.2.2.

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much less justifiable.<sup>104</sup> This idea is incorrect.<sup>105</sup> It means that there is a large gap in the theoretical analysis of failure of condition: there is essentially no explanation of why restitution is an appropriate response to the event. This thesis develops an answer to that question.<sup>106</sup>

A final theoretical dogma concerns the justification of the defendant's liability to make restitution.<sup>107</sup> The biggest mistake that is commonly made is to think that the defendant's liability does not demand a justification. For instance, Birks thought that there was not 'any convincing argument' against the liability.<sup>108</sup> This claim is difficult to accept: the defendant's liability to make restitution does require justification.<sup>109</sup> This thesis develops a novel justification for the defendant's liability in the context of failure of condition.<sup>110</sup> The argument shows that liability in failure of condition can be justified. But the justification comes at a price. If the argument is accepted, a new puzzle emerges. The supposedly 'core case' of mistake suddenly appears anomalous – and seems to need another form of justification.

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<sup>104</sup> P Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1997) 225; M McInnes, 'The Measure of Restitution' (2002) 52 *University of Toronto Law Journal* 163, 181; McInnes, 'Enrichment Revisited' (n 37) 198.

<sup>105</sup> My claim is foreshadowed in S Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009).

<sup>106</sup> See 5.3.

<sup>107</sup> In this field, the language of duties and liabilities is hotly contested. My stance on this question is explained in greater detail at 3.4.3. I will introduce new language with which to discuss these issues at 4.1.

<sup>108</sup> P Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 *OUCLJ* 1, 8.

<sup>109</sup> For the full argument, see 4.2.3.3.

<sup>110</sup> See 5.2.4.

### 1.3.1.2 Common Mistake, Frustration and Termination for Breach

As I explain in Chapter 7, these doctrines are widely accepted to bear *some* relation to one another. I accept the orthodox view that common mistake is the same doctrine as frustration, distinguished only by the time at which the event in question occurs.<sup>111</sup> That is, in the case of common mistake, the event precedes contractual formation; in the case of frustration, it occurs after contract formation. I further accept the claim – which, although it is not orthodox, is widely accepted – that some cases where a claimant may terminate her contract following the defendant’s breach are explicable on the same basis as frustration and common mistake.<sup>112</sup>

There was for some time a theory that these doctrines could be explained using the doctrine of failure of condition. That theory no longer has many, if any, adherents. However, as I explain in Chapter 7, the usual reason for rejecting the theory is weak. It rests upon a doctrinal confusion: that failure of condition only concerns failure of *performance* and, more precisely, that it only concerns cases where there has been *no* performance. This prompts me to reassess the theoretical claim in the light of the clarifications of this thesis.

## 1.3.2 My Constructive Claims

### 1.3.2.1 Failure of Condition: Conceptual Claims

Although failure of condition is far from new, the doctrine has not received a great deal of conceptual analysis. Chapter 2 addresses this deficiency, examining the con-

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<sup>111</sup> See 6.2.3.

<sup>112</sup> See 6.3.2.4. I distinguish, for these purposes, termination *for* breach from termination *following* breach. This distinction is also not unorthodox, though it has not been expressed in these terms before.

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ceptual foundations of the doctrine in detail. Seizing first upon the doctrine's *conditional* nature, the Chapter examines in greater depth the nature of a conditional relationship. This allows me to express the doctrine of failure of condition in simple, abstract terms.<sup>113</sup> A conditional relationship is of the structure: 'if C,  $\phi$ .' In this formulation, C is the condition of  $\phi$ . In an orthodox failure of condition case, this means that an enrichment ( $\phi$ ) is transferred conditionally upon some event (C).

This basic analysis does not tell us the precise relationship between the enrichment and the condition. There are a number of distinct ways in which an event can be a condition of some other event. A condition can be necessary, sufficient or necessary and sufficient. Given the doctrinal clarifications of 1.2, we can – when the terms are explained – see that the condition of failure of condition cannot be a sufficient condition.<sup>114</sup> It follows that it cannot be a necessary *and* sufficient condition. Instead, it is shown to be a necessary condition.

Another important conceptual question is the structure of a conditional intention. This is important to analyse, on the model of the law proposed here, as the condition of the transfer arises because the transferor's intention to make the transfer is itself conditional.<sup>115</sup> It is important to separate out a number of ways in which something might be said to be a 'condition' of something else. First, we must distinguish between a condition internal to an intention – where one has the intention to do some act only if a condition occurs – and a condition external to an intention – where one *forms* the intention to do some act only if a condition occurs.

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<sup>113</sup> See 2.2.1.

<sup>114</sup> That is because there is more than one way in which restitution, the cancellation of the enrichment, can be achieved.

<sup>115</sup> There has been almost no analysis of conditional intentions within the failure of condition scholarship; there is, though, some analysis within criminal law theory and general philosophy of action.

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The former is at the heart of failure of condition – that is, a condition embedded within an intention. The latter is not, I argue, sensibly referred to as a condition of an intention.<sup>116</sup>

We must also distinguish conditional intentions from unconditional intentions which are nevertheless defeasible. I highlight two particular ways in which such an intention can be defeated: by a background assumption being undermined<sup>117</sup> and by an override.<sup>118</sup> If I intend to take my umbrella with me when I go to the shops, and my umbrella has been stolen, I will – when I find out that it has been stolen – no longer intend to carry the umbrella. This must be distinguished from a case where I intend to carry the umbrella only if it has not been stolen. There, my intention is *ab initio* conditional.

An override is where an agent intends some action but that intention is defeated by reasons not to pursue the course of action to which she was initially committed, or in favour of a distinct, contradictory action. Again, the agent's intention to perform the action was not internally conditioned upon this event, so we should distinguish these cases from conditional intention cases. Failure of condition, I suggest, principally concerns conditional intentions – so these distinct concepts must generally be kept separate.

Finally, the limits of internal conditions must be clarified.<sup>119</sup> The key point is that a condition might be explicit or implicit. An explicit condition is one where there is no doubt that an agent has conditioned her intention upon the event in question.

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<sup>116</sup> See 2.3.2.

<sup>117</sup> See 2.4.2.2.

<sup>118</sup> See 2.4.2.3.

<sup>119</sup> See 2.3.4 and 2.4.2.

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It might be clearest where the agent actually states: ‘I am giving you this £10 on condition that you perform the contract.’ However, an unarticulated condition is still explicit if the agent formulates it in her own mind. An implicit condition is one where the agent does not formulate the qualification upon her intention, but where her intention is best understood as conditional notwithstanding. Although the possibility of such implicit conditions is clearly – and rightly – recognised in the law, difficulties can arise in an individual case when one has to decide whether an intention *is* implicitly conditional. The particular difficulty arises because although an agent’s intention to perform some action can be cancelled by the failure of a condition, it might also be defeated in a similar – but distinct – manner by a background assumption of sufficient importance being undermined.<sup>120</sup>

#### 1.3.2.2 Failure of Condition: Normative Claims

Chapters 3-5 introduce and examine the normative questions that failure of condition poses. Chapter 3 first tries to clarify the nature of the questions we might ask about the doctrine. There are essentially three facts that need to be justified: why (1) the particular claimant has (2) against the particular defendant; (3) a claim for restitution. The first and second questions are labeled ‘the bilaterality problem’.<sup>121</sup> The last question aims to explain why there are good reasons for the particular remedy the law has chosen – in particular, for this remedy as opposed to any others which might be thought to be appropriate.<sup>122</sup> So that we might refer to these questions without begging important questions, the claimant’s ability to make a claim against

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<sup>120</sup> See 2.3.4.

<sup>121</sup> For full discussion, see 3.2.

<sup>122</sup> For full discussion, see 3.3.

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the defendant is called an ‘endowment’ and the defendant’s ultimate duty to make restitution to the claimant is called her ‘responsibility’. I introduce and defend this language at 4.1.

Chapter 4 details the current answers to these questions which are to be found in the literature – and the problems with those answers. It suggests that there are deficiencies in the answers to all three questions. Importantly, although the orthodox analysis is correct to locate the justification of the claimant’s endowment in her conditional intention, it does not specify with sufficient precision why a conditional intention deserves the attention of the law. Furthermore, it does not explain why the law’s test of liability is objective.<sup>123</sup> That the defendant’s responsibility demands a justification is itself a contested proposition – and some time must be spent clarifying precisely why it does.<sup>124</sup> This allows us to uncover a premise underlying a great deal of writing on failure of condition – that the defendant is not harmed by making restitution.<sup>125</sup> The premise has not – as of yet – been adequately defended. This leaves the defendant’s responsibility unjustified in the current literature. The remedy of restitution is also widely assumed not to require a justification. It is generally understood to be required as a conceptual matter, thus evading normative analysis.<sup>126</sup> After showing that idea to be mistaken, it becomes clear that restitution needs a new defence if it is to be justified. Finally, a phenomenon which demands an explanation is the fact that the conditions of failure of condition are established

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<sup>123</sup> See 4.2.2.2.

<sup>124</sup> See 4.2.3.

<sup>125</sup> See 4.2.3.2.

<sup>126</sup> See 4.3.2.

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objectively.<sup>127</sup> As we have just seen, this gives rise to some difficulty in the orthodox explanation of the claimant's endowment – but the puzzle is more systemic than this. When failure of condition is placed alongside recovery of transfers made under a unilateral mistake, the position seems entirely anomalous. Chapter 4 finishes by examining the explanations commentators have given for this feature – suggesting, again, that none of the explanations is satisfactory.<sup>128</sup>

Chapter 5 attempts to solve these difficulties. The first challenge is to explain the objectivity of failure of condition.<sup>129</sup> I suggest three independent rationales for the objectivity requirement: an institutional rationale, that the objectivity ensures harmony between failure of condition and the law of contract;<sup>130</sup> a reliance rationale, that the objectivity ensures that defendants and third parties can be secure in their reliance on the transfer;<sup>131</sup> and a new, defendant-sided rationale, that the objectivity allows the responsibility of the defendant to be justified.<sup>132</sup> If these arguments are successful, they will simultaneously justify the claimant's endowment and the defendant's responsibility.

However, these arguments will not show why the claim should be *for restitution*. That is the final major puzzle of this Chapter.<sup>133</sup> One might instead have a remedy which aims to satisfy the condition of the transfer. I argue that this would normally be illegitimate. Restitution is a justified response as it ensures that a claimant is not

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<sup>127</sup> See 1.2.3.4 and 4.4.

<sup>128</sup> See 4.4.2.

<sup>129</sup> See 5.2.

<sup>130</sup> See 5.2.2.

<sup>131</sup> See 5.2.3.

<sup>132</sup> See 5.2.4.

<sup>133</sup> See 5.3.

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held to the consequences of an action when she did not intend those consequences, in the circumstances as they have materialised. These two points mean that restitution is not only a justified response to a failure of condition – it is the only justifiable response to these facts. In this manner, the substance of the orthodox assumption – that restitution is conceptually required – is preserved, but is now grounded in normative argument. Finally, a number of doctrinal controversies are examined to see what progress can be made with these in the light of the theoretical work that has been done.

#### 1.3.2.3 Common Mistake, Frustration and Termination

As I have said, an old theory sought to explain three ‘contractual’ doctrines – common mistake, frustration and termination following breach – in terms of failure of condition. The final project of the thesis is to reinterpret this analysis in light of the clarifications of earlier Chapters. Chapter 6 introduces the doctrines, setting out their basic doctrinal structure. Common mistake and frustration are widely understood. However, I make an important distinction concerning termination. We should distinguish termination *following* breach from termination *for* breach. Termination *for* breach concerns the power to cancel a contract which arises on breach of any term classified as a ‘condition’. Although termination *following* breach has the same substantive effect, it is crucially distinct in its preconditions. It arises whenever there is a frustrating event for which the defendant has undertaken responsibility.<sup>134</sup> For this reason, it has historically been – and should be – aligned with frustration. The Chapter argues that, in light of this, all three doctrines share important fea-

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<sup>134</sup> See 6.3.

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tures: the test to determine when the doctrines are triggered is the same in every case. Further, all three operate to cancel – or, in the case of common mistake, to prevent the creation of – contractual rights.<sup>135</sup>

Chapter 7 builds upon these foundations to examine the claim that failure of condition cancels contractual rights. I will first examine their doctrinal tests. Common mistake, frustration and termination following breach are all demonstrated to have the same basic ingredients as a failure of condition claim – and, indeed, for this reason many judges have invoked the concept of failure of condition when discussing these claims.<sup>136</sup> This is, after all, part of the reason why commentators have sought to unite these fields before.

To strengthen this link, I demonstrate how the conceptual foundations of both doctrines are essentially the same. We should first distinguish the *status quo ante* (SQA) from the *status quo* (SQ). The SQA is the position the parties occupy prior to some event – for instance, the position prior to the conditional payment of money. The SQ is the position the parties occupy after the event – for instance, the position of the parties after the conditional payment of the money. In an orthodox failure of condition case, the defendant must make restitution to the claimant. This means that both parties are taken from the SQ to the SQA. This movement is the only effect failure of condition can have. It is the very same effect of common mistake, frustration and termination following breach.<sup>137</sup> For instance, in those cases both parties move from a situation where they have no contractual rights (SQA) to one

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<sup>135</sup> For the full argument to this effect, see 7.3.

<sup>136</sup> See 7.2.

<sup>137</sup> Common mistake is a difficult case to explain in this manner. However, for the explanation, see 7.3.1.2.

where they have contractual rights (SQ). On the frustrating event, the parties are taken back to the SQA.

Finally, it is important to test whether the doctrines are normatively unified. I argue that the reasons which motivate these contractual doctrines are very similar to those that are recognised in orthodox failure of condition cases.<sup>138</sup> The intention to move from the SQA to SQ – whether it is to pay the money or to create the contractual rights in question – is undermined by the frustrating event. In these circumstances, the law does not hold the parties to their transaction: it unwinds the movement from SQA to SQ, placing the parties as close to the SQA as possible. Nevertheless, there is one crucial distinction between the cases. The reason for the lack of voluntariness is sometimes quite distinct. While failure of condition cases are generally concerned with conditional intentions to transfer, the contractual doctrines are often concerned with background assumptions. That is, rather than that intention being qualified by a condition, the parties simply never intended to be bound in the circumstances. Whether this distinction justifies separate doctrinal treatment is a question I do not examine. However, it should be clear that the old theory is not as hopeless as is customarily assumed.

## 1.4 Conclusion

We are now ready to begin an investigation of the doctrine of failure of condition. The next Chapter is an investigation of the conceptual structure of the doctrine, building on the insight that failure of condition concerns conditional transfers.

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<sup>138</sup> See 7.4.

## 2 The Conceptual Structure of the Doctrine

### 2.1 Introduction

#### 2.1.1 Background

The previous chapter demonstrated almost universal acceptance of the proposition that cases of failure of condition are, roughly speaking, cases of conditional transfers. As Chapter 4 will show, it is also widely accepted that the reason for the conditionality of the transfer has something to do with the conditionality of the claimant's intention. Until very recently, not a single commentator on the law of failure of condition had made even rudimentary inquiries into the nature of conditions or conditional intentions.<sup>1</sup> Indeed, courts have deprecated talk of conditions

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<sup>1</sup> The bulk of academic inquiry into conditional intentions has arisen in two distinct contexts: the philosophy of action and the (philosophy and doctrine of) criminal law. However, see G Klass, 'A Conditional Intent to Perform' (2009) 15 *Legal Theory* 107. Recently, Duncan Sheehan has begun an inquiry into the function of intentions in this context, including some analysis of conditional intentions: D Sheehan, 'Mistake, Failure of Consideration and the Planning Theory of Intention' (Unpublished Paper, SLS Annual Conference, University of Edinburgh, 2013).

as ‘chameleonic’<sup>2</sup> and conditional intentions as ‘pseudo-philosophical.’<sup>3</sup> This may be because philosophical inquiry into conditionals appears too abstruse to be of interest to lawyers; it may also be because there has been surprisingly limited analysis of conditional *intentions* in the philosophical debate.<sup>4</sup> However, this reluctance to dig down into the topic has left us with a deficient conceptual understanding of failure of condition. This Chapter addresses this deficiency.

### 2.1.2 An Overview

There are three related questions we should ask. What is the nature of: (1) a conditional relationship; (2) a conditional intention; and (3) the way in which a conditional intention gives rise to a condition (in law)? The first two issues are conceptual; the third is, at least in part, a normative inquiry. To separate these issues as cleanly as possible, this Chapter tackles the conceptual questions (1 and 2); the normative question (3) is deferred to Chapters 4 and 5. 2.2 will, therefore, clarify the nature of a conditional relationship. It will then show how failure of condition is, in light of these clarifications, to be understood. 2.3 will examine the nature of a conditional intention, establishing the limits of the concept. It uses the distinctions drawn to further clarify the nature of failure of condition, as described in Chapter 1.<sup>5</sup> After this work has been done, 2.4 will finally distinguish conditions from a number of

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<sup>2</sup> *Skips A/S Nordheim v Syrian Petroleum Co Ltd* [1984] QB 599 (CA) 618 (Sir John Donaldson MR).

<sup>3</sup> *Re Attorney-General's References (Nos 1 & 2 of 1979)* [1980] QB 180 (CA) 186 (Roskill LJ).

<sup>4</sup> Although conditional sentences have received a lot of attention from philosophers of language, ‘the contemporary debate in the philosophy of action has only occasionally taken up the issue of [conditional intentions]’: L Ferrero, ‘Conditional Intentions’ (2009) 43 *Noûs* 700, 700–01.

<sup>5</sup> The distinctions of this Chapter are useful only insofar as they illuminate that doctrine; the purpose is to get a firmer grasp of the doctrine with the use of these conceptual distinctions.

closely attendant concepts. First, I distinguish conditional intentions from two notions which are sometimes conflated with conditional intentions: background assumptions and overrides. Next, I distinguish conditions from reasons, hopes and mistakes.

It will be helpful to have a simple example which we can return to. Consider:

*Shopping Trip*: I intend to go to the shops this afternoon. I have a further intention to take an umbrella if it is raining when I leave the house.

In the course of this Chapter, I want to use this hypothetical to make (*inter alia*) the following distinctions. First, in *Shopping Trip* I have two intentions: an *unconditional* intention to go to the shops and a *conditional* intention to take an umbrella if it is raining. Secondly, the condition (that it is raining) of my conditional intention (to take an umbrella) can be either sufficient, necessary or necessary and sufficient – and in the case of failure of condition the condition is necessary.<sup>6</sup> Thirdly, although my unconditional intention is a cause of my conditional intention, this fact does not make my intention to go to the shops a condition of my intention to carry an umbrella.<sup>7</sup> Finally, either intention can be *defeated* by an override or by the negation of a background assumption of sufficient importance – and these defeaters are not conditions of my intention.<sup>8</sup>

### 2.1.3 Adjacent Issues

One can sensibly investigate the nature of the conditional relationship that failure of condition embodies without committing to a particular position on the underlying

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<sup>6</sup> See 2.2.2.

<sup>7</sup> See 2.3.2.

<sup>8</sup> See 2.4.2.

reasons for allowing legal claims to restitution when the condition of a transfer fails. For instance, there is a debate – which I will examine in greater depth below<sup>9</sup> – between those who think that the law in this area is organised around ‘unjust factors’ and those who think it is better understood as organised around ‘absence of basis’. Both sets of theorists must utilise the concept of conditional intentions – however, they might use that concept for distinct purposes.<sup>10</sup> My treatment of the normative justification of failure of condition, in Chapters 4 and 5, will give intentions a central justificatory role. But I have not proven their importance yet. So the sceptical reader must, for now, take on faith that intentions are important to the justification of failure of condition – and attend to the distinctions made in 2.3 accordingly.

There is one final point to be made by way of introduction. Whilst some lawyers are not accustomed to the representation of legal relationships in formal terms, others might prefer the clarity which formality brings. Therefore, although I will eschew representing them in formal terms in the main text – I am able to draw the distinctions that I wish to make in natural language terms – I will represent my claims in formal terms in the footnotes of the main text.<sup>11</sup> I will also confine my observations about conditions as a general class, which are chiefly of philosophical not legal interest, to footnotes.

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<sup>9</sup> See 3.4.2.

<sup>10</sup> While an unjust factors theorist will rely upon the concept to establish the claim, the absence of basis theorist might rely upon the concept to *deny* or *defeat* a *prima facie* claim. For more detail, see 3.4.2.

<sup>11</sup> For the enrichment of the defendant by the claimant’s action, I use  $\phi$ . For the condition of retention, I use C. My use of logical symbols is not specialised. For clarity’s sake: to indicate negation, I use  $\neg$ ; for a conditional relationship, I use  $\rightarrow$ ; for a biconditional relationship, I use  $\leftrightarrow$ .

## 2.2 The Relevant Relationship of Conditionality

### 2.2.1 The Basic Structure

#### 2.2.1.1 The Failure of Condition Relationship

The language of conditions is a vexed issue in private law. Sir John Donaldson MR has said that “‘conditions’” is a chameleon-like word which takes its meaning from its surroundings.’<sup>12</sup> This variety of usages is ‘a source of recurring confusion.’<sup>13</sup> Indeed, ‘the expression “condition”’ has been called ‘[o]ne of the most notorious sources of difficulty in the law of contract’.<sup>14</sup> The word ‘condition’ carries with it a number of extra-legal connotations. The law sometimes incorporates these definitions. For instance, I will argue that it does in the case of failure of condition. However, there are also specialised legal uses of the term, where the meaning of the word ‘condition’ is not acquired from its extra-legal usage. This is clearest in the law’s designation of a term of a contract (eg ‘conditions of sale’)<sup>15</sup> and in the *classification* of terms.<sup>16</sup>

Failure of condition concerns conditional transfers. To understand the structure of liability, it is therefore appropriate to analyse the concept of a condition. To clarify the issue at hand, and in particular to explain what it means for something

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<sup>12</sup> *Skips A/S Nordheim* (n 2) 618 (Sir John Donaldson MR).

<sup>13</sup> *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd’s Rep 209 (HL) 220.

<sup>14</sup> G Treitel, “‘Conditions’ and ‘Conditions Precedent’” (1990) 106 LQR 185, 185. Further AL Corbin, ‘Supervening Impossibility of Performing Conditions Precedent’ (1922) 22 Columbia Law Review 421, 421.

<sup>15</sup> *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) 250 (Lord Reid).

<sup>16</sup> See, further, 6.3.3.2.

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to be a condition of something else, we should begin with a basic definition of a conditional relationship. A conditional proposition, in abstract terms, has the following logical form: If C,  $\phi$ . For instance: if it rains (C), then I will take my umbrella ( $\phi$ ).<sup>17</sup> The antecedent clause (sometimes called the ‘protasis’) expresses the condition (it raining); the consequent clause (the ‘apodosis’) expresses the effect of the satisfaction of the condition (taking my umbrella).<sup>18</sup>

Let us make a preliminary analysis of the relationship in failure of condition cases.<sup>19</sup> Recall that in *Fibrosa* Lord Wright explained the relationship of conditionality in these terms: ‘The payment was originally conditional. The condition of retaining it is eventual performance.’<sup>20</sup> If we denote the retention of the enrichment with the symbol ‘ $\phi$ ’ and the condition with the letter ‘C’, Lord Wright’s claim can be expressed in abstract terms thus: if C,  $\phi$ . Given its abstraction, this formulation can apply to any relationship analysed in the previous chapter. C can therefore stand for ‘performance’, for ‘the creation of legal rights’, etc.  $\phi$  is more complicated. Here it refers to *the retention* of the money. In principle one might intend that a defendant only *receive* an enrichment on a certain condition. However, failure of condition cases generally concern situations where the claimant unconditionally intends the defendant to receive the enrichment; the condition concerns the retention of the enrichment. We will be concerned principally with such cases.

Lord Wright added that ‘when that condition fails, the right to retain the money

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<sup>17</sup> In this thesis, I will only discuss indicative conditionals.

<sup>18</sup> It is a matter of some controversy whether a conditional *itself* expresses a proposition: D Rothschild, ‘Do Indicative Conditionals Express Propositions?’ (2011) 47 *Noûs* 49.

<sup>19</sup> The analysis is preliminary as the precise relationship between antecedent and consequent is not established in this paragraph. This is the task of the next section.

<sup>20</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) 65 (Lord Wright).

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must simultaneously fail.<sup>21</sup> This claim can be expressed in this manner: if  $\neg C$ ,  $\neg\phi$ . It is important to see that Lord Wright's reasoning to reach this last claim – that is, the justification of the inference from the previous proposition – is not stated. His Lordship simply says that it follows 'accordingly'. Chapter 4 argues that the issue is more complicated than this.<sup>22</sup>

### 2.2.1.2 Failure of Condition and Obligations

A conditional relationship expresses a particular relationship between two propositions.<sup>23</sup> For instance, if the propositions are  $\phi$  and  $C$ , the conditional relationship might be – as in failure of condition –  $\phi$  if  $C$ . The key to understanding the conditional sentence is the relationship *between the propositions* rather than the content of the propositions themselves. That is, the conditional relationship is 'if  $C$ ,  $\phi$ ' – and in virtue of that conditional we need make no assertions about the content of  $C$  or  $\phi$ , or about our obligations with respect to these propositions.

This demonstrates an important point. As a conceptual matter, a conditional relationship is non-obligating.<sup>24</sup> That is, there is no duty *in virtue of the conditional relationship* to satisfy or prevent the occurrence of the condition.<sup>25</sup> As Stoljar put it, in the context of conditions in contracts, 'the condition itself can neither be broken nor performed: a condition can either happen (or be fulfilled) or not happen (or not

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<sup>21</sup> *Fibrosa* (n 20) 65 (Lord Wright).

<sup>22</sup> See 4.3.2.

<sup>23</sup> This terminology – denoting the antecedent and the consequent as 'propositions' – might be questioned by some: D Edgington, 'On Conditionals' (1995) 104 *Mind* 235, 235. However, the notion that a conditional is a combination of two propositions is assumed here.

<sup>24</sup> For this terminology, see P Birks, 'Retrieving Tied Money' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2003) 122–23.

<sup>25</sup> I will make this same point at greater length at 2.2.3.

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be fulfilled).<sup>26</sup>

The distinction between a conditional relationship and an obligation embedded within it is illustrated by *Morley v Attenborough*.<sup>27</sup> The case concerned the sale of a harp and the key question was whether the defendant warranted that she had good title to the harp. Parke B said:<sup>28</sup>

It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a [condition] that failed, if it could be shewn that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title.

Therefore, although money might be paid conditionally upon the defendant having good title, it is a separate question whether the defendant warrants the validity of that title. If there is no promise to that effect, there can be no damages for breach of the promise; yet there can still be restitution for the failure of condition.<sup>29</sup>

There is one complication to this view. A defendant may have a duty to bring about the condition of the transfer, i.e. he may owe a promissory obligation to ensure that the condition is satisfied. It is tempting to view the obligation and the condition as somehow linked – and therefore to think that the condition is itself obligating. (This is particularly tempting because the law of contract often uses the

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<sup>26</sup> SJ Stoljar, 'The Contractual Concept of Condition' (1953) 4 LQR 485, 496. Further, JE Stannard, *Delay in the Performance of Contractual Obligations* (OUP 2007) para 3.04.

<sup>27</sup> *Morley v Attenborough* (1849) 3 Ex 500, 154 ER 943.

<sup>28</sup> *Morley v Attenborough* (1849) 3 Ex 500, 514; 154 ER 943, 948–49.

<sup>29</sup> See, further, *Wright v Colls* (1849) 8 CB 150, 164; 137 ER 465, 471 (Court of Common Pleas) (Coltman J): although there was a dispute over the reason the lease was not granted, there was no need to prove any breach of duty in the failure to grant it. See, similarly, *Wright v Newton* (1835) 2 Cr M & R 124, 150 ER 53 (Exch).

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word ‘condition’ as a description of an *obligating* contractual term.)<sup>30</sup> This would be insufficiently precise. As I stress in more detail below,<sup>31</sup> a conditional assertion is best understood as standing for the simple conditional it asserts – and it is in the nature of a conditional assertion that *absent further information* no assertion is made as to the individual propositions within the conditional.<sup>32</sup>

### 2.2.2 Sufficient, Necessary and Necessary and Sufficient

A conditional statement is composed of an antecedent and a consequent. Let us refer to the antecedent as the condition. So, in ‘if C,  $\phi$ ’, the antecedent (C) can be said to be the condition of consequent ( $\phi$ ). The key point about a conditional relationship is that its chief concern is not the individual propositions (here, C and  $\phi$ ) but the relations between them. To say that C is a condition of  $\phi$  does not tell us what that relationship actually is. As Klass points out:<sup>33</sup>

An agent might intend a state of affairs as a sufficient condition on performing an act ..., as a necessary condition of performing it ..., or as a necessary and sufficient condition.

What is the relationship between the antecedent (the condition) and the consequent (the enrichment)<sup>34</sup> in a failure of condition relationship? Are the conditions neces-

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<sup>30</sup> The classic analysis of the bifurcated terms is *Wallis & Wells v Pratt & Haynes* [1910] 2 KB 1003 (CA) 1012–13 (Fletcher Moulton LJ).

<sup>31</sup> See para 2.2.3, below.

<sup>32</sup> That is, to assert that ‘if C,  $\phi$ ’ does not assert that C, or that  $\phi$ , but simply that *if* C,  $\phi$ . The assertoric force of C and  $\phi$  is, then, an entirely separate matter.

<sup>33</sup> Klass (n 1) 120. This subsection owes much to Klass’s paper, at 120–24. He has a specialised terminology for each of these conditions. The familiar language of necessity and sufficiency suffices for our purposes.

<sup>34</sup> Denoted above as C and  $\phi$ , respectively.

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sary, sufficient, or necessary and sufficient? This sub-section examines these relations more closely in order to illustrate the distinction between them. It also tests the doctrine outlined in the previous Chapter against these relations. In so doing, I show that the conditions of failure of condition are necessary ones.

Two preliminary clarifications are needed before we can begin the analysis. First, as is well known, the claimant's and the defendant's actions are not always synchronic. A claimant might have to pay money prior to the defendant's performance; and, vice versa, a defendant might have to perform in order to become entitled to payment from the claimant. This can make the proposed logical analysis of the relationship appear flawed.<sup>35</sup> This complication, thus noted, should – I suggest – be put to one side. It does not indicate anything deep about the relationship. That is because the conditional relationship – if C,  $\phi$  – is not an empirical fact. It is a normative relationship. So, if there is a failure of condition ( $\neg C$ ) and factually the defendant remains enriched ( $\phi$ ) there are reasons to ensure that restitution is made (such that  $\neg\phi$ ).<sup>36</sup> Secondly, the source and precise nature of this rational pressure is not examined at this stage. Describing the logical relationship will not establish *why* there is such a relationship – why, in other words, transfers are conditional. That – a normative question – is deferred for Chapters 4 and 5.

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<sup>35</sup> The relationship will be suggested to be  $\phi \rightarrow C$ . However, clearly the claimant might pay the defendant (such that  $\phi$ ) and the defendant might then fail to perform (such that  $\neg C$ ). This means that the conditional relationship appears not to satisfy modus ponens:  $\phi$  is true, but C is false. (I will leave to one side the possible challenge which could be made to modus ponens as a universally valid inference.) So, one might say, the relationship cannot be correctly represented in the first place.

Similarly, with the contrapositive of  $\neg C \rightarrow \neg\phi$ . If the claimant pays the defendant and the defendant fails to perform, the condition fails. At that moment, it appears that  $\neg C$  is true but  $\neg\phi$  is false. This is the precise same problem as the previous one.

<sup>36</sup> For argument to this effect, see 4.3.2.

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### 2.2.2.1 Sufficient Conditions

If the consequent obtains simply in virtue of satisfaction of the condition, the condition is a *sufficient* condition. For instance, recall:

*Shopping Trip*: I intend to go to the shops this afternoon. I have a further intention to take an umbrella if it is raining when I leave the house.

Consider my conditional intention to carry an umbrella if it is raining. The antecedent (i.e. the condition) is ‘if it is raining’; the consequent is ‘I will take an umbrella.’ This is a sufficient condition if it raining is always enough for me to take the umbrella.<sup>37</sup> The relationship of sufficiency means that I have made be no decision about what to do if it is *not* raining. I might decide to take an umbrella out of an abundance of caution. Then again, I might not. The conditional relationship does not dictate this, either way.<sup>38</sup>

How does this apply in the context of failure of condition? There are two difficulties which mean the conditions in failure of condition cannot be sufficient conditions. The principal difficulty with saying that the condition in these cases is sufficient is that failure of the condition always justifies restitution.<sup>39</sup> This appears to be inconsistent with the logic of a sufficient condition, whereby the condition can fail but the consequent can, nevertheless, be true.<sup>40</sup>

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<sup>37</sup> Again, let us denote the act as  $\phi$  and the condition as C. The relationship between these propositions is, of course, not *totally* specified here: any number of other factors might prevent me from taking the umbrella. However, the example has enough information to demonstrate the nature of a relationship of sufficiency.

<sup>38</sup> The relationship is, therefore,  $C \rightarrow \phi$ . Whenever C is true,  $\phi$  is true; but it does not follow that whenever  $\phi$  is true C is true.

<sup>39</sup> This proposition is not entirely uncontested. I discuss it at greater length in 2.2.2.3.

<sup>40</sup> In other words  $\neg C$  is perfectly consistent with  $\phi$  so long as C is a sufficient condition. But this is not the failure of condition relationship: if the condition fails, a claim for restitution arises.

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A second difficulty with saying that the condition is sufficient is that another logical implication of that relationship is inconsistent with failure of condition cases, more broadly conceived. If the condition is a sufficient one, the negation of the consequent (taking the umbrella) entails the negation of the antecedent (its raining). In other words, if I am walking to the shops without an umbrella, it (assuming all has gone according to plan) should not be raining.<sup>41</sup> However, this again does not fit the law in this field. That is because the response of restitution (i.e.  $\neg\phi$ ) can be brought about by some other event (mistake, wrongdoing, a failure of condition other than performance, etc.) In Birksian terms, restitution is multi-causal.<sup>42</sup> Therefore, the conditions of failure of condition do not seem to be sufficient conditions.

### 2.2.2.2 Necessary and Sufficient Conditions

If the consequent can obtain if, and only if, the condition is satisfied, the condition is both necessary and sufficient. Consider again my intention to take an umbrella if it is raining. Its raining will be both necessary and sufficient if (1) I will not take the umbrella unless it is raining; and (2) its raining means that I will take the umbrella.<sup>43</sup> Given that the condition of failure of condition does not display the characteristics of sufficiency, it seems impossible for it to be conceived of as a necessary *and* sufficient condition. We can, therefore, put this characterisation to one side.

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<sup>41</sup> In other words, the contrapositive of  $C \rightarrow \phi$  is  $\neg\phi \rightarrow \neg C$ .

<sup>42</sup> e.g. P Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne University Law Review 1, 4–5; P Birks, *Unjust Enrichment* (2nd, OUP 2005) 11, 22, 25. On the possibility of failure of condition and mistake operating concurrently, see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 387 (Lord Goff); *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2006] 1 AC 558 [50]–[51] (Lord Hope), [137] and [141] (Lord Walker).

<sup>43</sup> The relationship is, in the language of previous examples,  $\phi \leftrightarrow C$ .

## 2.2. THE RELEVANT RELATIONSHIP OF CONDITIONALITY

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### 2.2.2.3 Necessary Conditions

If the consequent can obtain only if the condition is satisfied, the condition is a *necessary* condition of the consequent. For instance, recall my intention to carry an umbrella if it is raining.<sup>44</sup> The condition is a necessary one if its raining is a pre-condition of my taking the umbrella. If it is not raining (on the necessary condition analysis), I will not take my umbrella. Furthermore, its raining does not entail my taking the umbrella: I might instead decide that I would like to get wet.<sup>45</sup>

This seems to be the relationship in failure of condition cases. It is generally accepted that any failure of condition will justify restitution. As a doctrinal proposition, this is somewhat contentious.<sup>46</sup> Some commentators might say there can be a *bar* to restitution, notwithstanding a failure of condition.<sup>47</sup> This would mean that not every failure of condition would justify restitution. There are two responses to this. First, the doctrinal claim is dubious. I have argued that the construction of the conditions interacts closely with the law of contract such that there is less likely to be the contradiction these commentators envisage.<sup>48</sup> Secondly, even if the criticism is correct – i.e. that a failure of condition can be defeated – the necessary condition

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<sup>44</sup> Represented, once more, as  $\phi$  and C.

<sup>45</sup> The relationship is, therefore,  $\phi \rightarrow C$ . So, whenever  $\phi$  is true, C is true; however, it does not follow that whenever C is true that  $\phi$  is true.

<sup>46</sup> Another suggestion is that the ‘total failure’ rule bars restitution even though there is a failure of condition. This seems the best way to understand the claims of A Burrows, *The Law of Restitution* (3rd, OUP 2011) 323–35. These commentators are, I have argued, simply mistaken about the nature of failure of condition. See F Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 CLJ 414.

<sup>47</sup> e.g. G Virgo, ‘Demolishing the Pyramid – the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009); *quaere* C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) Part Two.

<sup>48</sup> See Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 46) 423–32.

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analysis does fit the majority of cases. The criticism seems merely to point to a more general phenomenon, that there is a difficulty in specifying the conditions of legal liability in necessary and sufficient conditions.<sup>49</sup> We might instead call the condition of failure of condition *defeasibly* necessary – and this is sufficiently precise for our purposes.

If this analysis is correct, and any failure of condition will justify restitution, this suggests a relationship of necessity.<sup>50</sup>

### 2.2.3 The Logic of ‘Self-Induced’ Failures

An area of some doctrinal controversy concerns whether a self-induced failure of condition can justify restitution.<sup>51</sup> For example, in *Dies v British & Industrial Mining* the claimant made a pre-payment of £100,000 towards the purchase of rifles and ammunition (worth £270,000).<sup>52</sup> The claimant then – in breach of contract – refused to take delivery of the rifles. The question was whether the buyer could recover the advance payment from the defendant. Stable J granted restitution; however, his Lordship expressly stated that ‘the foundation of the right [to restitution]

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<sup>49</sup> The canonical discussion is HLA Hart, ‘The Ascription of Responsibility and Rights’ (1949) 49 Proceedings of the Aristotelian Society 171. For a recent analysis, see L Duarte d’Almeida, ‘A Proof-Based Account of Legal Exceptions’ (2013) 33 OJLS 133.

<sup>50</sup> In other words,  $\neg C \rightarrow \neg \phi$  appears to be the failure of condition relationship, as I suggested above. And this is simply the contrapositive of  $\phi \rightarrow C$ .

<sup>51</sup> Compare *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd’s Rep 502 (CA) 507–08 (Roskill LJ) and *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912 (CA) 936 with *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 (HL). For an interesting comparative view, see *Zembunt Holdings Ltd v Control Securities plc* 1992 SLT 151, helpfully discussed in R Evans-Jones and K Kruse, ‘Failure of Consideration’ in D Johnson and R Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 144–45.

<sup>52</sup> *Dies v British & International Mining and Finance Corp Ltd* [1939] 1 KB 724 (KB).

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... is not a total failure of consideration ... It was not the consideration that failed but the party to the contract'.<sup>53</sup> Stable J gave no foundation for the right to recover: he simply refers to a 'principle of law' justifying restitution.<sup>54</sup> There is an historical explanation for this. When *Dies* was decided, *Chandler v Webster* – which said that a contract had to be rescinded *ab initio* for an action for failure of condition to be brought – remained good law.<sup>55</sup> Stable J may simply have sought to evade that bar to allow recovery. The controversy is, in abstract terms, whether the claimant should be entitled to restitution, notwithstanding that her own actions brought about the failure of condition.

Conceptual analysis of the nature of conditionals can shed some fresh light on the matter.<sup>56</sup> We have seen that the condition is a necessary one. It seems to follow logically that if the condition fails, restitution should be ordered.<sup>57</sup> The difficulty with accepting this is that, in a case like *Dies*, the claimant is able to avoid the rational force of the consequent clause – the payment – by falsifying the antecedent. Have we any *conceptual* reason to suppose that this is illegitimate?<sup>58</sup> That is, is there any reason to suppose that the analysis of a conditional relationship should change depending upon whether the failure of the condition is self-induced?

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<sup>53</sup> *Dies* (n 52) 744 (Stable J).

<sup>54</sup> *Dies* (n 52) 744 (Stable J).

<sup>55</sup> *Chandler v Webster* [1904] 1 KB 493 (CA) was not overruled on this point until *Fibrosa* (n 20).

<sup>56</sup> There are a number of disputes of relevance. One concerns whether the truth-functional account of conditionals is correct. See D Edgington, 'Conditionals' in L Goble (ed), *The Blackwell Guide to Philosophical Logic* (Blackwell 2001) 401; Ferrero (n 4) 704; Klass (n 1) 128–29. Another concerns the correct way to understand conditional sentences: e.g. the strict conditional, the material conditional, the non-propositional, etc.

<sup>57</sup>  $\phi \rightarrow C$   
 $\therefore$   
 $\neg C \rightarrow \neg\phi$ .

<sup>58</sup> Compare 5.4.1, where the normative question of whether self-induced failures should suffice.

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There is one famous example in the literature on conditionals which seems a plausible analogy. Suppose that a doctor commands a nurse: ‘If the patient is alive in the morning, change his dressings.’<sup>59</sup> On one understanding of conditionals, the nurse can satisfy the doctor’s command by killing the patient.<sup>60</sup> As Ferrero explains:<sup>61</sup>

If satisfying a conditional intention to ( $\phi$  IF C) were a matter of satisfying the material conditional ( $C \rightarrow \phi$ ), the intention is carried out not only by  $\phi$ -ing when C obtains but also as an immediate consequence of the fact that C can no longer obtain.

The difficulty is that it seems peculiar to say that the nurse has obeyed the doctor’s command by murdering the patient. More particularly, in our context, it seems strange that the nurse can avoid the rational force of the consequent clause by preventing the antecedent clause from obtaining. The problem is the same in *Dies*, where the claimant avoids the rational force of the consequent clause (i.e. having to pay the price)<sup>62</sup> by falsifying the antecedent clause (i.e. preventing the defendant from performing her obligations under the contract).<sup>63</sup>

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<sup>59</sup> D Edgington, ‘Conditionals, Truth, and Assertion’ in I Ravenscroft (ed), *Minds, Ethics, and Conditionals: Themes from the Philosophy of Frank Jackson* (OUP 2009) 302.

<sup>60</sup> This is so on the material conditional analysis, where ‘if P, Q’ means ‘ $\neg P \vee Q$ ’.

<sup>61</sup> Ferrero (n 4) 704. I have amended the quotation to change the symbol for material implication from  $\supset$  to  $\rightarrow$ , so as to maintain the consistency of the logical symbols in my text. I have also removed what I take to be a typo: Ferrero refers to satisfying ‘a the material conditional’.

<sup>62</sup> The obligation in a case like *Dies* might accrue before the delivery is due. One might object that the rational force of having to pay, therefore, cannot be avoided in this way. However, this is simply another way to revive the fallacy we put to one side above, at 2.2.2.

<sup>63</sup> The antecedent in both the nurse example and *Dies* can be denoted as ‘if C’ and the consequent as ‘ $\phi$ ’. Is it acceptable to avoid  $\phi$  by ensuring that  $\neg C$ ? Notice that this same problem arises in the law of contract, where the defendant might prevent the claimant from accruing a debt by preventing performance of a condition precedent. In English law, this is permitted: there is no ‘fiction of fulfilment’. The law of contract in the United States demurs. See, generally, G Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press 1988) 268–69.

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Recall that the question is whether it is conceptually confused to suggest that a conditional is satisfied by prevention of the truth of an antecedent. Our answer should be a tentative: ‘no, at least not in our context.’ We must first distinguish the problem case above, concerning the nurse, from a case such as *Dies*. The former concerns a conditional command; the latter concerns a conditional intention. The argument that follows may not apply to commands – these should, therefore, be set to one side.<sup>64</sup> It is clear that one can coherently form a conditional intention and then seek to prevent the condition of the intention from occurring. For instance, one might profess the following intention: ‘if I lose the case, I intend to appeal.’ Here, the condition of my intention to appeal is that I lose the case – but clearly I can hold this intention consistently with an intention to win in the case. Notice next that the rational force of the *conditional* is quite distinct from that of the *antecedent*. I have two intentions: I intend to ensure that the antecedent is *false* and have a distinct conditional intention about what to do if they fail.<sup>65</sup>

How do these reflections apply to the case of failure of condition? They show that it is coherent to prevent the consequent by prevention of the antecedent.<sup>66</sup> This means that there is no conceptual confusion in the law accepting a self-induced failure of condition. There are two points to bear in mind in endorsing this conclusion. First, although it is conceptually coherent for the law to say that a claimant can prevent the consequent by preventing the antecedent, this does not mean that the law

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<sup>64</sup> Compare J Bennett, *A Philosophical Guide to Conditionals* (OUP 2003) 124–25. The nurse example itself is a difficult case: the nurse’s action is independently wrongful and also in contravention of the nurse’s professional obligations: Ferrero (n 4) 704.

<sup>65</sup> That is, I intend  $\neg C \vee$  if  $C, \phi$ .

<sup>66</sup> We have not, in this, claimed that such a prevention would satisfy the conditional intention. Such a view can only be endorsed if the material implication view is endorsed – a claim we need not make.

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should allow the claimant to do this. There is a further question of the *normative* coherence of self-induced failures. This is examined below.<sup>67</sup> Secondly, the claimant may *independently* of the conditional be subject to further legal responsibility in virtue of a contractual promise. This will be the case where the claimant's action in preventing the antecedent is in breach of an obligation to (for instance) ensure that the antecedent holds.<sup>68</sup> So the conceptual work has limited ambitions. But it does show that both sides of that doctrinal dispute have a sufficiently robust conceptual framework: neither is false on conceptual grounds. Recognising this, and the relevance of the debate in philosophical logic, is sufficient progress for our purposes.

### 2.2.4 A Summary of the Relationship

This section has examined in detail the nature of the conditional relationship to which failure of condition gives rise. It explained what it is for something to be a condition of something else and demonstrated the importance of a previously un-commented upon philosophical field to clarifying the concept of failure of condition. The inquiry has concentrated almost entirely upon the nature of a conditional relationship. There has been no analysis of the nature of a conditional intention. The next section tackles that important question.

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<sup>67</sup> See 5.4.1.

<sup>68</sup> See 2.2.1.2.

## 2.3 Conditional Intentions

### 2.3.1 Intentions as a Source of Conditions

As Holmes said, ‘[y]ou can give any conclusion a logical form. You always can imply a condition in a contract.’<sup>69</sup> The key question is therefore: ‘why do you imply it?’<sup>70</sup> If we are to have a coherent category of conditions, there must be more to the category than the fact we *can* represent them in the language of conditions. For instance, as Patterson points out:<sup>71</sup>

it might be said that the non-occurrences of facts constituting fraud, duress, or mistake (as to the subject matter) is a constructive condition external of one party’s promise ... One might go further and speak of the requirement of offer, acceptance and consideration (or agreement and consideration) as constructive conditions of (unsealed) contracts.

One way to pick out a coherent set of distinctive conditional relationships is by reference to the source of the condition. One important source of conditional relationships is conditional intentions. In Chapters 4-5, I will argue that the source of the conditions of failure of condition is the claimant’s *intention*. This section lays some conceptual groundwork for that claim, clarifying the nature of conditional intentions. The final section of the Chapter then distinguishes conditions imposed by conditional intentions from other related concepts – including some concepts

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<sup>69</sup> OW Holmes Jr, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, 466.

<sup>70</sup> OW Holmes Jr, ‘The Path of the Law’ (n 69) 466. Although Holmes is referring to conditions in the law of contract, the claim is just as applicable to any relationship which can be analysed in conditional terms.

<sup>71</sup> E Patterson, ‘Constructive Conditions in Contracts’ (1942) 42 Columbia Law Review 903, 905. For the avoidance of doubt, Patterson does not *condone* this analysis – he is simply emphasising that the logical form is insufficient to delineate an intelligible class of conditions.

which scholars sometimes discuss in the language of conditions.

### 2.3.2 The Nature of a Conditional Intention

A number of quite distinct concepts are discussed using the language of conditions. Although it is important not to be led by the terms of this debate, one distinction scholars draw must be highlighted. It is customary to distinguish *internal* and *external* conditions of an intention.<sup>72</sup> As Cartwright puts it, '[a] condition is internal when it is part of the content of the intent, and it is external when it is a condition of the formation of the intent.'<sup>73</sup> The distinction is endorsed by a number of other authors.<sup>74</sup>

Although I will return to this point below, it is helpful at this stage to see why this claim is mistaken. Doing so clarifies the nature of a conditional intention.<sup>75</sup> Recall once more:

*Shopping Trip*: I intend to go to the shops this afternoon. I have a further intention to take an umbrella if it is raining when I leave the house.

It is unfortunate that Cartwright's distinction has been drawn using adjectival qualifications of 'conditions'. This language makes it seem like these are two distinct ways in which an *intention* can be conditional. But this is incorrect. In *Shopping Trip* my

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<sup>72</sup> This distinction is not to be confused with Klass's distinction between 'foreground' and 'background' conditions: Klass (n 1) 109–10. Although I think Klass is correct to distinguish these situations, his distinction does not help us in this project. Klass's terminology is used in a particular way: whether a condition is foreground or background depends not upon whether it is consciously understood, but upon whether it is thought to be in doubt.

<sup>73</sup> JPW Cartwright, 'Conditional Intention' (1990) 60 *Philosophical Studies* 233, 235.

<sup>74</sup> JW Meiland, *The Nature of Intention* (Methuen & Co 1970) 15–17; K Campbell, 'Conditional Intention' (1982) 2 *Legal Studies* 77, 84–85; Ferrero (n 4) 701–02.

<sup>75</sup> See 2.4.2.2.

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intention to go to the shops (say, to buy nuts to eat) is caused by my background assumption that I am not allergic to nuts. If I were to discover that I am allergic to nuts, I would no longer intend to go to the shops (assuming that nuts were all I sought to buy). However, that does not – I will suggest – make my intention to go to the shops a conditional intention. It follows that we should reserve the language of conditional intentions for cases where the ‘condition’ forms (in Cartwright’s terms) ‘part of the content of the intent’.<sup>76</sup> A conditional intention is one where the condition qualifies the object of the intention itself.<sup>77</sup> Therefore, in *Shopping Trip* I have two separate intentions: to walk to the shops and to carry an umbrella. The former intention is not conditional; the latter intention is conditional upon it raining when I leave.

### 2.3.3 Conditional Intentions and the Law

Failure of condition cases are sensibly understood as concerning a conditional intention. The argument for this claim cannot be given here in its entirety – it is developed in subsequent Chapters. Nevertheless, it is helpful to see how the notion of a conditional intention fits the cases at hand. For instance, in *Fibrosa*, the claimants paid the defendants in advance for the sale of machinery.<sup>78</sup> As we saw above, Lord Wright reasoned that:<sup>79</sup>

The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail.

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<sup>76</sup> Cartwright (n 73) 235.

<sup>77</sup> A intends to  $\phi$  if C.

<sup>78</sup> *Fibrosa* (n 20).

<sup>79</sup> *Fibrosa* (n 20) 65.

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Notice that, as the money was paid in advance of the performance, it is logically impossible to say that the intention to pay the money was formed when performance was given. Instead, it seems that the claimant's intention to enrich the defendant with the money was qualified by a condition – that is, the claimant intended that the defendant retain the payment only if performance was ultimately rendered. This is a simple case of a conditional intention to enrich another.

### 2.3.4 The Limits of Conditional Intentions

It would be too much to demand of a theory of conditional intentions for it to trace the precise limits of the concept. However, to ensure that the concept is not thought to have *too* limited a range of application, it is important to stress that the conditions of an intention can be implicit as well as explicit.<sup>80</sup> An explicit condition is one which the claimant formulates and brings to the front of her mind; an implicit condition is one that the claimant tacitly assumes (but nevertheless is sensibly said to intend). This section establishes the conceptual coherence of the claim that we can *implicitly* intend a condition.

Consider first the meaning of utterances. In Wittgenstein's famous example:<sup>81</sup>

Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says 'That sort of game isn't what I meant.' Must the exclusion of the game with dice have come before his mind when he gave me the order?

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<sup>80</sup> The limits of the concept are traced by Campbell (n 74) 90 and Cartwright (n 73) 239, who both have a very restricted notion of conditionality, and Klass, who has a much broader conception: Klass (n 1) 113-116. I will not examine Campbell's arguments in depth as I believe they are met if my own argument is sound; Cartwright's argument, I suggest, does not survive Klass's treatment of it: Klass (n 1) 113-116.

<sup>81</sup> L Wittgenstein, *Philosophical Investigations: the German text, with a Revised English Translation* (Blackwell 2001) 28.

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Although what is explicitly requested could be thought to licence gaming, the response to this question is, of course, ‘no’. That is because the meaning of the request – teach my children a game – draws its margins from the background of understanding against which the utterance is made. Now, the speaker does not have to consciously formulate dice as an exclusion for dice to be excluded by the request. Nevertheless, dice is not included in the request *in virtue of the utterance*: the background understandings about what people mean by ‘game’ when games are taught to children form the limits of that concept implicitly.

The insight is, in substance, widely accepted in the law of contract. For instance, in *Investors Compensation Scheme*, Lord Hoffmann stressed that:<sup>82</sup>

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

The importance of certainty means that contractual interpretation adopts a detached objectivity – that is, what a ‘reasonable man’ would interpret the instrument to mean. However, the reliance upon the ‘relevant background’ to elucidate the meaning of a contractual instrument is incorporating Wittgenstein’s insight into contractual interpretation. There is, within the law of contract, a debate about quite *how much* work the more robust concept of meaning can do.<sup>83</sup> Our concern here

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<sup>82</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 913. See further: S Smith, *Contract Theory* (OUP 2004) 299-300.

<sup>83</sup> An important question is whether the interpretive approach of Lord Hoffmann’s speech in *Investors Compensation Scheme* (n 82) can be applied to explain implied terms (as it was in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988) and to explain the law of remoteness (as it was in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2008] 1 AC 61).

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is not with the limits of the concept. The basic principle is not doubted – and it is enough for us to grasp this core idea. The important point is that we can refer to implicit understandings in utterances without taking the inquiry beyond the realm of *what was intended*.

We can then apply this insight to the conditions.<sup>84</sup> The first point of importance in this regard is that it is possible to infer the contours of a stated condition from the background. For instance, suppose that I intend to accompany my friend to the Wimbledon final ‘if we can get in.’ Suppose now that tickets are sold out, but we are able to sneak in illegally to spectate. Am I, in virtue of my initial intention, committed to joining my friend? One reason that I am not is because the condition ‘if we can get in’ is shaped against our background of understanding and so the ‘if’ is not one of brute possibility, but (at the least) legal possibility.<sup>85</sup>

However, we can also infer the *existence* of a qualifying condition from the background of understanding. Suppose again that my friend and I are discussing Wimbledon, and the remarkable form of our mutual friend, a wild-card entrant, who has made the semi-final. Our friend is now hotly tipped to win the tournament. We agree to watch the final live and we agree to do ‘whatever it takes’ to do so. But our friend loses her semi-final match. Are we still committed to doing whatever it takes to watch the final? Surely not. That is because it was an implicit condition of our initial intention, discerned from the shared background of understanding, that our friend being in the final was a condition of that intention.

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<sup>84</sup> I argue below that Wittgenstein’s example is not a conditional intention: see fn 93.

<sup>85</sup> Whether this is so may depend on context. Suppose that we live in a commune and fiercely oppose private property rights. Against that background of understanding, if we reach the same agreement – to go to Wimbledon ‘if we can get in’ – I might well be renegeing on the agreement if I refuse to commit trespass to watch the match. The important point is that the limits of our agreement depend upon context.

These points apply directly to failure of condition. First, they allow us to see why a transfer can be conditional even though there is no express statement ‘this transfer is on condition that C.’ Instead, when money is paid under a contract for the sale of goods, it is implicit that the money is paid conditionally upon performance. Secondly, they also allow us to see how the contours of the conditions are to be established. The precise limits of a condition are to be established by reference to the background understanding of the parties. For this reason, I have previously suggested that the construction of the conditions in failure of condition should utilise the principles of contractual construction.<sup>86</sup>

## 2.4 Conditions and Other Concepts

### 2.4.1 An Overview

In this final section of the Chapter I distinguish conditions from other related concepts. First, I note that an unconditional intention is not the same thing as an *indefeasible* intention. The recognition that even an unconditional intention can be defeated prompts us to distinguish between conditions and two other concepts: *background assumptions* and *overrides*. These distinctions are vital to maintaining a coherent category of conditional intention. Next, I distinguish three further distinct concepts: reasons, hopes and mistakes. Although we are here concerned to distinguish extra-legal concepts, all of these concepts feature in the law and so a firm conceptual grasp of their distinctions is important. While all of these concepts have

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<sup>86</sup> F Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (2011) 127 LQR 610, 620-23. For support, see C Mitchell, ‘Unjust Enrichment’ in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 18.84.

(sometimes close) parallels, conditions are conceptually distinct from all three.

### 2.4.2 Conditions, Assumptions and Overrides

#### 2.4.2.1 The Possibility of Unconditional, Defeasible Intentions

Ferrero stresses that ‘when we say ... “I intend to  $\phi$ ”’, we do not mean’ that we intend to  $\phi$  though the world perish.<sup>87</sup> This is true enough. Even if an agent intends to perform an action, she might not end up performing the action. For instance, I intend to go to the shops this afternoon – but if I find out there is a gunman on the loose between my house and the shops, I will make other plans. It seems, therefore, that many statements of intention which appear to be *unconditional* (such as ‘I intend to go to the shops’) are nevertheless *defeasible*.

How should we respond to this insight? One approach is to incorporate the defeating circumstances – such as the gunman – into the conditions of the intention. This is Ferrero’s approach. He points out that if an agent is given an ‘unusual and unexpected scenario’, she might redescribe her intention. Consider again my intention to go to the shops. You might question whether I would still do this if there is a gunman patrolling High Street. If I have sufficient patience, I might reply: ‘No, I intend to go to the shops only if there is no such gunman.’<sup>88</sup> For Ferrero, this demonstrates that ‘[t]he deep structure of our ordinary intentions is conditional.’<sup>89</sup> We should, he seems to claim, incorporate all *defeating* circumstances into *condi-*

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<sup>87</sup> Ferrero (n 4) 700: in Ferrero’s terms, we do not mean ‘*Fiat  $\phi$  pereat mundus*’. See, further, C Webb, ‘Intention, Mistakes and Resulting Trusts’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 321.

<sup>88</sup> See Ferrero (n 4) 723.

<sup>89</sup> Ferrero (n 4) 731.

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tions.<sup>90</sup>

This approach is mistaken. It fails to make proper use of the full range of concepts which can operate to defeat an intention. In this subsection, I want to suggest two further concepts which must be distinguished from conditions of the intention itself. These are, in order, *assumptions* and *overrides*. When we recognise these concepts, it becomes clear that there is no confusion in the recognition of an unconditional yet defeasible intention.

### 2.4.2.2 Conditions and Assumptions

Even if an agent intends to perform an action, she might not end up performing the action. One possible reason, which we have examined above, is because her intention to perform the action was *ab initio* conditional. I intend to carry an umbrella if it is raining. If it is not raining, I will not carry the umbrella: my intention was conditional and the condition was not met.<sup>91</sup> However, this situation should be kept apart from the following situation. When I go to the shops, I intend to carry an umbrella if it is raining. It is raining, and so the condition of my intention is met – but my umbrella has been stolen. In this case, I had an unconditional intention<sup>92</sup> –

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<sup>90</sup> A further distinction commentators draw is between ‘enabling’ and ‘restrictive’ conditions. The distinction is made, for example, by Ferrero (n 4) 702 and Klass (n 1) 121. For these commentators, whereas an enabling condition is a precondition of the object of the intention being actioned, a restrictive condition ‘delimits what it takes for the agent to carry out her ... intention’: Ferrero (n 4) 702. There is little to say for this distinction. For one thing, nothing of conceptual or normative importance seems to turn on whether a condition is enabling or restrictive. Worse, as these commentators analyse the distinction, it seems to cut across the crucial distinction between conditional intentions and assumptions. For instance, one of Ferrero’s examples of an enabling condition is the ‘universal enablers of agency (e.g., [that an agent] is to be alive and not paralyzed)’: Ferrero (n 4) 702. These are, except for the most paranoid, background assumptions, not conditions of our intentions.

<sup>91</sup> I here suppose that the condition is a necessary one.

<sup>92</sup> Or, perhaps, a conditional intention where the condition has been met.

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to take the umbrella – which I formed in part due to a *background assumption* (that my umbrella had not been stolen). These ideas must be kept apart.<sup>93</sup> This distinction is a vital one for our purposes. I will argue in Chapter 7 that this – and only this – distinguishes common mistake, frustration and termination following breach from orthodox failure of condition cases.

Some authors use different language to describe an intention formed against a background condition: they call this an intention subject to an ‘external condition’. Recall Cartwright’s distinction: ‘[a] condition is internal when it is part of the content of the intent, and it is external when it is a condition of the formation of the intent.’<sup>94</sup> In Cartwright’s terms, my unconditional intention to carry my umbrella was externally conditional upon my umbrella not having been stolen: my belief that I was in possession of an umbrella led me to form the (initially conditional) intention to carry the umbrella. When I discover that I do not have the umbrella, my intention to take it with me is rendered nugatory.

Drawing this distinction in terms of internal and external conditions is dangerous as it might lead one to think that in the case of the stolen umbrella a condition is embedded within my intention. That is incorrect. My intention is unconditional; there was simply a condition of its formation (an ‘external’ condition) which turned out to be false. In order to keep these concepts apart, I will refer to Cartwright’s ‘external conditions’ as ‘assumptions’.

These two concepts share a great deal in their conceptual structure. One similar-

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<sup>93</sup> Wittgenstein’s example is similar to this notion rather than that of an override: as Hubin says ‘I needn’t mean that there is some reason, perhaps overridden, to play dtice. What I have said is compatible with my thinking that there is no reason to play that sort of game’: D Hubin, ‘What’s Special About Humeanism’ (1999) 33 *Noûs* 33, 43.

<sup>94</sup> Cartwright (n 73) 235.

## 2.4. CONDITIONS AND OTHER CONCEPTS

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ity of particular importance concerns *changes of mind*. When one's intention is *ab initio* conditional, one does not need to change one's mind when the condition fails. When I intend to carry an umbrella if it is raining, if it does not rain then my intention does not commit me to carrying an umbrella *in any event*. Importantly, if I do not take an umbrella this is not because I have *changed my mind* about the merits of carrying an umbrella. Instead, the condition of my intention simply was not met. The same analysis explains the case where my umbrella is stolen. My intention to carry the umbrella was premised on the assumption that I was still in possession of the umbrella. It turns out that I do not have the umbrella. I will not, it follows, take the umbrella with me if I go to the shops.<sup>95</sup> This is not because I have changed my mind; it is instead because the background assumption of my intention (that I have an umbrella) does not hold. My intention, therefore, does not commit me to carrying an umbrella in the way it *prima facie* appeared to.

One problem with my terminology is that not every assumption is so important as to be a condition of the intention (in Cartwright's sense). Only fundamental assumptions count. I intend to go to the shops. I might assume that I will be able to buy milk. Nevertheless, even if I discover that the store is out of milk, I might still go to the store: milk was not, in such a case, so fundamental to my purpose that its absence cancels my intention. The language of conditions has the attraction that it can capture these cases. Nevertheless, because conditional intentions are the primary object of our inquiry it is crucial that we do not confuse conditions with other concepts, and for that reason we should avoid the language of conditions when we discuss background assumptions.

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<sup>95</sup> This 'if' is to cater for the possibility that, having discovered that my umbrella has been stolen, I will decide not to go to the shops after all.

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The distinction between a conditional intention and an intention formed on the basis of a background assumption is an extremely difficult one to draw in individual cases. The precise line between the two is determined by how robust a concept of implicit intention we employ. Nevertheless, most people will appreciate the distinction in an individual case. As Campbell puts it:<sup>96</sup>

If suffering from a draught, only a paranoid would decide not that he should close the window but that he should close the window only if nothing unexpected happened before he reached it.

There is not enough room in this thesis for an investigation of the limits of these concepts.<sup>97</sup> But we should not ignore the fact that there *is* such a distinction, however difficult it can be to draw in practice.

### 2.4.2.3 Conditions and Overrides

Next, we should distinguish a conditional intention from an intention being *overridden*. We can tease out this distinction by making use of Raz's discussion of the concept of a reason. He claims that:<sup>98</sup>

The notion of one reason overriding another should be carefully distinguished from that of a reason being cancelled by a cancelling condition. A reason can be overridden only by a fact which is itself a reason for contradictory action.

An intention to perform an action might, similarly, be overridden. It might be overridden either by reasons to perform a distinct, contradictory action – as Raz con-

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<sup>96</sup> Campbell (n 74) 90.

<sup>97</sup> Within the law of contract, this debate is well known: see n 83.

<sup>98</sup> J Raz, *Practical Reason and Norms* (new ed, OUP 1999) 27.

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templates – or by reasons against the initial course of action.<sup>99</sup>

Consider first the possibility of an intention being overridden by reasons for taking a distinct, inconsistent action. Suppose again that I intend to go to the shops. As I begin to walk to the shops, I witness an accident in the road – a friend of mine is hit by a car. My reasons to go to the shops have not changed – but still, I should not go to the shops. Instead, I should stay with my friend, call an ambulance, etc. This is not because I intended to go to the shops ‘unless my friend gets hit by a car’ (as with a conditional intention) nor because I simply assumed my friends would not get hit by cars as I walked (as with a background assumption). Instead, it is because my intention to go to the shops will be overridden by the emerging circumstances: I have better reasons to stay with the friend, but these reasons are for an inconsistent course of action (as I cannot both go to the shops *and* stay with the friend).

The second case of an override is where there are reasons against the original course of action. Consider once more the case where I intend to go to the shops. Just as I am about to head out, I am told that a gunman is on the loose in Oxford, killing people as they go about their business. Here, again, my reasons to go to the shops have not changed – but I have a strong reason not to go to the shops, i.e. that I will be risking my life in doing so.

These two examples are both cases where my initial intention is *overridden*. There are two crucial distinctions between these cases and both conditional intentions and background assumptions. First, in the case of an override the agent has to *change her mind* about pursuing the initial course of action. In the gunman case,

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<sup>99</sup> A further complication is that this distinction operates at the level both of our reasons to succeed and our reasons to try. If I intend to walk to the other end of the hall and the ceiling collapses, I might have good reasons to succeed – but not reasons to try. This complication need not detain us; we must simply be careful to keep in mind the nature of the rational defeat.

## 2.4. CONDITIONS AND OTHER CONCEPTS

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for example, I will have to weigh up the urgency of my getting to the shops against my risk of being killed – and, if I am to stay at home, I will have to decide that the latter outweighs the former. Compare that with the case where I intend to take an umbrella if it rains. If it is not raining, I might have to make a new decision about whether to carry an umbrella (e.g. concerning the risk of it raining). But on no account – if I take an umbrella or if I do not – will I have to change my mind. The condition having not occurred, my intention does not commit me to any course of action. For this reason, it is inappropriate to characterise the overriding facts as *conditions* of the agent's intention. As Campbell puts it:<sup>100</sup>

If a person changes his mind because a certain contingency arises this shows that his intention was not conditional as regards that contingency. If it had been conditional he would not have had to change his mind.

It is important, therefore, that we do not talk of override cases in terms of conditions.

The second distinction relates to the first, but concerns the aftermath of the decision to change our mind. In the case of both conditional intentions and background assumptions, after the condition fails or the background assumption is contravened there is no reason *in virtue of the intention* to pursue the initial course of action. When I intend to carry an umbrella if it is raining and it does not rain, *that* intention does not give me any reason to carry an umbrella (for instance on some other shopping trip). My intention is, we might say, spent. Equally, when I intend to carry an umbrella, assuming that it has not been stolen, when that assumption turns out to be false my intention is similarly spent.

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<sup>100</sup> Campbell (n 74) 90. Further, Cartwright (n 73) 245; G Yaffe, 'Conditional Intent and *Mens Rea*' (2004) 10 *Legal Theory* 273, 276-77; Klass (n 1) 112; J Finnis, 'Conditional and Preparatory Intentions' in *Intention and Identity* (OUP 2011) 223.

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This is not the case when my intention is overridden. Recall again the example where I intend to go to the shops but am informed of a gunman on the loose in Oxford. My intention to go to the shops is overridden. However, my reason to go to the shops does not necessarily disappear. There might be a ‘rational remainder’, i.e. some force in the reason to pursue the original course of action.<sup>101</sup> Suppose that I intended to go because I needed milk. I might now still need milk – I just do not need milk enough to justify risking my life. When the gunman is caught, I will still have a reason to buy milk. These twin features – of a change of mind and of the ‘rational remainder’ – are key distinctions separating an override from a condition or an assumption.

### 2.4.2.4 Application to the Doctrine

We can understand doctrinal debates in the light of these clarifications. For instance, in *Guinness Mahon* the claimant paid money under a void swap transaction.<sup>102</sup> Restitution was granted for failure of condition – the condition having been that the money was legally due under the parties’ contract. That result has been questioned by some commentators. For instance, Birks claimed that in this case:<sup>103</sup>

the invalidity of a contract is in itself the reason why there has to be restitution of enrichments transferred under it. The invalidity means that those enrichments have no explanatory basis. They are transferred *sine causa*.

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<sup>101</sup> J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1, 41.

<sup>102</sup> *Guinness Mahon Co Ltd v Chelsea and Kensington Royal London Borough Council* [1999] QB 215 (CA)

<sup>103</sup> Birks, *Unjust Enrichment* (n 42) 113.

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Birks' conclusion, that the invalidity was itself the reason for restitution, depends upon failure of condition – the stated rationale in such cases – being an inadequate explanation of liability. Whether the doctrine does have explanatory use in this context depends, I suggest, in large part on the proper limits of implicit conditions. Is it, in other words, intelligible to say that the claimant has an implicit intention, when paying money, that the money is legally due? Or is such a fact – i.e. the fact that the money is not legally due – beyond the limits of the claimant's implicit conditions to her intentions? If so, the case may be better characterised as an *assumption*. Those who deny that failure of condition sensibly applies to the case seem to claim the latter.<sup>104</sup>

It is inevitable that there is some dispute at the margins over where the boundary is best drawn. We need not resolve this dispute yet. We need simply re-emphasise two points. First, although in practice it can be difficult to draw the boundaries of the concept of implicit conditions – especially its connection with overriding circumstances and background assumptions – these boundaries clearly exist. Secondly, although failure of condition will be argued to properly encompass conditional intentions, *Guinness Mahon* displays that some cases which might be better characterised as background assumption cases do fall within its remit.

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<sup>104</sup> This must be Birks' claim: the swaps cases prompted him to reject the 'unjust factors' approach, indicating that he thought conditional intentions could not explain them.

### 2.4.3 Conditions and Reasons

The condition (or ‘consideration’) in the concept of failure of condition initially meant ‘the reason for the act’.<sup>105</sup> Cartwright claims that:<sup>106</sup>

An internal condition of an intention is such that its fulfilment constitutes a reason for continuing with the intention and performing the action intended, while its non-fulfilment constitutes a reason for not doing these things.

Are conditions, then, distinct from reasons? Or are they the same thing? In a large category of cases, they do appear to be the same. As Ferrero puts it:<sup>107</sup>

If an agent intends to ( $\phi$  IF C) rather than to  $\phi$  unconditionally ... it is reasonable to expect that, in the agent’s own lights, there is something about C that makes  $\phi$ -ing advisable when C obtains but not necessarily otherwise.

However, in two important respects, conditions and reasons are distinct.<sup>108</sup> First, not every reason for an action will be a condition. A claimant might have multiple reasons for an action, but not every reason is sufficiently important to count as a condition. The class of conditions is, therefore, more tightly defined than the class of reasons. There is a deep, structural reason why reasons and conditions will come apart in this respect. As we saw above, in failure of condition cases the conditions

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<sup>105</sup> P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 223.

<sup>106</sup> Cartwright (n 73) 240. See, further, D Davidson, ‘Intending’ in *Essays on Actions and Events* (2nd edn, OUP 2001) 94-95; Ferrero (n 4) 203.

<sup>107</sup> Ferrero (n 4) 703. In Ferrero’s text, he refers to ‘different sets’: I take this to be a misprint.

<sup>108</sup> Meiland suggests a third distinction. He claims that a belief that C will obtain need not be a reason for the formation of the intention to  $\phi$  if C: Meiland (n 74) 17. Meiland here appears to conflate the reasons C might give with the reasons a belief that C will be present might give.

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are either necessary or necessary and sufficient. Some reasons are sufficient for an action, but unnecessary.

The second distinction between conditions and reasons is that not every condition of an action is a reason for/ against it. Sometimes this will be the case if the agent imposes C as a condition, *thinking* that C is a reason for  $\phi$ ing, but where the agent is mistaken about the reason-giving force of C. And sometimes the agent might realise that C is not a reason to  $\phi$ . Klass gives the example of Mark Bittman, a food columnist for the *New York Times*, who had a diet of ‘nearly “vegan until six”’.<sup>109</sup> As Klass explains:<sup>110</sup>

Satisfaction of the condition – the fact that it is not yet six – has nothing to do with Bittman’s reasons for not eating animal products. Those reasons involve considerations of health and concerns for the environment. The reason for the condition has to do with Bittman’s desire for a moderate plan he will stick to. While Bittman has reasons for adopting the conditional intention, the condition itself is not a reason for the intended act.

### 2.4.4 Conditions and Hopes

It is often said that those who act ‘in the hope’ of some event will not be awarded restitution.<sup>111</sup> Why? Given what we know about hopes and conditions, it is possible to see – from the perspective of the law – a distinct logic to the two.<sup>112</sup> However,

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<sup>109</sup> Klass (n 1) 116.

<sup>110</sup> Klass (n 1) 116.

<sup>111</sup> *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QBD) 719 (Barry J); *Regalian Investments v London Docklands* [1995] 1 WLR 212 (Ch) 224 (Rattee J); *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB) [171] (Christopher Clarke J). See, further, S Meier, ‘No Basis’ in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 352; F Maher, ‘Failure of Basis’ (DPhil thesis, 2008) 17, 28 and 312.

<sup>112</sup> Suppose that A intends to  $\phi$  if C and also intends to  $\phi$  in the hope, H, that some event occurs. We know that  $\neg C \rightarrow \neg\phi$  but that  $\neg H$  is consistent with  $\phi$ .

## 2.4. CONDITIONS AND OTHER CONCEPTS

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reflection on how the two are, as a logical matter, treated by the law is unlikely to take inquiry further: it will merely reformulate the law's conclusion on the matter.<sup>113</sup> Therefore, to give a good answer to that question, we should consider how hopes and conditions are – conceptually – distinct.

The crucial distinction between conditions and hopes concerns the claimant's desire as to the proposition which forms the object of the hope or condition. A claimant need not – though of course she may – have any desires either way as to the object of the condition. Consider situations of what Bratman calls 'precautionary plans'.<sup>114</sup> For instance, in the US Presidential Campaign of 2012 a number of people professed the intention to move to Canada 'if Obama wins.' This was a precautionary plan, in that those professing the intention strongly hoped that Obama would not win the election. By way of contrast, it seems generally true that a claimant who hopes for some state of affairs must desire that the state of affairs come about. It normally makes no sense to say 'I do not want X but hope that X.'<sup>115</sup>

A consequence of this distinction is that there is a distinct object of *disappointment* in hope cases. Consider:

*Hopeful Father:* A father spends lavish sums of money educating his daughter at law school, hoping that his daughter will take a job at a city law firm. His daughter becomes a philosopher.

The primary object of regret in this case seems to be that the hope did not occur,

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<sup>113</sup> The symbolic representations of the previous footnote merely restate the question – they do not tell us what it is about things like H as opposed to things like C that set them apart in their logical relationship.

<sup>114</sup> See M Bratman, 'Simple Intentions' (1979) 36 *Philosophical Studies* 245, 250; Ferrero (n 4) 706.

<sup>115</sup> Sometimes X might be the lesser of two evils. Here, one might hope that X – to avoid the worse horn of the dilemma – but not want X. Even here, however, one has some desire for X (to avoid the worse horn); one simply does not desire it *as an end*.

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i.e. that the daughter did not become a lawyer. In cases of hopes, one *might* – though it seems that one *need not* – also regret the actual outcome. For instance, although the father might be disappointed in his daughter's career choice, he would not be conceptually confused if he is pleased that his daughter has found a career which she enjoys.

The precise converse is true in condition cases. Consider instead:

*Conditional Stipend:* A law firm pays a law student an annual stipend to support her through her studies. The stipend is on condition that the student join the firm for two years after qualification. The student becomes a philosopher.

Here, the law school's primary object of regret is the outcome: paying money and not getting an employee. They need not regret that the condition failed – though of course they may (if the student would, for instance, have been an excellent lawyer). The distinction between this case and the first can be made clearer by asking whether there is any residual regret for either the father or the law firm if the philosopher in each case refunds the money paid. The father should always have some regret, i.e. that his daughter is not a lawyer. The law firm need not have any (for instance, where the student would have made a bad lawyer).

Does this show why hopes might be insufficient and conditions sufficient for restitution, in the legal context? Not on its own. But we have not yet given any argument for the relationship of conditionality in failure of condition – and it is surely there that some distinction between conditions and hopes must be made. The conceptual distinction does demonstrate a point of vital importance in this regard: the justification of the law's interest in a failure of condition case will not

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be the same as in a case where the claimant merely hoped for some event.<sup>116</sup>

### 2.4.5 Conditions and Mistakes

The law distinguishes mistakes from failures of condition.<sup>117</sup> However, the law has a very specific conception of mistake. Importantly, the law's definition of mistakes is such that one cannot – as a conceptual matter – make a mistake as to the future.<sup>118</sup> This might be thought to contrast with the extra-legal concept of mistake, where an action could be called a mistake in light of subsequent events. If I place a bet on a horse and the horse comes in last, I might sensibly say 'that bet was a mistake.' I might do so even if there is no incorrect data in my head at the time of the payment – and it appears that I am not suffering from conceptual confusion in doing so.<sup>119</sup> However, given the law's commitment to a conception of mistake which is exclusively concerned with present facts, it is the conception I will here examine.

In law, these concepts clearly can come apart. On the one hand, a claimant might make a mistaken transfer – and yet have no claim for failure of condition. A claimant might improve another's land in the belief that the land belongs to a third party. Suppose that the owner of the land is not at home.<sup>120</sup> The claimant is

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<sup>116</sup> I use the term 'interest' here to leave open the possibility that the law could – though in England it does not – allow restitution for hopes.

<sup>117</sup> The distinction between these two ideas has not been subjected to much analysis by scholars. For a preliminary analysis, see Maher, 'Failure of Basis' (n 111) 24-28.

<sup>118</sup> *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [109] (Lord Walker). Notice that his Lordship refers to *legally relevant* mistakes, rather than mistakes *sans phrase*.

<sup>119</sup> I am unsure about this: if one cannot make a mistake as to the future, it seems that we cannot disagree about propositions about the future, only over the arguments for those propositions. This seems problematic.

<sup>120</sup> This detail is to ward off any possible 'free acceptance' claim.

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mistaken – but there is no failure of condition.<sup>121</sup> On the other hand, there might sometimes be a claim for failure of condition, but no claim in mistake. In *Woolwich*, there was a dispute over whether tax was owed by the claimant to the defendant.<sup>122</sup> The claimant did not think the tax was due; the Government claimed that it was. The claimant paid under protest. The claimant was correct: the tax was not due.<sup>123</sup> Therefore, ‘Woolwich was in reality suffering from no mistake at all’.<sup>124</sup> A failure of condition claim would, it is suggested, have succeeded.<sup>125</sup> It is necessary, therefore, to reflect upon whether a condition is distinct from a mistake – and how it is distinct. I suggest two distinctions of importance.

It follows that the first distinction of importance between mistakes and conditional intentions concerns the time at which the relevant facts (establishing the mistake or the failure of the condition in the intention) might be established. As Lord Walker says, ‘a legally significant mistake normally relates to some past or present matter of fact or law.’<sup>126</sup> For that reason, if a claimant makes a payment at

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<sup>121</sup> This is in part for the reason that the conditions of failure of condition are bilateral, requiring, in the ordinary case, acceptance by the defendant. See below 4.4.

<sup>122</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

<sup>123</sup> *R v Inland Revenue Commissioners Ex p Woolwich Equitable Building Society* [1990] 1 WLR 1400 (HL).

<sup>124</sup> *Woolwich* (n 122) 173.

<sup>125</sup> See, for example, *Woolwich* (n 122) 197 (Lord Browne-Wilkinson). A difficulty with expressing this in terms of conditional intentions is that it does not seem coherent to make one’s intention conditional upon an event one *knows* is a certainty: Meiland (n 74) 33. For instance, if I intend to carry my umbrella if it is raining, it is raining, and I know that it is raining, it seems more natural to say I have an unconditional intention to carry my umbrella. Notice, though, that this requires both ontological (that it is raining) *and* epistemic (that I know it is) certainty. If it is not determined yet whether it will rain, or if I do not *know* either way, I can coherently form a conditional intention. In the *Woolwich* case, the uncertainty could be said to have been either ontological (that the House of Lords had to exercise some interpretive discretion regarding the limits of the ultra vires principle) or epistemic (that *Woolwich* could not have known whether their interpretation was the correct one). Therefore, a conditional intention remains coherent.

<sup>126</sup> *Pitt v Holt* (n 118) [109], endorsing W Seah, ‘Mispredictions, Mistakes and the Law of Unjust

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t in the belief that C, if C at t the claimant cannot establish a mistake even if  $\neg C$  at  $t_{+1}$ . The distinction is generally expressed in the law as being between mistakes and mispredictions.<sup>127</sup> By way of contrast, a conditional intention can depend upon facts in the future. There is no conceptual confusion, for example, in the intention ‘to go on holiday if I get the promotion’. This is the same in cases of failure of condition. If a claimant makes a payment on a condition, the condition sometimes fails due to facts that did not exist at the time of the payment. In *Fibrosa* the payment was made on condition of performance – but the failure of performance did not come about until long after the payment.<sup>128</sup>

This will be insufficient to distinguish a condition intention from a mistaken intention in many cases. Despite some commentators’ views to the contrary,<sup>129</sup> the law accepts that a condition can fail *ab initio*.<sup>130</sup> This accords with an ordinary extra-legal conception of conditional intentions, where an agent might qualify her intention by reference to some fact about the past. Suppose that I am told you were yesterday married. I might send you a wedding gift. Here, my intention to give clearly seems to be conditional: I gave you the gift on condition that you are married.

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Enrichment’ [2007] RLR 93. Compare Sheehan’s curious claim that a mistake depends on the facts which can be *established* at the time: D Sheehan, ‘What is a Mistake?’ (2000) 20 *Legal Studies* 538, 538. For criticism, see Seah (n 126) 95-96.

<sup>127</sup> *Pitt v Holt* (n 118) [109] (Lord Walker), endorsing Seah (n 126).

<sup>128</sup> *Fibrosa* (n 20).

<sup>129</sup> e.g. E McKendrick, ‘Restitution of Unlawfully Demanded Tax’ [1993] LMCLQ 88, 95; E McKendrick, ‘The Reason for Restitution’ in P Birks and F Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press 2000) 105; A Sanders, ‘Absence of Basis: A German Perspective’ in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart 2013) 215 (‘a basis ... subsequently fails’).

<sup>130</sup> See *Re Ames’ Settlement* [1946] Ch 217; *Re Goldcorp Exchange Ltd (In Receivership)* [1995] 1 AC 74 (PC) 104 (Lord Mustill). Compare, however, *Neste Oy v Lloyds Bank Ltd (The Tiiskeri, The Nestegas and The Enskeri)* [1983] 2 Lloyd’s Rep 658 (QB) 666, where Bingham J says ‘there was bound to be a total failure of consideration.’ (emphasis added).

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Therefore, this distinction will not always set the two cases apart.

The second distinction of importance between a mistaken action and a conditional action concerns the nature of the *impairment* to the agent's intention. The distinction is relatively simple: a mistaken action is, of its nature, flawed;<sup>131</sup> whereas a conditional action is flawed only with reference to further facts (which establish whether the condition fails). This means that although mistaken actions are *always* problematic, conditional acts only *may* be so. That a conditional act is not of its nature flawed is clearest when the condition is satisfied.<sup>132</sup> For instance, suppose that money is paid on condition of performance – and perfect performance is rendered. There is no deficiency in the payor's intention to pay the money.

The situation is more complicated when the condition in question has neither succeeded nor failed at the time of the action in question.<sup>133</sup> Suppose that I pay you £10 because I think you are married. You are not married. My payment of the money can be said to be flawed from the moment I pay you. Suppose instead that I pay you £10 on condition that you will get married tomorrow. You do not end up getting married. How are we to understand the action – the payment – in the interim period (from payment to failure of the condition)? It is most plausibly understood as being successful: I intended to pay you conditionally and I succeeded in doing so.<sup>134</sup> This claim allows us the conceptual space we need to say that one can intend

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<sup>131</sup> See S Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 187: 'A mistaken transfer is not a wrong, but it is something that we would have wished had not happened.'

<sup>132</sup> Suppose that A  $\phi$ s at time  $t$  on condition that  $C$ . If  $C$  is true, there is no deficiency (*ceteris parabis*) in A's action.

<sup>133</sup> Suppose that A pays B £10 at time  $t$  on condition that  $C$  at  $t_{+1}$ . How are we to understand the period of  $t \rightarrow t_{+1}$  if  $\neg C$  at  $t_{+1}$ ?

<sup>134</sup> One might think, instead, that we simply cannot assess the payment until the condition is satisfied or fails – but this would collapse together assessment of the action *overall* with assessment of discrete

to do something conditionally and *fail in so doing*. We should make room for such a category as the law makes use of it. Not every unilateral qualification of intention suffices to render the transfer in question conditional. As we examine in greater detail in the next Chapter, the recipient must – to speak loosely – be aware of the condition. In such a case we might say that the claimant intended to do some action (pay money, perform a service, etc.) conditionally – but *failed to do so*.

These distinctions serve to show that conditions and mistakes are distinct concepts, even if they do shade into one another in some cases.

## 2.5 Conclusion

This Chapter has clarified the fundamental concepts of the doctrine of failure of condition. The concept of a condition was sharpened and the importance of these clarifications to the law were explained. It was argued that the condition in failure of condition is a necessary one. It was also argued that there is no conceptual reason to disallow self-induced failures of condition. The Chapter then turned to conditional intentions. After clarifying the nature of a conditional intention, the limits of conditional intentions were then examined. It was shown that we should distinguish between intentions *conditioned* upon an event and two distinct but related concepts: intentions formed upon a background assumption which turns out to be false and intentions *overridden* by extraordinary events. Finally, conditions were distinguished from other related concepts: reasons, hopes and mistakes.

With the doctrinal and conceptual groundwork in place, we can turn to the normative justification of failure of condition. The very characterisation of that

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parts of the action.

## 2.5. CONCLUSION

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puzzle is, as we shall see, a matter of some controversy. Let us consider next how the puzzle is appropriately conceived – and what responses theorists have made to that puzzle.

# 3 Questions for a Theory of Failure of Condition

## 3.1 Introduction

This Chapter aims to establish the key questions a theory of failure of condition should answer. In a normal failure of condition case, the defendant has to make restitution to the claimant. There are three parts to this claim; all three must be dealt with. The claim can be divided into three distinct propositions: (1) the claimant is entitled to (2) restitution from (3) the defendant. A good theoretical account of failure of condition should, I suggest, provide a justification for the content of all three propositions.<sup>1</sup> I will here explain the importance of these three questions and attempt to clarify how one go about justifying (1)–(3). I will also highlight three related debates which can be left to one side if all we want is a theory of failure of condition, concerning the classification of liability, the structure of the law of unjust enrichment, and the nature of the defendant’s responsibility to the claimant.

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<sup>1</sup> There is, perhaps, a fourth proposition concerning the nature of the claimant’s entitlement vis-à-vis the defendant – for instance, whether it is a power or a right. I argue at 3.4.3 that this is not a central phenomenon and so does not need to be analysed here.

## 3.2 The Bilaterality Problem

### 3.2.1 Introduction

A pervasive feature of private law is that liability is ‘of a particular defendant ... to a particular [claimant]’.<sup>2</sup> This feature presents a particular justificatory puzzle: why would ‘the law ... want to attribute a responsibility to one party to provide satisfaction to the other’?<sup>3</sup> I term this the ‘bilaterality problem’. This section will examine the methodological disputes which lie beneath any answer to it. It attempts to show why we can, at this stage, avoid taking a stand on a number of key debates: because the inquiry is non-committal, we are able to leave open a number of questions, including whether the practice is ultimately justified.

### 3.2.2 Justifying a Legal Proposition

A theory of failure of condition aims to justify the three propositions set out in the introduction – why *this* claimant has a claim against *this* defendant for *this*. In other words, the theory calls for a *justification* of that state of affairs – the reasons why we might think the state of affairs is a good thing. The notion of evaluating the merits of a legal proposition (or state of affairs) appears easy enough to understand. There are, though, important disputes about which facts count as reasons in favour of – or against – a particular proposition. One point of particular difficulty is the importance of the history of a rule of law to its justification. Before attempting a

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<sup>2</sup> EJ Weinrib, ‘The Normative Structure of Unjust Enrichment’ in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 43.

<sup>3</sup> P Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WH Cornish and others (eds), *Restitution: Past, Present and Future* (Hart 1998) 252.

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justification of a legal state of affairs, it is important to clarify whether the history of a rule is important to a justification.

At first blush, there appears to be an obvious distinction between an historical explanation of a proposition of law and a justificatory explanation. The historical explanation seems simply to ask a distinct question: instead of seeking the justification, it seeks ‘an explanatory factor in the past.’<sup>4</sup> One might think, therefore, that we can simply ask two questions about one proposition of law: first, how did this rule of law come about? And, secondly, is it a good thing that we have this rule of law? This simple distinction can be difficult to maintain. The realists were keen to stress how aberrant causal facts play a role in determining the decisions reached in courts. For instance, Frank claimed that ‘the judge’s innumerable unique traits, dispositions and habits’ often shape her decision.<sup>5</sup> Similarly, in the philosophical literature there has been interest in the causes of our beliefs – and whether their causal contingency undermines our claims to knowledge about their objects.<sup>6</sup> The realists’ insights – stressing the causal contingency of any position – seem particularly troubling to law. That is because the reasons for a decision play a significant role in legal practices – for instance, in determining a particular rule’s application in future cases. The problem, for our purposes, is this: do we need a story about the history of rules of law in order to justify (or debunk) those rules of law?

One response to the realists is to reaffirm that historical questions are hermit-

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<sup>4</sup> J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1, 3, fn 3.

<sup>5</sup> J Frank, *Law and the Modern Mind* (Tudor 1930) 110.

<sup>6</sup> Our beliefs are often determined by a number of contingent facts (where we grew up, who our parents were, etc.). For a helpful discussion, see R White, ‘You Just Believe That Because ...’ (2011) 24 *Philosophical Perspectives* 573.

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ically sealed from justificatory questions – a ‘separation thesis’. An opposite response – an ‘integration thesis’ – is to claim that questions of justification cannot be answered without detailed recourse to the history of the law in question.<sup>7</sup> Although detailed resolution of these problems is beyond the scope of this thesis, it is important to be clear about the methodological assumptions made in order to establish the criteria for a good justification.

I suggest that we should accept a partial integration thesis. That is, we should accept that the reasons a judge gives for a particular decision can play *some* role in assessing the decision itself. Given the distinctive role of legal reasoning, the reasons which the participants in the practice offer to justify their actions are important to our interpretation of the practice. However, our rationale for considering those facts delimits *which* historical facts are important to a justification. It allows us to resist the temptation to make questions of justification *unremittingly* historical. On the partial integration thesis, although the reasons a judge gives for her decision are important, we need not conduct fMRI scans of the judge’s brain to try to discover whether these reasons were not true motivators of the decision in question. The judge’s motivations are – legally – irrelevant and so are irrelevant to the question of whether the legal decision is a good one or not.

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<sup>7</sup> There are yet further positions one might draw – for instance, about which practice is explanatorily prior. These complications need not concern us here.

### 3.2.3 Explanations and Justifications

Some theorists believe that there is an important distinction between an explanation of a practice and a justification of it. For instance, Coleman claims that:<sup>8</sup>

There is an important and familiar distinction between theoretical explanations and theoretical justifications. While both can illuminate or deepen our understanding, explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are; by contrast, justifications seek to defend or legitimate certain kinds of things – for example, actions, rules, courses of conduct, practices, institutions, and the like.

The key distinction Coleman seeks to draw seems to be this. Some explanations of a practice will claim that the practice is worth retaining. The explanation might say, accordingly, that the practice in question is *justified*. Other explanations will attempt to list all the reasons in favour of a particular position and yet either reject the practice or leave the question of its retention to a later analysis. These explanations might – even if successful – end up concluding that the practice is *unjustified*. Coleman distinguishes these species of explanation so as to ‘remain aloof’ from the commitments of the first kind of explanation.<sup>9</sup>

The distinction Coleman draws is not one between justification and explanation. As Gardner has argued:<sup>10</sup>

To justify something is to explain it rationally. It is to set out some or all of the reasons why it is as it is. Anyone who tries to explain anything in

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<sup>8</sup> J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003) 3.

<sup>9</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 4) 3–4.

<sup>10</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 4) 4 (footnote omitted).

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terms of reasons for it cannot but be concerned with the justification of that thing.

Both of the explanations Coleman sets out are justificatory in this sense: both are enumerations of the reasons in favour of the position described. Nevertheless, the distinction Coleman draws is an important one. The important point for our purposes is that the latter species of explanation – which we might term the *non-committal* justification – is not to be rejected on the basis that it does not show a practice to be worth continuing. Conversely, the first (committal) species of justification will fail by its own lights if the practice in question is not on the balance of reasons worth continuing.

With this clarification made, we will talk in terms of the justification of failure of condition. My inquiry into the justification of failure of condition is non-committal. It does not seek to demonstrate that failure of condition is a doctrine the law must retain. Instead, it tries to find the best non-committal justification for a doctrine of failure of condition. Only then can we ask about committal justifications; until we know what there is to be said in favour of a practice, we cannot hope to decide whether there is enough to be said in favour of it for it to be retained.

### 3.2.4 Which Reasons Count?

Even accepting that we are seeking a justification of the practice, there remains an important dispute over which reasons count as part of a justification.<sup>11</sup> The disagreement appears, at first blush, quite strange. One might be forgiven for thinking

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<sup>11</sup> The distinction drawn below is also drawn, in slightly different language, in S Smith, 'The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?' (2003) 36 *Loyola of Los Angeles Law Review* 1037, 1043.

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that any reason ‘counts’ (in favour of a rule) simply because that is what it is for something to be a reason.<sup>12</sup> However, the disagreement in question is so entrenched in the literature that it must be understood if we are to make sense of a number of claims that theorists have made. This sub-section sets out the dispute. Its conclusion is that we should accept as part of our theory of failure of condition any reason which might count in favour of the doctrine – while accepting that some reasons might not ultimately suffice to make a practice *justified*.<sup>13</sup>

Some explanations of a legal rule simply do not qualify *qua* justifications. For instance, notwithstanding the complications noted above, it seems right to say that some historical stories simply do not count in this respect. If the question is ‘why do we have a law of unjust enrichment?’, an answer focussing on the influence of Robert Goff or Peter Birks in the development of the subject does not seem to be justificatory at all – regardless of the truth of its historical claims. Such an answer might sound initially plausible – but this would be because it is trading on the vagueness of the word ‘why?’ It would not, in truth, answer the justificatory question.

Other explanations are less clear. Suppose, for instance, that we are asked why the law allows claimants a right to recover compensation for negligently inflicted injury. Some people might say that the reason for this liability nexus is:<sup>14</sup>

to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – level of accidents and safety.

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<sup>12</sup> T Scanlon, *What We Owe To Each Other* (Belknap Press of Harvard University Press 1998) 17: ‘Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favour of it.’

<sup>13</sup> Here, the clarification of the previous sub-section is vital – the justification sought is non-committal.

<sup>14</sup> R Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29, 33. Posner actually says that this is the ‘function’ of the negligence system.

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This answer seems more plausible as a justification for a legal rule than a merely historical one. It does seem to give a reason for liability. Beneath the answer lies what we might term the Functionalist Premise. That premise is that:<sup>15</sup>

legal doctrine is justifiable to the extent that it promotes desirable goals, such as deterrence, compensation, loss-spreading, and commercial utility, that can be specified independently of the doctrine.

In keeping with current debates, these accounts will be termed *functionalist* accounts.<sup>16</sup> Functionalist accounts justify the law by arguing that the law furthers some end extrinsic to the law.<sup>17</sup>

These explanations are controversial because some theorists reject their premise. For instance, Weinrib – developing his theory, which he terms ‘corrective justice’ – focuses closely on the bilaterality problem. That is, he closely attends to ‘the fact that liability of a particular defendant is always a liability to a particular [claimant]’.<sup>18</sup> The bipolarity convinces Weinrib that only certain reasons count in favour of a rule of law. That is why he rejects the Functionalist Premise.<sup>19</sup> The rejection is clear in his (in)famous claim that law is ‘just like love’.<sup>20</sup> By that claim, he means that law cannot be justified by reference to the ends it serves. Instead, he appears to

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<sup>15</sup> EJ Weinrib, ‘The Rights of Corrective Justice’ (Obligations VI: Challenging Orthodoxy, Western University, 2012) 1.

<sup>16</sup> This is the language used at EJ Weinrib, *The Idea of Private Law* (rev, OUP 2012) 4.

<sup>17</sup> Within the law of restitution, consider M Gergen, ‘What Renders Enrichment Unjust’ (2000) 79 *Texas Law Review* 1927, 1933 and H Dagan, *The Law and Ethics of Restitution* (CUP 2004) 9–10.

<sup>18</sup> Weinrib, ‘The Normative Structure of Unjust Enrichment’ (n 2) 43. I do not, of course, suggest that Weinrib’s is the only example of this kind of theory.

<sup>19</sup> If there is an elision here, it may not be mine. As will become clear, I am not entirely sure why the feature of bipolarity entails, as Weinrib appears to think, the rejection of the Functionalist Premise *in toto*.

<sup>20</sup> Weinrib, *The Idea of Private Law* (n 16) 56.

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claim that the ‘law has some ends that are internal to it in the sense that tort law helps to constitute them, and not merely to serve them’.<sup>21</sup> Questions of justification involve ‘recourse not to social and political values at large, but to the normative considerations appropriate to this common structure.’<sup>22</sup> When understood in this way, functionalist accounts are – according to Weinrib – doomed to failure from the start. They can never show the practice to be justified. As Weinrib says:<sup>23</sup>

Because corrective justice focuses on what is normatively implicit in the parties’ relationship, it has no room for, and indeed denies the relevance of, the independently desirable goals postulated by instrumentalist [functionalist] analysis.

Let us refer to such theories as ‘formalist’ theories. For formalist theorists, an instrumental reason no more justifies a doctrinal rule than does an historical explanation. Indeed, a justification cannot come ‘by an accumulation of considerations that apply separately to the two parties’.<sup>24</sup> Instead, the reason why the claimant has a claim must be *the same* as the reason why the defendant is liable.<sup>25</sup>

This debate is beyond the scope of this thesis. However, both functionalists and formalists accept that explaining the bilaterality problem is a mark of theoretical success. This is plain with formalists – their entire theoretical structure is oriented

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<sup>21</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 4) 2. This is Gardner’s interpretation of a passage at Weinrib, *The Idea of Private Law* (n 16) 4.

<sup>22</sup> Weinrib, ‘The Normative Structure of Unjust Enrichment’ (n 2) 24.

<sup>23</sup> Weinrib, ‘The Rights of Corrective Justice’ (n 15) 2.

<sup>24</sup> Weinrib, *The Idea of Private Law* (n 16) 122.

<sup>25</sup> This sometimes seems to be Weinrib’s claim, eg Weinrib, *The Idea of Private Law* (n 16) 120–22. Compare the notion that the justification must ‘embrace both parties’, which simply suggests that there must be reasons for both parties to be connected, but not necessary the same reason: EJ Weinrib, ‘Restoring Restitution’ (2005) 91 *Virginia Law Review* 861, 863, 868.

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towards the problem. However, it is no less true with functionalists. For instance, Posner claims that:<sup>26</sup>

damages are assessed against the defendant as a way of measuring the costs of accidents, and the damages so assessed are paid over to the [claimant] (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system.

Regardless of its plausibility, this account is clearly offering an answer to the bilaterality problem: it is justifying the position of *both* parties in the claim. The dispute between functionalists and formalists is, therefore, over whether this is a *good* account.

I suggest that we should be as permissive as possible about the considerations which count in favour of a doctrine. Two separate instrumental reasons – as Posner’s two reasons for liability in tort law – still give us *a* justification for a liability nexus. Even supposing for now that a correlative reason would be a stronger reason, it is an open question whether an answer such as Posner’s is as good as we can muster as a justification of a particular field of law. It might be that there simply are no correlative reasons for liability. It is here important to recall the distinction between non-committal and the committal justifications. Our inquiry is non-committal. A later question is whether the justification we give for the doctrine is sufficient to justify its retention. If one shares Weinrib’s commitment to correlativity, there is ample room for Weinribian criticism at the later – committal – stage. There is no *need*, therefore, to seek a correlative reason for liability.

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<sup>26</sup> Posner (n 14) 33.

### 3.3 The Reasons for the Remedy

The third feature of failure of condition which a theory must explain is why, following a failure of condition, restitution is the appropriate remedy. The response of restitution has been called a ‘moral imperative’ to such facts.<sup>27</sup> But, to borrow from a distinct but related debate, why is the remedy not simply ‘crying over split milk’?<sup>28</sup> What, in other words, are the ‘good reasons’ why ‘those who are unjustly enriched should come under a duty to make restitution.’<sup>29</sup>

The point has received relatively little attention within the unjust enrichment scholarship.<sup>30</sup> That may be because, as we will see in the next Chapter, many people have thought the justification of the remedy is extremely simple. For instance, Birks claimed that there is not ‘*any* convincing argument’ why a defendant might keep a mistaken payment.<sup>31</sup> He thought, further, that restitution was a ‘logical necessity’.<sup>32</sup> Nevertheless, regardless of how restitution is justified, be it through conceptual ana-

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<sup>27</sup> K Barker, ‘Restitution of Passenger Fare: *The Mikhail Lermontov*’ [1993] LMCLQ 291, 294.

<sup>28</sup> J Gardner, ‘The Purity and Priority of Private Law’ (1996) 46 *University of Toronto Law Journal* 459, 474.

<sup>29</sup> S Smith, ‘Unjust Enrichment: Nearer to Tort than Contract’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 198. Smith would now replace ‘duty’ with ‘liability’: see 3.4.3. But the message is much the same.

<sup>30</sup> Compare here the debate amongst contract and tort theorists concerning the justification of the responses to breach: see, for a summary of the views, S Smith, ‘Breach of Contract – One Remedy or Two?’ in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

<sup>31</sup> P Birks, ‘Failure of Consideration and its Place on the Map’ (2002) 2 *OUCLJ* 1, 8 (emphasis added). Further, P Birks, *Unjust Enrichment* (2nd, OUP 2005) 6: ‘there is no answer’ to a claim.

<sup>32</sup> P Birks, ‘The Concept of a Civil Wrong’ in D Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1997) 225. However, Birks does think that there is a ‘limited potential’ for ‘some choices’ about the response: P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 *University of Western Australia Law Review* 1, 11.

lysis or normative argument, the response demands an explanation.<sup>33</sup>

### 3.4 Background Issues

This section will examine three debates of general importance, the resolution of which – I will argue – is unnecessary for the work of this thesis.

#### 3.4.1 The Classification of Liability

The ‘law can be divided in a number of different ways.’<sup>34</sup> One method is to do so contextually, as textbooks on ‘commercial law’ do.<sup>35</sup> Whether a particular rule of law belongs in such a book is not a matter of analytic precision; it is a matter of pragmatic convenience. However, other methods of classification have different criteria for their success. For instance, Birks popularised a method of classification where the law is divided into ‘events’ and ‘responses’. Legal rights, Birks claimed, arose in virtue of consent, wrongdoing, unjust enrichment, or some other reason.<sup>36</sup> Although the classification scheme is much disputed, it should be uncontroversial that it *aims to* classify according to the reasons for liability.

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<sup>33</sup> A closely related debate concerns the manner in which the law ensures – or aims to ensure – that restitution is made. The debate is sufficiently important to warrant separate treatment. See 3.4.3, below.

<sup>34</sup> R Stevens, *Torts and Rights* (OUP 2007) 284.

<sup>35</sup> P Birks, ‘Restitution and the Freedom of Contract’ (1983) 36 CLP 141, 146; P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 73–74; P Birks, ‘Definition and Division: A Meditation on Institutes 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon 1997) 34.

<sup>36</sup> P Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 University of Western Australia Law Review 1, 10; Birks, ‘Definition and Division: A Meditation on Institutes 3.13’ (n 35) 17–20; P Birks, ‘Unjust Enrichment and Wrongful Enrichment’ (2001) 79 Texas Law Review 1767, 1771.

### 3.4. BACKGROUND ISSUES

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One point of controversy concerns the proper location of failure of condition in this classificatory scheme. Birks himself identified it as an instance of unjust enrichment.<sup>37</sup> That conclusion is widely endorsed by scholars.<sup>38</sup> However, this position is not uncontested. A number of theorists of English law have disagreed with Birks' claim.<sup>39</sup> Recently, the American Law Institute claimed that a similar doctrine is contractual in nature.<sup>40</sup>

These questions – of the proper way to classify the law and the correct location of failure of condition within such a scheme — are of obvious importance. For two reasons, they are not questions we will examine in depth here.<sup>41</sup> The first reason is that the question of the proper approach to classification demands deeper treatment than could be achieved within the confines of this thesis. The second reason is that the work of this thesis is logically prior to the second categorisation question. That is, one cannot decide upon the proper location of failure of condition within any classificatory scheme until one has a sound grasp of the nature of failure of condition. Much of the analysis of the thesis can be endorsed, therefore, by theorists from either the contractualist or the unjust enrichment 'camp'.

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<sup>37</sup> Birks, 'Restitution and the Freedom of Contract' (n 35) 157–58; Birks, *An Introduction to the Law of Restitution* (n 35) 219–20.

<sup>38</sup> R Chambers, *Resulting Trusts* (OUP 1997) 143–44; E McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in WR Cornish and others (eds), *Restitution: Past, Present and Future* (Hart 1998) 181–83; G Virgo, *The Principles of the Law of Restitution* (2nd, OUP 2006) 305–06; F Maher, 'Failure of Basis' (DPhil thesis, 2008) 10; T Baloch, *Unjust Enrichment and Contract* (Hart 2009) Chapter 2; A Burrows, *The Law of Restitution* (3rd, OUP 2011) 86.

<sup>39</sup> PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) 489; S Hedley, 'Implied Contract and Restitution' (2004) 63 CLJ 435, 452 fn 45.

<sup>40</sup> American Law Institute, *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute Publishers 2011) §38.

<sup>41</sup> For a preliminary response to the R3RUE see F Wilmot-Smith, '§38 and the Lost Doctrine of Failure of Consideration' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013).

There are two caveats to this agnosticism; neither should be of genuine concern to theorists of any camp. First, the terms of the theoretical debate of the next two Chapters have largely been set by the unjust enrichment scholars. Pursuing the inquiry within that framework might be thought to lend credence to their premises. This worry is unnecessary. We are not bound to endorse either the terms or the conclusions of the unjust enrichment scholars. Indeed, even if we were to endorse the *particular* justificatory story that the unjust enrichment scholars have offered, it would not mean that we were bound to endorse the conclusion that failure of condition should be classified within the law of unjust enrichment. Such a claim relies on a number of quite distinct arguments (regarding classification of the law in general).

Secondly, one claim that might be made about failure of condition – that the contract between the parties is the source of its conditions – is rejected below at 4.4.2.1. This conclusion does not mean that the source of the conditions is a law of unjust enrichment; neither does it mean that failure of condition cannot be classified as part of ‘the law of contract.’ All depends on what we mean by the ‘law of contract’ – a question which, to repeat, is not dealt with here.

#### 3.4.2 Unjust Factors or Absence of Basis

Amongst those who endorse a category or cause of action known as unjust enrichment, there is a debate about the best way to understand the law. When Birks first gave his full elucidation of the law of restitution, he spoke in terms of ‘factors’ which rendered enrichment unjust.<sup>42</sup> As regards the law of ‘subtractive unjust en-

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<sup>42</sup> Birks, *An Introduction to the Law of Restitution* (n 35) 62.

richment’ (as opposed to that category of liability we would now call ‘restitution for wrongdoing’), Birks identified a set of factors, including mistake, ignorance, duress and failure of condition. He placed these factors within abstract categories of ‘viti-ation’ and ‘qualification’.<sup>43</sup> This analysis is widely endorsed by other scholars.<sup>44</sup> However, in his last work, Birks argued that the law of unjust enrichment is better understood as providing for restitution when an enrichment is transferred without legal ground. This approach, heavily influenced by civilian models,<sup>45</sup> he called the ‘absence of basis’ approach to liability.<sup>46</sup>

There is a lively and complex debate over whether Birks was correct to ‘change direction’ in this manner.<sup>47</sup> Some have rejected Birks’ new system.<sup>48</sup> Others have argued that Birks was correct.<sup>49</sup> Yet others steer a middle course, arguing for some kind of mixed system of unjust factors and bases.<sup>50</sup> This debate – both its proper characterisation and its resolution – is beyond the scope of this thesis. However, the

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<sup>43</sup> Birks, *An Introduction to the Law of Restitution* (n 35) 105.

<sup>44</sup> See, for example, Chambers, *Resulting Trusts* (n 38) Chapters 5 and 6; Virgo, *The Principles of the Law of Restitution* (n 38) 120–21; Burrows, *The Law of Restitution* (n 38) 86–7; C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) Part 5.

<sup>45</sup> Birks, *Unjust Enrichment* (n 31) viii.

<sup>46</sup> Birks, *Unjust Enrichment* (n 31) 117–19, Chapter 6.

<sup>47</sup> Birks, *Unjust Enrichment* (n 31) 127: ‘In the swaps cases English law changed direction.’

<sup>48</sup> e.g. A Burrows, ‘Absence of Basis: The New Birksian Scheme’ in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Burrows, *The Law of Restitution* (n 38) 95–16.

<sup>49</sup> e.g. R Stevens, ‘Is There a Law of Unjust Enrichment?’ in S Degeling and J Edelman (eds), *Unjust Enrichment and Commercial Law* (Thomson 2008); Baloch, *Unjust Enrichment and Contract* (n 38) Chapter 3. Note that both regard unjust factors as important to proving an absence of basis.

<sup>50</sup> G Virgo, ‘Demolishing the Pyramid – the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009); Mitchell, Mitchell and Watterson (n 44) (Part 2 includes ‘justifying grounds’ of enrichments); H Scott, *Unjust Enrichment in South African Law: Rethinking Enrichment By Transfer* (Hart 2013).

dedication of extensive inquiry to a doctrine seen by many as an ‘unjust factor’ – that is, to failure of condition – might be thought to beg a more fundamental question of whether the ‘unjust factors’ system is the correct one. There are two reasons why this is not so. First, it is wrong to suppose that the unjust factors/ absence of basis debate is logically prior to an investigation of individual doctrines. The opposite is true: only with an appreciation of the intricacies of individual doctrines can that debate sensibly be approached. Secondly, an absence of basis theorist’s particular arguments regarding the nature of liability can comfortably be raised in the discussion of justification. For instance, if the lack of legal ground is the determinative feature of the cases, the concentration on agential intention in the following Chapters might be thought to be mistaken.<sup>51</sup> There is nothing to prevent a theorist from raising such points at that stage of discussion.

#### 3.4.3 Duties and Liabilities

We will, in the next two Chapters, be seeking the justification of the doctrine of failure of condition. Does it, for our purposes, matter what responsibilities the defendant has when she receives an enrichment subject to a condition that fails? In particular, does the nature of the justificatory puzzle change if the defendant is under a *duty* to make restitution as opposed to a *liability*? ‘A duty ... is that which one ought or ought not to do.’<sup>52</sup> That is, it is a requirement to X/ not to X. As regards liabilities:<sup>53</sup>

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<sup>51</sup> This formulation is hedged to accommodate those absence of basis theorists who retain an important role for agential intention, for instance as a reason to *deny* restitution.

<sup>52</sup> *Lake Shore & M S R Co v Kurtz* 10 Ind App 60, 304 (Appellate Court of Indiana 1894).

<sup>53</sup> S Smith, ‘A Duty to Make Restitution’ (2013) 26 Canadian Journal of Law and Jurisprudence 157, 161. Further, WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’

To say that an individual is liable to X is to say that X may be done to or imposed upon that individual if another person (or institution) exercises a power.

Steve Smith has, in a series of recent articles, suggested that a great deal turns on this distinction.<sup>54</sup> This section, after a brief introduction to Smith's arguments, argues that the issue can – for our purposes – be left to one side.

Smith has argued that:<sup>55</sup>

the only legal consequence of a mistaken payment is that the recipient becomes liable to be judicially ordered to repay the money (to 'make restitution') if the transferor brings a legal action.

Now, Smith expressly caveats that his theory says 'nothing about the rules governing things like ... restitution for a failure of [condition].'<sup>56</sup> However, his argument makes many structural claims of general importance, which we should consider. In particular, he suggests that his doctrinal claim – that the defendant is only *liable* to make restitution – will assist in the resolution of the justificatory puzzle. That is because, Smith claims, the justificatory puzzle changes depending on whether the defendant is under a duty or a liability.<sup>57</sup> He claims that:<sup>58</sup>

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(1913) 23 Yale Law Journal 16, 44–5.

<sup>54</sup> Contract: S Smith, 'Why Courts Make Orders (and What this Tells Us About Damages)' (2011) 64 CLP 51; S Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727. Unjust enrichment: S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Hart 2013); Smith, 'A Duty to Make Restitution' (n 53).

<sup>55</sup> Smith, 'A Duty to Make Restitution' (n 53) 158. See, further, Smith, 'The Restatement of Liabilities in Restitution' (n 54).

<sup>56</sup> Smith, 'A Duty to Make Restitution' (n 53) 157, fn 7.

<sup>57</sup> See, for example, Smith, 'The Restatement of Liabilities in Restitution' (n 54) 247.

<sup>58</sup> Smith, 'A Duty to Make Restitution' (n 53). I have here integrated two passages, from 176 and 163. I have not amended Smith's claims; the editing is presentational, to bring together Smith's claims about the two types of justificatory story.

the kind of justificatory story that is needed to explain liability-imposing rules is different in kind from that needed to explain duty-imposing rules. In particular, [whereas] to explain a legal duty we must show how it is at least plausible to suppose that the action it requires gives effect to a moral duty, the justificatory story [of a liability-imposing rule] will not be about moral reasons that apply to the subject.

If this is correct, we will need first to examine the doctrinal question of whether the defendant is subject to a duty or a liability: if it is a duty, *only* moral reasons can be marshalled as part of the justification; if it is a liability, *only* non-moral reasons can be marshalled.

There are two reasons why we need not take a stand on that doctrinal question. First, because the doctrinal question of whether the defendant is subject to a duty or a liability is actually an aspect of a distinct justificatory puzzle from the one with which we are concerned. We should distinguish between two quite distinct difficulties one might be concerned with in assessing a legal regime. The first is what we might call the *responsibility* puzzle; the second is what we might call the *compliance* puzzle.<sup>59</sup> These puzzles are both concerned with the ways we might justify the law's intervention to the defendant – however, they have different interventions as their justificatory objects. The responsibility puzzle concerns the difficulty of explaining why the law is interested in the defendant at all. This is, at the most general level, the 'why me?' objection which a defendant might raise.<sup>60</sup> So, in a tort context the fact that a defendant breached the claimant's rights will (on many accounts) form

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<sup>59</sup> I defend the use of the word 'responsibility' further at 4.1.

<sup>60</sup> The word 'responsibility' can be employed in a wide variety of instances. A familiar sense of the term concerns the obligations an agent has – 'our responsibilities to others', etc. In this respect, the word can be understood as linguistically broad enough to act as an umbrella for both duties and liabilities. It is important to stress that the term is not used to take a stand on the issue examined below, the specific reasons a for a defendant to be held to account by the law.

part of the story of why the defendant owes the claimant something.

The compliance puzzle concerns the distinct difficulties which arise due to the law's own mechanisms – those mechanisms with which the law aims to ensure the defendant's compliance with her own responsibility. Suppose we accept that a defendant who has breached a claimant's rights should come under some kind of responsibility to the claimant. There is a subsequent question as to how the responsibility should be enforced in law. There might, for instance, be good reasons – incidental to the defendant's responsibility – for the law to avoid giving effect to this responsibility with a legal duty. A duty might be thought to bring with it various incidental problems (such as the spectre of multiplied liability, with further claims arising on breach of that duty). So, at least in this way, the manner in which the law secures compliance with the responsibility seems important – but it seems to be a different puzzle from the responsibility puzzle.

At times, Smith seems to be concerned with the compliance puzzle. For instance, he summarises his 'conceptual objections' to the duty model of restitution thus:<sup>61</sup>

First, the model assumes that the law imposes positive duties on citizens who have neither agreed to such obligations nor indeed done anything at all. Second, the model supposes the existence of duties that neither party to the duty may know, or reasonably be expected to know, exist.

The objections seem to be that placing the defendant under a duty to make restitution would be too onerous.<sup>62</sup> The objections to the duty model are, therefore, objections to the *manner* in which the law secures compliance with this responsibility, rather than with *the responsibility itself*. These concerns are avoided on the

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<sup>61</sup> Smith, 'A Duty to Make Restitution' (n 53) 175.

<sup>62</sup> See, similarly, Dagan (n 17) 43; MA Eisenberg, 'Mistake in Contract Law' (2003) 91 California Law Review 1573, 1592.

### 3.4. BACKGROUND ISSUES

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liability model – there are simply no positive duties on recipients of mistaken payments until a court makes an order. In this respect, placing a defendant under a liability might be regarded as aiming to ensure that the defendant has to live up to her responsibility (i.e. to make restitution) without the mechanism ensuring compliance adding onerous *extra* responsibilities (such as keeping abreast of one’s bank account, the motives of payers, etc).<sup>63</sup>

When it comes to a theory of failure of condition, I suggest that the key difficulty is the responsibility puzzle. Only if we can explain why there should be responsibility *at all* can we turn to the way in which that responsibility should be enforced. Further, the justification of that responsibility should be the same regardless of the ultimate way in which the responsibility is upheld: that is, we might rely upon moral reasons or non-moral reasons.<sup>64</sup>

We can, therefore, leave open the precise mechanism of compliance with which the law should (or *does*) hold the defendant to that responsibility. In the case of failure of condition the difficulty is how to justify the defendant’s responsibility in the broadest sense, i.e. why it is acceptable for the defendant to (ultimately) have to surrender an enrichment to the claimant.<sup>65</sup> The justificatory puzzle of the next Chapters concerns the responsibility puzzle of failure of condition: why is it (if it is) a good thing for a defendant to have to make restitution?<sup>66</sup> The question of the proper way to uphold that responsibility is not addressed here; however, that

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<sup>63</sup> A third possible position the law could take is for the defendant to be under a conditional duty to make restitution, with knowledge of the circumstances rendering her receipt unjust being a prerequisite to the duty to arise.

<sup>64</sup> If Smith is correct, of course, the nature of *this* argument might change the way in which the law should seek compliance with the responsibility.

<sup>65</sup> The ‘ultimately’ of this formulation is to explicitly signal agnosticism on the duty/ liability puzzle.

<sup>66</sup> A proposition Smith accepts: Smith, ‘A Duty to Make Restitution’ (n 53) 173, Part 4.

question is only sensibly approached when we have an answer to the responsibility question.

The second reason why my analysis in the next two Chapters need not take an affirmative stand on the question of duties and liabilities is that both moral and non-moral reasons can be marshalled if the compliance mechanism is a liability. Smith is right to distinguish the nature of the reasons we might bring to bear to justify a legal regime. In justifying a defendant's responsibility, we might refer to moral reasons. For instance, we might say that the responsibility encapsulates what the defendant should (regardless of the legal position) do. We might, instead, refer to non-moral reasons. For instance, we might say that the responsibility ensures a particular outcome, such as efficiency.<sup>67</sup> But it is less clear whether this distinction *must* track the law's chosen compliance mechanism. We might recognise a liability – even when there are moral reasons applicable to the defendant – to avoid the incidental harms that legalising a moral duty might bring about. Smith insists that:<sup>68</sup>

1. To explain a legal duty we must show how it is at least plausible to suppose that the action it requires gives effect to a moral duty; and
2. The justificatory story [of a liability-imposing rule] will not be about moral reasons that apply to the subject.

These claims are independent. We can, in principle, endorse one without endorsing the other. While it may well be correct that a duty can only be justified by moral reasons applying to the agent, it seems less plausible that liabilities can only be

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<sup>67</sup> I here assume that efficiency is not a moral value. However, this precise claim does not matter to the point I am making.

<sup>68</sup> Smith, 'A Duty to Make Restitution' (n 53) 163, 176.

justified by non-moral reasons.<sup>69</sup> If we soften Smith's thesis so as to only endorse the first of the claims, Smith's claim is less likely to change the nature of the analysis in the next two Chapters. If the compliance mechanism of failure of condition's responsibility is a liability, the whole gamut of reasons are available to us. It is only if the defendant comes under a duty that Smith's claim bites. Smith would appear most likely to endorse the liability model.<sup>70</sup> On his view, therefore, the distinction he draws does not take us further.

These two reasons to query Smith's theory are independent. The former is more sceptical than the latter as regards his project in general and if correct allows us to put the duty/ liability distinction completely to one side. The latter, of course, leaves open the possibility that the compliance mechanism is a duty, and that this circumscribes the justificatory story we can tell about the law. However, if Smith's own descriptive claims – that the compliance mechanism is a liability – are correct, the latter reason means we can put Smith's normative claims to one side.

## 3.5 Conclusion

The work of this Chapter has been groundwork for the inquiries of the next two Chapters. Having already explored the doctrinal and conceptual foundations of failure of condition, we can finally turn to the question of the normative justification of the doctrine. The next Chapter sets out the current responses to the questions a theory of failure of condition must answer – and sets out the problems with these

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<sup>69</sup> My reasons for saying so are those of the previous paragraphs, i.e. that there might be good reasons to uphold a moral duty through a liability mechanism.

<sup>70</sup> This is subject to the caveat at n 56.

### 3.5. CONCLUSION

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accounts.

## 4 Problems with Current Answers

### 4.1 Introduction

The previous Chapter explained the questions that a theory of failure of condition must address. This Chapter examines the answers to those problems given in the current literature, their problems, and the questions they leave unanswered. Two of the problems – the bilaterally problem and the justification of the response to a failure of condition – were explained in the previous Chapter. There is a third problem which arises due to the fact that most theories which seek to justify the claimant's claim focus on her qualified intention. This appeal to subjective intentions is problematic in light of the objectivity of failure of condition. The problem – termed the Objectivity Anomaly – is discussed below at 4.4.

The previous Chapter also showed why we are able to discuss these issues without taking a stand on the precise legal relationship that is instantiated in the doctrine of failure of condition – duty/ right, liability/ power, etc. Ultimately remaining aloof on this issue gives rise to a terminological problem. How are we to describe the position of the claimant and the defendant? I will in the following two Chapters employ the terms 'endowment' to describe the fact that the claimant is able to make a claim for restitution and 'responsibility' to describe the position of the defendant.

The *explananda* are, first, why the claimant is endowed by the law such that she can claim restitution from the defendant; and, second, why the defendant is responsible to make restitution to the claimant. Although both of these terms – endowment<sup>1</sup> and responsibility<sup>2</sup> – come with their own associations, these associations do not beg any questions concerning the status of the parties (that is, whether they are subject to duties, liabilities, etc.). They are also rarely employed in this manner. This is a virtue as it should allow discussion of the substantive issues without getting hung up on terminology. I will use the term ‘liability nexus’ to describe the relationship between the two parties.

## 4.2 Justifying the Liability Nexus

### 4.2.1 Introduction

This section examines one orthodox attempt to answer the bilaterality problem. As regards the justification of the claimant’s endowment, although there are a number of issues which current explanations leave either unanswered or inadequately answered, the orthodox account is broadly endorsed. As regards the question of why the defendant is responsible to the claimant, it is difficult to find an orthodox account. This may be because the defendant’s responsibility is seen as being so easily justified as to not require much comment. However, as we shall see, there are grave difficulties to justifying the responsibility.

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<sup>1</sup> The appropriate definition of the OED is: A ‘gift’, power, capacity, or other advantage with which a person is endowed by nature or fortune.

<sup>2</sup> The sense in which this is employed is the OED’s second meaning: The state or fact of being accountable; liability, accountability for something.

### 4.2.2 Claimant-Sided Problems

#### 4.2.2.1 The Qualified Intention Thesis

Sir William Evans thought that the justification of the liability nexus for a failure of condition was ‘too plain to require any comment.’<sup>3</sup> Others have been more forthcoming. Birks explained it in this way:<sup>4</sup>

the [claimant] ... has taken pains to qualify the transfer, making clear that, although he wanted the defendant to have the enrichment, his intent to that effect was not absolute but conditional. Now, as events have turned out, the condition has failed; and with its failure the transfer has become non-voluntary.

For Birks, the condition of the transfer arises from the conditional quality of the claimant’s intention to make the transfer.<sup>5</sup> This explanation has been extremely influential. For instance, Chambers, echoing Birks, argues that in a failure of condition case:<sup>6</sup>

the provider has a properly formed, but qualified intention to benefit the recipient; i.e. that intention is conditional upon the happening of certain events. When those events fail to occur or continue as expected, the transfer becomes non-voluntary[.]

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<sup>3</sup> Sir William Evans, *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* (Liverpool, Merrit & Wright 1802) 3.

<sup>4</sup> P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 219.

<sup>5</sup> It is important to see that Birks includes within his justification that the claimant ‘[made] clear’ the qualification of his intention. This assists in justifying the responsibility, as is seen at 5.2.4.

<sup>6</sup> R Chambers, *Resulting Trusts* (OUP 1997) 143. Compare G Virgo, *The Principles of the Law of Restitution* (2nd, OUP 2006) 305, who says that we should *treat* the intention as qualified. This suggests that the condition itself is imposed for other reasons.

## 4.2. JUSTIFYING THE LIABILITY NEXUS

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Equally, McInnes reasons that:<sup>7</sup>

Despite fully intending the defendant to *receive* an enrichment, the [claimant] may intend for him to *retain* it only if a certain condition is met. If that expectation is subsequently disappointed, the [claimant] may be entitled to relief.

A feature common to these accounts is that ‘the reason for restitution essentially turns on [the claimant’s] state of mind.’<sup>8</sup> That is, the transfer appears to be conditional because the claimant intends it to be so.

There is one problem with – and two questions arising out of – the orthodox account. All three must be answered if it is to give us a good justification of liability for failure of condition. The problem should be addressed first as it is the most fundamental. It challenges the claim that the claimant’s intention is the object of the law’s concern. The problem is: if the qualified intention thesis is correct, why are the conditions of the transfer objective? Assuming that this problem can be rebuffed, there are two questions which the qualified intention thesis – as presented above – leaves unanswered. First, why the law should be concerned by the fact that a claimant made a transfer with a qualified intention. Secondly, why restitution is an appropriate response to the problem. Let us examine first the problem and then these questions.

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<sup>7</sup> M McInnes, ‘The Measure of Restitution’ (2002) 52 *University of Toronto Law Journal* 163, 175 (footnotes omitted, emphasis in original). McInnes goes so far as to suggest that “‘failure of consideration” ... [is] more accurately termed “qualified intention””. See, also, IM Jackman, *The Varieties of Restitution* (The Federation Press 1998) 44; A Burrows, *The Law of Restitution* (3rd, OUP 2011) 319; C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) para 12.01.

<sup>8</sup> McInnes, ‘The Measure of Restitution’ (n 7) 175.

### 4.2.2.2 The Objectivity Problem

The orthodox account relies upon the fact that the claimant has subjectively qualified her intention. However, one might respond, a subjective qualification is neither necessary nor sufficient. A subjectively qualified intention might seem to be unnecessary, for instance, in an orthodox case of failure of condition. If a claimant pays a defendant a lump sum for the construction of a house and the defendant fails to complete the work, the claimant is entitled to restitution.<sup>9</sup> A claimant need not prove that her own subjective intention was qualified in order to make such a claim: the mere fact her intention appears, objectively, to be conditional upon the construction of the house will suffice. This might be thought to suggest that a subjectively qualified intention is unnecessary.

We must be sure not to overstate the conclusion we can reach from this example. Even though the claimant does not have to prove that her intention was privately qualified, this does not mean that the law is uninterested in her private intentions. There is, in our hypothetical, no evidence that her intention was *not* conditional. The appropriate test case would be whether the claimant is barred from restitution if the defendant can prove that she (the claimant) intended the defendant to have the money regardless of the construction of the house. The law is rather less clear on that matter: plausibly restitution would be barred in such a case.<sup>10</sup> Perhaps, therefore, the problem is better conceived of in these terms: why does the law allow restitution *merely* on proof of an objectively qualified intention?<sup>11</sup>

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<sup>9</sup> *Sumpter v Hedges* [1898] 1 QB 673 (CA).

<sup>10</sup> We have no law testing this question.

<sup>11</sup> This formulation allows us to remain agnostic on the ways in which a *prima facie* claim for restitution might be defeated – as, for instance, it might be if the defendant can prove that the claimant intended

## 4.2. JUSTIFYING THE LIABILITY NEXUS

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A more problematic argument is that a subjective intention also appears to be insufficient for restitution to be awarded. Suppose again that money is paid by the claimant to the defendant under a contract for the construction of a house. The defendant constructs the house but the quality of some of the craftsmanship is deficient. If the obligation to build is a condition precedent to the duty to pay for the construction, the defendant will have an action for the agreed sum – the claimant will have to bring a cross-action for damages.<sup>12</sup> It should follow that the claimant cannot, if her obligation to pay was precedent to the defendant's obligation to build, recover her money. She cannot do so even if – privately, subjectively – the obligation as to quality was crucial to her intention.

Therefore, as a matter of legal doctrine, proof of a subjective qualification to the claimant's intention does not appear to be necessary – and nor is it sufficient for restitution to be awarded. But, if the claimant's intention is the core justification of the claimant's endowment, how can this be so?<sup>13</sup> Theorists have not, to my knowledge, formulated this question in this manner – and so there are no existing answers on which we can build.

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the defendant to have the enrichment in any event.

<sup>12</sup> *Hoening v Isaacs* [1952] 2 All ER 176 (CA).

<sup>13</sup> It is also important not to overstate the contrast between the objective and the subjective states of affairs. In the vast majority of situations it is reasonable to suppose that our outward manifestations of intention correlate closely with our subjective intentional states. There are aberrant cases, such as where we are automata – these do not trouble us. The class of cases which raises the concern is relatively small, being those where a claimant had a subjectively qualified intention to make some transfer – that is, qualified in the *conditional* sense developed in Chapter 2 – but where she has failed to manifest that intention. Such cases could arise, but they are far from frequent.

### 4.2.2.3 Why Does a Qualified Intention Matter?

If the objectivity problem can be overcome, the first question which the qualified intention thesis faces is demonstrating why a qualification of the claimant's intention should matter. In this respect, the orthodox explanation leaves a crucial step of the argument unanswered. For instance, Barker says that:<sup>14</sup>

the [claimant's] ... consent to the defendant's retaining the money, originally qualified by reference to a condition, has, with the failure of that condition, been vitiated. That being so, the moral imperative for relief is established[.]

The question is, let us be clear, why the *transfer* between the claimant and the defendant is qualified. Barker does not appear to provide an argument for this. Indeed, he does not appear to regard the qualification of the transfer as *requiring* an argument – the last sentence of the quote is proposed as a deduction from the first sentence. However, the proposition that the claimant's intention is qualified is quite separate from the proposition that the transfer in question is qualified: the first is a fact about the claimant; the latter is a conclusion of law.

To develop an argument for the deduction, we can approach the question in reverse. We might ask why it would be a problem if the transfer itself *were not qualified*, despite the claimant qualifying her will. An answer to that question would explain why there is a value in the transfer being understood as conditional when the claimant has made her own intention conditional. Barker does hint at an explanation in the reference to non-voluntariness (or vitiation) of the claimant's intention. This merely gestures at an argument – it does not provide one.

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<sup>14</sup> K Barker, 'Restitution of Passenger Fare: *The Mikhail Lermontov*' [1993] LMCLQ 291, 294.

### 4.2.2.4 Why Does Restitution Help?

The second question is why restitution is an appropriate response to the problem identified. This problem is one part of a wider difficulty of justifying restitution. Discussion of the difficulty is deferred until 4.3.

### 4.2.3 Defendant-Sided Problems

#### 4.2.3.1 The Basic Problem

Even if we can overcome the claimant-sided problem and questions and explain why there are good reasons to endow the claimant with the ability to claim some form of relief, the Bilaterality Problem would not yet be completely answered. We would still require a justification for why that claim should be against *this defendant*.<sup>15</sup> The notion that there is a peculiar defendant-sided difficulty in justifying restitution has been largely ignored by scholars.<sup>16</sup> That may be because of the widespread assumption that this side of the problem – that is, the justification of the defendant’s responsibility – is not a difficult one to solve. Birks claimed that there is not ‘any convincing argument’ why a defendant might keep a mistaken payment.<sup>17</sup> This is incorrect – and so, for the reasons explored in greater detail below, such an account

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<sup>15</sup> Recall that at 3.2.4 it was argued that we should accept any reason why a defendant might be made responsible in this way, even it is not the same reason why the claimant has a claim.

<sup>16</sup> However, Hume asks:

suppose a person to have lent me a sum of money, on condition that it be restored in a few days; and also suppose that after the expiration of the term agreed on, he demands the sum: *I ask, what reason or motive have I to restore the money?* (D Hume, *Treatise on Human Nature* (OUP 1978) 479 (emphasis in original).

<sup>17</sup> P Birks, ‘Failure of Consideration and its Place on the Map’ (2002) 2 OJCLJ 1, 8 (emphasis added). Further, P Birks, *Unjust Enrichment* (2nd, OUP 2005) 6: ‘there is no answer’ to a claim.

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is necessary. The orthodox account does not currently give it.

We should first stress the uniqueness of the justificatory problem faced in this field. The defendant does not promise to repay the enrichment to the claimant and does nothing wrong in receiving the enrichment. The defendant does no civil wrong in receiving or retaining the enrichment. The theoretical concern is that a purely unilateral – claimant focussed – right to recover would fail to explain the defendant’s responsibility. Weinrib goes so far as to suggest that the basis of the responsibility ‘cannot be the unilateral consequence of the [claimant’s] lack of donative intent’ to make the transfer.<sup>18</sup> If the defendant were to have to make restitution based on those facts alone, the law would – Weinrib claims – be incoherent. He explains:<sup>19</sup>

The basis of the [claimant’s] claim is that, in the absence of donative intent on her part, the transfer of something for nothing has deprived her of value that belonged to her without her having freely parted with it. If the [claimant’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 objection is powerful. However, theorists have not been insensible to this claim. The next sub-section will attempt to reconstruct the argument implicit in the claims of many theorists. The argument is accepted to be valid – that is, it can overcome Weinrib’s objection to the responsibility. The subsequent section questions whether it is sound.

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<sup>18</sup> EJ Weinrib, ‘The Structure of Unjustness’ (2012) 92 Boston University Law Review 1067, 1071.

<sup>19</sup> EJ Weinrib, ‘Correctively Unjust Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 41–42.

### 4.2.3.2 The ‘No Harm’ Thesis

In trying to justify why the defendant is responsible to the claimant, many share the intuition that some part of the explanation is to be found in the fact that the defendant has received an enrichment by a transfer from the claimant. The intuition is thought to be vital to the independence of a law of unjust enrichment. For instance, Birks claimed that ‘[t]he independence and necessity of the law of unjust enrichment derives from the peculiar normativity of extant gain’.<sup>20</sup> Birks never explained quite what he meant by this. His core justification for the claim appears to have been sourced in a brief thought experiment.<sup>21</sup> He asks us to ‘[s]uppose a situation in which change is overpaid.’<sup>22</sup> For instance, a shopkeeper gives you change for a £50 note when you had paid with a £20. Here:<sup>23</sup>

You may be tempted to insist that you were entirely innocent ... But you will immediately see that a retort of that kind will not strengthen your case to keep the £30. Your innocence is irrelevant ... [S]o long as you still have the mistaken money, there is no answer to the shop’s demand to have it back.

We can reconstruct the argument which motivates the thought experiment from a number of passages. Birks says, as we have seen, that strict liability to repay mistaken payments ‘barely needs authority’ and that there is not ‘any convincing argument’ why a defendant may keep a mistaken payment.<sup>24</sup> The defendant’s respons-

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<sup>20</sup> Birks, *Unjust Enrichment* (n 17) 209.

<sup>21</sup> See e.g. P Birks, ‘Receipt’ in P Birks and A Pretto-Sakmann (eds), *Breach of Trust* (Hart 2002) 229–30; Birks, ‘Failure of Consideration and its Place on the Map’ (n 17) 8–9; Birks, *Unjust Enrichment* (n 17) 6.

<sup>22</sup> Birks, *Unjust Enrichment* (n 17) 6.

<sup>23</sup> Birks, *Unjust Enrichment* (n 17) 6.

<sup>24</sup> Birks, ‘Failure of Consideration and its Place on the Map’ (n 17) 8.

## 4.2. JUSTIFYING THE LIABILITY NEXUS

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ibility must be strict – strict liability is said to be ‘the *only* acceptable regime’<sup>25</sup> – because the claimant:<sup>26</sup>

is not trying to make [the defendant] worse off. [He] seeks only that [she] should give up the gain obtained at [his] expense. He asks that [she] return to the position [she] would all along have been in had [she] not received from [the claimant] money to which [she was] not entitled.

A number of theorists claim, in justifying the liability nexus, that the defendant will not be made worse off than she was before the enrichment was received. For instance, in Beatson and Bishop’s analysis of mistaken payments, the authors ask us to ‘imagine a world in which any mistaken payment is very quickly discovered’.<sup>27</sup> They say that in such a world ‘the recipient ... can return the money to the mistaken party ... and suffer no loss as a result.’<sup>28</sup> Similarly, Smith says that ‘an obligation to reverse a defective transfer is not particularly onerous. At most, it consists of returning the transferred property or its value’.<sup>29</sup> These claims seem to be intended as part of an argument – indeed, they seem to be a *vital piece* in the argument – justifying the defendant’s responsibility.

The theories suggest that the justification of the defendant’s responsibility is that she will not be harmed (not ‘worse off’, ‘no loss’) by the action for restitution. Let

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<sup>25</sup> Birks, *Unjust Enrichment* (n 17) 7 (emphasis added).

<sup>26</sup> Birks, *Unjust Enrichment* (n 17) 7. In the following quote I will use the feminine to refer to the defendant and the masculine to refer to the claimant. See, too, the distinction between ‘allocating a loss’ and ‘relocating a gain’: Birks, ‘Failure of Consideration and its Place on the Map’ (n 17) 8–9. Further, Birks, ‘Receipt’ (n 21) 229.

<sup>27</sup> J Beatson and W Bishop, ‘Mistaken Payments in the Law of Restitution’ (1986) 36 *University of Toronto Law Journal* 149, 150.

<sup>28</sup> Beatson and Bishop (n 27) 150.

<sup>29</sup> S Smith, ‘A Duty to Make Restitution’ (2013) 26 *Canadian Journal of Law and Jurisprudence* 157, 172.

## 4.2. JUSTIFYING THE LIABILITY NEXUS

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us call this idea the ‘No Harm thesis’.<sup>30</sup> The No Harm thesis seems to be this. If the remedy satisfies some interest that the claimant has in being awarded restitution at no cost to the defendant, there is no objection to the award.<sup>31</sup> Let us grant that claim. Doing so does give us a valid argument in support of the defendant’s liability. The premises of the argument are, first, that responsibility is, *ceteris parabis*, justifiable if the defendant is not harmed by the imposition of responsibility; and, second, that a defendant is not harmed in an action for failure of condition. If this is so, responsibility is *prima facie* justified in a failure of condition case.<sup>32</sup>

### 4.2.3.3 Difficulties for the ‘No Harm’ Thesis

I have granted the first premise, albeit only *arguendo* (and, indeed, without argument). Let me concentrate instead on the second premise, that a defendant is not harmed in an action for restitution upon a failure of condition. Investigation of this premise requires an account of the nature of harming. The concept is much disputed. However, a working definition of harm might say that C harms D where C acts in such a way as to adversely affect D’s interests.<sup>33</sup> On one conception of

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<sup>30</sup> See, further, D Klimchuk, ‘The Scope and Structure of Unjust Enrichment’ (2007) 57 *University of Toronto Law Journal* 795, 799.

<sup>31</sup> The reflex of this argument would seem to be that if the defendant gains at no cost to the claimant, there is no objection to her (the defendant) holding onto the gain. If the argument is valid then we should be suspicious of any general account of gain-based damages. Liability might be justified at one step removed: for instance, by the necessity of integrity to a system of rights and the deterrence offered by this kind of liability. But such an account would find it difficult to explain why *the claimant* should get the gain.

<sup>32</sup> Why only *prima facie*? To leave open the possibility that there is no reason for the claimant’s endowment.

<sup>33</sup> I take this working definition – and I accept that it is no more than that – from S Perry, ‘Harm, History, and Counterfactuals’ (2003) 40 *San Diego Law Review* 1283. This account has only two conditions, acting and adverse effect on D’s interests. These two conditions are reduced down from Feinberg’s six: J Feinberg, ‘Wrongful Life and the Counterfactual Element in Harming’ in *Freedom and Fulfillment* (Princeton University Press 1994) 6–7. Although I will not defend Perry’s formula-

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harm, the adverse change to D's interests can be found with reference to a counterfactual condition. For instance, Feinberg suggests that C harms D in this way when '[D]'s personal interest is in a worse condition ... than it would be in had [C] not acted as he did.'<sup>34</sup> Another plausible candidate for the test of an interference with D's interests is an historical 'worsening' test. For instance, Feinberg suggests that C might harm D where D's 'personal interest is in a worse condition ... than it was before [C] acted.'<sup>35</sup> For completeness' sake, let us examine the situation using both conditions.<sup>36</sup>

Why might one think that the defendant is not harmed by having to make restitution? One possible reason to think that she is not harmed is this. Recall that both the counterfactual and the historical worsening conditions ask us to compare D's position now (for instance, her position after making restitution of a benefit) with her position had C 'not acted as he did' or her position 'before [C] acted.' A 'no harm' theorist might claim:

*No Transfer:* Had C never acted at all – that is, had C never *conferred the benefit in the first place* – D would never have received the enrichment. It follows that the post-restitution state does not meet either condition. D is not counterfactually worse off than if C had never acted: she did not have the enrichment beforehand; she does not have it afterwards. D is not worse off than she was prior to the act in question for the same reason.

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tion, it has great intuitive plausibility and Perry's critique of Feinberg's additional four ingredients should suffice: Perry (n 33) 1285-86.

<sup>34</sup> Feinberg (n 33) 7.

<sup>35</sup> Feinberg (n 33) 7.

<sup>36</sup> Within the debate on the metaphysics of harm, some theorists endorse one condition, some endorse the other. Perry endorses both: Perry (n 33). Shiffrin endorses neither: S Shiffrin, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm' (1999) 5 *Legal Theory* 117. For a spirited defence of the counterfactual condition, see: V Tadros, 'What Might Have Been' in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

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As the no harm thesis has never been defended, it is difficult to know whether any theorist would endorse such a claim. The claim appears to have some intuitive force – and it may explain why at least some no harm theorists think that the defendant is not harmed by having to make restitution.<sup>37</sup>

The argument is fatally flawed. To see why, we must distinguish between the act we seek to test (to test if the act causes harm) and the more general acts of the claimant. Recall that the first premise was: if the award of restitution satisfies some interest that the claimant has at no cost to the defendant, then there is no objection to the award. It follows that our purpose must be to discover whether the act of *making restitution* harms the defendant. It is this act which we must use within the counterfactual or the historical condition. But *No Transfer* does not use that act in its test. Instead, it assesses the situation with reference to the earlier payment of the claimant to the defendant. That is clearly an illegitimate amendment to the test.

If we assess the act of disenriching the defendant – that is, the act of making restitution – on either the counterfactual or historical worsening test, the defendant seems to be harmed. Had the defendant not made restitution to the claimant, she (the defendant) would have had the enrichment. Being without the enrichment in question seems clearly to be a harm. Therefore, the no harm thesis looks in danger of failing to prove its crucial claim – that there is no harm in disenrichment.

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<sup>37</sup> It is important to see that the no harm thesis is not universally endorsed. Having to make restitution has been called ‘a hardship’ (*Mahme Trust Reg v Tayeb* [2002] EWHC 1543 (Ch), [2002] WTLR 21 [143]) and a ‘bitter disappointment’ (*Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818 [34]).

### 4.2.3.4 A Possible Argument: The *Status Quo Ante*

There is one possible argument for why the defendant is not harmed by the responsibility in question – that is, by having to make restitution to the claimant. The argument depends upon Raz’s claim that ‘one harms another when one’s action makes the other person worse off than he ... is entitled to be’.<sup>38</sup> This claim can be used to test whether, to recall Feinberg’s tests, D’s ‘personal interest is in a worse condition’ after making restitution of the enrichment she receives.<sup>39</sup> Before the argument is made, it is helpful to distinguish the *Status Quo Ante* (SQA) from the *Status Quo* (SQ). By SQA I mean the position of the defendant before the receipt of the enrichment from the claimant; by SQ I mean the position of the defendant after that receipt.

The argument for why the defendant is not harmed by making restitution is extremely simple. Whether the defendant is harmed depends on whether the defendant’s entitlements are appropriately measured relative to the SQA or to the SQ. Relative to the SQ, the defendant is obviously harmed by having to make restitution. Relative to the SQA, the defendant is only harmed by the normal incidents of legal proceedings. Therefore, one can justify the defendant’s responsibility if one can justify measuring the defendant’s entitlements relative to the SQA. This is a promising argument – but its success depends on an argument for the SQA as the appropriate baseline.

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<sup>38</sup> J Raz, *The Morality of Freedom* (OUP 1986) 414.

<sup>39</sup> Feinberg (n 33) 7.

### 4.2.3.5 Flawed Justifications for the SQA

There are four general justifications which might be given for holding the SQA as a baseline. None is, I suggest, wholly convincing. However, they are worth examining if for no reason other than to demonstrate that the SQA is harder to justify than might be commonly perceived. The first two are dismissed out of hand; the last two are shown to be problematic but not definitively dismissed.

The first possible justification for the SQA is perhaps the one most doctrinal scholars will intuitively endorse. It might be tempting to say that the defendant's entitlements should be considered at the SQA because the SQ arose 'unjustly', such that the defendant is 'not entitled' to the enrichment.<sup>40</sup> Now, if the defendant is not entitled to the enrichment, a plausible case can be made that the defendant is not harmed by surrendering it: 'one harms another when one's action makes the other person worse off than he ... is entitled to be'.<sup>41</sup> But the putative justification is viciously circular. The question is whether the defendant's responsibility is justified. One way in which it might be justified is, we have assumed, because it serves an interest of the claimant without harming the defendant. But we cannot say that the defendant is not harmed *because* she is not entitled to the enrichment – the question of entitlement here depends on whether there is responsibility, and to say there is no harm because there is no entitlement is therefore relentlessly question begging. The concept of harm does no work in such an account.

The second possible justification for the SQA is contractualist in structure.<sup>42</sup>

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<sup>40</sup> Birks, *Unjust Enrichment* (n 17) 7.

<sup>41</sup> Raz, *The Morality of Freedom* (n 38) 414.

<sup>42</sup> To be clear, I use the term 'contractualist' in the manner more generally associated with political philosophy – in the tradition of Hobbes, Locke, Rawls, etc. Particular rules of private law are rarely

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Suppose that we can come up with a good account for why claimants who transfer enrichments subject to a condition which fails would be better off if they were awarded restitution. If so, it is in the interests of everyone that there is a system in place to allow us to recover enrichments transferred subject to conditions which fail. And so (the argument would run), a defendant cannot rationally oppose the system being designed as it is: she would (given various ideal conditions), *ex ante*, agree to the rules of the game.

This argument has a logical gap at the crucial moment. Restitution following a failure of condition is generally restitution of the value transferred, not the rights. Therefore, it is *prima facie* plausible that the claimant should – rationally – be as satisfied with compensation, measured by the value transferred, from a third party as from the defendant. Absent a further argument about why the defendant is peculiarly implicated in the transfer, one might instead expect the parties to socialise the claimant's 'loss' rather than to strip the defendant of the gain.<sup>43</sup> In other words, the contractualist model does not seem to have an answer for why claimants can recover the value of such transfers from the defendant – rather than, for instance, from the State.

The third and fourth justifications are more promising – in part because they are more theorised – and do not appear to suffer from the formal flaws of the first two. They cannot, therefore, be rejected as doomed to failure. The third possible justification is so-called 'corrective justice' theory. A number of different theorists'

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defended in such a contractualist (whether broadly or narrowly conceived) manner. Nevertheless, the justificatory structure seems not only plausible, but promising.

<sup>43</sup> Notice that my claim is caveated – that is because, as I argue at 5.2.4, there *is* a good reason to localise the dispute to the parties in question. The simple reason is that the defendant accepted the transfer subject to a condition.

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claims are grouped together under this heading. They claim to build on Aristotle's *Nicomachean Ethics* and have been prevalent in tort law.<sup>44</sup> They have also been proposed as explanations of the remedy of restitution for unjust enrichment.<sup>45</sup> One reason why theorists think that corrective justice is important is the formal similarity of corrective justice and the remedy of restitution.<sup>46</sup> However, as regards the particular point of this section – the possible justification of the SQA as a normative baseline – it is unclear whether the theory does any justificatory work.<sup>47</sup> Instead, theorists seem simply to assert the SQA as inherent in corrective justice. For instance, Lionel Smith claims that '[c]orrective justice requires that pretransaction holdings be respected, and it is achieved when they are.'<sup>48</sup> Similarly, Weinrib claims that corrective justice 'features the maintenance and restoration of the notional equality with which the parties enter the transaction.'<sup>49</sup> These claims might be rephrased in the following manner: we have a (strong) reason to maintain the SQA (and so to return to it once we have departed from it). But, they simply invoke the SQA without supplying a reason for doing so. Therefore, these claims do not seem to provide an explanation of SQA.

The final justification for the SQA can be deduced from the notion that the

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<sup>44</sup> Aristotle, *Nicomachean Ethics* book V, ch 2, 1130b25–1131a. See, for example, J Coleman, 'Corrective Justice and Wrongful Gain' (1982) 1 *Journal of Legal Studies* 421; EJ Weinrib, *The Idea of Private Law* (rev, OUP 2012) Chapter 3.

<sup>45</sup> L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115; EJ Weinrib, *Corrective Justice* (OUP 2012) Chapter 6.

<sup>46</sup> For a more detailed account, see Z Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31 *OJLS* 551, 553–56.

<sup>47</sup> I leave open here the possibility that the account of Kantian right can perform this function. Such a claim would combine with the argument of the next paragraph. Further, Weinrib's own account – which uses the concept of 'acceptance of a benefit' is specifically invoked at 5.2.4.

<sup>48</sup> Smith, 'Restitution: The Heart of Corrective Justice' (n 45) 2118.

<sup>49</sup> Weinrib, *Corrective Justice* (n 45) 9, 17.

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claimant's power to recover is sourced in her pre-existing property right. Such theories have been advanced to explain much of the law of unjust enrichment. For instance, Jaffey has claimed that:<sup>50</sup>

it is implicit in his or her right of ownership that [the claimant] should be able to recover the money (or its value) from anyone who received it other than through a valid exercise of his or her power as owner to transfer it.

McFarlane has defended a modified, and wider, version of this argument. He has claimed that:<sup>51</sup>

the liability principle [which requires that defective transfers be reversed] is justified at one remove: the duty [to make restitution] is itself part of the justification for the law's conclusion that a particular event has both caused C to lose a right (or acquire a duty or liability) and has caused D to gain a right (or lose a duty or liability).

This is not the place to examine this thesis as a general matter. The theory – if true – might provide a justification for the SQA (at least in cases where there is a transfer of a right). If the transfer of a right is defective – assuming for now that a system of legal rights is defensible – the defendant might justifiably be held to the SQA as the claimant's entitlement to the right in question defeats hers.

However, at a crucial point in the argument, the thesis appears to collapse into the no harm thesis. To demonstrate this, suppose that the claimant has a (defeasible) right to a thing. Suppose next that the claimant transfers the right to the defendant in a transfer subject to a condition that fails. The law of property tells us that the

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<sup>50</sup> P Jaffey, 'Two Theories of Unjust Enrichment' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) 147.

<sup>51</sup> B McFarlane, 'Unjust Enrichment, Rights and Value' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012) 607.

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right passes. The claimant's autonomy is implicated because her factual position has worsened without full consent to that deterioration. But it is not clear why the defendant is implicated in that deterioration.<sup>52</sup> It may be that the only way to justify D's liability is by reference to a claim like the no harm thesis. McFarlane explicitly recognises that this move is required:<sup>53</sup>

D may therefore ask why he should bear the burden of protecting C — the response is that, if D is wholly innocent, D's duty will only exist to the extent that it does not make D factually worse off, as compared to his initial position.

Thus, it appears that the legal rights thesis depends upon the no harm thesis – and, accordingly, an argument for the SQA.<sup>54</sup> If that is true, the legal rights thesis is under serious threat as an explanation of these cases.<sup>55</sup>

### 4.2.4 Conclusion

This section has examined putative justifications of the claimant's endowment and the defendant's responsibility. The orthodox justification of the claimant's endowment was shown to be concerned with the claimant's intention to make a transfer. Although the next Chapter will broadly endorse this thesis, it was shown to require further argument before it can count as a successful explanation. The justification

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<sup>52</sup> Again, leaving to one side the fact that the defendant knew about the condition of the transfer – that is, I argue below, an important part of the solution to this puzzle. See 5.2.4.

<sup>53</sup> McFarlane (n 51) 605.

<sup>54</sup> Notice that such an account cannot rely upon the legal rights having been transferred defectively without falling into a similar vicious circle to that of the first justification canvassed above.

<sup>55</sup> This is not the place to explore this criticism. However, the difficulty the legal rights thesis faces is explaining – if the SQA can be justified as a normative baseline – why it drives such a firm wedge between deteriorations of the claimant's *factual* and *legal* circumstances.

of the defendant's responsibility is more complicated. Very few theorists have appreciated the difficulties this account faces. However, a reconstruction of a possible argument – the no harm thesis – was attempted. This argument was shown to be valid; but it has not yet been shown to be sound.

We will return to these difficulties in the next Chapter. Let us next examine a class of problems associated with the justification of the particular response to failure of condition – the response of restitution. The next section will suggest that there are two quite distinct problems in this regard.

## 4.3 Explaining the Remedy

### 4.3.1 Introduction

Customarily, the remedy following a failure of condition is restitution.<sup>56</sup> Indeed, the 'near universally held view' is that restitution is the *only* response to failure of condition.<sup>57</sup> This throws up a number of puzzles. The first puzzle is why restitution is thought to be an appropriate response to a failure of condition. This question has – due perhaps to a widespread perception that the response is not puzzling – received insufficient attention. The second puzzle is why – accepting that restitution is in principle a good response to a failure of condition – restitution is the *best* response to these facts. This section examines both these questions, explaining the deficiencies with existing answers to the puzzles.

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<sup>56</sup> In this section I will use the term 'remedy' interchangeably with 'response'.

<sup>57</sup> R Williams, 'Preventing Unjust Enrichment' [2000] RLR 492, 513. See, for example, P Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne University Law Review 1, 8; Burrows, *The Law of Restitution* (n 7) 9. Compare A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) s. 36(3)(b).

### 4.3.2 Why Is the Remedy Restitution?

This question is perhaps widely perceived as resting on a conceptual confusion. In the literature, restitution is seen as a ‘logical necessity’.<sup>58</sup> The link between the failure of condition and the response of restitution is seen as conceptual.<sup>59</sup> So long as restitution is seen as following as a conceptual matter from a failure of condition, no normative argument will be given for the response. We need, first, to explain this view; then, to see why it is misguided.

The view arises from a conjunction of two claims – first, that failure of condition is part of the law of unjust enrichment; secondly, that, as a conceptual matter, the appropriate response to an unjust enrichment is restitution.<sup>60</sup> The conjunction of these claims leads to the conclusion that restitution is the only logical response to a failure of condition. The argument is valid; again, the question is whether it is sound. Let us grant the first premise, that failure of condition is part of the law of unjust enrichment.<sup>61</sup> Instead, let us consider a claim we can derive from the second premise, that restitution can be proven to be the appropriate response by conceptual

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<sup>58</sup> P Birks, ‘The Concept of a Civil Wrong’ in D Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1997) 225.

<sup>59</sup> S Smith, ‘Unjust Enrichment: Nearer to Tort than Contract’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) fn 43 cites various passages of Birks for the claim. Smith, in making the distinctions of this paragraph, uses the language of ‘logical’ rather than conceptual. I prefer the term ‘conceptual’ to logical, as it drains any associations of normativity which the word logical can imply. It is important to do so in order to bring the distinction between the conceptual and normative connections of event and response into sharp relief.

<sup>60</sup> For instance, McInnes claims that restitution is the ‘*only* coherent response’ to unjust enrichment: McInnes, ‘The Measure of Restitution’ (n 7) 181.

<sup>61</sup> It is difficult to see how the argument in question can make *any* sense if this premise is not endorsed. The premise is only granted *arguendo*. We are not, thus, committed to the events-based classification or to failure of condition’s place within that map of the law of obligations.

### 4.3. EXPLAINING THE REMEDY

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reasoning only. The idea is that restitution is not simply the most rational response, in the sense that compensation might be thought to be a rational response to a breach of a duty. Instead, the idea is that any response to the facts but restitution would be conceptually confused.

This idea is mistaken.<sup>62</sup> The link between the failure of condition and restitution is normative, in that reasons are required for why the remedy is an appropriate response to the facts as they occur.<sup>63</sup> That is why, as Smith puts it:<sup>64</sup>

it is entirely possible, in fact normal, to describe the facts that led to an unjust enrichment and to explain why the event is an unjust enrichment without saying what, if anything, the enriched party should do.

That this is so should give us some pause for thought before accepting the claim that there is a conceptual link between failure of condition and restitution: it places a question mark over the second premise and so the claim we derived, above. The possibility might arise only rarely; but there is – at least in theory – another possibility open to the law in a failure of condition case. Rather than trying to unwind the transfer, the law could aim to ensure that the defect in the transfer is itself removed. The rational space in failure of condition cases is explained in greater detail below, when the problem is examined in depth.<sup>65</sup> For now it suffices to note the clear possibility that the law, rather than awarding restitution, could aim to ensure that the condition in question is satisfied.

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<sup>62</sup> An argument similar to that of this paragraph is developed at greater length in Smith, 'Unjust Enrichment: Nearer to Tort than Contract' (n 59).

<sup>63</sup> I here assume that the justification of a response to an event might be either conceptual or normative. Compare P Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia Law Review* 1, 11, who suggests that 'authority' can be a third.

<sup>64</sup> Smith, 'Unjust Enrichment: Nearer to Tort than Contract' (n 59) 198.

<sup>65</sup> See 4.3.3.

Therefore, we must reject the second of the premises in the syllogism noted above (that restitution can be justified by conceptual reasoning alone). This means that we require further argument to justify restitution in a failure of condition case. The argument must be normative – that is, it must explain what the ‘good reasons’ are why ‘those who are unjustly enriched should come under a duty to make restitution.’<sup>66</sup> The next Chapter will attempt to answer that question.

#### 4.3.3 Why Restitution?

Suppose that we are able to provide an answer to the question of the previous subsection, i.e. why restitution is a sensible response to a failure of condition. A further problem then arises from the fact that restitution is not the only conceivable response to the problem in a failure of condition case. Given that, we need a further argument to see why, even if there is *some* reason to provide for restitution, there is *sufficient* or *most* reason for the response.

To clarify quite why the argument of this section is required, we should distinguish remedies that go ‘backwards’ from those which go ‘forwards’.<sup>67</sup> Going backwards means unwinding, returning the parties to the pre-transfer position. Going forwards means putting the parties (or, more simply, the claimant) in the position they (she) sought to be in. If the deficiency of the transfer is that its consequences were not as the claimant expected, the law could do one of two things. For example, suppose that A pays B £10 on condition that B will deliver a book to A. B then fails to deliver the book. The law could return A to the pre-transfer position (it could

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<sup>66</sup> Smith, ‘Unjust Enrichment: Nearer to Tort than Contract’ (n 59) 198.

<sup>67</sup> I borrow this terminology (adapted) from J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003) 35.

### 4.3. EXPLAINING THE REMEDY

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‘go backwards’) by ordering restitution of the £10. Alternatively, the law could try to remedy the position she is in by making the consequences as near to those she anticipated as is possible (it could ‘go forwards’). In other words, it could compel B to deliver the book.

This dual possibility is clearest when there is a contractual promise to fulfil the condition. Then, on failure of the condition, there may be a concurrent breach of contract.<sup>68</sup> In such a situation there might be a power to claim restitution of the value transferred.<sup>69</sup> However, the law also has the ability to compel the party in breach to make good their promise. In some circumstances, it will compel the defendant to do the very thing she promised to do – to specifically perform her promise.<sup>70</sup> In others, it will compel the performance of the ‘next best thing’, and order the defendant to pay for the value of the defect in performance.<sup>71</sup> In theory, at least, this possibility is not confined to cases where the defendant makes a contractual promise: the law could respond to any failure of condition in a similar manner. Nevertheless, it is widely accepted that going forwards is – at least generally – illegitimate. For instance, Lord Reed has claimed that the:<sup>72</sup>

injustice [following a failure of condition] cannot be corrected by requiring the defendant to provide the claimant with the reward which either party might have been willing to agree.

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<sup>68</sup> This only ‘may’ be the case to leave open the possibility of an excuse for non-performance.

<sup>69</sup> *Giles v Edwards* (1797) 7 TR 181, 101 ER 920 (KB).

<sup>70</sup> The leading case on this ‘remedy’ is *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

<sup>71</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 849 (Lord Diplock).

<sup>72</sup> *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351 [99].

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Why, though?<sup>73</sup> The problem is, stated simply, this: why should the claimant be taken backwards rather than forwards?

### 4.4 Justifying the Objective Condition Rule

#### 4.4.1 The Nature of the Problem

Chapter 1 demonstrated that a condition cannot be unilaterally imposed by a claimant. In the various formulations, the condition must be shared, discovered objectively, or a claimant must not take the risk of the condition failing.<sup>74</sup> Let us call this rule the ‘Objective Condition Rule’. This was shown, above, to give rise to a particular difficulty in formulating the claimant-sided justification of failure of condition.<sup>75</sup> This section examines the difficulty from another angle.

Suppose, for now, that failure of condition is concerned with the claimant’s subjective intentions. Suppose, further, that the doctrine allowing transferors to recover enrichments transferred by mistake has similar concerns. Accepting these premises, the preconditions for recovery for failure of condition and mistake appear to be importantly distinct. In particular, the Objective Condition Rule is in stark contrast with the unilaterality of mistake. That is because, Lord Walker says, ‘the mistake [need not] be known to ... the person or persons taking a benefit under the disposition’.<sup>76</sup> Lionel Smith accurately describes the anomalous position this appears to

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<sup>73</sup> Lord Reed himself does give some reasons – these are examined in the next Chapter, at 5.3.3.3.

<sup>74</sup> See 1.2.3.4.

<sup>75</sup> See 4.2.2.2.

<sup>76</sup> *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [114].

#### 4.4. JUSTIFYING THE OBJECTIVE CONDITION RULE

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generate:<sup>77</sup>

a claim based on a failure of [condition] cannot be totally [claimant]-sided. A mistake claim can be based on a mistake of which the defendant had no knowledge, but a “secret [condition]” will not generate a claim when it fails.

Similarly, O’Dell asserts that a claimant:<sup>78</sup>

who makes a payment on foot of a mistaken belief has a straightforward claim for restitution on the grounds of mistake, but if that belief is neither shared nor communicated to [D], it is difficult to see how there may be a claim in failure of [condition].

Given the various premises, the difficulty is in explaining why these cases should be treated differently. If in mistake cases the law finds subjective, private states of mind sufficient, why is it any different in cases of failure of condition? Commentators have rarely faced the anomaly head on – though a number of different explanations have been given for why the condition in question must be shared. Of course, the best explanation of why the condition should be shared need not explain the anomaly with mistake – sometimes there are simply anomalies in the law. However, if the position *is* anomalous, we must then decide which position – mistake or failure of condition – is better.

The next subsection examines the existing suggestions, both those which seek to explain the anomaly and those which seek merely to explain why conditions must be shared. I suggest that all of these explanations have flaws.

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<sup>77</sup> Smith, ‘Restitution: The Heart of Corrective Justice’ (n 45) 2143 fn 115. Further, P Birks, ‘Restitution After Ineffective Contracts: Issues For The 1990s’ (1990) 2 JCL 227, 235.

<sup>78</sup> E O’Dell, ‘Bricks and Stones and the Structure of the Law of Restitution’ (1998) 20 Dublin University Law Journal 101, 139–40.

### 4.4.2 Existing Answers

#### 4.4.2.1 Contractual Explanations

Some commentators are attracted to the view that the objectivity of the conditions demonstrates that the nature of liability is contractual. For instance, Jaffey says that:<sup>79</sup>

The crucial question is ... why [the defendant] should know the [condition] on which [the claimant] is working and be able to repudiate it. The reason is surely that where [the defendant] has the opportunity to reject his failure to do so constitutes the acceptance of an offer; thus the claim is best understood as a contractual claim.

Jaffey's argument is difficult to make out. Although this may be reconstruction rather than exegesis, the claim appears to be this. Assuming that contractual principles are justifiably objective, failure of condition – as it is also objective – must be contractual. This does not say why objectivity in the law of contract is important, but it is fair to say that that is a separate argument.<sup>80</sup> The important move to consider for our purposes is the reclassification of failure of condition as contractual. For most theorists, this would eliminate the anomaly with mistake: contractual liability is widely accepted to be justifiably objective.<sup>81</sup>

A number of theorists have claimed that failure of condition is a contractual doctrine. However, it is not always clear what the precise claim actually is – that

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<sup>79</sup> P Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (Hart 2000) 102. Further, P Jaffey, 'Restitutionary Remedies in the Contractual Context' (2013) 76 *Modern Law Review* 429, 441, fn 46.

<sup>80</sup> H Sheinman, 'Contractual Liability and Voluntary Undertaking' (2000) 20 *OJLS* 205 with C Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997, 1042–1045.

<sup>81</sup> Jaffey does not, in truth, give us an argument for this classification. Even if all contractual liability is objective, it does not mean that all objective liability is contractual.

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is, what is meant by the claim that failure of condition is a *contractual* doctrine. Sometimes theorists merely say that claims for failure of condition arise ‘in the contractual context’.<sup>82</sup> That claim – a contextual analysis – is consistent with a wide variety of doctrinal and conceptual claims. For instance, while Baloch views failure of condition as part of the law of unjust enrichment, Jaffey does not think there is *such a thing* as the law of unjust enrichment. The clearest and boldest claim is that failure of condition is a doctrine providing for damages following a breach of contract.<sup>83</sup> For instance, the American Law Institute’s *Restatement (Third) Restitution and Unjust Enrichment* claims that ‘the remedy is merely a second-best measure of compensatory damages, enforcing the contract so far as the evidence permits’.<sup>84</sup> It has also been claimed, more precisely, that failure of condition is distinct from an action for breach of contract – but nevertheless, less precisely, somehow bound up with the law of contract. For instance, Brierly claims that restitution following a failure of condition:<sup>85</sup>

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<sup>82</sup> J Perillo, ‘Restitution in a Contractual Context’ (1973) 73 Colum L Rev 1208; T Baloch, ‘Unjust Enrichment in the Contractual Context’ (DPhil thesis, 2008); T Baloch, *Unjust Enrichment and Contract* (Hart 2009) 1 and Jaffey, ‘Restitutionary Remedies in the Contractual Context’ (n 79).

<sup>83</sup> Sir WR Anson, *Principles of the English Law of Contract* (Clarendon Press 1879) 327, fn 1; AL Corbin, ‘Discharge of Contracts’ (1913) 22 Yale Law Journal 513, 514; RM Jackson, *The History of Quasi-Contract in English Law* (CUP 1936) 86; American Law Institute, *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute Publishers 2011) §38. Farnsworth calls restitution in these circumstances a ‘remedy for breach’ but says that it aims ‘to prevent unjust enrichment’: EA Farnsworth, *Contracts* (Little, Brown and Co 1982) §12.19. Compare, further, J Perillo, ‘Restitution in the Second Restatement of Contracts’ (1981) 81 Columbia Law Review 37, 44–45.

<sup>84</sup> American Law Institute, *R3RUE* (n 83) 610. The intellectual foundations of this claim are to be found in a series of articles by Professor Kull: A Kull, ‘Restitution as a Remedy for Breach of Contract’ (1993) 67 South California Law Review 1465; A Kull, ‘Rationalizing Restitution’ (1995) 83 California Law Review 1191. I have criticised what I take to be the arguments of these papers at F Wilmot-Smith, ‘§38 and the Lost Doctrine of Failure of Consideration’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 73–78.

<sup>85</sup> JL Brierly, *Anson’s Principles of the English Law of Contract* (20th, Clarendon Press 1952) 376. This may be Epstein’s claim, who suggests that an ‘action should not be classified as quasi-contractual’

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does not arise out of the contract as the right to damages does ... it would be more correct to describe [the remedy] as an incident of, rather than as a remedy for, the breach of a contract.

Similarly, Robert Goff and Gareth Jones claimed that in failure of condition cases ‘the defendant [can] be taken to have impliedly contracted that, in such an event, he would repay the money to the plaintiff.’<sup>86</sup>

Given this variety of formulations, each (presumably) with distinct premises and arguments, it is not easy to know how to respond. There are three reasons of general application to doubt the elision of failure of condition with contractual principles.<sup>87</sup> These reasons are all closely related to the doctrine. That is because although the point in question is itself theoretical, its truth depends upon it being a good interpretation of the law in this field. The first reason to reject the contractualist account is that, even in the contractual context, failure of condition is treated as a distinct principle to the contractual claim. A good interpretation of failure of condition would explain why the claims are treated distinctly.<sup>88</sup> An important illustration – which has gone entirely unnoticed by modern commentators – came in *Cahoon v Burford*.<sup>89</sup> An action for assumpsit was brought following the sale of a horse. The

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when a ‘plaintiff must plead and prove [an] agreement between the parties in order to’ succeed: R Epstein, ‘Pleadings and Presumptions’ (1973) 40 *University of Chicago Law Review* 556, 571. On some views of the law, as we have seen, a condition must be agreed upon if it is to suffice.

<sup>86</sup> R Goff and G Jones, *The Law of Restitution* (Sweet & Maxwell 1966) 6. Further, AL Corbin, *Corbin on Contracts* (one volume, West Pub Co 1952) §658.

<sup>87</sup> Quite how devastating these points are for an individual contractualist depends, of course, upon her classificatory commitments.

<sup>88</sup> I argued above, at 3.2.2, that it is right to make reference to the reasoning of cases.

<sup>89</sup> *Cahoon v Burford* (1844) 13 M & W 136, 153 ER 56 (Exch). At any rate, I have been unable to find reference to the case in any recent work. It does appear in some older treatises: e.g. HTJ Macnamara, *A Practical Treatise on the Several Counts and Pleas Allowed to be Pleaded Together* (W Benning & Co 1844) 16, 77; CG Addison, *Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu* (W Benning & Co 1847) 234.

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first count sought damages for breach of warranty: the horse was warranted sound and ‘was not sound’.<sup>90</sup> The second count sought to recover back the price of the horse for money had and received. The defendant sought to strike out the claim as the counts were said to be ‘substantially for the same cause of action’.<sup>91</sup> In dismissing this allegation, Alderson B said:<sup>92</sup>

It seems to me plain, that it is not for the same cause of action ... The first count is for the recovery of damages for the breach of a warranty of a horse; but the second is to recover money paid to the defendant, on the ground that it was advanced on a [condition] which has failed.

Similarly, in *Hirst v Tolson* Lord Cottenham LC distinguished damages ‘upon a breach of [a] covenant’ from a claim arising ‘independently of the right under the covenant’.<sup>93</sup> The latter claim arises:<sup>94</sup>

from the transaction itself, and which would have existed if there had been no covenant, namely, to a return of a portion of the money paid upon the ground that the [condition] for which it was paid failed[.]

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<sup>90</sup> *Cahoon v Burford* (1844) 13 M & W 136, 136; 153 ER 56, 56 (Exch).

<sup>91</sup> *Cahoon v Burford* (1844) 13 M & W 136, 136; 153 ER 56, 56 (Exch). Under The New Rules of Pleading of the Hilary Term 1834 s 5: ‘several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each.’ This meant that ‘counts founded on one and the same principal-matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed’.

<sup>92</sup> *Cahoon v Burford* (1844) 13 M & W 136, 137; 153 ER 56, 56 (Exch). See, further, *Heyman v Darwins* [1942] AC 356 (HL) 397–98 (Lord Porter).

<sup>93</sup> *Hirst v Tolson* (1850) 2 M & G 134, 135; 42 ER 52, 53 (Ch) (Lord Cottenham LC). His claim that there are ‘two modes in which [the] case may be viewed’ is echoed in Birks’ work, eg P Birks, ‘Restitution and the Freedom of Contract’ (1983) 36 CLP 141, 151 (‘alternative analysis’).

<sup>94</sup> *Hirst v Tolson* (1850) 2 M & G 134, 135; 42 ER 52, 53 (Ch) (Lord Cottenham LC). Discussion of the principle as being concerned with money which in ‘justice and equity belongs to another’ similarly suggests that the principle is not agreement based: *Royal Bank of Canada v The King* [1913] AC 283 (PC) 296 (Viscount Haldane LC).

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These passages demonstrate that there is judicial authority for the proposition that the conditions are distinct from the contract. They show that the claim for restitution is juridically distinct from the claim for damages.

The second reason to reject the contractualists' claim is that the same principles apply even when no contract ever comes into existence. Although some have argued that failure of condition cannot apply when there is no contract, that view is no longer tenable.<sup>95</sup> And, as Jaffey puts it: 'here the claim is clearly non-contractual.'<sup>96</sup> Absent a reason to think that there are two principles at hand, the better theory is one that can explain liability in both cases. As Baloch says, 'the better approach is to adopt a theory which reflects this commonality.'<sup>97</sup>

The final reason to reject the contractualists' claims is that failure of condition can operate even when the parties' contract is frustrated or unenforceable. The consequences of frustration are now governed by Statute.<sup>98</sup> However, it is uncontroversial that – absent the statute – failure of condition would apply to allow for restitution of the value transferred.<sup>99</sup> The difficulty the contractualist account faces is in explaining why, if the contract places conditions on the transfer of value, frustration of the contract does not eliminate those conditions. A simple and therefore attractive analysis is that the conditions can arise in the contractual context – but that the conditions are, nevertheless, extra-contractual. Frustration of the contract

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<sup>95</sup> See 1.2.

<sup>96</sup> Jaffey, 'Restitutionary Remedies in the Contractual Context' (n 79) 430, 441.

<sup>97</sup> Baloch, *Unjust Enrichment and Contract* (n 82) 179–80. This is the reason to reject Jaffey's assertion that, although the conditions are non-contractual when there is no contract, they become contractual when a contract exists: Jaffey, 'Restitutionary Remedies in the Contractual Context' (n 79) 441.

<sup>98</sup> Law Reform (Frustrated Contracts) Act 1943.

<sup>99</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

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does not, therefore, eliminate those conditions.

It is somewhat less clear, as a matter of English law, whether restitution of value transferred under an unenforceable contract is justified by failure of condition.<sup>100</sup> One example is *Pulbrook v Lawes*.<sup>101</sup> The claimant performed various acts to improve the land of the defendant (in anticipation of the grant of a lease). The defendant did not grant the lease and the claimant sought restitution. She was awarded it. Blackburn J reasoned that ‘it is exactly the same thing as if the consideration had failed’.<sup>102</sup> The case has been criticised for its conception of enrichment.<sup>103</sup> However, it seems clearly to recognise the potential for failure of condition to apply for restitution of value transferred under an unenforceable agreement. Further, no case has ever denied the availability of the claim in such circumstances. A number of cases appear to be best explained in these terms.<sup>104</sup> Therefore, there is good reason to think failure of condition applies to claims for restitution of value transferred under unenforceable contracts.

Strong support, if necessary, can be garnered from a comparative analysis. In Australia, *Equuscorp* makes plain that failure of condition is the basis of liability.<sup>105</sup> The claimants sought to recover money paid to the defendants under a failed blueberry investment scheme. The money was paid under contracts which were con-

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<sup>100</sup> It is clear that restitution can be awarded and that the claim is distinct from the action for damages: *Souch v Strawbridge* (1846) 2 CB 808, 814–15; 135 ER 1161, 1164 (Court of Common Pleas) (Tindal CJ). The question, instead, is whether failure of condition is the doctrinal justification of that award.

<sup>101</sup> *Pulbrook v Lawes* (1876) 1 QB 284 (QB).

<sup>102</sup> *Pulbrook v Lawes* (n 101) 289.

<sup>103</sup> e.g. Burrows, *The Law of Restitution* (n 7) 384.

<sup>104</sup> *Scarbrick v Parkinson* (1869) 20 LT 175 (Exch); *Scott v Pattison* [1923] 2 KB 723 (KB).

<sup>105</sup> *Equuscorp Pty Ltd v Haxton* (2012) 86 ALJR 296 (HCA). For some time there was discussion over whether to understand *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 in these terms.

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trary to the Companies Code and were therefore unenforceable. Although the High Court of Australia denied restitution (Heydon J dissenting), the majority reasoned that:<sup>106</sup>

Where a payment is made under a contract which is unenforceable ... the unenforceability of the agreement may constitute a failure of consideration which is capable of supporting a claim for recovery of the payment.

Similar analysis has been made by courts in a number of States of the United States of America.<sup>107</sup> In the leading case in the Supreme Court of Canada, the remedy was said to be for restitution of ‘an unjust enrichment at the expense of the plaintiff’.<sup>108</sup> Although it was not said why the enrichment was unjust, Cartwright J invoked Lord Wright’s speech in *Fibrosa* – and so endorses a failure of condition analysis.<sup>109</sup> This presents the same problem for the contractualists’ claims as the fact that the doctrine can operate when the contract is frustrated.

These three reasons mean that we should reject the contractualist account of failure of condition. This means the anomaly highlighted above remains to be explained. The next explanation which has been suggested is so-called risk-taking reasoning.

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<sup>106</sup> *Equuscorp* (n 105) [33] (French CJ, Crennan & Kiefel JJ). See, further, *Equuscorp* (n 105) [134] (Heydon J).

<sup>107</sup> *Allen v Booker* 2 Stew 21, 3 (Supreme Court of Alabama 1829) (Taylor J); *Thompson v Gould* 37 Mass 134, 137 (Supreme Judicial Court of Massachusetts 1838) (Wilde J); *Kelley v Thompson* 181 Mass 122, 124 (Supreme Judicial Court of Massachusetts 1902) (Loring J); *Cromwell v Norton* 193 Mass 291, 293 (Supreme Judicial Court of Massachusetts 1906) (Morton J).

<sup>108</sup> *Deglman v Guaranty Trust Co of Canada and Constantineau* (1954) 3 DLR 758 (SCC) 788 788 (Rand J).

<sup>109</sup> *Deglman* (n 108) 795.

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### 4.4.2.2 Risk-Taking Reasoning

Some have claimed that the objectivity of failure of condition serves to prevent risk-takers from being awarded restitution.<sup>110</sup> Risk-taking reasoning is prevalent in judicial reasoning and is often used to decide whether a claim for restitution should be allowed. For instance, in analysing whether a claimant who has paid money to a defendant in a state of doubt could recover the money back, Lord Hoffmann said that '[t]he real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.'<sup>111</sup> In the failure of condition context, considering the principles governing claims when a claimant has transferred value to a defendant in anticipation of a contract that fails to materialise, Christopher Clarke J claimed that:<sup>112</sup>

the court may not regard it as just to impose an obligation to make payment if the Claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the Claimant.

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<sup>110</sup> Compare the argument that risk-taking is a possible additional bar, even when both parties share the condition: JP Benjamin and WCA Ker, *A Treatise on the Law of Sale of Personal Property with References to the French code and Civil Law* (6th, Sweet & Maxwell 1920) 482.

<sup>111</sup> *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2006] 1 AC 558 [571] (Lord Hoffmann). This was said in *Pitt v Holt* (n 76) [114] (Lord Walker) to be 'illuminating': the question is whether 'the claimant deliberately ran the risk, or must be taken to have run the risk, of being wrong.'

<sup>112</sup> *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB) [171]. (Christopher Clarke J). For a full list of references to risk-taking reasoning see F Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (2011) 127 LQR 610, 611 fn 4. The concept is used not only to deny a prima facie claim but also to disqualify a change of position defence: *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] QB 549 [125] and [129] (Aikens LJ) and [153] (Etherton LJ). Curiously, the concept is even used as a reason *in favour* of proprietary restitution: A Tettenborn and G Jones, 'Remedies for the Recovery of Money Paid by Mistake' (1980) 39 CLJ 272, 276; Burrows, *The Law of Restitution* (n 7) 176–79. Compare W Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28 Legal Studies 506, 525–27.

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Academics have argued that this form of reasoning can explain the reason why the conditions are objective (although, perhaps because the anomaly between mistake and failure of condition is rarely commented on, the distinction between these two – in risk-taking terms – is less commonly drawn). For instance, Edelman and Bant say that ‘a strong reason’ for the objectivity is the idea that a claimant ‘[should not] recover if he is a risk-taker.’<sup>113</sup> In Birks’ work, where the argument first arose, he asserted that:<sup>114</sup>

The essence of the matter is that the [claimant] specified the basis of his giving. That is what distinguishes him from the risk-taking volunteer, who hopes that a particular state of affairs will eventuate but does not stipulate that the hoped for event will happen.

The argument is often made.<sup>115</sup> Most recently, Burrows’ *Restatement* explained the objectivity of the conditions by asserting that:<sup>116</sup>

the claimant’s condition must be accepted by, or made clear to, the defendant. The explanation for this is that, in order to throw the relevant risk onto the defendant, it is insufficient that the condition is merely, subjectively, in the claimant’s mind.

Given this array of academics and judges who find the concept of risk-taking reasoning helpful, it can only be rejected with great caution.

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<sup>113</sup> J Edelman and E Bant, *Unjust Enrichment in Australia* (OUP 2006) 247.

<sup>114</sup> Birks, *An Introduction to the Law of Restitution* (n 4) 219.

<sup>115</sup> See, further, the formulations of the principle in Birks, ‘Restitution and the Freedom of Contract’ (n 93) 158; F Maher, ‘A New Conception of Failure of Basis’ [2004] RLR 96, 100–01; Virgo, *The Principles of the Law of Restitution* (n 6) 305; HW Tang, ‘An Unjust Enrichment Claim for the Mistaken Improver of Land’ [2011] Conv 8, 22, 24.

<sup>116</sup> Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 57) 88.

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However, risk-taking reasoning must be rejected as a form of reasoning and so as an explanation for the anomaly in question. There are two reasons to dismiss risk-taking reasoning. The first reason is that the language of risk is simply inapposite in this field. As Duarte D’Almeida has argued (in a distinct but directly applicable context), the vocabulary of risk:<sup>117</sup>

wrongly suggests that there is such a thing as a pre-existent ‘risk’ of uncertainty that it is the law’s task somehow to allocate or distribute. But in so far as there is any ‘risk’ at all involved for the ‘burdened’ party, this risk is the product – rather than the object – of the law’s chosen solution: it is by determining, e.g., that a given party will not succeed unless a given proposition X is proved that the law creates for that party the relevant ‘risk’.

The second reason to reject talk of risk builds on – and forces home – this first point.<sup>118</sup> Risk-taking reasoning should be rejected as it does not add any content to the inquiry. Instead, it simply restates the question – in other words, it is circular. For risk-taking to offer a satisfactory response to anomaly, it would have to answer three questions. First, who is a risk-taker? Second, why should she be denied restitution? Third, why is the claimant a risk-taker when the condition is secret, but not so when she is mistaken? To test whether the concept of ‘risk’ adds evaluative criteria, the first and second questions are crucial; the final question is a matter of application to our case. The problem with existing analysis under the rubric of risk-taking reasoning is that the first and second questions are elided, with the definition of a risk-taker being no more than a description of one who transfers an enrichment in circumstances

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<sup>117</sup> L Duarte d’Almeida, ‘Defences and Defeaters’ (DPhil thesis, 2011) 129, fn 20.

<sup>118</sup> The following draws on Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (n 112) which gives more reasons to reject this kind of reasoning. A localised doctrinal reason is that the risk-taking analysis fails to properly distinguish mistake cases, too: T Akkouch and C Webb, ‘Mistake, Misprediction and Change of Position’ [2002] RLR 107, 109.

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where they cannot recover it. Given that the concept is supposed to be used to determine who can recover for a failure of condition, the definition of a risk-taker is, it follows, circular. Therefore, '[t]he conclusion (that the claimant cannot recover) is merely asserted by the reasoning (that the claimant is a risk-taker).'<sup>119</sup>

To demonstrate this point, consider again Burrows' *Restatement of the English Law of Unjust Enrichment*'s claim, amended:<sup>120</sup>

the claimant's condition must be accepted by ... the defendant [because] in order to throw the relevant risk onto the defendant, it is insufficient that the condition is merely, subjectively, in the claimant's mind.

The passage is difficult as the key term – the 'relevant risk' – is not defined. If the risk in question is of the claimant not recovering in restitution the claim is *ex facie* circular.<sup>121</sup> The risk might instead be thought to be 'the risk of the condition not occurring'.<sup>122</sup> From the defendant's point of view this is only sensibly characterised as a 'risk' if the failure of the condition has some consequence to the defendant – and the only possible consequence would be the prospect of making restitution of the enrichment. So conceived the claim is – once again – circular. Burrows' claim would simply reassert that a condition has to be accepted by the defendant because otherwise the claimant has no claim – but he would not explain the crucial question, i.e. *why* the claimant has no claim in those circumstances. If a claimant had an

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<sup>119</sup> Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (n 112) 613.

<sup>120</sup> Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 57) 88.

<sup>121</sup> If the risk is whether the claimant can recover in restitution, the assertion that the claimant can only avoid this risk by sharing the condition is simply a restatement of the claim that a private condition will not – for the purpose of the law in this field – suffice.

<sup>122</sup> This is how Seah initially appears to interpret it: 'there is some risk that the event might fail': W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] RLR 93, 104. However, he does not make clear why one 'necessarily' accepts the *legally created* risk of non-recovery on failure of this condition: Seah (n 122) 104–05.

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action in unjust enrichment for secret conditions, she would not run either risk. It follows that a claimant ‘will only take this risk if she has no action in unjust enrichment’; therefore, ‘the conclusion (that there is no action) drives the argument (that the claimant is a risk-taker) to reach that conclusion.’<sup>123</sup> The criticism is fatal. Attractive as risk-taking reasoning appears to be, it must be abandoned.

##### 4.4.2.3 The Protection of Other Legal Categories

The third possible justification of the secret condition rule lies beneath the veneer of risk-taking reasoning. For instance, Weinrib states that ‘[i]t is not unjust for value donatively transferred to be irretrievable.’<sup>124</sup> That claim seems uncontroversial. As Brett LJ put it, ‘it has been always clear that a purely voluntary payment cannot be recovered back.’<sup>125</sup> Weinrib supplements that uncontroversial claim in this manner:<sup>126</sup>

Donative intent includes risk-taking, that is, the conferral of a benefit under circumstances in which the transferor hopes for remuneration but knows that the transferee is not obligated to give it.

As this argument stands, Weinrib’s claim is no better than the previous one. It is circular. However, Weinrib develops the analysis elsewhere:<sup>127</sup>

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<sup>123</sup> Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (n 112) 613.

<sup>124</sup> Weinrib, ‘Correctively Unjust Enrichment’ (n 19) 40.

<sup>125</sup> *Leigh v Dickeson* (1884) 15 QBD 60 (CA) 64 (Brett LJ).

<sup>126</sup> Weinrib, ‘Correctively Unjust Enrichment’ (n 19) 40.

<sup>127</sup> EJ Weinrib, ‘The Normative Structure of Unjust Enrichment’ in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 36. The same argument is repeated, with a minor excision, in Weinrib, ‘The Structure of Unjustness’ (n 18) 1079. A similar claim appears to lie behind J Nadler, ‘What Right does Unjust Enrichment Protect?’ (2008) 28 OJLS 245, 266–67. Unfortunately, Nadler fails to move beyond assertion: the claimant ‘must be taking a risk’ in the circumstances postulated.

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Imagine, for example, that the [claimant] makes an unrequested improvement to property that he knows belongs to another in the hope of being compensated for his labour. Subjectively, he may have no intention of giving a gift. But because his action takes place within a legal regime under which, as he knows or ought to know, only the owner has the right to determine whether to improve one's property, the improver can be taken to know that his action cannot obligate the owner to pay for the improvement. Accordingly, the law treats his action as the bestowal of a gift ... having transferred the value free of any obligation on the transferee, the improver is a risk-taker with respect to the hoped-for compensation.

This claim has more promise as it includes an argument for its conclusion regarding risk-taking. The claim is that the 'background legal category of property ... justifies the law's viewing the improvement as the expression of a donative intent.'<sup>128</sup> Although not raised for this purpose, the theory might be capable of explaining the requirement that conditions be objective.

Before examining the claim, a small clarification must be made. The invocation of intention acts as a conclusion, just as risk-taking does (hence the claimant is *taken to know* various things). The argument is: *because* allowing liability would undermine a legal category, *therefore* we may impute a donative intention to the claimant. As it stands, this argument is problematic – and liable to be rejected out of hand by some because of that. To see the problem, let us distinguish the 'because' claim from the 'therefore' claim. The 'therefore' claim is a fiction: we impute a donative intention. This means that the argument is incomplete – we do not know why we are resorting to the imputation. The answer must be: 'to ensure that a legal category is not undermined.' When the claim is stated in that manner, it becomes clear that Weinrib is really making two arguments. First, that liability would undermine an-

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<sup>128</sup> Weinrib, 'The Normative Structure of Unjust Enrichment' (n 127) 36.

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other legal category. Secondly, that we should not allow this to happen. So let us assess each claim in turn.<sup>129</sup>

The first argument, that allowing restitution would undermine another legal category, is difficult to assess. On Weinrib's stated case, which concerns an improvement to property, the claim is plausible (assuming that Weinrib is correct to draw the conclusion he does about the nature of the legal category of property). However, what if the claimant simply paid money to the defendant subject to a condition in the future? Consider:

*Cancelled Marriage:* C pays D £10. C only wants D to have the money if he (D) gets married. C believes D is getting married tomorrow. D does not get married.

When the marriage does not take place, why is liability denied? The arguments raised above – regarding the defendant's ability to determine improvements to her own property – clearly will not suffice. The question is then whether some other category would be undermined.<sup>130</sup> Perhaps another argument could be raised regarding the category of contract. There is a danger of circularity: the category of contract being simply defined in such a way as to prevent restitution. Therefore, although the first argument may be true in some cases – as in the case of a mistaken improver of property – it cannot justify a restrictive approach to liability in every situation.

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<sup>129</sup> The distinction does not appear to distinguish failure of condition from mistake. If the first claim is accepted, the argument should track the legal categories, not the time at which the impairment (the mistake or the failure of condition) occurs.

<sup>130</sup> It would be unfair to attack Weinrib here: because Weinrib does not explain what the background legal categories are, it is difficult to ascertain where their limits are for him. The question here is what the limits of the argument might be.

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The second argument – that we should not allow another legal category to be undermined – can only make sense if we have some notion of subsidiarity of legal categories. If we deny a claim for restitution consequent upon a failure of condition because some other category (e.g. ‘the law of property’) would otherwise be undermined, it must be a premise that the law of property trumps failure of condition. Otherwise, the argument could be reversed: the rules of the law of property could be said to be undermining the law of failure of condition. Weinrib gives no argument for subsidiarity.<sup>131</sup> This is not to say that such an argument cannot be made; it is only to say that the argument has not been made. Even if the subsidiarity claim can be established, we are left with the problems the first claim throws up. These remarks are necessarily tentative, arising out of speculation. Even so, there is sufficient reason to reject the claim until better justifications are offered for it.

##### 4.4.2.4 Evidential Concerns

The fourth possible argument for the secret condition rule is evidential. For instance, Chambers (who denies that there is, in truth, a secret condition rule<sup>132</sup>), argues that:<sup>133</sup>

The lack of communication of the [condition] is a good indication that the [supposed condition] was only a motive, but it does not conclusively prove that fact. Communication may serve an important evidentiary function which prevents a disappointed risk-taker from claiming restitution on the basis of an alleged secret qualification of intention to benefit the recipient.

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<sup>131</sup> Some have made this argument explicitly: R Grantham and C Rickett, ‘On the Subsidiarity of Unjust Enrichment’ (2001) 117 LQR 273.

<sup>132</sup> Chambers, *Resulting Trusts* (n 6) 170. Further, K Barker, ‘Restitution and Third Parties’ [1994] LMCLQ 305, 307.

<sup>133</sup> Chambers, *Resulting Trusts* (n 6) 170.

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Despite the reference to risk-taking reasoning here, by ‘risk-taker’ Chambers denotes a claimant who has not, in truth, qualified her intention. The claim seems to be that secret conditions do not count because it is too difficult to prove that the claimant actually qualified her intention in such circumstances.<sup>134</sup>

However, it is doubtful that failure of condition does present particular evidential concerns.<sup>135</sup> Most pertinently, mistake cases may present evidential difficulties as great as those in failure of condition cases. The Limitation Act 1980 states that:<sup>136</sup>

where in the case of any action for which a period of limitation is prescribed by this Act ... the action is for relief from the consequences of a mistake ... the period of limitation shall not begin to run until the [claimant] has discovered ... mistake ... or could with reasonable diligence have discovered it.

Although there is some dispute about the correct interpretation of ‘relief from the consequences of a mistake’,<sup>137</sup> the basic position is that the limitation period in mistake cases can be, in principle, infinitely backdated.<sup>138</sup> The limitation period for an action for failure of condition, by contrast, would be six years.<sup>139</sup> Mistake cases

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<sup>134</sup> For an analogy, see Lord Clarke’s warning – considering the dangers of a principle of ‘subjective devaluation’ – that ‘[a] defendant can always simply assert that he valued a benefit at less than the market value.’ *Benedetti* (SC) (n 72) [23].

<sup>135</sup> One might not be persuaded by this argument as it uses the cases on mistake – but if the explanation of failure of condition is correct, one might object, these cases are surely the anomalous ones. However, the regime for mistake is not perceived as giving rise to great evidential difficulties.

<sup>136</sup> Limitation Act 1980, s 32(1)(c).

<sup>137</sup> e.g. J Edelman, ‘Limitation Periods and the Theory of Unjust Enrichment’ (2005) 68 *Modern Law Review* 848; *DMG* (n 111) [22] (Lord Hoffmann) and [147] (Lord Walker); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2013] 2 AC 337 [42]–[63] (Lord Walker), [177]–[185] (Lord Sumption).

<sup>138</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

<sup>139</sup> Limitation Act 1980 s 5, as interpreted in *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890 (QB).

seem to present much greater evidential burdens: the longer the time between the facts in question and the case, the more difficult the evidential questions become. Of course, as Lord Clarke added: ‘a court will be very unlikely to accept such an assertion unless there has been some objective manifestation of the defendant’s subjective views.’<sup>140</sup> This concerns evidence – whether, in other words, a claimant can establish that her intention was qualified. But that is quite another matter. It follows that the evidential concerns of a failure of condition case do not seem *peculiar* to a failure of condition case – and, indeed, that they could be overcome. Therefore, the evidential explanation of the secret condition rule appears flawed.

## 4.5 Conclusion

This Chapter has examined the arguments in the literature which might be used to answer the questions identified in the previous Chapter. There was some promise in various orthodox claims. However, a number of problems were identified with current theories. I will now attempt to answer the problems which remain unanswered.

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<sup>140</sup> *Benedetti* (SC) (n 72) [23] (Lord Clarke).

# 5 Solving the Problems

## 5.1 Introduction

The previous two Chapters have, in turn, described the questions a theory of failure of condition should answer and sought to show the problems with the existing answers to these questions. This Chapter will give my answers to the remaining problems. There are two principal sections. First, I will attempt to explain why failure of condition is objective in its construction of conditions. If my answer succeeds, it will explain the objectivity from *both* a claimant- *and* a defendant-sided perspective. It will also explain why the defendant is justifiably subject to a responsibility in these cases. Next, I will try to explain why restitution is an appropriate response to failure of condition. If this explanation succeeds, we will have a complete theory for failure of condition.

I will then examine the implications of these answers for three doctrinal controversies. These are (1) whether restitution should be awarded for a self-induced failure of condition; (2) whether failure of condition should allow a claimant to escape a bad bargain; and (3) whether cross-firing conditions should suffice to establish a failure of condition.

## 5.2 Explaining Objectivity

### 5.2.1 Introduction

Liability in failure of condition is, as was stressed above, established objectively.<sup>1</sup> The objectivity of the conditions is a problem for the orthodox justification of the liability nexus, which relies upon the claimant's subjectively qualified intention (the 'subjective intention thesis').<sup>2</sup> At its strongest, the objection was that a subjectively qualified intention is neither necessary nor sufficient. Although a subjectively qualified intention does appear to be insufficient for recovery, the necessity claim was suggested to be too strong. A more moderate – and, I suggested, more plausible – objection was that a claimant need not *prove* a subjectively qualified intention (though a defendant might be entitled to prove that the claimant intended to pay the defendant in any event).<sup>3</sup>

This section will attempt to solve the puzzles this objectivity throws up. It does so via three independent arguments for an objective standard of conditions. The first argument is termed an 'institutional' argument. The argument points out that failure of condition began – and often operates within – a contractual context. Contractual liability is established objectively; objectivity of failure of condition therefore ensures consistency with that system. The second argument is a 'reliance' argument. In a failure of condition case, the defendant often receives the enrichment in the ex-

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<sup>1</sup> See 1.2.3.4.

<sup>2</sup> See, in particular, 4.2.2.2.

<sup>3</sup> It was also pointed out that this objectivity creates a potential anomaly with the liability nexus of unilateral mistakes, where there is no shared mistake rule. This argument is only indirectly relevant, relying as it does upon a classificatory move – placing unilateral mistakes and failure of condition together.

pectation it can be kept if various acts are performed (i.e. if the condition does not fail). By ensuring that subjective conditions do not count, the law gives the defendant – and all who rely on the defendant’s receipt – safety to rely upon her receipt of the enrichment. If either of the first two arguments is sound, the objectivity of the conditions will not give us a good reason to reject the subjective intention thesis.<sup>4</sup>

However, these arguments will not alone be sufficient to justify the liability nexus. My third argument suggests that the objectivity can help justify the defendant’s responsibility. Briefly stated, the objectivity means that the defendant knows the conditions upon which the transfer depends. Therefore, either the defendant accepts the SQA as the appropriate baseline against which to measure her entitlements – or, more plausibly, the harm to the defendant in making restitution is more easily justified.

### 5.2.2 An Institutional Rationale

#### 5.2.2.1 A Note On The Argument

Above, I developed an argument of Weinrib’s, that the law in this field should not undermine another legal category, and suggested that it could be marshalled to explain the objectivity of failure of condition.<sup>5</sup> As Weinrib has neither developed the claim in any great detail nor applied it to the failure of condition context, I had to speculate on the shape the argument might take. I suggested that there was not sufficient argument in the existing account to justify its adoption. However, my argument of this subsection adopts the thrust of the argument I took Weinrib to

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<sup>4</sup> The subjective intention thesis faces further problems; however, these are distinct and are dealt with below.

<sup>5</sup> See 4.4.2.3.

be making. My criticisms of his approach must, it follows, be borne in mind as particularly pertinent concerns about my own approach.

### 5.2.2.2 Failure of Condition and the Law of Contract

Failure of condition is closely linked with the law of contract. Indeed, the link has led the law and commentators into a number of errors. Some thought that failure of condition meant failure of a contract – such that an initially valid contract would defeat any claim.<sup>6</sup> Some have thought that a valid contract is a precondition of a claim.<sup>7</sup> Both of these claims are false: a valid contract is neither necessary nor inconsistent with a failure of condition claim.<sup>8</sup> On more substantive matters, a number of theorists have claimed that failure of condition has some intrinsic relationship with the law of contract.<sup>9</sup> Those claims were rejected – we have good reason to think that failure of condition is distinct from the law of contract.<sup>10</sup>

Nevertheless, the constant confusion with the law of contract is understandable. The most well-known case of failure of condition is the recovery of pre-payments made under a contract which is not performed.<sup>11</sup> The doctrine allows restitution of benefits transferred under a valid contract – even if the contract is not itself

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<sup>6</sup> *Chandler v Webster* [1904] 1 KB 493 (CA) 499 (Lord Collins MR).

<sup>7</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QB) 924 (Hobhouse J).

<sup>8</sup> See 1.2.

<sup>9</sup> See the variety of views discussed at 4.4.2.1.

<sup>10</sup> There is an independent reason to suppose that failure of condition and the law of contract are more closely interwoven than these comments might suggest. Failure of condition has an important role in ensuring non-arbitrariness. That is, it ensures that the ultimate distribution following the breakdown of contractual relations is not dependent upon whether payment was precedent or subsequent to performance: F Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 CLJ 414, 427.

<sup>11</sup> *Giles v Edwards* (1797) 7 TR 181, 101 ER 920 (KB).

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discharged.<sup>12</sup> It is doubtful that any other non-contractual doctrine can do this. This interrelation with the law of contract is a promising line of inquiry if we want to understand why failure of condition is objective. Consider first that contractual interpretation is objective. As Lord Hoffmann puts it:<sup>13</sup>

The court ... is concerned only to discover what the [contract] means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties[.]

There are, of course, debates within the law of contract over the justification of this approach. Let us suppose, as premises, that the approach is justifiable and that it does not ultimately mean that the law is unconcerned with the parties' intentions.<sup>14</sup>

To see why contract law's objective approach can support the objective approach in failure of condition, consider a simple hypothetical. Recall the case of particular difficulty, raised above,<sup>15</sup> where a subjectively qualified intention appeared insufficient. Money is paid to the defendant by the claimant. The defendant performs her duty, with a defect as to the obligation of quality. The claimant – subjectively, but only privately – thinks that the payment is on condition that an obligation of quality will be complied with perfectly. However, when parties formalised their relationship in a contract, they formalised them under a system of rules which includes the

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<sup>12</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

<sup>13</sup> *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 [16].

<sup>14</sup> For such an argument see H Sheinman, 'Contractual Liability and Voluntary Undertaking' (2000) 20 OJLS 205.

<sup>15</sup> See 4.2.2.2.

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objective approach to contractual interpretation. The law of contract says that the defendant is, in the suggested hypothetical, entitled to the price of the contract; she has a claim in debt even if there is a defect as to quality in her performance. If the claimant's privately qualified intention were sufficient to give the claimant a right to restitution, it would be nakedly contradicting the law of contract.

I pointed out above that such an argument needs to give a reason for the primacy of one institution over another.<sup>16</sup> Why, in this case, should the law of contract trump failure of condition? It is tempting to try to dissolve this conflict – between the law of contract and failure of condition – by saying that the claimant should, in the contractual sphere, realise that her actions will be construed in accordance with the objective meaning of those acts.<sup>17</sup> However, this kind of argument would be circular: what the claimant can expect depends upon the law's rules. The better analysis seems to be that there is a genuine conflict here between the values of failure of condition and the law of contract. That is, there remain good reasons in these cases to consider the claimant's subjective intentions. Our answer must, therefore, say why there are stronger reasons in favour of the contractual approach.

There are good reasons to think that, on balance, it is better to have the objective condition rule than to allow private conditions to count in these circumstances. If failure of condition were to trump the contractual regime in this manner, the law of contract would be fundamentally unsettled. Defendants and third parties would *never* be able to rely upon the system as the system aims to allow them to. So there would be a serious weakening of the values of contract if the objective condition rule were abandoned. By way of contrast, the values of failure of condition are not

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<sup>16</sup> See 4.4.2.3.

<sup>17</sup> This sort of answer seems to lie behind Weinrib's claims at 4.4.2.3.

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greatly undermined by the objective condition rule: in most cases, it will accurately track the claimant's subjective intentions. The class of cases where a claimant will genuinely condition her intention subjectively but will not manifest it objectively seems relatively rare – particularly in the contractual context. Therefore, on the balance of reasons the objective condition rule seems to make for a better system overall.

### 5.2.2.3 Why Every Case?

Suppose that my argument regarding failure of condition and contract is accepted. Can this justify the objectivity of failure of condition in *every* case? There are, after all, many cases of *non-contractual* failures of condition.<sup>18</sup> One might object: even if the rules of failure of condition should be objective when there is a contract, why should those the rules *always* be objective?

There are two points to make in response. First, it is important to stress the number of cases to which the institutional argument applies. It most clearly applies to restitution of benefits under a subsisting contract and an initially valid contract discharged for breach.<sup>19</sup> It also clearly applies to claims for restitution following frustrated contracts or contracts void for common mistake.<sup>20</sup> In the first of these cases, there is an initially valid contract and so the argument directly applies; in the latter, as will be developed at greater length below, all the 'positive' elements of the contract are present, meaning the parties are justified in treating the con-

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<sup>18</sup> See above, 1.2.

<sup>19</sup> As in *Roxborough* (n 12) and *Giles v Edwards* (n 11).

<sup>20</sup> As in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) and *Couturier v Hastie* (1856) 5 HLC 673, 10 ER 1065 (HL).

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tract as valid. It follows that the putative contractual rights are a source of justified expectations – and failure of condition’s rules should not undermine these expectations. The argument also applies to restitution of benefits under an unenforceable contract.<sup>21</sup> In such a case, although the defendant cannot rely upon the contract to make positive claims, the contract still exists. For instance, when a debt is earned under an unenforceable contract, if the debt is paid it cannot be recovered.<sup>22</sup>

More problematic are claims for restitution of benefits transferred in anticipation of a contract that does not materialise.<sup>23</sup> Here, there is *ex hypothesi* no contract between the parties – and, it might be said, one cannot justifiably plan upon the guarantees of a contract until one *actually has* a contract. Void contracts are similarly problematic: as there is no contract between the parties, the parties’ relations are not being regulated by the law of contract.<sup>24</sup> In these cases, we need to rely upon a second line of response. The second response is that the objective construction of conditions does not yield to subjectivity in extra-contractual cases to ensure that a consistent doctrine is applied. Given how the principle arose, we have seen, it is intelligible and justifiable for the conditions to be construed objectively in the bulk of cases. This is now a rule of the doctrine. If it were subject to an exception in anticipated contract cases, this could fracture the doctrine, encroaching

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<sup>21</sup> As in *Pulbrook v Lawes* (1876) 1 QB 284 (QB) or *Equuscorp Pty Ltd v Haxton* (2012) 86 ALJR 296 (HCA).

<sup>22</sup> Although there is no clear authority for this proposition, it follows from the ‘good consideration’ rule in *Barclays Bank Ltd v W J Simms & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695 (Robert Goff J). See, further, *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676 (KB); *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 (CA) 208 (Millett LJ).

<sup>23</sup> As in *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351. In fact, in *Benedetti* the parties had a contract, but abandoned it due to changed circumstances.

<sup>24</sup> As in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) and *Guinness Mahon Co Ltd v Chelsea and Kensington Royal London Borough Council* [1999] QB 215 (CA).

upon the areas where the objectivity *is* justified. Defending such an approach, which prizes consistency above the perceived merits of an individual case, would require greater argument than I have space for here. However, if there is anything to such an argument, it applies to these cases with great force.

### 5.2.3 A Reliance Rationale

#### 5.2.3.1 The Rationale Stated

The second rationale for the objectivity of failure of condition is closely related to the first, but is broader. There is an important value in allowing the recipient of a benefit to make plans with that benefit: to know what options are available to them, what risks to take, etc.<sup>25</sup> This means that there are good reasons to allow the defendant to rely upon the claimant's objective manifestation of her intention – whether in a contractual context or not. If the receipt of value were defeasible due to the claimant's private qualified intentions, any receipt could be defeated by facts unknown to the defendant. This would mean that the defendant would not be able to plan around the objective manifestations of intention. The objectivity of failure of condition, therefore, supports the ability of the defendant to plan around the receipt of value.

#### 5.2.3.2 An Objection

One might object to this rationale by saying that the law can achieve the same ends with a defence of change of position. To understand this objection, we should

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<sup>25</sup> This argument has been made in the restitutionary context before: H Dagan, *The Law and Ethics of Restitution* (CUP 2004) 45–6.

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compare failure of condition with unilateral mistake. Consider first that failure of condition allows the defence of change of position only sparingly. The difficulty which a defendant faces in a failure of condition case is that:<sup>26</sup>

When value is transferred to a recipient on an agreed basis, he knows that he may have to repay a like sum if the basis fails to materialise, suggesting that he cannot spend the money in the honest belief that the transferor had an unqualified intention to benefit him.

In the terms of this thesis, the objectivity requirement makes it harder for the defendant to claim a change of position defence. For instance, in *Goss v Chilcott* the defendants borrowed money under a void agreement.<sup>27</sup> The money was paid to a third party and the defendant sought to raise this fact as part of a change of position defence. The Privy Council said that they could not do so. Although the reasoning is not easy to follow,<sup>28</sup> the Privy Council were persuaded by the fact that the defendants knew the money paid to the third party ‘would nevertheless have to be repaid to the [claimant].’<sup>29</sup>

By way of comparison, unilateral mistake – which appears to allow private states of mind to count – has a strong ‘change of position’ defence.<sup>30</sup> This contrast between failure of condition and unilateral mistake suggests a plausible view: that the law is trying to achieve the same thing – the ability of the defendant to plan around the

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<sup>26</sup> C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) para 27.49.

<sup>27</sup> *Goss v Chilcott* [1996] AC 788 (PC).

<sup>28</sup> The crucial argument is that the defendants ‘deliberately [took] the risk that he would be unable to repay the money’ by paying it over to the third party: *Goss v Chilcott* (n 27) 799 (Lord Goff). However, whether they took this risk depends upon whether they have a defence. The reasoning is, therefore, circular.

<sup>29</sup> *Goss v Chilcott* (n 27) 799 (Lord Goff).

<sup>30</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 579–80 (Lord Goff).

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receipt of enrichment – in two different ways. The unilateral mistake approach is to allow a broad cause of action and broad defence; the failure of condition approach is to have a limited cause of action and a limited defence. For ease of reference, we might term these approaches the ‘broad’ and ‘narrow’ approaches, respectively. Both approaches, therefore, plausibly allow the defendant to rely upon her own receipt, but in distinct ways. If these arguments are sound, one might object: the goal of allowing the defendant to rely upon her receipt is not a good explanation of the objectivity of failure of condition because the law might achieve this in a simpler way, i.e. a defence of change of position.

### 5.2.3.3 Three Responses to the Objection

There are three reasons why the objection fails. First, the objection does not show that the explanation of the objectivity is not a good one. It simply suggests that there are better ways for the law to achieve the stated goal. The security of the defendant’s receipt might nevertheless give reasons for the objectivity; there might, notwithstanding, be *more* reason for a broad approach. This might give us reasons to reform the law of failure of condition; it does not show that the rationale is unsound or invalid.

However, there are also two reasons to suppose that the approach of failure of condition is superior to that of mistake. First, the broad approach to liability always leaves some uncertainty over the receipt of an enrichment. Although a defendant might be protected by a defence, she can never be sure that she can rely on the *entire* enrichment. The narrow approach to liability, by way of contrast, allows the defendant to establish when the receipt of an enrichment is indefeasible – making it

easier for her to make firm plans.<sup>31</sup>

Secondly, there is a risk that change of position will fail to capture all the losses defendants might incur by disenrichment. In particular, it will be difficult to calibrate the defence to the readjustment of expectations which comes from mere receipt of a benefit – and which makes surrender of that benefit concomitantly more painful than never receiving the benefit in the first place. This phenomenon is well known to economists under the rubric of ‘loss aversion’ and the ‘endowment effect’.<sup>32</sup> The basic idea is that an individual experiences a greater disutility in giving up a good than the amount they would have paid to acquire the good. There is no evidence within the cases that the harms which flow from such adjusted expectations are taken into account by the law. We could, of course, readjust the change of position defence to capture these additional harms – however, this would still not answer the first objection.

### 5.2.4 A Defendant-Sided Rationale

#### 5.2.4.1 Introduction

The previous two arguments have sought to justify the objectivity of the conditions from a claimant sided perspective. A key justificatory puzzle remains why the defendant should be responsible to the claimant. In our context, the question is why

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<sup>31</sup> Scholars of unjust enrichment have rarely examined in detail the reasons for allocating issues of substantive liability to the cause of action or to the defence stage. The question has recently been examined by J Goudkamp and C Mitchell, ‘Denials and Defences in the Law of Unjust Enrichment’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Hart 2013). The concern of this paragraph – the value of the defendant taking indefeasibly – does not seem to be comfortably accommodated into any of their five rationales at 146-49.

<sup>32</sup> For an overview, see D Kahneman, JL Knetsch and RH Thaler, ‘Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias’ (1991) 5 *The Journal of Economic Perspectives* 193.

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the defendant should have to make restitution rather than the claimant being endowed with a remedy from, for instance, the State. Neither of the previous two explanations justify the defendant's responsibility in this regard. I will here attempt to justify the defendant's responsibility. The justification of the defendant's responsibility relies upon the objectivity of the conditions in failure of condition – thus, in so doing, it gives a further reason for the objectivity of the conditions.

A powerful objection to the defendant's responsibility – as was explained in depth at 4.2.3 – is that having to make restitution harms the defendant. One way to avoid this conclusion is to argue that the defendant's entitlements are legitimately measured relative to her pre-enrichment position.<sup>33</sup> That argument, I suggested, had the potential to justify the defendant's responsibility in situations like failure of condition. A number of arguments seeking to justify the SQA in a wide variety of cases were canvassed.<sup>34</sup> None was found to be successful. My argument here is more modest. I suggest that the objectivity of the conditions means one of two things, either of which justifies the defendant's responsibility. Either the defendant's entitlements are justifiably measured relative to the SQA – or any harm incurred by the defendant in making restitution is justified as she accepted the move from SQA to SQ was conditional.

### 5.2.4.2 Weinrib's Acceptance Condition

We saw above that Weinrib objects to a purely unilateral right to restitution on the basis that it fails to treat the parties as equals.<sup>35</sup> Weinrib's own response to

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<sup>33</sup> See 4.2.3.4.

<sup>34</sup> 4.2.3.5.

<sup>35</sup> See above, 4.2.3.

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that objection is, for our purposes, enlightening. He suggests that an ‘obligation-creating condition’ is required on the defendant’s side, i.e. some extra reason to single out the defendant.<sup>36</sup> For Weinrib, ‘[o]n the defendant’s side the obligation-creating condition consists in accepting the benefit as non-gratuitously given’.<sup>37</sup> Although Weinrib’s definition of ‘acceptance’ is eccentric,<sup>38</sup> and so perhaps cannot do the work he requires of it for the whole of the law of unjust enrichment,<sup>39</sup> the argument can be developed to give a cogent justification for liability in failure of condition.

To explain the applicability of Weinrib’s claim, consider a simple case where the claimant is explicit about the condition upon which she transfers the enrichment. Suppose that the claimant transfers £10 to the defendant, saying ‘you can only keep this money if it rains tomorrow.’ The defendant accepts the money as transferred on that condition. It does not rain. The claimant has – as we will see at greater length below<sup>40</sup> – good reason to want the money back. If she asks the defendant for the money back, the defendant’s objection would be – as we saw above<sup>41</sup> – that making restitution would be harmful to her. How plausible is this in a failure of condition case? Recall, further, Raz’s claim that ‘one harms another when one’s action makes

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<sup>36</sup> EJ Weinrib, ‘Correctively Unjust Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 42. See, further, EJ Weinrib, ‘The Normative Structure of Unjust Enrichment’ in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 37. Weinrib’s commitment to correlativeity means he would resist the suggestion that this is a different reason.

<sup>37</sup> Weinrib, ‘Correctively Unjust Enrichment’ (n 36) 42.

<sup>38</sup> EJ Weinrib, *Corrective Justice* (OUP 2012) 204: ‘[a]cceptance here refers not to an express affirmation by the defendant but to the integration of the benefit into the defendant’s purposes.’

<sup>39</sup> D Klimchuk, ‘The Normative Foundations of Unjust Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 81.

<sup>40</sup> 5.3.

<sup>41</sup> 4.2.3.

the other person worse off than he ... is entitled to be'.<sup>42</sup> The defendant's entitlement clearly depends upon her receipt of the transfer from the claimant.<sup>43</sup> However, she accepted that this receipt was conditional – and that condition has failed. In light of this, her answer to the claimant's request for retransfer seems hollow.<sup>44</sup> Weinrib expresses this notion with the more general proposition: 'If the defendant can be regarded as having accepted a benefit as non-gratuitously given, then in fairness the benefit cannot be retained gratis.'<sup>45</sup> If 'gratis' is replaced with 'unconditionally', the structure of failure of condition in these cases is illustrated.

### 5.2.4.3 How Should We Understand the Claim?

Even if we accept that this argument succeeds, there remains a question of quite *how* it succeeds. It is not initially clear how the conclusion – that the defendant has no entitlement to the enrichment as against the claimant – should be expressed. There are two possible approaches. We might say, first, that failure of condition is a particular case where the SQA is justified as a baseline, such that the claimant is not harmed by making restitution. But in some respects this can appear misleading. If the condition does not fail and the money is stolen from the defendant by a third

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<sup>42</sup> J Raz, *The Morality of Freedom* (OUP 1986) 414.

<sup>43</sup> This is not, for the avoidance of doubt, to suggest that one is bound to the view that we can only inquire into the state of acquisition of an enrichment in order to assess its justice. The point is simply that in this case the receipt from the claimant will be a part of the defendant's argument as to why she is entitled to the enrichment.

<sup>44</sup> The fact she has no answer *to the claimant* is important in explaining why a third party has no justification in depriving the defendant of the money: the transfer is only defective against the claimant, but valid against the whole of the rest of the world. In this respect, there is some analogy with English law's relativity of title: *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

<sup>45</sup> Weinrib, *Corrective Justice* (n 38) 207. Further, Weinrib, 'Correctively Unjust Enrichment' (n 36) 42.

## 5.2. EXPLAINING OBJECTIVITY

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party, it seems that the defendant has been harmed. If the SQA were the baseline for harming, this conclusion could not be reached. We could say, instead, that the SQA is the appropriate baseline when the condition fails. This, too, seems problematic when the money is stolen from the defendant before she has made restitution, especially if the claimant was not going to seek restitution of the money.<sup>46</sup> From these observations we can see that, if the SQA is to be the appropriate measure of the defendant's entitlements, it must be in a particular, relational manner. The idea is something like: *as against the claimant*, the defendant's entitlement to the value is to be measured relative to the SQA. This analysis does seem plausible, capturing as it does the peculiarity of the defendant's entitlement: good against all the world except the claimant.

We do not *need* to adopt this analysis for the claim to have cogency. There is another way in which we might explain it. We can concede that the defendant's entitlements are sensibly measured relative to the SQ. This would mean that the defendant is harmed by making restitution. Nevertheless, we can say that the particular harm incurred – in the transition from the SQ to the SQA – is justifiable. What harm the defendant incurs, she incurs voluntarily. Given the objectivity of the conditions, the defendant could have avoided the harm by rejecting the enrichment in the first place – an enrichment she knew from the start was given conditionally. In light of this, the harm she incurs does not have the same normative force as in a normal case. This approach has the same practical justificatory force as the no harm thesis – that is, it makes the claimant's claim for restitution from the defendant justifiable. But it reaches its conclusion in a distinct manner. Rather than saying there

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<sup>46</sup> This fact scenario means we avoid the complications of whether the defendant would have a change of position defence on these facts.

is *no harm*, it says that the harm the defendant incurs should not count against the claimant's claim.

### 5.2.5 Conclusion

This section has given three independent rationales for the objectivity of the construction of the conditions of transfers. If either of the first arguments succeeds, the objectivity will be justified from a claimant-sided perspective. This means that the subjective intention thesis, detailed in the previous Chapter, succeeds in spite of the objectivity of the conditions. If the third argument succeeds, we have a further justification for the objectivity, but one which, further, justifies the defendant's responsibility. If a conjunction of these arguments succeeds, we have a major piece in the theoretical puzzle. Only one question remains: why should the claimant be awarded *restitution*?

## 5.3 Justifying Restitution

### 5.3.1 Introduction

As we saw in Chapter 4, the 'near universally held view' is that restitution is the *only* response to failure of condition.<sup>47</sup> That view was seen to arise from the thought – though rarely from any argument – that the response is conceptually entailed by the facts giving rise to liability. That view was shown to be incorrect.<sup>48</sup> This makes it incumbent upon us, if we want to understand failure of condition, to provide reasons

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<sup>47</sup> R Williams, 'Preventing Unjust Enrichment' [2000] RLR 492, 513. See, generally, 4.3.

<sup>48</sup> See 4.3.2.

why restitution should be the proper response to its facts. This section does so in two steps. First, it establishes the *prima facie* case for restitution – that is, why there is some reason for restitution to follow from transfers made conditionally where the condition attaching to the transfer fails. Next, it demonstrates why restitution is a superior option to any other plausible remedial regime (especially a regime which aims to satisfy the condition which has failed). If both of these arguments are successful, there will no longer be a puzzle as to why restitution is the response to a failure of condition.

### 5.3.2 The *Prima Facie* Case

#### 5.3.2.1 Conditional Intentions (Again)

In order to understand why restitution might be an appropriate response to a failure of condition, we must recall the conceptual clarifications made in Chapter 2 regarding the nature of a conditional intention. The most important distinction to recall here concerns the nature of the disruption that failure of a condition brings to a claimant's intention. Only if we understand the problem – that is, only if we know what has gone wrong when the intention to make a transfer is subject to a condition which fails – can we know why the appropriate solution might be restitution.

Consider first the case where no transfer is made. If a claimant intends to perform some action if a condition holds, and the condition never obtains, there is – having regard only to the content of the conditional intention – no disruption to the claimant's purposes.<sup>49</sup> Now consider the case where a claimant makes a transfer

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<sup>49</sup> This analysis – localising the analysis simply upon the conditional relationship – was used to demonstrate why there is no illogicality with allowing self-induced failures of condition to justify restitution: 2.2.3. Whether the claimant might yet perform the act in question depends upon the precise

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with a conditional intention – for instance, where money is paid on condition of performance. If the claimant makes the transfer and the condition holds there is, of course, no difficulty. However, if the condition fails, the situation is different. Although there is no inherent problem with the claimant’s action or even with the *outcome* of the action – had the condition been satisfied, the transfer would have been indefeasible – the action and the outcome are problematic in light of the conditional intention.<sup>50</sup> If the claimant only intended the outcome on a condition, and the condition has failed, her intention to bring about that outcome is undermined. We can view the problem from two perspectives: it is *either* that the condition failed; *or* that the outcome was brought about by a flawed intention.<sup>51</sup>

#### 5.3.2.2 The Value of Restitution

This point suggests why restitution is an appropriate remedy for a failure of condition. Although the claimant’s action – for instance, the payment of money on condition of performance – is not itself impugned, when the condition fails (e.g. when she does not receive the expected counter-performance) her intention to perform the action loses its force. This means that the consequences of her action – in this case, the payment of money – do not truly reflect what she intended.<sup>52</sup> If the movement from the SQA to the SQ is justified by the claimant’s intention to make that transition, there is then a justificatory problem: the claimant’s intention seem like it

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nature of the condition: see 2.2.2.

<sup>50</sup> This distinction is important. It is, as we saw, a key difference between transfers made subject to conditions which fail and transfers made by mistake. See 2.4.5.

<sup>51</sup> The term ‘flawed intention’ is here used to represent the fact that the intention was conditional and the condition failed.

<sup>52</sup> To recall the formal terminology I used in Chapter 2, she intends  $\phi$  if  $C$  – and now  $\phi \wedge \neg C$ .

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cannot justify this transition.

If the claimant is able to unwind those consequences – for instance, through restitution of the money transferred – she is able to prevent the normative disruption (performance subject to a failed condition) from persisting. The claimant is thereby returned to the SQA, a position which she only conditionally intended to depart from. When the condition fails, in other words, the law has insufficient reason to uphold the movement from the SQA; returning to the SQA ensures there is no disruption to the claimant’s purposes.<sup>53</sup> This is, in a nutshell, the reason why the law provides for restitution when a condition fails: otherwise the claimant will be held to actions which do not reflect her true purposes.

There is a further, albeit incidental, benefit to the remedy of restitution. When a claimant pursues some project – whether conditionally or unconditionally – she necessarily forecloses various options she might otherwise have pursued. This phenomenon can be seen in our everyday experiences. For instance, many universities allow students to choose a limited number of optional courses as part of their undergraduate degree. Suppose that a student is allowed to pursue only one option from a selection of jurisprudence, public international law and intellectual property law. The student chooses intellectual property law. By pursuing this course, she forecloses the chance of studying jurisprudence or public international law. The student might come to regret her choice – if she decides (for instance) that she might have preferred to have studied jurisprudence. In many of these situations, we have

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<sup>53</sup> There is, I have argued, a further puzzle here: why the SQA is the baseline the law works from *from the claimant’s perspective*: F Wilmot-Smith, ‘Why is unjust enrichment so hung up on the past?’ (Moral Values in Private Law II, King’s College, London, 2012). Discussing this is beyond the scope of this thesis. However, notice that this argument cannot be the same as that I suggest from the defendant-sided perspective, at 5.2.4.

no way to undo the past: we are left with the regret about our earlier choice. In the case of failure of condition, the situation is distinct. By allowing restitution, ‘the claimant is permitted to reopen the options she forwent in pursuing the relevant course of conduct, a course of conduct which did not turn out as she wished.’<sup>54</sup> This is, to repeat, not the principal benefit that restitution brings. The principal benefit is found simply in allowing the claimant to unwind the transfer which does not reflect her purposes. The incidental benefit is that – having unwound the transfer – a host of options, previously foreclosed, become available to her again.<sup>55</sup>

### 5.3.3 The Complete Case

#### 5.3.3.1 Assessing a Remedial Regime

When assessing any remedial regime, we must, of course, ask what reasons there are for various courses of action. Some remedies may fail at this stage as there may simply be *no* reason for them. For instance, one might think that there is – in a normal case – no reason to punish the contract breaker. If so, punitive damages would be ruled out at this stage. As Kimel suggests:<sup>56</sup>

the availability ... of ... punitive damages for an intentional breach ... would usually serve no purpose other than that of, in effect, the suppression of immorality for its own sake.

It is tempting to think that the *only* question we need ask concerns the reasons for

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<sup>54</sup> F Wilmot-Smith, ‘§38 and the Lost Doctrine of Failure of Consideration’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 80.

<sup>55</sup> A failure to distinguish these distinct values is a problem of my argument at Wilmot-Smith, ‘§38 and the Lost Doctrine of Failure of Consideration’ (n 54) 80.

<sup>56</sup> D Kimel, ‘The Morality of Contract and Moral Culpability in Breach’ (2010) 21 King’s LJ 213, 226.

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the remedy in question. However, the inquiry is more complicated than this. Beyond the basic inquiry into the reasons for an individual remedy, there are two further stages. First, we should ask what we have *most* reason to do. Although there might be good reasons for a particular remedy, there might be stronger reasons against it. A prospective heir might have good reasons to kill her parents – to inherit their wealth, etc. – but few would doubt that these reasons are outweighed by the strong reasons not to kill. Secondly, we must attend to the practicality of remedies – by which I mean the prospect or ability of the remedy to achieve its goal. There might be good reasons for one particular remedy, but no prospect of those reasons being conformed with. In such a case, there is no reason for the law to try to pursue the remedy in question (though there are still, of course, reasons *for the remedy*). As Gardner says:<sup>57</sup>

Where acting with a view to  $\phi$ ing would not contribute to one's  $\phi$ ing, one has reasons to  $\phi$  (i.e. reasons to succeed) without corresponding reasons to try. I am on a cliff top miles from anywhere looking down helplessly on a man drowning in the storm sea below. Because no amount of trying would bring me closer to success, my reasons to save the man do not yield any reasons to try to save him.

As placeholder terms for these distinctions, I will distinguish between what we have *reason* to do, what we have *most* reason to do, and what it is *practical* to do.

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<sup>57</sup> J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Hart 2001) 137 (footnote omitted). See, further, J Gardner, 'Justifications and Reasons' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 92–93.

### 5.3.3.2 The Choice the Law Must Make

When a claimant performs some action with a conditional intention and the condition fails, the problem she faces – as I stressed above<sup>58</sup> – might be conceived of in one of two ways. First, one might regard the problem as being with the *action* that the claimant has performed. Although she intended to perform the action only if a certain condition held, she performed the action and the condition did not hold. It follows that her action is not a reflection of her true intentions. This perspective is the one of the previous section, which established a plausible case for restitution of a transfer made subject to a condition which fails. The problem might, alternatively, be conceived as being not about her *action* but instead about the *failure of the condition*. The problem is not, on this view, that the claimant has acted; the problem is that the condition attached to her action has failed.

These dual possibilities give the law a choice. I described that choice – and I will continue to use these terms here – as one between ‘going backwards’ (i.e. ‘curing’ the act) and ‘going forwards’ (i.e. ‘curing’ the failure of condition).<sup>59</sup> The choice for the law is in designing its remedial structure. It could adopt one of four possibilities:<sup>60</sup>

1. *Always Backwards*: Such a regime would endow a claimant to a failure of condition action with a restitutionary remedy – and not provide any other remedy for the failure of condition.
2. *Always Forwards*: Such a regime would endow a claimant to a failure of condition action with a remedy which seeks to cure the failure of condition – and

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<sup>58</sup> 4.3.3.

<sup>59</sup> See 4.3.3.

<sup>60</sup> A possible fifth option is allowing a claimant to go forwards and backwards – i.e. *both* restitution *and* damages. On the possibility of such a claim, see K Barker, ‘Restitution of Passenger Fare: *The Mikhail Lermontov*’ [1993] LMCLQ 291, 294–97. The reasons for the law not adopting *Always Forwards* will demonstrate why this, too, would be illegitimate.

not provide any other remedy for the failure of condition.

3. *Claimant's Election*: Such a regime would allow the claimant a choice of either restitution or a remedy which seeks to cure the failure of condition.
4. *Defendant's Election*: Such a regime would allow the claimant either restitution or a remedy which seeks to cure the failure of condition – however it would be for the defendant to choose which remedy to provide.

The law on failure of condition is clear. It has adopted *Always Backwards*.<sup>61</sup> Why should this be the case? Why, in other words, has the law chosen only ever to go backwards? Given that we have already established a *prima facie* case for going backwards, the important questions concern the strength of the reasons to go forwards and the practical course, given facts about the world.

#### 5.3.3.3 Four Objections to Going Forwards

To understand why *Always Backwards* is a sensible position to adopt, we should consider the objections one might have to the law instead adopting *Always Forwards*. These arguments, collectively, show why failure of condition does not – in and of itself – give rise to reasons to go forwards and why, even when there are such reasons, it would be illegitimate for the law to seek to comply with them.

The first reason to reject *Going Forwards* is founded on a premise about the justification of remedies in private law. Let us assume that the remedies of private law should aim to conform with the reasons their causative facts generate.<sup>62</sup> The

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<sup>61</sup> This does not mean, in case the point is not already clear, that claimants are never able to go forwards – only that the *source* of that endowment is not the doctrine of failure of condition. This point will be stressed further in the following section.

<sup>62</sup> This seems to be – when interpreted broadly – a premise shared by a wide range of scholars of private law, e.g. A Ripstein, *Force and Freedom* (Harvard University Press 2009) 304–05 and J Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1. These are all what Sinel calls 'intrinsic' accounts of remedies: Z Sinel, 'Understanding Private Law's Remedies' (SJD thesis, 2013).

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facts giving rise to a failure of condition do not appear themselves to generate any new reasons to go forwards. In Chapter 2, I pointed out that there might be no reason at all for the condition in question to be satisfied.<sup>63</sup> The fact of a conditional transfer does not itself lend the condition any reason-giving force. If we combine this point with the premise, we have a valid and sound argument against *Going Forwards* as a remedy for a failure of condition.

This argument relies upon contentious claims about the justifiable remit of remedies in private law. There is not enough space in this thesis to defend that propositions. Therefore, it is important to examine whether there are other reasons to say that failure of condition only justifies going backwards. There are three further problems with *Going Forwards*. The first of these is that there might be no reason to go forwards. As was stressed in Chapter Three, not every condition entails a desire that the condition be satisfied – let alone a reason to satisfy it.<sup>64</sup> For instance, suppose that I contract a cold and become convinced of my impending death. This leads me to give away my worldly goods. I have a lingering doubt about whether the cold will prove fatal – and so I make my gift conditionally. I give the money away on condition – to put it imprecisely – that I will die (soon). When I recover from the cold, the condition fails. Here, going forwards would mean my own death. And – let us assume – there is no good reason for that. Although this example might appear somewhat fanciful, the same analysis could apply to a number of failure of condition cases. A claimant might pay money in return for the defendant's per-

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<sup>63</sup> See 2.4.3–2.4.4.

<sup>64</sup> See above, 2.4.3–2.4.4. While I do not want to suggest that reasons are mere desires, I will – in the following discussion – use desires as a shorthand for reasons. In most cases of failure of condition, whether there is a reason to satisfy a condition depends upon whether the claimant wishes that the condition be satisfied.

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formance and it might be of the essence that performance be rendered in a timely fashion. If the defendant fails to perform, there might be then no reason to compel performance: the time at which it would have been useful has passed.

The second problem with *Always Forwards* is that, although there might be reasons to go forwards, these might not be *sufficient* to justify going forwards. Importantly, although there might be good reasons to go forwards, there might be stronger countervailing reasons such that going forwards would not be desirable. This situation can be illustrated with an example, where the conflict of reasons arises due to moral concerns with going forwards. Consider:<sup>65</sup>

*Marriage Settlement*: the claimant transfers money to the defendant on the condition of a forthcoming marriage between the defendant and a third party. The couple fall out and the marriage does not take place.

In this situation, there are two possible responses to the failure of condition. The first is restitution of the money paid. The second is to force the defendant and the third party to marry. Doing so would ensure that there is no failure of condition. There might even be some good reasons for the marriage – the parties' tax bills might reduce and their friends might enjoy the party at the wedding. Nevertheless, no one would suggest that the law should compel this. We have good reasons not to force people into marriages – stronger reasons than those in favour of the forced marriage. Fulfilling the expectation of the claimant would require an unjustifiable interference with the normative state of other parties. This demonstrates that going forwards is not what we have *most* reason to do.

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<sup>65</sup> The example is based on *Re Ames' Settlement* [1946] Ch 217. In *Re Ames* the impossibility was factual, not normative: the husband, the beneficiary of the settlement, had died by the time of the suit.

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This second problem can be expanded into a more generalised concern about the legitimacy of going forwards. It seems plausible that going forwards will, at least in most normal cases, interfere with the normative position of some other party. That fact gives a strong *prima facie* reason against going forwards. A similar concern led Raz to reject the expectation measure of damages in contract law. He claimed that:<sup>66</sup>

Those who, like myself, accept Mill's harm principle ... will doubt the legitimacy of the law's adoption of a general policy of enforcing voluntary obligations ... It follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law.

There is a powerful counter-argument to this claim in the context of contract law.

As Kimel reasons:<sup>67</sup>

To harm a person is to affect adversely her prospects, deny her of what she is entitled to, and the like. And if the benefits of the bargain are something to which parties to contract are entitled – part and parcel of seeing them as the subject of the parties' core rights – then at least inasmuch as these benefits are of a discernible value for a party, denying them to this party is harming it, and harming it in a rather paradigmatic sense.

For our purposes, Raz and Kimel are both *ad idem* on the important point. That is, they agree that going forwards – placing the parties in a new normative state – will only be justifiable when the claimant has an entitlement to be placed in that state. When there is no entitlement to be placed in the new state, we have – at least in any normal case – insuperable reasons not to take the parties forwards.<sup>68</sup> And, in this

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<sup>66</sup> J Raz, 'Book Review: Promises in Morality and Law' (1982) 95 Harvard Law Review 916, 934.

<sup>67</sup> D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2005) 106.

<sup>68</sup> My caveat is to leave room for situations of gross injustice, where a localised redistribution might be desirable.

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respect, the facts of a failure of condition case do not appear to give rise to sufficient reasons: they do not entail any entitlement to go forwards (though one might arise concurrently, where there is a concurrent contract).

The final problem with *Always Forwards* is that going forwards might pose practical problems. Two difficulties are worth considering. First, it might be unclear what going forwards would actually involve. For instance, in *Benedetti v Sawiris* Lord Reed discussed the remedy in a failure of condition case. His Lordship said that '[t]he object of the remedy ... is ... to correct the injustice arising from the defendant's receipt of the claimant's services on a [condition] which [failed].'<sup>69</sup> His Lordship claimed that:<sup>70</sup>

the unjust enrichment arising from the defendant's receipt of the claimant's services can only be corrected by requiring the defendant to pay the claimant the monetary value of those services

His Lordship's reasoning in support of the conclusion is revealing. He claimed that the:<sup>71</sup>

injustice cannot be corrected by requiring the defendant to provide the claimant with the reward which either party might have been willing to agree ... [T]he court [cannot] make the parties' contract for them: a contract which might have included many other terms and conditions besides a price.

Let us set to one side the idea that absent a contract neither party's intentions can be determinative. The deeper concern which his Lordship is voicing is a practical

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<sup>69</sup> *Benedetti* (SC) (n 23) [99] (Lord Reed).

<sup>70</sup> *Benedetti* (SC) (n 23) [99] (Lord Reed). From the way I have expressed his Lordship's claims, it might seem that the 'only' in this formulation was incautious. However, the 'only' claim was intended to apply to only those situations where the subsequent concerns – the difficulty of knowing *how* to go forward apply. So, when placed in context, the claim is not confused.

<sup>71</sup> *Benedetti* (SC) (n 23) [99] (Lord Reed).

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worry about going forwards: absent a contract, it is impossible to know what going forwards actually *means* for the parties.

The second practical problem with going forwards is that – although there might be reasons to go forwards – these reasons might be incapable of satisfaction. This phenomenon is well-known to contract lawyers. Suppose that a contract is agreed whereby the defendant promises to perform a service for the claimant. The defendant fails to perform, in non-excusable breach of contract. The claimant is, therefore, entitled to a remedy. The expectation award is the normal remedy. This remedy aims to place the claimant ‘so far as money can do it ... in the same position ... as if the contract had been performed.’<sup>72</sup> Such a remedy aims to take the parties forwards. However, the payment of damages – or even specific performance<sup>73</sup> – is rarely just as good as performance in the first instance. As Gardner puts it (in the context of torts) there will generally be a ‘rational remainder ... [i.e.] unsatisfied or imperfectly satisfied reasons’ to perform the original course of conduct.<sup>74</sup> If damages can be inadequate as a means of satisfying the reasons in favour of performance, in some cases the reasons to *try* to go forward will not be as strong as they might otherwise seem. From this exclusively contractualist story we can divine a more general message. Our reasons to try to go forward may not be as strong as a consideration of the reasons in favour alone might suggest. That is because – although the reasons for going forward might still exist – they will exert no practical force in favour of trying to go forward if they are incapable of satisfaction.

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<sup>72</sup> *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

<sup>73</sup> D Winterton and F Wilmot-Smith, ‘Steering a Course on Contract Damages and Failure of Consideration’ (2011) 128 LQR 23, 27.

<sup>74</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 62) 34.

### 5.3.3.4 Why Restitution

The previous sections have clarified why there is reason – following a failure of condition – to go backwards and has suggested problems with going forwards. These reflections lend strong support to the law’s remedial position of *Always Backwards*. Although there are a number of problems with going forwards, the crucial point in this respect is the illegitimacy of going forwards absent a claimant’s entitlement to the new normative state. A transfer subject to a condition does not – in and of itself – generate such an entitlement. Indeed, to reiterate a point made above, that may often be a good thing: there might simply be no reason to go forwards. For this reason, restitution is not only an appropriate response to the facts of a failure of condition – a return to the SQA is the exclusively appropriate response.

## 5.4 Implications of the Analysis

### 5.4.1 Self-Induced Failures

Chapter Three introduced the problem of self-induced failures of condition.<sup>75</sup> For example, in *Dies v British & Industrial Mining* the claimant made a pre-payment of £100,000 towards the purchase of rifles and ammunition (worth £270,000).<sup>76</sup> The claimant then – in breach of contract – refused to take delivery of the rifles. The question was whether the buyer could recover the advance payment from the defendant. As we saw, there is some controversy about both the individual case and the principle in general. I argued that there is no conceptual confusion in allowing

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<sup>75</sup> See 2.2.3.

<sup>76</sup> *Dies v British & International Mining and Finance Corp Ltd* [1939] 1 KB 724 (KB).

#### 5.4. IMPLICATIONS OF THE ANALYSIS

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restitution to such a case. But what should the position be, in light of the reflections of this Chapter?<sup>77</sup>

In practice, this problem will often intersect with the bad bargains problem.<sup>78</sup> That is because often – though not always – the reason why the claimant induces the failure of condition is in order to escape an unfavourable bargain (as was the case in *Dies*). However, we should distinguish the two cases as the problem of self-induced failures can arise, in principle, even when the contract is not a losing one. The appropriate question is, therefore, whether a claimant should be entitled to restitution for a self-induced failure when the bargain is a good one. If there is no objection to restitution in such a case, there can be no objection to self-induced failures as a category.<sup>79</sup>

A transfer made subject to a condition which fails generates a *prima facie* case for restitution.<sup>80</sup> As Smith puts it:<sup>81</sup>

Benefits were conferred on a condition that was not satisfied. The transferor should, on basic unjust enrichment principles, be able to recover those benefits.

Why would the *cause* of the failure of condition be relevant? If there is an objec-

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<sup>77</sup> In this subsection, as in the next, I assume that a claim for restitution following a failure of condition can operate concurrently with a claim for damages following a breach of contract.

<sup>78</sup> S Smith, 'Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement' (1999) 115 LQR 245, 250.

<sup>79</sup> Of course, one might want to allow restitution in a good bargains case, but not in a bad bargains case. If this were the position adopted, it would be adopted for reasons local to the bad bargains cases, examined at 5.4.2.

<sup>80</sup> Sometimes the condition might be complex, such that it does not fail if the claimant brings about the state of affairs in question. This might be the case, for instance, where the money paid is a deposit: *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2011] Ch 23. This is also the best explanation of *Sumpter v Hedges* [1898] 1 QB 673 (CA). These complications do not affect the basic case.

<sup>81</sup> Smith, 'Concurrent Liability in Contract and Unjust Enrichment' (n 78) 254.

#### 5.4. IMPLICATIONS OF THE ANALYSIS

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tion to restitution, it seems unlikely to be a defendant-sided concern. It makes no substantive difference to a defendant whether she has to make restitution for a condition which has happened to fail as opposed to one which the claimant caused to fail. As Burrows rightly says, the concern in these cases appears to be:<sup>82</sup>

that, as the contract-breaker has himself been responsible for the failure of [condition], he has debarred himself from claiming that the enrichment is unjust.

The claimant's responsibility in bringing about the failure of condition is, therefore, seen as disentitling her from claiming restitution for a failure of condition. Why, exactly?

The precise argument here is difficult to make out. I will here attempt a brief reconstruction – and suggest why the argument is flawed.<sup>83</sup> Restitution is supposed to unwind a transfer when the transfer is made with insufficient voluntariness. However, it seems – at least at first impression – confused to say that there is insufficient voluntariness to make the transfer when the claimant has herself brought about the failure of condition. How can the claimant both maintain that the condition has failed, something she intentionally brought about, and at the same time complain about the outcome of this failure? When these two propositions – concerning the justification of restitution and the individual case – are combined, the inference is that self-induced failures of condition should not suffice for restitution.

However, the discussion in this Chapter, combined with the conceptual clarific-

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<sup>82</sup> A Burrows, *The Law of Restitution* (3rd, OUP 2011) 353. I should note that Burrows does not endorse this view.

<sup>83</sup> Of course, even if I am correct that this argument is flawed, I might misunderstand the argument against self-induced failures. My intention here is only to clear up what seems to be a confusion in the debate, not to solve this particular issue.

ations of Chapter 2, demonstrate that the first premise is flawed. We saw in Chapter 2 that a claimant need not desire that a condition holds.<sup>84</sup> The problem in a failure of condition case is not the failure of condition *simpliciter*. The problem is, instead, the conjunction of the transfer and the failure of condition – or, rather, failure to get restitution when the condition fails.<sup>85</sup> This means that the argument to deny restitution for a self-induced failure of condition is flawed. It seems therefore that, as McHugh J said in *The Mikhail Lermontov* (quoting Birks), ‘once it does appear that the condition for retaining the money has failed the fact that it failed in response to the payer’s own breach does not matter’.<sup>86</sup>

### 5.4.2 Bad Bargains

#### 5.4.2.1 The Controversy

A further point of particular doctrinal controversy is whether a claimant will be awarded restitution for failure of condition to escape a bad bargain.<sup>87</sup> For instance, in *Boomer v Muir* the claimants agreed to build a dam on the defendant’s land for a fixed sum.<sup>88</sup> They were excluded from the site when the dam was nearly built. Boomer had been paid all but \$20,000 of the contract price; the market price of the services for which they had not been paid was roughly \$200,000. The Court awar-

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<sup>84</sup> See 2.4.4.

<sup>85</sup> See 5.3.2.1-5.3.2.2.

<sup>86</sup> *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344, 352.

<sup>87</sup> See M Garner, ‘The Role of Subjective Benefit in the Law of Unjust Enrichment’ (1990) 10 OJLS 42, 53–56; P Birks, ‘In Defence of Free Acceptance’ in A Burrows (ed), *Essays on the Law of Restitution* (OUP 1991) 135–37; G Virgo, *The Principles of the Law of Restitution* (2nd, OUP 2006) 332–35; Burrows, *The Law of Restitution* (n 82) 344–50.

<sup>88</sup> *Boomer v Muir* 24 P 2d 570 (Cal Dist Ct App 1933).

#### 5.4. IMPLICATIONS OF THE ANALYSIS

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ded them \$200,000. The question of principle is the effect of the parties' contract on the claim: should a party be able to escape the contract price in this manner? The doctrinal position is inconsistent.<sup>89</sup> Some cases have allowed recovery to the full level of the enrichment, regardless of the contract price.<sup>90</sup> Others have used the contract price as a ceiling to the claim.<sup>91</sup> Let us set to one side the doctrinal position. How should we think about the problem, in light of the conceptual and theoretical clarifications we have thus far made?<sup>92</sup>

Consider a simple case:<sup>93</sup>

*Bad Bargain:* Claimant contracts with Defendant for the sale of 10 bags of wheat at a price of £100 per bag. Claimant pays the price, £1,000, in advance. Defendant fails to deliver the wheat. Meanwhile, the price of wheat has fallen to £50.

The normal measure of damages for breach is, of course, expectation damages.<sup>94</sup> These would be the cost of 10 bags in the current market: £500. There is then the question of whether the claimant can recover the prepayment – i.e. £1,000.

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<sup>89</sup> For a helpful analysis, see Mitchell, Mitchell and Watterson (n 26) paras 3.40–3.57.

<sup>90</sup> *Boomer v Muir* (n 88); *Lodder v Slowey* [1904] AC 442 (PC) 453; *Chandler Brothers Ltd v Boswell* [1936] 3 All ER 179 (CA) 186; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWCA 234 (NSWCA); *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912 (CA) 927–28 (Kerr LJ).

<sup>91</sup> *Ranger v The Great Western Railway Company* (1854) 5 HLC 72, 101; 10 ER 824, 836 (HL) (Lord Cranworth LC), (1854) 5 HLC 72, 118 (Lord Brougham); *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) [26] (Cooke J).

<sup>92</sup> This analysis supposes that there will be some cases where such a claim is – as a conceptual matter – possible. Compare R Stevens, 'Three Enrichment Issues' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 60–61.

<sup>93</sup> Based upon *Bush v Canfield* 2 Conn 485 (Supreme Court of Errors of Connecticut 1818).

<sup>94</sup> *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

### 5.4.2.2 A Flawed Argument

Part of the difficulty with this case is how best to conceive of the problem. We can clarify the issue by considering an arguments which might be made to argue against a claim for restitution of the £1,000 for failure of condition. Sometimes it is supposed that there is no *true* failure of condition to the full extent of the £1,000. One way to make this argument is to understand the condition of the payment as disjunctive. That is, the claimant pays the defendant on condition that the defendant will either perform her contract or will pay damages.<sup>95</sup> So long as the claimant receives the damages – £500 – the condition does not fail.<sup>96</sup> This analysis seems flatly inconsistent with what seems to be the best construction of the facts of normal cases: the condition in most cases is performance, not damages *in lieu*.<sup>97</sup> Just as we should reject the argument in the contractual sphere – the simple contractual obligation is performance, not performance or damages – we should reject it in the failure of condition context. There is, therefore, a *prima facie* failure of condition.<sup>98</sup>

Therefore, the appropriate question is: should the claimant's *prima facie* entitlement to claim restitution be barred by the availability of a claim for compensation? In order properly to understand the problem, we need first to introduce the no-

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<sup>95</sup> The contractual obligation is understood in this way by D Markovits and A Schwartz, 'The Myth of Efficient Breach: New Defenses of the Expectation Interest' (2011) 97 Virginia Law Review 1939. One could easily transplant this argument to the failure of condition context.

<sup>96</sup> This appears to be Stevens' argument: Stevens, 'Three Enrichment Issues' (n 92) 60.

<sup>97</sup> This is a point contract scholars have made many times. For a well-known defence, see D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628.

<sup>98</sup> In saying this, I wish to leave open the possibility that in some cases the condition of a *particular* contract is primary performance or damages *in lieu*. There is no *conceptual* reason to reject such a construction. However, even if the parties have put a liquidated damages clause into their contract, we should be slow to infer such a construction: the function of liquidated damages clauses is not always (if ever) to indicate that parties are just as satisfied with damages.

## 5.4. IMPLICATIONS OF THE ANALYSIS

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tion of inconsistency of remedies – and then to distinguish two senses in which one remedy can be inconsistent with another.

### 5.4.2.3 Two Senses of Inconsistency

As Lord Nicholls has said, [t]he law frequently affords an injured person more than one remedy for the wrong he has suffered.<sup>99</sup> Equally, the law sometimes allows a claimant two causes of action on one set of facts.<sup>100</sup> These causes of action might justify quite distinct responses. For instance, in *Bad Bargain* there is a claim for damages (for breach of contract) and a claim for restitution (for the failure of condition). As Lord Nicholls notes, ‘[s]ometimes the two remedies are alternative and inconsistent.’<sup>101</sup>

It is important to distinguish between two senses of inconsistency. One remedy might be inconsistent with another in the sense that their *cumulation* would be irrational.<sup>102</sup> For instance, if the award of remedy A ‘incidentally serve[s] the function of’ remedy B, there is no reason for the law to give both A *and* B; award of both A and B would, it follows, be irrational.<sup>103</sup> When this is the case A and B are not inherently inconsistent. In fact, the opposite is the case: it is because A performs the same functions as B that B cannot be awarded cumulatively with A. Let us label this

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<sup>99</sup> *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (HL) 521 (Lord Nicholls).

<sup>100</sup> The notion is called ‘alternative analysis’ by Birks: P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 46.

<sup>101</sup> *Tang Man Sit* (n 99) 521 (Lord Nicholls).

<sup>102</sup> As regards restitution for failure of condition and damages, very little has been written in this regard. The principal discussion remains: Barker, ‘Restitution of Passenger Fare: *The Mikhail Lermontov*’ (n 60) 294–96. See, further, *Millar’s Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204 (CA).

<sup>103</sup> J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002) 250.

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species of inconsistency ‘inconsistency of remedies’.<sup>104</sup>

One remedy might also be inconsistent with another in the sense that its award would be inconsistent with the purposes of the legal institution in which the other remedy arises. To distinguish this species of inconsistency from the first sense, let us refer to it as ‘inconsistency of institutions’. To explain what I have in mind, it will be helpful to have some placeholder terms. Suppose that on one set of facts two institutions are engaged: Institution<sub>C</sub> and Institution<sub>D</sub>. Each institution would give distinct remedies: respectively, Remedy<sub>C</sub> and Remedy<sub>D</sub>. Inconsistency of institutions arises when, on such facts, the *mere* award of Remedy<sub>C</sub> would undermine Institution<sub>D</sub>. That is, to be clear, the award of Remedy<sub>C</sub> is problematic quite apart from its *cumulation* with Remedy<sub>D</sub>. This situation is complicated by the fact that the same argument operates where Institution<sub>D</sub> *denies* a remedy – that is, where Remedy<sub>D</sub> has ‘no remedy’ as its substantive content.<sup>105</sup>

This can be seen – and the notion of inconsistency refined – from the following example. Suppose that a sub-contractor is employed by a contractor to work on an employer’s land for an agreed remuneration. The sub-contractor performs the work but his contract with the contractor is unenforceable. Can the sub-contractor claim restitution against the employer in unjust enrichment? Etherton LJ has said that liability will be denied when it would ‘undermine ... the way in which the parties

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<sup>104</sup> The leading authorities on the problems of such election are *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) and *Tang Man Sit* (n 99).

<sup>105</sup> This demonstrates a further difficulty with the formulation. I said that this problem can arise where ‘two institutions are engaged’. However, ‘are engaged’ cannot – if the following is correct – be synonymous with ‘gives rise to a remedy’. There is then a question of what it means for an institution to be engaged. This complication is, of course, not one of my own creation: it is latent in the claims of, for example, Etherton LJ.

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chose to allocate the risks involved in the transaction'.<sup>106</sup> Here, it is the mere remedy – rather than its cumulation with some other remedy – which is seen as problematic. This is the relevant sense of inconsistency with which we are concerned. When concerns are noted about restitution saving parties from a bad bargain, the concern is not with cumulation of restitution with compensatory damages; the worry is that the mere award of restitution is problematic given the contractual context. Here, to recall my placeholder terms, the award of restitution is  $\text{Remedy}_C$  and the contractual context is  $\text{Institution}_D$ .

In order that we can think clearly about the question of this subsection, we must distinguish three further questions. First, what is meant by ‘inconsistency’ in the case of inconsistency of institutions. Secondly, in our case, whether restitution for failure of condition in ‘bad bargain’ cases would be inconsistent with the institution of contract. Finally, if the second question is answered affirmatively, whether this gives us reason to block the claim for failure of condition.

### 5.4.2.4 Inconsistency in the Abstract

The first question is the nature of inconsistency at hand. Genuine contradiction of remedies is hard to imagine.<sup>107</sup> This is certainly not what we have in mind. Instead, the putative inconsistency is – to adopt the general terms used by Etherton LJ – that one remedy would somehow *undermine* another institution. Therefore, we might say that one remedy is inconsistent with another institution if (1) its award; (2) would undermine; (3) the purposes of the other institution.<sup>108</sup> The question is –

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<sup>106</sup> *MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930, [2011] QB 24 [21].

<sup>107</sup> Contradiction would be where one remedy mandated R and another remedy demanded  $\neg R$ .

<sup>108</sup> Here ‘concurrency’ must include the complications noted above at n 105.

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to return to our particular case – whether the award of restitution would do so where the claimant has a remedy in damages which is worth less than the claim for restitution.

### 5.4.2.5 Is Restitution Inherently Inconsistent with the Contract?

We might begin to refine our question in this way. The law of contract aims to ensure various outcomes. Restitution following a failure of condition can seem to be inconsistent with that purpose. That is because it unwinds the parties' positions, putting them in the position they would have occupied if the contract had never been entered into. Therefore, although the law of contract aims 'to make nonoptional a course of conduct that would otherwise be optional', failure of condition appears to allow a claimant to escape her own commitment.<sup>109</sup> So stated, this argument proves too much. The argument would say that restitution is always inconsistent with the contractual purpose, even when contractual damages exceed the potential restitutionary claim. However, it is now rarely argued that a claim based on failure of condition cannot lie where there is a contract. If the bad bargains case poses a distinctive problem for the law, it cannot be the bald inconsistency.

Nevertheless, there does seem to be something to the worry. The problem, more precisely, is with putting a party in a better position than if the contract had been performed. As Cooke J put it:<sup>110</sup>

Such recovery in itself would be unjust since it would put the innocent party in a better position than he would have been if the contract had been fulfilled.

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<sup>109</sup> C Fried, *Contract As Promise* (Harvard University Press 1981) 8.

<sup>110</sup> *Taylor v Motability Finance Ltd* (n 91) [26] (Cooke J).

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This explains why failure of condition is not thought to be objectionable when a contractual claim exceeds the claim for restitution. The argument seems to be, first, that restitution would put the claimant in a better position than if the contract had been performed; second, that putting the parties in a better position than if the contract had been performed is inherently inconsistent with the contractual regime; and therefore, that failure of condition in bad bargains cases is inherently inconsistent with the law of contract.

Does the argument succeed? Both premises are contentious. The truth of the first premise – that restitution puts the claimant in a better position than if the contract had been performed – depends on a number of contingent facts. In particular, if the claimant suffers consequential damages for the defendant’s failure to perform, her substantive position might be worse after restitution than if the defendant had performed.<sup>111</sup> However, the first premise will sometimes be true. In a liquid market where there is no harm in the breach of contract, if the claimant makes a bad bargain it is possible for her to be put in a better position by restitution than by performance.<sup>112</sup> Indeed, this appears to be the case in *Bad Bargain*.

The second premise – that putting the claimant in a better position than if the contract had been performed is inconsistent with the contractual regime – is beyond the scope of this thesis, requiring as it does a detailed examination of the institution of contract. Nevertheless, it is likely that this is the source of most disagreement. Most scholars agree that the claim should *sometimes* be barred, for instance where the parties have ‘contracted out of restitution.’<sup>113</sup> Clearly, parties can exclude claims

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<sup>111</sup> And damages for breach might not suffice if these are barred by remoteness.

<sup>112</sup> Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 10) 431.

<sup>113</sup> Burrows, *The Law of Restitution* (n 82) 345. Compare Virgo, *The Principles of the Law of Restitu-*

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for failure of condition. The question is, then, to clarify the nature of the institution of contract. Only then can we see whether the institution of contracting justifies not only putting the parties in the position they would have been in had the contract been performed – but also limiting the parties other common law rights such that this is *all* the parties can achieve. Answering this question would take us too far into the theory of contract; I will not, therefore, attempt such an answer here.

Even if that argument can be made out, it would not conclude the matter. The question would then be whether failure of condition should ‘bow to’ the law of contract, such that the claim for restitution should be barred.<sup>114</sup> One argument in favour of this can clearly be dismissed: it cannot be argued that the claimant in *Bad Bargains* took the risk of the market falling. Whether she takes that risk will – the argument of the last Chapter should make clear – depend upon whether restitution is available.<sup>115</sup>

The discussion here should illustrate two points. First, that the problem of this subsection is not principally a problem for failure of condition, but one for the law of contract. This illustrates the limits of theoretical analysis of failure of condition: it cannot definitively answer controversies such as *Bad Bargain*, either way, as they depend upon both facts (what do parties assume in the contractual sphere?) and norms (what would best respect the law of contract?) beyond its scope. However, the second point of importance is that the theoretical discussion has clarified the nature of the controversy at hand and directed attention to the appropriate location: the question of whether the remedy of restitution would fail to respect the bargain

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tion (n 87) 334 (‘risk’).

<sup>114</sup> Burrows, *The Law of Restitution* (n 82) 345.

<sup>115</sup> See 4.4.2.2.

the parties struck. This is a sufficient goal for theorists.

### 5.4.3 Cross-Firing Conditions

#### 5.4.3.1 The Controversy

In *Burgess v Rawnsley*, a man and a woman bought a house together, as joint tenants, each providing half the purchase price of £850.<sup>116</sup> The man bought the house in anticipation of a marriage with the woman; the woman knew nothing of these plans. She joined in the purchase so as to have a place of her own – the upstairs flat in the house. The parties did not marry and the woman did not move into the flat upstairs. After the man died, the woman claimed that the house was hers by survivorship. The man's administratrix claimed that the tenancy had been severed in equity – or, alternatively, that there was a resulting trust of the purchase monies. Although both parties had distinct purposes in their advance of the purchase monies, both purposes failed.<sup>117</sup> The Court of Appeal held that there had been severance of the joint tenancy. There was a disagreement over whether there was a resulting trust. Lord Denning MR argued that:<sup>118</sup>

Each has a different object in view, but each failed. What then is the position? I think it is the same as if the common object of both had failed. In my opinion there is a resulting trust in favour of the two of them, according to their respective contributions.

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<sup>116</sup> *Burgess v Rawnsley* [1975] Ch 429 (CA).

<sup>117</sup> Browne LJ and Sir John Pennycuick questioned this conclusion: as the woman took an interest in the whole house, they argued, her purpose did not fail. This is a question of the facts. This section will examine the question of principle in the case.

<sup>118</sup> *Burgess* (n 116) 437–38.

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However, a majority of the court held that there was no resulting trust since there was no failure of a *shared* purpose. As Browne LJ put it:<sup>119</sup>

it seems to me impossible to say that there has been a total failure of [condition] ... where a trust is created by two people and where there is a failure of a purpose for which one of them created the trust but which he did not communicate to the other party and which the other did not share.

Browne LJ and Sir John Pennycuik are the majority in the case and so their formulations must be the authoritative ones. Two problems arise. First, what is the precise test the case espouses? That question is not one this thesis will examine.<sup>120</sup> Secondly, as a matter of principle, is the decision correct? Why, in other words, should cross-firing conditions, both of which fail, not suffice for a failure of condition?<sup>121</sup>

### 5.4.3.2 Existing Analysis

This question has received surprisingly little attention – and essentially no analysis – from academic commentators. Chambers endorses *Burgess*; however, he does so by

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<sup>119</sup> *Burgess* (n 116) 442 (Browne LJ). See, similarly, *Burgess* (n 116) 445 (Sir John Pennycuik) (the need for ‘a common purpose’ or ‘a communication by the one having the purpose’).

<sup>120</sup> The difficulty arises from the imprecision of the formulations. Is it sufficient that the defendant know of the claimant’s purpose, even if that purpose is not the defendant’s? The stress on *communication* might suggest so. However, the reference to the purpose being *common* or *shared* implies that it must be a joint object – rather than one the defendant is simply *aware of*. There is a similar elision of these distinct concepts in A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 88 (‘accepted by, or made clear to, the defendant’). The vagueness may mean that the imprecision can only be resolved by resorting to first principles – hence the inquiry of this section.

<sup>121</sup> In *Unjust Enrichment*, Birks suggested that ‘where parties are at cross-purposes there is no basis *ab initio* at all for the retention of benefits’, adding that *Burgess* (n 116) might – for this reason – ‘have to be reconsidered’: P Birks, *Unjust Enrichment* (2nd, OUP 2005) 145. Although the suggestion is interesting, it is of limited application to our circumstances, concerning the explication of Birks’ new system of liability. It seems impossible to say that there is – from the claimant’s perspective – a failure of condition *ab initio* simply in virtue of the defendant not sharing her condition.

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appealing to the contract between the parties.<sup>122</sup> Even if this is the correct analysis of the case, it does not help in cases where there is no contract. Edelman and Bant support the case by asserting that if a claimant does not communicate the condition of their transfer ‘they [run] the risk of not being paid for it.’<sup>123</sup> As was explained at length above, such reasoning is circular.<sup>124</sup> The latest edition of *Goff and Jones* supports the case. The analysis in *Burgess* is said to be ‘surely correct’ as ‘[t]he [condition] ... must be jointly understood ... by both parties.’<sup>125</sup> This gives no reasons to support the decision. Similarly, Maher supports a requirement that the condition of a transfer be shared – but gives no reason of principle for doing so.<sup>126</sup>

### 5.4.3.3 The Appropriate Analysis

To answer this question, we need first to reflect further on the appropriate rule for failure of condition to adopt. We saw in Chapter 1 that a claimant cannot unilaterally and privately impose a condition upon a transfer.<sup>127</sup> There was some disagreement about how best to describe the rule the law has adopted in this regard. It has been claimed that a condition must be shared, agreed upon, objectively ascertainable or that the claimant must not take the risk of the condition failing. Which of

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<sup>122</sup> R Chambers, *Resulting Trusts* (OUP 1997) 168–70.

<sup>123</sup> J Edelman and E Bant, *Unjust Enrichment in Australia* (OUP 2006) 247. This reasoning is, as we saw above at 4.4.2.2, relied upon by a number of commentators to explain the objectivity of failure of condition.

<sup>124</sup> See 4.4.2.2. Edelman has since recognised this, in principle: J Edelman, ‘Liability in Unjust Enrichment where a Contract Fails to Materialise’ in A Burrows and E Peel (eds), *Contract Formation and Parties* (OUP 2010) 160–62, though remains in support of the ‘shared basis’ requirement: Edelman, ‘Liability in Unjust Enrichment where a Contract Fails to Materialise’ (n 124) 165–66.

<sup>125</sup> Mitchell, Mitchell and Watterson (n 26) para 13.02.

<sup>126</sup> F Maher, ‘Failure of Basis’ (DPhil thesis, 2008) 38.

<sup>127</sup> See 1.2.3.4.

#### 5.4. IMPLICATIONS OF THE ANALYSIS

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these formulations is the right one? And, in light of that, is there any room for a cross-firing condition?

In view of the argument of the previous Chapter, we can reject the last formulation as confused – whether the claimant takes the relevant risk depends upon whether the law allows recovery for secret conditions.<sup>128</sup> The three other formulations do not seem to suffer from any such logical affliction. Given that the agreed condition rule will only become distinct from the shared condition rule in those circumstances where the defendant privately rejects the condition, we can reject that rule. There is no value in protecting a defendant in such circumstances. Therefore, the two candidates are the shared condition rule and the objective condition rule. From the perspective of the subjective intention thesis, a benefit of the shared condition rule is that the claimant has to actually qualify her intention if she is to recover – and it is less clear that this is so on an objective rule. It is plausible that a claimant will be barred from making a claim if the defendant can prove that she, the claimant, did not in truth qualify her intention. Both the shared condition rule and the objective condition rule allow the defendant to rely upon the transfer. Only the objective condition rule ensures that third parties can similarly rely upon the transfer. It seems, therefore, that there is relatively little to distinguish the two – but what distinction there is supports the objective condition rule. Further, the clearest statement of the rule appears to support the objective condition rule.<sup>129</sup> Perhaps this rule should be supported for the simple reason that it allows courts to draw on a

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<sup>128</sup> See the argument at 4.4.2.2.

<sup>129</sup> *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) [285]–[286].

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wealth of pre-existing law on the construction of conditions.<sup>130</sup>

The objective condition rule will, of course, axiomatically prevent the possibility of cross-firing conditions. Objectivity, of its nature, cannot yield distinct conditions from a claimant's and defendant's perspective. I did suggest above that a claim might be defeated if it can be proven that the claimant did not, in fact, make the transfer with a conditional intention.<sup>131</sup> But this is readily explicable: the basic justification of the claim is not present. Can the objective rule justifiably be made subject to a further exception to cater for cross-firing conditions? This is only plausibly required where, first, there is no objective failure of condition; secondly, the claimant secretly qualifies her intention on a condition that fails; and, thirdly, the defendant secretly accepts subject to a condition which also fails. This situation is, of course, fanciful – though, as *Burgess* illustrates, not beyond the realms of possibility. There seems to be a claimant-sided reason for restitution in such a case; the question is whether there is a reason for the defendant's responsibility.

We can only answer this question with a firm grasp of the rationale for the objectivity of failure of condition. 5.2 argued that the reason for the objectivity is threefold. First, to support the law of contract; secondly, to enable reasonable reliance by the defendant and third parties; thirdly, to help justify the defendant's responsibility to make restitution. The third rationale does provide some assistance – and, indeed, suggests a reason why a cross-firing condition should count. The third rationale, recall, suggested that the defendant's responsibility is easier to justify when she accepts the enrichment on a particular condition – she accepted all along

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<sup>130</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL). See, further, C Mitchell, 'Unjust Enrichment' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 18.84.

<sup>131</sup> See 4.2.2.2.

that her receipt was defeasible.<sup>132</sup> This rationale appears to apply with just as much force to the case where the condition which the defendant accepts is a distinct one to that the claimant imposed upon her will. However, the first rationale suggests a reason why such conditions should not suffice: if private conditions were to count, this would raise the possibility of failure of condition conflicting with the law of contract. For that reason, although there is some reason for cross-firing conditions to count, it is suggested that the objective rule should apply nonetheless.<sup>133</sup> In other words, cross-firing conditions should not count to justify restitution. It follows that *Burgess v Rawnsley* should be regarded as correctly decided.

## 5.5 Conclusion

This Chapter has attempted to answer the remaining questions a theory of failure of condition must answer. It did this in two stages: first, justifying objectivity of the conditions of failure of condition; secondly, justifying the response of restitution. The implications of this analysis for some contentious areas were then developed. If these answers are successful, we have a complete theory of failure of condition. Three points of particular controversy were analysed in light of these clarifications.

The next Chapter turns to three doctrines customarily analysed within the law of contract. The link between these doctrines and the work of the previous five Chapters may not be immediately apparent. However, revitalising an old theory, I will argue that the doctrines have a great deal in common.

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<sup>132</sup> See 5.2.4, above.

<sup>133</sup> The second rationale for objectivity does not appear to militate against allowing cross-firing conditions: the defendant always thought her reliance was conditional.

## 6 Three ‘Contractual’ Doctrines

### 6.1 Introduction

This Chapter concerns the doctrines of common mistake, frustration and termination. For most people, this will seem to be an excursion into entirely new territory. The previous five Chapters have been concerned with explaining the doctrine of failure of condition. Although the point is not uncontroversial, many consider that doctrine to be a part of the law of unjust enrichment. Conversely, most theorists will consider the doctrines discussed here as part of the law of contract.<sup>1</sup> For that reason, the most likely response to the topics treated in this Chapter will be that – while all well and good, and interesting in their way – they are irrelevant to a thesis on failure of condition. This is incorrect. In the next Chapter I will seek to breathe new life into an old – now largely defunct – claim: that these ‘contractual’ doctrines are best understood as instances of failure of condition.<sup>2</sup> The full argument for *why* it is incorrect cannot be made until we have some grasp of the nature

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<sup>1</sup> As Aktin J said, about the doctrine of frustration: ‘the doctrine in question is part of the law of contract’: *Lloyd Royal Belge SA v Stathatos* (1917) 33 TLR 390 (KB) 391.

<sup>2</sup> Failure of condition was the second of five theories Lord Hailsham considered in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 687. His Lordship dismissed the explanation in a single sentence. It is the fifth of Treitel’s five theories and is said to be ‘plainly wrong’: G Treitel, *Frustration and Force Majeure* (Sweet & Maxwell 2004) para 16.012.

of the doctrines. Until then, I must ask that the sceptical reader to place to one side her concerns; these will be addressed in the next Chapter.

This Chapter has two aims. First, it will introduce the doctrines of common mistake, frustration and termination. All these topics are dealt with in detail in other works and my purpose is not to improve upon these accounts. Therefore, this introduction will be comparatively brief, designed chiefly to survey the core doctrinal rules. The second aim of the Chapter is to explain the precise theoretical puzzle these doctrines give rise to. The key difficulty is explaining why the contractual rights are cancelled on the event in question. I will – in this and in subsequent Chapters – refer to these cases as a whole as ‘frustrating events cases’. The reason for that label will become clear below.

## 6.2 Common Mistake and Frustration

### 6.2.1 Common Mistake

Common mistake is helpfully distinguished from mutual mistake. Common mistake operates where the requirements of offer and acceptance are satisfied, but the parties have dealt with one another on the basis of a shared yet false assumption. If the mistake is sufficiently important, no contractual rights arise. Mutual mistake is different. In such a case, there is no *shared* mistake. For instance, in *Raffles v Wichelhaus* the parties contracted for the sale of a cargo of cotton to arrive ‘ex “Peerless” from Bombay.’<sup>3</sup> However, there were two ships matching that description, both carrying cotton. One sailed in October; the other sailed in December.

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<sup>3</sup> *Raffles v Wichelhaus* (1865) 2 H & C 906, 159 ER 375 (KB).

## 6.2. COMMON MISTAKE AND FRUSTRATION

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In such a case, no contract is formed simply because the requirements of offer and acceptance are not satisfied.<sup>4</sup>

The leading case on common mistake is *Bell v Lever Bros Ltd*.<sup>5</sup> Lever Bros employed Bell and Snelling to work for the Niger Company, which it controlled. Bell and Snelling were secretly speculating in cocoa, putting them both in fundamental breach of their contracts of employment (such that Lever Bros had the power unilaterally to terminate Bell's and Snelling's employment). Unaware of this fact, Lever Bros paid Bell and Snelling substantial severance packages to terminate their contracts of employment. When the pair's speculations came to light, Lever Bros sought to set the severance agreement aside for common mistake.<sup>6</sup> Both Wright J and the Court of Appeal held that the agreement was void; the House of Lords allowed Bell's and Snelling's appeal, holding that the agreement was valid.

*Bell v Lever Bros Ltd* has been the subject of enormous controversy. Disagreements can be split into three categories. First, there is disagreement over the test of common mistake that the case actually formulated.<sup>7</sup> Secondly, there is disagreement over the test of common mistake which the House of Lords *ought* to have formulated. Finally, there is disagreement over the question of whether that test,

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<sup>4</sup> OW Holmes Jr, *The Common Law* (Barnes and Noble Books 2004) 189–90; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 (CA) [29] (Lord Phillips of Worth Matravers MR). This does not mean there is *no* agreement, but that the agreement is too vague: T Endicott, 'Objectivity, Subjectivity and Incomplete Agreements' in J Horder (ed), *Oxford Essays in Jurisprudence* (OUP 2000) 161.

<sup>5</sup> *Bell v Lever Bros Ltd* [1932] AC 161 (HL).

<sup>6</sup> Somewhat implausibly, it was found by the jury that both Bell and Snelling had forgotten about their breaches of contract: C MacMillan, 'How Temptation Led to Mistake' (2003) 119 LQR 625, 645–6.

<sup>7</sup> e.g. HAE, 'Contract – Mistake in Formation' (1932) 4 CLJ 370, 371; H Gutteridge, 'Notes *Bell v Lever Brothers, Ltd.*' (1932) 48 LQR 148.

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howsoever formulated, was correctly applied to the facts of the case.<sup>8</sup> We do not need to – and do not seek to – resolve any of these controversies. Our concern is, instead, the general structure of liability. For a time, there was great controversy over the status of common mistake in equity.<sup>9</sup> However, despite some support for the idea,<sup>10</sup> the Court of Appeal has decided that there is no separate doctrine of mistake in equity.<sup>11</sup> There is, therefore, only one doctrine of common mistake. Lord Phillips MR restated it in these terms:<sup>12</sup>

(i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

This formulation has been adopted in subsequent decisions.<sup>13</sup> Without adopting the precise terms of the test,<sup>14</sup> the crucial aspect is this: even when the principles of

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<sup>8</sup> e.g. PH Winfield, 'Review of *Principles of Contract*' (1936) 52 LQR 429, 430; CJ Hamsom, 'Bell v Lever Bros' (1937) 53 LQR 118, 123; F Pollock, *Principles of Contract: Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (10th, Stevens & Sons 1936) 498.

<sup>9</sup> *Solle v Butcher* [1950] 1 KB 671 (CA).

<sup>10</sup> *West Sussex Properties Ltd v Chichester District Council* [2000] EWCA Civ 205 [42]; FH Lawson, *The Rational Strength of English Law* (Stevens & Sons 1951) 65–7; C MacMillan, *Mistakes in Contract Law* (Hart 2011) 285–90.

<sup>11</sup> *Great Peace* (CA) (n 4).

<sup>12</sup> *Great Peace* (CA) (n 4) [76] (Lord Phillips).

<sup>13</sup> *Shuttari v Solicitors Indemnity Fund Ltd* [2005] EWHC 2858 (Ch) [47] (Launcelot Henderson QC); *Butters v BBC Worldwide Ltd* [2009] EWHC 1954, [2009] BPIR 1315 [66] (Peter Smith J).

<sup>14</sup> Compare, e.g., M De Gregorio, 'Impossible Performance or Excused Performance? Common Mistake and Frustration after *Great Peace Shipping*' (2005) 16 King's College Law Journal 69, 71.

## 6.2. COMMON MISTAKE AND FRUSTRATION

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offer and acceptance are satisfied, the law may hold that no contract is formed if there is a shared false assumption of sufficient gravity.

### 6.2.2 Frustration

Bilateral contracts were recognised in the sixteenth century. However, the notion that the rights under such a contract could be defeasible was obscured for nearly two centuries by the notion that the promises were generally construed to be independent.<sup>15</sup> One party's failure to perform would not discharge the other; instead, there would be liability for the promisor's failure to perform. Impossibility would not prevent such liability arising.<sup>16</sup>

The increasing frequency of bilateral contracts threatened this orthodox position. The 'vexed topic'<sup>17</sup> came up for consideration in *Taylor v Caldwell*.<sup>18</sup> Taylor let the Surrey Music Hall to Caldwell for the performance of various theatre productions. During some building reconstructions, the hall burnt to the ground. The productions could not go ahead and Taylor sued Caldwell for breach of contract. On the old analysis, the claim would have succeeded. Blackburn J rejected the claim.

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Impossibility has been thought an inapposite test. It is far from reliable. As late as 1952, Corbin thought that going to the moon was impossible: AL Corbin, *Corbin on Contracts* (one volume, West Pub Co 1952) §1325.

<sup>15</sup> For a helpful discussion of the construction of promises, see T Baloch, *Unjust Enrichment and Contract* (Hart 2009) 97–122.

<sup>16</sup> *Paradine v Jane* (1647) Aleyn 26, 82 ER 897.

<sup>17</sup> *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 (CA) 238 (Lord Denning MR).

<sup>18</sup> *Taylor v Caldwell* (1865) 3 B & S 826, 122 ER 309 (KB). For more on the background to the case, see C MacMillan, 'Taylor v Caldwell' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008).

## 6.2. COMMON MISTAKE AND FRUSTRATION

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In doing so, his Lordship stated the general principle that:<sup>19</sup>

in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

His Lordship held that there was such a condition in this contract, and thus that ‘both parties [were] excused’ from their contractual rights and obligations.<sup>20</sup> *Taylor v Caldwell* was subsequently relied upon to cancel contractual rights and the doctrine of frustration began.<sup>21</sup> To adopt the language used by Blackburn J, we can state the position in these terms: Caldwell’s duty to perform was conditional upon the continued possibility of such performance.

A stream of authority, concerning a doctrine known as ‘frustration of the adventure,’ developed in parallel. In *Jackson v Union Marine Insurance Co Ltd*, the claimant entered into a charterparty with the defendant whereby he agreed to send a ship to Newport, Wales ‘with all possible dispatch’.<sup>22</sup> The ship ran aground on her way, which would have set the voyage back by eight months. The court said that there was ‘an implied condition that the ship should arrive at Newport in time for [the voyage].’<sup>23</sup> Again, both parties were released from their obligations.<sup>24</sup> The rights were cancelled because the accident had ‘put an end in a commercial sense to

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<sup>19</sup> *Taylor v Caldwell* (1865) 3 B & S 826, 839; 122 ER 309, 314 (KB) (Blackburn J).

<sup>20</sup> *Taylor v Caldwell* (1865) 3 B & S 826, 840; 122 ER 309, 315 (KB). Compare W Buckland, ‘Causus and Frustration in Roman and Common Law’ (1932–1933) 46 Harvard Law Review 1281, 1287; Treitel, *Frustration and Force Majeure* (n 2) paras 2.039–2.043.

<sup>21</sup> e.g. *Baily v De Crespigny* (1868) LR 4 QB 180 (QB).

<sup>22</sup> *Jackson v Union Marine Insurance Co Ltd* (1879) LR 10 CP 125 (Exch).

<sup>23</sup> *Jackson* (n 22) 142 (Bramwell B) (emphasis removed).

<sup>24</sup> *Jackson* (n 22) 144.

## 6.2. COMMON MISTAKE AND FRUSTRATION

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the commercial speculation entered into by the shipowner and charterers'.<sup>25</sup>

These two streams of authority – springing from *Taylor* and *Jackson* – are now recognised as instances of the doctrine of frustration.<sup>26</sup> While many of the consequences of frustration are now regulated by statute,<sup>27</sup> the common law continues to dictate what constitutes a frustrating event and that such an event cancels the contractual rights. As with common mistake, we do not require agreement on every aspect of the doctrine. An abstract statement of principle suffices. A contract is frustrated where there is a fundamental change in circumstances, not brought about by the promisor,<sup>28</sup> such as to render performance 'radically different from that which was undertaken in the contract.'<sup>29</sup> This is determined objectively.<sup>30</sup> When a contract is frustrated, the contractual rights are cancelled.<sup>31</sup> This does not depend on an election by either party: the cancellation is automatic.<sup>32</sup> As with common mistake,

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<sup>25</sup> *Jackson* (n 22) 141 (finding of the jury, affirmed by Bramwell B).

<sup>26</sup> *Horlock v Beal* [1916] 1 AC 486 (HL) 513 (Lord Shaw of Dunfermline); *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 (HL) 403–04 (Earl Loreburn). This terminology is contested: see Treitel, *Frustration and Force Majeure* (n 2) paras 2.044–2.050.

<sup>27</sup> Law Reform (Frustrated Contracts) Act 1943.

<sup>28</sup> *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC); *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA).

<sup>29</sup> *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696 (HL) 728; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724 (HL) 738 and 744 (Lord Diplock) and 751–2 (Lord Roskill); *The Super Servant Two* (n 28) 8 (Bingham LJ).

<sup>30</sup> *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 (HL) 510 (Lord Sumner); *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 (HL) 274 (Lord Wright); *Davis Contractors* (n 29) 728 (Lord Radcliffe); *The Super Servant Two* (n 28) 8 (Bingham LJ).

<sup>31</sup> *Hirji Mulji* (n 30) 505 (Lord Sumner); *Davis Contractors* (n 29) 728 (Lord Radcliffe); *The Super Servant Two* (n 28) 8, 9 and 14 (Bingham LJ).

<sup>32</sup> *Stubbs, Administrator v Holywell Railway Co* (1866) LR 2 Ex 311 (Exch) 314 (Martin B); *Hirji Mulji* (n 30) 509 (Lord Sumner); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL) 163 (Viscount Simon LC), 170–1 (Viscount Maugham), 187 (Lord Wright) and 200 (Lord Porter); *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* (n 30) 274 (Lord Wright); *Panalpina* (n 2) 712; *FC Shepherd Ltd v Jerrom* [1987] QB 301 (CA) 327 (Mustill LJ); *The Super Servant Two* (n 28) 8 (Bingham LJ).

## 6.2. COMMON MISTAKE AND FRUSTRATION

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parties are free to regulate the consequences of a frustrating event by contract.<sup>33</sup> The doctrine can be stated thus: contractual rights are conditional upon the surrounding circumstances remaining within certain limits (e.g. remaining possible).

### 6.2.3 The Unity of Mistake and Frustration

While the two doctrines differ in their detailed rules,<sup>34</sup> at a more abstract level frustration is distinguished from common mistake only by the moment in time when the event arises.<sup>35</sup> The music hall in *Taylor v Caldwell* might have been destroyed moments before the contract was formed, or moments after. Equally, there might be uncertainty about whether the event was before or after the purported contract.<sup>36</sup> Suppose that Serafin hires Callas on Monday to sing at the opening night of La Scala. The concert is due to take place on Wednesday. On Tuesday, Callas is found to be suffering from laryngitis and cannot sing. Suppose further that medical science is unable to determine whether Callas developed the illness on Sunday night

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<sup>33</sup> *Great Peace* (CA) (n 4) (Lord Phillips).

<sup>34</sup> In particular, the events triggering the doctrines' operation differ marginally. Compare, for example, *Great Peace* (CA) (n 4) [76] (Lord Phillips MR) with *Davis Contractors* (n 29) 728 (Lord Radcliffe). However, for the recognition of abstract unity, notwithstanding, see *Great Peace* (CA) (n 4) [82] (Lord Phillips MR).

<sup>35</sup> *Bell v Lever Bros Ltd* [1931] 1 KB 557 (CA) 584–85 (Scrutton LJ); *Bell v Lever Bros Ltd* (HL) (n 5) 225–26 (Lord Atkin). The point is often recognised: S Williston and GJ Thompson, *A Treatise on the Law of Contracts* (Rev., Baker, Voorhis & Co 1936) §1936; HWR Wade, 'The Principle of Impossibility in the Law of Contract' (1940) 56 LQR 519, 521; L McTurnan, 'An Approach to Common Mistake in English Law' (1963) 4-1 Can Bar Rev 1, 25–6; IM Jackman, *The Varieties of Restitution* (The Federation Press 1998) 49; J Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialise' in A Burrows and E Peel (eds), *Contract Formation and Parties* (OUP 2010) 173; R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in A Burrows and WE Peel (eds), *Contract Terms* (OUP 2007) 105. Compare E Peel, *Treitel on the Law of Contract* (13th, Sweet & Maxwell 2011) 19.124.

<sup>36</sup> The classic example is *Amalgamated Investment & Property Co v John Walker & Sons* [1977] 1 WLR 164 (CA).

or Monday morning. It would be not only irrational but impractical if, in such circumstances, the effects of the doctrines depended upon the time the frustrating event occurred.

## 6.3 Termination Following Breach

### 6.3.1 Introduction

As Diplock LJ has said:<sup>37</sup>

Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?

The previous section demonstrated one such instance: when there is a frustrating event. This section will add only one more instance: when there is a breach of a term of the contract classified as a ‘condition’. For reasons I will detail below, I will refer to this situation as termination ‘for’ breach. However, the more important point of the section is to return to the fact that a frustrating event can relieve a party of her obligation to perform. The very same event justifies termination when a breach of contract is so severe as to deprive the promisee of the substance of the performance promised, i.e. gives rise to a frustrating event. The only difference is that in such a situation the defendant has made a contractual promise as to the event in question. I will refer to this situation as termination ‘following’ breach.

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<sup>37</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA) 65 (Diplock LJ).

### 6.3.2 Termination *Following* Breach

#### 6.3.2.1 Introduction

When A breaches a synallagmatic contract with B, B is sometimes awarded a power to cancel the primary obligations and thus terminate the bilateral duties of performance. B's exercise of that power used to be described as 'rescission'<sup>38</sup> and is now generally described as 'termination'.<sup>39</sup> Neither term is perfect.<sup>40</sup> I will adopt the second as being more widely used. In so doing, we must be sure to guard against the view that 'termination' of the contract means that there are no longer any *effects* of the contract. As will be explained below, a claimant might still claim damages for breach of contract after termination. So long as this fundamental point is borne in mind, there is no danger in using the term 'termination.'

#### 6.3.2.2 *Ex Ante* and *Ex Post*

The history of this topic is complicated. A simple overview suffices for now. Until *The Hongkong Fir* there were two streams of authority, offering distinct answers to the problem of when a party might be released from her contract.<sup>41</sup> One such analysis, the *ex post* analysis, examined the consequences of breach. For instance, in *MacAndrew v Chapple*, the question was whether a delay in sending out a ship

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<sup>38</sup> e.g. G Treitel, 'Damages on Rescission for Breach of Contract' [1987] LMCLQ 143.

<sup>39</sup> e.g. *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 1 QB 27 [13] (Moore Bick LJ).

<sup>40</sup> For an explanation of the problems, see JW Carter, *Carter's Breach of Contract* (Hart 2012) paras 3.40–3.41.

<sup>41</sup> These different approaches are helpfully described in MG Bridge, 'Discharge for Breach of the Contract of Sale of Goods' (1983) 28 McGill Law Journal 867.

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entitled the charterer to refuse to load the ship.<sup>42</sup> Willis J said that:<sup>43</sup>

a delay or deviation which ... goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo[.]

Another approach, the *ex ante* approach, was to examine the term breached by the defendant. For instance, in *Bettini v Gye* a performer missed four of six days of rehearsals.<sup>44</sup> The opera director claimed that this allowed him to discharge the contract. Although there are passages consonant with the *ex post* approach,<sup>45</sup> there is a shift in tenor in the judgment to the parties' agreement rather than the outcome of the breach.<sup>46</sup> In rejecting the claim, Blackburn J said that the question turned on 'the true construction of the contract as a whole'.<sup>47</sup> That is, he was concerned with what the parties had agreed to, rather than what the outcome of the event was.

#### 6.3.2.3 *The Hongkong Fir*

These distinct approaches came to a head in, and the modern law begins with, *The Hongkong Fir*.<sup>48</sup> There, the question was whether a charterer was entitled to re-

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<sup>42</sup> *MacAndrew v Chapple* (1866) LR 1 CP 643.

<sup>43</sup> *MacAndrew v Chapple* (n 42) 648 (Willis J). See, further, *Cargo Ships 'El Yam' Ltd v Invoeren Transport Onderneming 'Invotra' NV* [1958] 1 Lloyd's Rep 39 (QB) 52 (Devlin J); *Universal Cargo Carriers Corp v Citati (No 1)* [1957] 2 QB 410 (QB) 423, 430 (Devlin J).

<sup>44</sup> *Bettini v Gye* (1876) 1 QBD 183 (QB).

<sup>45</sup> *Bettini v Gye* (n 44) 188 (Blackburn J).

<sup>46</sup> See, further, DP Nolan, '*Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008) 273–74.

<sup>47</sup> *Bettini v Gye* (n 44) 187 (Blackburn J). See, further, *Bentsen v Taylor Sons & Co (No 2)* [1893] 2 QB 274 (CA) 280–81 (Bowen LJ).

<sup>48</sup> *The Hongkong Fir* (n 37).

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pudiate a charterparty due to the owner's breach of the 'seaworthiness' obligation.

Diplock LJ said that:<sup>49</sup>

it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations[.]

The event in question, in order for it to justify termination, must:<sup>50</sup>

deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings[.]

Parties could expressly agree that a certain event went to the root of the agreement.

These terms are classified as 'conditions' and give the promisee the power to terminate the contract on any breach of them.<sup>51</sup> His Lordship further recognised an intermediate category of terms.<sup>52</sup> For these terms:<sup>53</sup>

all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain.

These moves allowed his Lordship to blend the two streams of authority. The parties' agreement would define the importance of the terms (*ex ante*); however, the consequences of breach were the determinative factor justifying termination (*ex post*).

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<sup>49</sup> *The Hongkong Fir* (n 37) 69 (Diplock LJ).

<sup>50</sup> *The Hongkong Fir* (n 37) 66 (Diplock LJ).

<sup>51</sup> *The Hongkong Fir* (n 37) 69 (Diplock LJ). See, further, *The Hongkong Fir* (n 37) 66–7 (Diplock LJ). For further discussion of this aspect, see G Treitel, *Some Landmarks of Twentieth Century Contract Law* (OUP 2002) 107–15; Nolan (n 46) 285–86, 291.

<sup>52</sup> It is probably correct to say that this was 'a new light on old principles': *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL) 719 (Lord Lowry). See, generally, Nolan (n 46) 269, 270–76.

<sup>53</sup> *The Hongkong Fir* (n 37) 70 (Diplock LJ).

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The breach had to amount to a *substantial* failure to perform – not because of the gravity of the breach, per se, but because of the gravity of the *consequences* of breach.<sup>54</sup>

When such a breach occurs, the claimant is endowed in two distinct ways. Firstly, she is given a power to cancel the contract. When the claimant exercises the power, both parties are discharged from performance.<sup>55</sup> It is important to stress that it is a *power*: the claimant is perfectly entitled to keep the contract alive.<sup>56</sup> Secondly, as Lord Diplock says:<sup>57</sup>

Every ... breach of contract ... gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach

However, if the claimant elects to bring the contract to an end:<sup>58</sup>

there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future

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<sup>54</sup> See, further, American Law Institute, *Restatement (First) of Contracts* (American Law Institute Publishers 1932) §397. For a number of formulations of the necessary effects, see E Peel, 'The Termination Paradox' [2013] LMCLQ 519, 521.

<sup>55</sup> *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 350 (Lord Diplock); *Johnson v Agnew* [1979] AC 367 (HL) 392 (Lord Wilberforce).

<sup>56</sup> The point is often made. See, e.g. *Hain Steamship Co v Tate & Lyle Ltd* (1936) 41 Com Cas 350 (HL) 355 (Lord Atkin); *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 399 (Lord Reid); *Fercometal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788 (HL) 805 (Lord Ackner); *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523.

<sup>57</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 849 (Lord Diplock).

<sup>58</sup> *Photo Production* (n 57) 849 (Lord Diplock).

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### 6.3.2.4 Termination Following Breach and Frustration

When we understand the power to terminate the contract as arising in virtue of a particular *event* – i.e. where the party is deprived of ‘substantially the whole benefit of the contract’<sup>59</sup> – the link between frustration and the power to terminate following breach becomes clear.<sup>60</sup> The event upon which the contractual rights depend is the same. For instance, in *The Hongkong Fir Sellers* LJ said that the breach of contract, in order to entitle the claimant to terminate, must ‘make the performance a totally different performance of the contract from that intended by the parties’.<sup>61</sup> This formulation is echoed in Lord Radcliffe’s canonical statement of the test of frustration. His Lordship stated that:<sup>62</sup>

frustration occurs whenever ... the circumstances in which performance is called for would render it [i.e. performance] a thing radically different from that which was undertaken by the contract.

If it is right to equate the event justifying termination of the contract with the event leading to frustration of the contract, the principal difference between frustration and termination following breach is that in the latter case the defendant has warranted that the event will not occur.

The suggestion that frustration and termination for breach have this fundamental equivalence is not novel, though it is less often voiced today. Besides Diplock

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<sup>59</sup> *The Hongkong Fir* (n 37) 66 (Diplock LJ).

<sup>60</sup> See *The Hongkong Fir* (n 37) 66–67 for Diplock LJ’s explicit rejection of counsel (Ashton Roskill QC)’s submission that the events are distinct. This analysis was affirmed by Lord Diplock in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904 (HL) 928.

<sup>61</sup> *The Hongkong Fir* (n 37) 57 (Sellers LJ).

<sup>62</sup> *Davis Contractors* (n 29) 729 (Lord Radcliffe).

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LJ, a number of judges have noticed the link.<sup>63</sup> Devlin J explicitly recognised a ‘connexion [with] frustration’.<sup>64</sup> Writing extrajudicially, Lord Devlin said that:<sup>65</sup>

For an event to [allow a claimant to terminate a contract for breach of an innominate term] it must be of such magnitude as to bring about a total loss of consideration. That is, it must be a frustrating event – one which destroys the whole purpose of the contract.

Mustill J developed this link on a number of occasions. For instance, in *Peter Lind & Co v Constable Hart & Co Ltd*, in a dispute over termination, a question arose as to whether an arbitrator could be compelled to state his award in the form of a special case on a question of law.<sup>66</sup> It was clear that questions of frustration fell within the statute. Therefore, termination was said to fall within the statute by analogy. As Mustill J said:<sup>67</sup>

the essential issue is whether the main contractors’ conduct went to the root of the contract ... This so closely resembles the issue raised by a dispute as to commercial frustration that it would be artificial to draw a distinction between the two for the purposes of s.21(1).

A year later, his Lordship stated – even more clearly – that:<sup>68</sup>

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<sup>63</sup> *The Hongkong Fir* (n 37) 64 (Upjohn LJ); *Trade and Transport Inc v Iino Kaiun Kaisha Ltd (The Angelia)* [1972] 1 WLR 210 (QB) 223 (Kerr J); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854 (HL) 918 (Lord Diplock); *Great Peace (CA)* (n 4) [82] (Lord Phillips MR).

<sup>64</sup> *Citati (No1)* (n 43) 430 (Devlin J). At *Citati (No1)* (n 43) 431, Devlin J acknowledges the influence upon his thinking of RG McElroy and GL Williams, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (The University Press 1941), which had itself pointed out this link between frustration and termination.

<sup>65</sup> Lord Devlin, ‘The Treatment of Breach of Contract’ (1966) 24 CLJ 192, 202–03.

<sup>66</sup> *Peter Lind & Co Ltd v Constable Hart & Co Ltd* [1979] 2 Lloyd’s Rep 248 (QB). The jurisdiction was under under Arbitration Act 1950 s 21(1).

<sup>67</sup> *Peter Lind* (n 66) 354 (Mustill J).

<sup>68</sup> *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd (The Hermosa)* [1980] 1 Lloyd’s Rep 638 (Comm) 649 (Mustill J).

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frustration and repudiation are aspects of the same general principle, differentiated only by the consequences which attend the discharge of the contract, and the identity of the party who is entitled to assert the discharge.

The point has often been picked up on – and endorsed – by academics.<sup>69</sup> For instance, as Reynolds puts it:<sup>70</sup>

The test to be applied [to determine whether a contract can be terminated] is ... the same test as is applied to determine whether a contract is frustrated. If the event does have [the requisite] effect, the party concerned is released [from her obligations]. If it has occurred by reason of factors for which neither party has assumed responsibility, the case is one of frustration; if as a result of breach of contract by one party, the other alone is discharged, and the party in breach remains liable in damages.

Therefore, it should be clear that it is the same event which triggers the effects of both frustration and termination following breach. Contractual rights, one might say, depend upon a particular event *not being the case*.<sup>71</sup> If the event occurs, the contractual rights are (or, in the case of termination, *may be*) cancelled. Although the strictness of the test for breach has been criticised,<sup>72</sup> it remains the best inter-

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<sup>69</sup> McElroy and Williams (n 64) Chapter VI; J Williams, *Salmond and Williams on Contracts* (2nd, Sweet & Maxwell 1945) 536; L Sealy, 'Contract – Frustration – Language' (1961) 19 CLJ 152, 153–54; M Furmston, 'The Classification of Contractual Terms' (1962) 25 Modern Law Review 584, 585; Lord Devlin (n 65) 203; AM Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 Modern Law Review 623, 624; JE Stannard, *Delay in the Performance of Contractual Obligations* (OUP 2007) paras 6.17–6.22; Nolan (n 46) 273, 286.

<sup>70</sup> F Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 LQR 534, 539–40. Reynolds' description of the effect of termination is not entirely correct; however, the important point of the passage is the recognition of the equivalence of frustration and termination.

<sup>71</sup> Compare Carter, *Carter's Breach of Contract* (n 40) para 6.47, which claims that frustration is a narrower category of events.

<sup>72</sup> For instance, in N Andrews and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell / Thomson Reuters 2011) para 12.010, the authors suggest that the Supreme Court 're-open' the test to 'lower the bar for termination'. See, further, Bridge (n 41) 49, fn 233; Diplock LJ's test 'is too strict'.

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pretation of the law that the consequences must be as serious for frustration as for termination.

### 6.3.2.5 Why Is Termination Not Automatic?

As Devlin J said in *Universal Cargo Carriers v Citati*:<sup>73</sup>

Not every frustrating event brings the contract to an end. The event must have other characteristics, and one of them is that it must not have arisen by the fault of either party.

In saying this, Devlin J reasserts the view that it is the frustrating event which – for both frustration and termination following breach – justifies the cancellation of the contract rights. However, he also gestures to a difficulty within that view. The problem arises from the fact that:<sup>74</sup>

repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.

This position is clearly distinct from that in frustration, where cancellation of the contract is automatic.<sup>75</sup> Megaw LJ brought the anomaly to the fore in *Bunge v Tradax*:<sup>76</sup>

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<sup>73</sup> *Citati (No1)* (n 43) 433–34 (Devlin J).

<sup>74</sup> *Heyman v Darwins* [1942] AC 356 (HL) 361 (Viscount Simon LC). It is unimportant in this respect that Viscount Simon LC refers to ‘repudiation’. See, further, *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 (CA) 368 (Salmon LJ), 375 (Sachs LJ), 381 (Buckley LJ); *The Simona* (n 56) 800 (Lord Ackner); *Geys* (n 56).

<sup>75</sup> See above, n 32.

<sup>76</sup> *Bunge Corp v Tradax Export SA* [1981] 2 All ER 524 (CA) 538 (Megaw LJ). Megaw LJ’s reference to the ‘Virgilian quote’ is to the invocation of Aeneas’s plea to Dido, *non haec in foedera veni*: see, for example, *Davis Contractors* (n 29) 729 (Lord Radcliffe). See Chapter 7 n 100 for the full range of references.

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If [the frustration test] ... were the universal test which must be applied before there can be a condition or a breach of condition, then there can never be an election by the innocent party to proceed with the contract, despite the other party's default. For, as appears dramatically in the Virgilian quotation, it would not be the same contract. Yet the law has never ceased to recognise that there may be a right of election, when the innocent party is faced with a repudiatory breach, to keep the contract alive: the same contract, not a different one, as it would, necessarily and invariably, be on the frustration test.

Megaw LJ asks: 'If the event in question were the same, how can the consequences be different?'<sup>77</sup> To defend the claims of this section, we must have an answer to that question.

The customary answer given to Megaw LJ's question is given by Diplock LJ in *The Hongkong Fir*. His Lordship justified the power model as 'a specific application of the ... rule that a man should not be allowed to take advantage of his own wrong.' If a unilateral breach of contract were to terminate a contract automatically, a defendant would be able to bring her own contractual obligations to an end simply by committing a repudiatory breach. This is thought to be unfair to the claimant and – the argument goes – the law therefore allows the claimant a power to terminate the contract instead. The Supreme Court has recently affirmed this rationale. In *Geys v Société Générale, London Branch*, the question arose whether a repudiatory breach by the bank Société Générale, automatically terminated the banker, Geys', contract. The answer to this question determined whether Geys was entitled to a higher bonus.<sup>78</sup> The majority of the Supreme Court (Lord Sumption dissenting) affirmed the orthodox view that termination following a repudiatory breach is not automatic.

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<sup>77</sup> *Bunge v Tradax* (CA) (n 76) 538 (Megaw LJ).

<sup>78</sup> The entitlement to the bonus, under paragraphs 5.15(b)(iii) and (iv) of the contract, depended on when his "employment terminates".

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Instead, it gives the claimant an election. The justification for this is, in Lord Hope's words, that:<sup>79</sup>

The automatic theory can operate to the disadvantage of the injured party in a way that enables the wrongdoer to benefit from his own wrong. The law should seek to avoid such an obvious injustice. Where there is a real choice as to the direction of travel, the common law should favour the direction that is least likely to do harm to the injured party.

This answer – at least in so far as it sees the relevant benefits as the entitlements under the contract – is flawed. The flaw is that the wrongdoer will not always benefit from the claimant terminating the contract. For instance, in *Avery v Bowden* the claimant promised to take the defendant's cargo from Odessa.<sup>80</sup> When the claimant arrived at Odessa, the defendant failed to supply the cargo, a repudiatory breach. The claimant continued to demand the cargo. The Crimean war broke out, frustrating the contract. This meant that the claimant was unable to claim damages for the defendant's breach.<sup>81</sup> This shows that it is incorrect to say that an automatic termination will always allow the wrongdoer to benefit. Instead, the important point is that there are risks attendant to both termination of the contract and to keeping it alive. Termination of the contract, as in *Geys*, can disentitle the claimant from various benefits, such as a bonus. However, keeping the contract alive can, as in *Avery*, lead to the claimant losing her right to performance or compensation in lieu. If the defendant were able to determine the contract unilaterally, she would be able

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<sup>79</sup> *Geys* (n 56) [15] (Lord Hope). Further, [18]–[19] (Lord Hope) and [97] (Lord Wilson). See the distinct reason of Lady Hale at [42].

<sup>80</sup> *Avery v Bowden* (1856) 6 E & B 962, 119 ER 1122.

<sup>81</sup> See, similarly, *The Simona* (n 56), where the claimant failed to accept the defendant's repudiation. Their nominated vessel was not ready to load, enabling the defendants to cancel the contract themselves without incurring any secondary obligations.

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to choose which risks she prefers.<sup>82</sup> In that sense, therefore, the wrongdoer would *always* benefit from a regime where termination was automatic.<sup>83</sup> The law – justifiably – prefers to allow the claimant to decide whether she wishes to incur one risk or the other. For that reason, in the case of termination, it allows a power to terminate rather than automatically cancelling the rights.

### 6.3.3 Termination *For* Breach

#### 6.3.3.1 Introduction

Any breach of a term of the contract classified as a ‘condition’ will allow the claimant a power to terminate the contract.<sup>84</sup> As parties are generally free to stipulate that *any* term of their contract is a condition, the situation is distinct from that of the previous subsection – that is, the power to terminate cannot arise in virtue of the frustrating event. Therefore, it is vital to distinguish the previous instance of termination – which *follows* breach but is not, as we saw, *for* breach – from the situation here, where breach of the contract is the only reason termination is allowed. This subsection details the nature of termination *for* breach and sets it to one side. The justification of this doctrine is not the subject of this thesis. However, if the clarifications to follow are not made, there is a grave danger that the two quite distinct reasons for for termination will be confused.

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<sup>82</sup> These risks are legally created, in that they depend upon other rules of law – such as when a claimant loses her right to compensation. There is plainly no circularity in referring to these risks: the claimant is not given an election in virtue of some inherent structure of these risks; instead, she is given an election to allow *her* to structure the risks.

<sup>83</sup> This is a distinct concern to that of Lord Hope, who is concerned about the benefits *themselves* (such as Geys’s bonus).

<sup>84</sup> The point is extremely widely recognised. For a canonical statement see *Photo Production* (n 57) 849 (Lord Diplock).

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### 6.3.3.2 Classifying Terms: Conditions and Warranties

When it comes to classifying contractual terms, ‘conditions’ are to be distinguished from ‘warranties’. The latter are terms that cannot justify termination, regardless of the gravity of the breach. The law did not always use the language in this way. For instance, in *Behn v Burness* Williams J referred to ‘a warranty that is to say a condition’.<sup>85</sup> Dissatisfaction with the language of warranties being used in this manner grew.<sup>86</sup> Judges started using the language of conditions more clearly for the purpose of defining the precedence of one obligation to another.<sup>87</sup> The law began to distinguish more sharply in its classification between warranties and conditions. Exact performance of the terms under consideration here was initially described as ‘conditions precedent’ to the other party’s liability.<sup>88</sup> This meant that the term *itself* came to be described as a condition.<sup>89</sup> This development is often traced to Pollock’s textbook, which adopted the usage.<sup>90</sup> The Sale of Goods Act 1893, drafted by Sir Mackenzie Chalmers, also adopted this terminology, and it remains today in the Sale of Goods Act 1979.<sup>91</sup>

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<sup>85</sup> *Behn v Burness* (1863) 3 B & S 751, 755; 122 ER 281, 283 (KB).

<sup>86</sup> e.g. *Chanter v Hopkins* (1838) 4 M & W 399, 404–06; 150 ER 1484, 1486–87 (Exch) (Lord Abinger CB).

<sup>87</sup> *Glaholm v Hays* (1865) 2 M & G 257, 265–69; 133 ER 743, 746–47 (Court of Common Pleas) (Tindal CJ).

<sup>88</sup> *Pordage v Cole* (1646) 1 Wms Saund 319, 85 ER 449; *Kingston v Preston* (1773) 2 Doug 689, 691; 99 ER 437, 438 (KB); *Boone v Eyre* (1779) 2 Wm Bl 1312, 96 ER 767 (Court of Common Pleas).

<sup>89</sup> G Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press 1988) 261.

<sup>90</sup> F Pollock, *Principles of Contract at Law and in Equity: Being a Treatise on the General Principles Concerning the Validity of Agreements* (Stevens & Sons 1876) 445–46.

<sup>91</sup> Sale of Goods Act 1893, now Sale of Goods Act 1979. See especially Sale of Goods Act 1979, ss 11–15 and 61(1). The classic analysis of the bifurcated terms is *Wallis & Wells v Pratt & Haynes* [1910] 2 KB 1003 (CA) 1012–13 (Fletcher Moulton LJ).

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The language of conditions has been strongly deprecated in this context. For instance, Lord Wilberforce called the language ‘artificial’<sup>92</sup> and Fletcher Moulton LJ said ‘I do not think that the choice of terms is happy’.<sup>93</sup> Williston called the language ‘astonishing’ as it ‘confuses a true condition with a promise’.<sup>94</sup> But it is now impossible to avoid using the language of conditions in this way, as the usage is ‘too deeply embedded in English law to be uprooted by anything less than a complete revision.’<sup>95</sup> Especially in the context of this thesis, it will be helpful to have a specialised term with which to refer to this particular use. To encapsulate the peculiarity of the term, which operates both as a condition of the contractual rights and as a promissory term within the contract, I shall employ the terminology of ‘promissory conditions’.

#### 6.3.3.3 The Distinctiveness of Promissory Conditions

As we have seen, in *The Hongkong Fir* Diplock LJ explained the power to terminate following breach as being justified by ‘the event and not the fact that the event is a result of a breach of contract’.<sup>96</sup> Some of the older analysis aligns the power to terminate for breach of a condition with this logic, reasoning that conditions are simply those terms:<sup>97</sup>

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<sup>92</sup> *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) 262 (Lord Wilberforce).

<sup>93</sup> *Wallis & Wells* (n 91) 1012 (Fletcher Moulton LJ).

<sup>94</sup> Williston and Thompson (n 35) §665. The use ‘cannot be too strongly deprecated.’ Further, CB Morison, *Rescission of Contracts: A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 38; AL Corbin, ‘Supervening Impossibility of Performing Conditions Precedent’ (1922) 22 *Columbia Law Review* 421, 423; G Treitel, “Conditions” and “Conditions Precedent” (1990) 106 *LQR* 185, 185.

<sup>95</sup> *Schuler v Wickman* (HL) (n 92) 262 (Lord Wilberforce).

<sup>96</sup> *The Hongkong Fir* (n 37) 69 (Diplock LJ).

<sup>97</sup> *The Hongkong Fir* (n 37) 69 (Diplock LJ).

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every breach ... [of which would] ... deprive the party not in breach of substantially the whole benefit which it was intended that he should obtain from the contract[.]

This would mean that breach of a promissory condition is merely one way of demonstrating that the event, described in the previous subsection, has occurred.<sup>98</sup>

Regardless of its historical accuracy, this analysis cannot be accepted to be the correct way to understand promissory conditions. That is because, as Lord Roskill said in *Bunge Corp v Tradax Export SA*:<sup>99</sup>

many cases ... where terms the breaches of which do not deprive the innocent party of substantially the whole benefit which he was intended to receive from the contract were nonetheless held to be conditions any breach of which entitled the innocent party to rescind[.]

Therefore, the power to terminate for breach of a condition arises ‘irrespective of the gravity of the event’ resulting from breach.<sup>100</sup> This means that the classification of a term as a condition cannot be understood to express a fact about the consequences of breach of the term, i.e. that breach will axiomatically deprive the promisee of the substance of the promise.<sup>101</sup>

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<sup>98</sup> Treitel, *Some Landmarks of Twentieth Century Contract Law* (n 51) 116–18; Bridge (n 41) 908. Compare the interpretation of Nolan (n 46) 285–86.

<sup>99</sup> *Bunge v Tradax* (HL) (n 52) 725 (Lord Roskill). See, further, *Bell v Peter Browne & Co* [1990] 2 QB 495 (CA) 511–13 (Mustill LJ); Peel, ‘The Termination Paradox’ (n 54) 520.

<sup>100</sup> *Photo Production* (n 57) 849 (Lord Diplock). The notion that there must be prejudice in breach is ‘a surprising proposition’: *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd’s Rep 274 (QB) 279 (Bingham J).

<sup>101</sup> This is sometimes expressed to be the rationale, achieved by legal fiction, as where the breach ‘is treated’ as so-depriving the promisee: *Lombard North Central v Butterworth* [1987] QB 527 (CA) 535 (Mustill LJ). Even if the law were to employ such a fiction, the question would then become *why* it employed it.

### 6.3.3.4 Conclusion

Promissory conditions have been introduced chiefly to allow us to set them to one side. It should be clear that the power to terminate a contract for breach of a promissory condition is a distinct doctrine to the power to terminate a contract following a breach which goes to the root of a contract. The first of these allows termination simply *for* the breach; the latter allows a power to terminate not in virtue of the breach, but in virtue of the event to which the breach gives rise. The doctrine with which we are concerned is the latter, termination *following* breach; we do not seek to explain termination *for* breach.

### 6.3.4 Conclusion

This section had two principal tasks and one subsidiary task. First, it sought to explain the power to terminate a contract which arises on a certain kind of breach – i.e. a breach which goes to the root of the contract. Secondly, it argued that the event which justifies termination is the same event as the event which frustrates a contract. The distinction between the doctrines arises because, in the case of termination following breach, there is a contractual promise to ensure that the event *does not* occur. The subsidiary task of the section was to introduce and to set to one side the power to terminate a contract following breach of a promissory condition.

## 6.4 The Puzzle of the Doctrines

### 6.4.1 Introduction

This section aims to clarify the key doctrinal features of common mistake, frustration and termination which I will, in the next Chapter, seek to explain in terms of failure of condition.<sup>102</sup> This is important as there are – in the case of each doctrine – closely related doctrinal features which it is vital to distinguish. Having distinguished the key doctrinal features, I explain quite why these features are puzzling: why, in other words, they call for an explanation.

### 6.4.2 Common Mistake and Frustration

#### 6.4.2.1 Effects and Consequences

There is an important distinction to be drawn between two aspects of these doctrines. I will make the distinction by referring to the effects and the consequences of the doctrines. Semantically, there is little difference between an effect and a consequence of an action. This can be seen from the fact that the OED defines a consequence as ‘[a] thing or circumstance which follows as an effect ... from something preceding.’<sup>103</sup> However, these terms – effects and consequences – are the best language we have with which to draw the distinction.

By the ‘effects’ of common mistake and frustration I mean, respectively, the pre-

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<sup>102</sup> To be clear, I will be testing whether these doctrines *can* be explained in such terms, rather than trying to definitively prove that link.

<sup>103</sup> See, recently, in the particular context of rescission of a gift: *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [116], [119], [123] (Lord Walker).

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vention and the cancellation of *prima facie* valid contractual rights.<sup>104</sup> That simple phenomenon is what the next Chapter will seek to explain. I will shortly explain this phenomenon more precisely. First, this must be sharply distinguished from the ‘consequences’ of the doctrines.<sup>105</sup> When value is transferred under a contract that is void for common mistake or avoided by frustration, the question arises whether the party who has transferred the value can claim the value back from the recipient. This is the question with which I am concerned when I use the language of ‘consequences’.

A statutory regime governs the consequences of frustration.<sup>106</sup> Before that statutory regime was implemented, it was clear that benefits transferred prior to the frustration of the contract could, in principle, be recovered.<sup>107</sup> They could be recovered whenever they were paid subject to a condition that had failed. The consequences of common mistake are not governed by the same regime. Nevertheless, the restitution of benefits transferred under a contract void for common mistake is likely to be analysed as one of failure of condition.<sup>108</sup> This does not demonstrate that failure of condition has anything to do with the *effects* of frustration or common mistake. The two questions – of effects and consequences – are conceptually distinct. This can be most clearly perceived by considering *Chandler v Webster*. The Court of Appeal there laid down the rule that money paid under a contract subsequently

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<sup>104</sup> One might take issue with this description of the facts – it might be thought that the contract is not *prima facie* valid, but simply void. I will meet this objection shortly.

<sup>105</sup> For the language of ‘consequences’ see, for instance, HG Beale, *Chitty on Contracts* (31st, Sweet & Maxwell/Thomson Reuters 2012) 23.070–23.098.

<sup>106</sup> Law Reform (Frustrated Contracts) Act 1943.

<sup>107</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

<sup>108</sup> By analogy with *Fibrosa* (n 107). Further, because failure of condition can operate in the void contracts sphere: *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] QB 549.

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frustrated could not be recovered.<sup>109</sup> The rule was much criticised as being unjust by both judges<sup>110</sup> and commentators.<sup>111</sup> This ultimately led to the House of Lords overturning the decision.<sup>112</sup> However, no one suggested that it was *conceptually* confused. That is, it is quite possible to have a doctrine of frustration which does not permit for any legal consequences – that leaves the losses (and gains) where they lie. But one cannot have a doctrine of common mistake and frustration which does not prevent or cancel the contractual rights – the prevention or cancellation of rights is simply what it is to have such doctrines.

The distinction between the effects and the consequences can be easiest to elide in the case of common mistake. For that reason, it is important to be clear about the question a court is asked. For example, in *Strickland v Turner* a claimant paid money under an annuity on the life of a dead man.<sup>113</sup> Neither party knew that the man had died. The claimant sought restitution of the money. Pollock CB reasoned that:<sup>114</sup>

there was no annuity in existence. The money, therefore, which was paid, was paid wholly without consideration, and may now be recovered back

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<sup>109</sup> *Chandler v Webster* [1904] 1 KB 493 (CA).

<sup>110</sup> *Lloyd Royal Belge SA v Stathatos* (n 1) 392 (Atkin J); *Russkoe v Stirk* (1922) 10 Ll L Rep 214 (CA) 217 (Atkin LJ); *Cantiare San Rocco v Clyde Shipbuilding & Engineering Co Ltd* 1924 AC 226 (HL) 248 (Lord Dunedin, with restraint), 259 (Lord Shaw, without).

<sup>111</sup> F Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (8th, Stevens & Sons 1911) 440; Buckland, 'Causa and Frustration in Roman and Common Law' (n 20) 1294–97; R Gottschalk, *Impossibility of Performance in Contract, with a Supplement for the Years 1938-1944* (Stevens 1945) 18. For support see *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494 (HL) 523 (Lord Parmoor) and VP Goldberg, 'After Frustration: Three Cheers for *Chandler v Webster*' (2011) 68 *Washington & Lee Law Review* 1133.

<sup>112</sup> *Fibrosa* (n 107).

<sup>113</sup> *Strickland v Turner* (1852) 7 Exch 208, 155 ER 919.

<sup>114</sup> *Strickland v Turner* (1852) 7 Exch 208, 218; 155 ER 919, 924 (Pollock CB).

from the defendant

This conclusion does not, of itself, tell us whether there was a common mistake such as to avoid the contract.<sup>115</sup> After all, money paid under a valid contract can be recovered if the payor does not get counter-performance.<sup>116</sup> The test would be whether the payor could, in the appropriate case, claim damages for breach of contract. Suppose that instead of an annuity the claimant had sought to purchase non-existent goods, paying money in advance. The claimant could certainly recover the prepayment. But could she claim damages for breach of contract instead, for the defendant's failure to deliver the goods? That depends on whether the contract is itself invalid.

### 6.4.2.2 The Puzzle of Common Mistake and Frustration

So what is the puzzle of common mistake and frustration? For a court to find that there is a contract between two parties – and so, as a precondition for a court to invoke any of the normative consequences that a contract can generate, such as duties of performance, responsibility for breach, etc. – it must ascertain that a number of 'positive conditions' are present.<sup>117</sup> These conditions include an offer, an acceptance, consideration and an intention to create legal relations. If any of these elements is not established, a court would be unjustified in finding that there is a contract between the parties. Even if these positive conditions are proven, it remains

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<sup>115</sup> This point is stressed by CJ Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 LQR 385, 397: such cases are 'no authority for any general proposition on the subject of common mistake.'

<sup>116</sup> *Giles v Edwards* (1797) 7 TR 181, 101 ER 920 (KB).

<sup>117</sup> This is the language of Hart: HLA Hart, 'The Ascription of Responsibility and Rights' (1949) 49 Proceedings of the Aristotelian Society 171, 174.

#### 6.4. THE PUZZLE OF THE DOCTRINES

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open to a defendant to resist the court's finding of a contract – and thereby avoid the normative responsibilities this would trigger – by demonstrating that the contract was formed (*inter alia*) in the presence of a common mistake, or that a supervening event has frustrated the contract. In this way, common mistake and frustration can be said to defeat a *prima facie* contract.<sup>118</sup>

I have characterised common mistake and frustration as factors which defeat a *prima facie* contract. This is most clearly the appropriate characterisation in the case of frustration. There, the contract indubitably exists for a period of time up until the point of the frustrating event. This is acknowledged within the law: frustration operates *de futuro* rather than *ab initio*.<sup>119</sup> The position is marginally less clear in the case of common mistake: one might insist that there is simply *no* contract at all. In one sense, this is true: when all the facts are known, a court will find the contract void. If a defendant does not plead and prove a common mistake, a claimant can succeed. That is, a court might legitimately find there to be a contract if a defendant does not plead and prove a common mistake. This demonstrates why the *prima facie* characterisation is correct.<sup>120</sup>

The puzzle is, therefore, this. Why do common mistake and frustration operate as defeaters to *prima facie* contractual rights?

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<sup>118</sup> I take this helpful language, of 'defeat', from L Duarte d'Almeida, 'Defences and Defeaters' (DPhil thesis, 2011). Duarte D'Almeida uses the concept of a defeater to describe the precise phenomenon we seek to isolate here: those facts which a claimant need not prove the negation of for a positive claim to be established; but which, when proven, can defeat a *prima facie* claim. This phenomenon is often explained in the language of 'exceptions'.

<sup>119</sup> Indeed, that a frustrated contract is not 'wiped out altogether' was the reason why the Court of Appeal refused to find a failure of condition in *Chandler v Webster* (n 109).

<sup>120</sup> This argument is developed at greater length below, at 7.3.1.2.

### 6.4.3 Termination Following Breach

#### 6.4.3.1 Effects and Consequences

As in the case of common mistake and frustration, there is a distinction between the effects of the event justifying termination and the consequences of that event.<sup>121</sup> Recall that in the cases under review the power to terminate arises when a frustrating event occurs, the defendant having contractually promised that the event will not occur. There are two distinct matters which need to be explained. First, the effect of the event. A claimant is awarded a power to terminate the contract. Secondly, *two* consequences of the event. A claimant always receives a right to damages for the loss caused by the breach; if the power to terminate is exercised, she is also able to claim loss of bargain damages.<sup>122</sup> As with common mistake and frustration, we are here concerned with the effects, i.e. the power to terminate the contract.

Recall Lord Diplock's canonical statement, that:<sup>123</sup>

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ... Where ... the party not in default [elects] to put an end to all primary obligations of both parties remaining unperformed ... there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future[.]

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<sup>121</sup> Although this terminology is, for the reasons noted, not perfect, it is simplest to retain it so as to maintain consistency with common mistake and frustration.

<sup>122</sup> *Photo Production* (n 57) 849 (Lord Diplock).

<sup>123</sup> *Photo Production* (n 57) 849 (Lord Diplock).

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There are here two distinct secondary obligations – the ‘general secondary obligation’ and the ‘anticipatory secondary obligation’.<sup>124</sup>

The justification of these obligations is much contested.<sup>125</sup> Some theorists claim that compensatory damages for breach of contract arise in part because of the breach of the primary duty.<sup>126</sup> That is, they view the remedy as being justified in part by the wrong of failure to perform the contractual duty. This claim finds expression in Lord Diplock’s analysis, above: it is the *breaches* of primary obligations that give rise to the secondary obligations. Other theorists view this remedy as being no more than an adjunct of the primary duty (to perform). For instance, Markovits and Schwartz’s ‘due performance hypothesis’ holds that:<sup>127</sup>

contracts typically impose alternative obligations on the promisor: *either* to supply goods or services for a specified price *or* to transfer to the promisee the gain the promisee would have made had those goods or services been supplied.

It is unimportant to establish quite who agrees with this formulation; however, a range of theorists do agree with such a claim (in one form or another).<sup>128</sup> To allow us a convenient shorthand to refer to these two theories, let us label them, respectively, the ‘wrongs’ theorists and the ‘rights’ theorists .

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<sup>124</sup> These are Lord Diplock’s terms: *Photo Production* (n 57) 849 (Lord Diplock).

<sup>125</sup> For a general overview of the two views, see S Smith, ‘Breach of Contract – One Remedy or Two?’ in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

<sup>126</sup> e.g. P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 39.

<sup>127</sup> D Markovits and A Schwartz, ‘The Myth of Efficient Breach: New Defenses of the Expectation Interest’ (2011) 97 *Virginia Law Review* 1939, 1948 (emphasis in original).

<sup>128</sup> Ranging from, for example, OW Holmes Jr, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 462 to EJ Weinrib, *The Idea of Private Law* (rev, OUP 2012) 135 and A Ripstein, *Force and Freedom* (Harvard University Press 2009) 303–05. The latter two would certainly not phrase their claims in the same terms as Markovits and Schwartz. They would say, instead, that the *or* duty is simply a part of what the *either* duty required all along.

#### 6.4. THE PUZZLE OF THE DOCTRINES

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On the wrongs analysis, the inquiry of this thesis is perfectly intelligible. On this analysis, the justification of the damages claim is the initial breach of contract, combined with the termination of the contract. In that way, the damages arise from the wrong itself – and there is simply an open question as to why the law awards claimants a power to terminate following breach. However, if the rights theorists are correct, the matter is more complicated. If a duty to pay compensation is the same duty as the duty to perform the primary obligation, it seems incorrect to say that both parties are discharged from performance of their obligations by the claimant's election. This might lead one to the view that, if the rights theorists are correct, then the links between frustration and termination following breach are weaker than I have suggested.<sup>129</sup> That would be too hasty a conclusion. It is, after all, undeniable that the claimant is – following breach – awarded a power to *do something*. Even if one, following the rights theorists, conceives this as simply a power to elect a distinct form of performance, there remains a question as to why the claimant is awarded this power.<sup>130</sup>

We do not need to resolve this disagreement – which concerns the *consequences* of termination – in order to answer our question, which concerns the *effects* of the frustrating event. Even so, these views – the wrongs view and the rights view – must be kept separate as the effects of termination need to be explained in a slightly different manner depending upon the analysis which is adapted.<sup>131</sup>

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<sup>129</sup> See 6.3.2.

<sup>130</sup> For a more precise answer, see 7.3.2.2.

<sup>131</sup> See 7.3.2.2.

### 6.4.3.2 The Puzzle of Termination Following Breach

In light of these clarifications, what is the puzzle of termination following breach? Just as in the case of common mistake and frustration, the puzzle is the effect of termination. The puzzle is why a *prima facie* valid contract is defeasible, such that a claimant receives a power to terminate the contract following a certain kind of breach. After all:<sup>132</sup>

A system of law is conceivable in which ... the only result of a breach of contract is an action for damages, the injured party remaining nevertheless bound to perform his own obligations, and not being excused for his own breach by any prior breach by the other party.

This puzzle is, then, to be distinguished from the question of why the claimant is awarded a right to damages in breach of contract cases. That debate will, therefore, not be examined any further.

## 6.5 Conclusion

This Chapter has introduced three doctrines: common mistake, frustration and termination. I set out the doctrinal foundations of the doctrines and isolated one particular aspect of these doctrines. In the case of common mistake, that phenomenon was the fact that a *prima facie* valid contract is prevented from arising if the parties formed the contract subject to a common mistake. In the case of frustration, it was the fact that a *prima facie* valid contract is cancelled on the occurrence of a frustrating event. In the case of termination following breach, it was the fact that a

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<sup>132</sup> JW Salmond and PH Winfield, *Principles of the Law of Contracts* (Sweet & Maxwell 1927) 266.

*prima facie* valid contract may be cancelled at the election of the claimant on the occurrence of a frustrating event which the defendant has warranted will not occur.

This sets the stage for the inquiry of the next Chapter. I will there re-examine the old claim that these contractual doctrines are best understood as instances of failure of condition.

# 7 Frustrating Events and Failure of Condition

## 7.1 Introduction

There is great controversy over the proper ‘juristic basis’ of the doctrines of common mistake and frustration.<sup>1</sup> However, as Atiyah has stressed, ‘[t]here are ... several distinct questions involved in attempting to analyse the ‘basis’ of a doctrine.’<sup>2</sup> Some theorists concern themselves with an inquiry into the doctrinal mechanisms by which judges decide concrete cases.<sup>3</sup> Others examine the underlying justifications of these doctrinal mechanisms.<sup>4</sup> Because theorists do not always ask the same question, it is sometimes difficult to determine when there are matters of genuine disagreement.

It is particularly noteworthy that the debates considered here have been entered

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<sup>1</sup> For this language see, e.g., G Treitel, *Frustration and Force Majeure* (Sweet & Maxwell 2004) para 16.006.

<sup>2</sup> P Atiyah, ‘Judicial Techniques and the Law of Contract’ in *Essays on Contract* (OUP 1986) 273.

<sup>3</sup> e.g. AD McNair and A Watts, *The Legal Effects of War* (4th, CUP 1966) 176.

<sup>4</sup> e.g. J Smith and R Smith, ‘Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information’ (1990) 19 *Journal of Legal Studies* 467.

by judges as well as commentators, a phenomenon that is only rarely found in other areas of contract law. As Treitel points out:<sup>5</sup>

one does not ... find elaborate judicial discussions of the theoretical basis of the right to rescind for misrepresentation or for breach, or even of the doctrine of consideration.

The most acute contrast in this respect is between the discussion of the basis of common mistake and frustration, on which there is much judicial rumination, and the discussion of the basis of termination following breach, on which there is virtually none.<sup>6</sup> Indeed, what discussion there is on the point is to be found in those judgments which draw the link between frustration and termination for breach.<sup>7</sup> This merely compounds the mystery of why – if I might use the term to encompass all three doctrines – *frustrating events* have these effects.

Except where the doctrines are explicitly distinguished, this Chapter will take as a premise the notion that common mistake, frustration and termination following breach are – at least at the doctrinal level – united.<sup>8</sup> The question which the Chapter seeks to answer is why frustrating events have the effect they do. The question is, more precisely: why do frustrating events defeat, or allow the claimant a power to defeat, a *prima facie* valid contract? In this Chapter I will revisit an old answer to

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<sup>5</sup> Treitel, *Frustration and Force Majeure* (n 1) para 16.007. For the same point, focussing only on the differential treatment of frustration and termination, see F Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 LQR 534, 550.

<sup>6</sup> As Smith says, the matter 'has been little explored' by commentators, too: S Smith, *Contract Theory* (OUP 2004) 373. Reynolds considers three possible rationales: Reynolds, 'Warranty, Condition and Fundamental Term' (n 5) 544–46. See, more recently, J Carter, 'Discharge as the Basis for Termination for Breach of Contract' (2012) 128 LQR 283 and C Langley and R Loveridge, 'Termination as a Response to Unjust Enrichment' [2012] LMCLQ 65.

<sup>7</sup> See the references at 6.3.2.

<sup>8</sup> See 6.3.2.4 and 6.2.3 for arguments in support.

that question. That answer was: because there is, on the frustrating event, a failure of condition. In light of the clarifications of this thesis, I suggest that the explanation is much more attractive than it is now generally thought to be. I do not ultimately endorse the explanation as one capable of embracing every instance of these cases. However, using the distinctions of Chapter 2, I aim to show the key distinction between the two cases – orthodox failure of condition and frustrating events.

I will develop my argument in the following way. First, I will show how the test of liability is remarkably similar in cases of failure of condition and the three doctrines such that failure of condition seems a highly plausible candidate to explain the frustrating events cases. When courts seek to determine whether a frustrating event has occurred, they examine the same kinds of facts as they do when they seek to determine whether a condition has failed. In making this argument, I will show why the customary rejection of failure of condition as an explanation is flawed. Secondly, I will demonstrate the basic conceptual unity of failure of condition and the three doctrines. That is, the three doctrines embody a relationship of conditionality not as to value transferred – as in the basic failure of condition case – but as to the creation of the contractual rights. Finally, in 7.4 I will detail the justification of the three doctrines and explain how this relates to the justification of failure of condition. The two are very closely related – perhaps closely enough to justify their being considered together – but there is an important distinction between the two.

## 7.2 The Doctrinal Tests

### 7.2.1 Introduction

This section will show that the tests for frustration, common mistake and the power to terminate a contract following breach have been and can be explained as instances of the doctrine of failure of condition. In particular, the focus on the impossibility of or failure of performance has clear parallels with the focus on the failure of a condition of a transfer in orthodox failure of condition cases. The explanatory power of failure of condition goes further than this. It also explains the limits of the doctrines: frustration and termination following breach will operate only when there is a *substantial* failure to perform. This can be explained as an instance of the so-called ‘total failure’ rule. These parallels justify a more detailed inquiry into the conceptual and normative links between the frustrating events jurisprudence and failure of condition.

### 7.2.2 Frustration and Common Mistake

#### 7.2.2.1 The Basic Argument

The precise facts that must be proved to engage the doctrines of common mistake or frustration are not entirely clear. However, there is a particular focus upon the (impossibility of) performance of the obligation envisaged under the putative contract. This focus shapes the tests formulated for the doctrines. At the inception of the doctrine of frustration, in *Taylor v Caldwell*, Blackburn J concentrated on ‘the impossibility of performance’ arising from the destruction of the Music Hall, which

## 7.2. THE DOCTRINAL TESTS

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was ‘essential to [the concerts’] performance’.<sup>9</sup> This formulation was repeated so often that – just as in orthodox failure of condition cases<sup>10</sup> – some were led to view it as the foundation of the doctrine itself.<sup>11</sup> It is now recognised to have been a test for the event upon which the creation of contractual rights is generally conditional. As Lord Porter pointed out in *Joseph Constantine*, the formulations show that in these cases the contractual rights are ‘conditional on something, i.e. , the possibility of performance.’<sup>12</sup>

Various tests have been suggested. Although my inquiry is not into the correct or the best test, it is notable that all the leading tests refer to the effect of the event on *performance*. For instance, in *Bell v Lever Bros Ltd*, Lord Atkin said that a common mistake had to render performance ‘essentially different’ if it was to excuse the parties.<sup>13</sup> In *Davis Contractors v Fareham* Lord Radcliffe said that frustration occurs when the contract ‘has become incapable of being performed’.<sup>14</sup> This focus upon performance aligns the doctrines with orthodox principles of failure of condition. As Viscount Simon LC pointed out, ‘it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.’<sup>15</sup> In

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<sup>9</sup> *Taylor v Caldwell* (1865) 3 B & S 826, 839; 122 ER 309, 314 (KB) (Blackburn J).

<sup>10</sup> For example, *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) [261] (Stadlen J).

<sup>11</sup> RG McElroy and GL Williams, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (The University Press 1941) xxvii–xxviii.

<sup>12</sup> *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL) 204–05 (Lord Porter).

<sup>13</sup> *Bell v Lever Bros Ltd* [1932] AC 161 (HL) 218 (Lord Atkin).

<sup>14</sup> *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696 (HL) 729 (Lord Radcliffe).

<sup>15</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) 48 (Viscount Simon LC).

the same case, Lord Wright was clearest in drawing this link, stressing that:<sup>16</sup>

The same event which automatically renders performance of the consideration for the payment impossible, not only terminates the contract as to the future, but terminates the right of the payee to retain the money which he has received only on the terms of the contract performance.

These formulations show that the basic test of frustration and common mistake has much in common with the basic test of an orthodox failure of condition case: this is plausibly because both ask whether the failure of performance causes for the condition of the creation of the contractual right to fail.

### 7.2.2.2 An Objection

Although the point has not been phrased in quite the same terms as I have put it here, the suggestion that failure of condition is the explanation of frustration and common mistake is not new. An objection to this claim has been that failure of condition is incapable of explaining those cases where the frustrating event does not render *performance* impossible. For instance, Patterson considered the applicability of failure of condition to the doctrine of frustration and remarked that the concept:<sup>17</sup>

will explain some decisions but it will not explain those cases in which the promisee's obligation did not include a performance which was rendered impossible by the frustrating event.

Patterson has in mind a case such as *Krell v Henry*, one of the many 'Coronation Cases'.<sup>18</sup> A week before the scheduled coronation of Edward VII, the defendant

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<sup>16</sup> *Fibrosa* (n 15) 65 (Lord Wright).

<sup>17</sup> E Patterson, 'Constructive Conditions in Contracts' (1942) 42 *Columbia Law Review* 903, 951.

<sup>18</sup> See Patterson (n 17) 951, discussing *Krell v Henry* [1903] 2 KB 740 (CA).

agreed to hire from the claimant a flat along the procession route for the procession days. The contract price was £75, of which £25 was paid as a deposit. Before the full sum became payable, the King's illness led to the procession being abandoned. The owner claimed the unpaid balance; the hirer counterclaimed for the return of the deposit. Accepting the excuse for non-performance – i.e. accepting that the contract was frustrated – Vaughan Williams LJ held that:<sup>19</sup>

It is not essential to the application of the principle of *Taylor v Caldwell* that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time.

It is undoubtedly correct that Vaughan Williams LJ propounds a more permissive test for frustration than impossibility of performance. The court must first ask: 'what is the substance of the contract'?<sup>20</sup> Then they must ask whether – for the substance of the contract to be achieved – the contract 'needs for its foundation the assumption of the existence of a particular state of things'.<sup>21</sup> The question is whether such a test can be explained by the principles of failure of condition.

### 7.2.2.3 Responding to the Objection

If failure of condition is coterminous with failure of the counter-performance, it clearly cannot explain *Krell v Henry*. But failure of condition is not coterminous with failure of counter-performance.<sup>22</sup> Indeed, what is most striking about the ana-

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<sup>19</sup> *Krell v Henry* (n 18) 754 (Vaughan Williams LJ).

<sup>20</sup> *Krell v Henry* (n 18) 749 (Vaughan Williams LJ).

<sup>21</sup> *Krell v Henry* (n 18) 749 (Vaughan Williams LJ).

<sup>22</sup> This proposition was established above, at 1.2.

lysis in *Krell v Henry* is the parallels between the formulation of Vaughan Williams LJ and the formulations of the nature of failure of condition. Vaughan Williams LJ was concerned with the ‘foundation’ and ‘substance’ of a contract.<sup>23</sup> In *David Securities*, the court, formulating a test of the condition of failure of condition, considered important the facts on which the transfer was ‘predicated’.<sup>24</sup> In *Roxborough*, similarly, Gummow J referred to the ‘state of affairs contemplated as the basis for the payments’.<sup>25</sup> Commentators, in using the language of ‘failure of basis’ invoke similar concerns: the notion of some fundamental assumption of the transfer being undermined.<sup>26</sup> When failure of condition is properly understood, therefore, it is clearly capable of explaining *Krell v Henry*.<sup>27</sup>

### 7.2.2.4 Partial Performance and Failure of Condition

Frustration cannot be established when sufficient performance is rendered. For instance, in *Leiston Gas Co v Leiston-Cum-Sizewell Urban District Council* the claimants contracted with the defendants to light their district for five years.<sup>28</sup> When the contract had been partially performed, for nearly three and a half years of a five-year contract, an order under the Defence of the Realm Regulations 1914 prohibited

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<sup>23</sup> *Krell v Henry* (n 18) 749 (Vaughan Williams LJ).

<sup>24</sup> *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>25</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 [104] (Gummow J).

<sup>26</sup> See above, Chapter 1 fn 40.

<sup>27</sup> As Patterson anticipated with the ‘broader sense’ of failure of condition: Patterson (n 17) 951. His objection to this ‘broader sense’ is that it would ‘prove too much’: Patterson (n 17) 951. However, the difficulties failure of condition faces in this regard are not unique to the failure of condition explanation: the limits of the doctrine will be difficult to establish regardless of the explanation. Any explanation of frustration (including Patterson’s own explanation of ‘constructive conditions’) must face up to such difficulties.

<sup>28</sup> *Leiston Gas Co v Leiston-Cum-Sizewell Urban District Council* [1916] 2 KB 428 (CA).

the lighting of street lamps. The Court of Appeal denied that the contract had been frustrated in consequence of this regulation. Scrutton J reasoned that ‘the consideration for the payment claimed has not wholly failed.’<sup>29</sup> This was because, as Lord Reading CJ said, the part performance of the contract which had already occurred ‘cannot be regarded as a trivial part’.<sup>30</sup>

One of the virtues of failure of condition as an explanation of frustration is that it is able to explain this limit of the doctrine. In the field of failure of condition, it is well established that the condition must totally fail if restitution is to be granted; a ‘partial failure of consideration gives rise to no claim for recovery’.<sup>31</sup> The reason why partial performance defeats a claim of frustration is readily explicable in the light of the total failure rule: when there is partial performance, there is no total failure and, accordingly, no justification for frustration to operate.<sup>32</sup>

This also shows why Lord Hailsham was incorrect to dismiss failure of condition as an explanation of frustration. In *National Carriers v Panalpina*, his Lordship claimed that:<sup>33</sup>

many, if not most, cases of frustration which have followed *Taylor v Caldwell* have occurred during the currency of a contract partly executed on both sides, when no question of total failure of consideration can possibly arise.

A proper understanding of the total failure rule demonstrates that partial perform-

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<sup>29</sup> *Leiston Gas Co* (n 28) 439 (Scrutton J).

<sup>30</sup> *Leiston Gas Co* (n 28) 433 (Lord Reading CJ).

<sup>31</sup> *Fibrosa* (n 15) 77 (Lord Porter). See, generally, See 1.2.3.1.

<sup>32</sup> This argument is predicated on the view that the total failure rule is justified. In support of that premise, see F Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 CLJ 414, 429-31.

<sup>33</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 687 (Lord Hailsham). This is also Treitel’s objection: Treitel, *Frustration and Force Majeure* (n 1) para 16.012.

ance of a contract is not, *ex hypothesi*, inconsistent with a claim for failure of condition. I have argued that the total failure rule means a claimant can only recover if a substantial part of the condition is unsatisfied.<sup>34</sup> If that interpretation is correct, the total failure rule is clearly consistent with the cases that Lord Hailsham had in mind. This is an important insight because it means that the orthodox rejection of failure of condition as an explanation rested upon shaky doctrinal foundations. This gives good grounds to revisit the interpretation in full.

### 7.2.3 Termination Following Breach

#### 7.2.3.1 Failure to Perform as the Condition

For the claimant to be awarded a power to terminate the contract, the defendant must have (1) substantially (2) failed to perform. Let us examine these facts in reverse order. Why might a failure of performance be relevant? The answer is the same as in the case of frustration and common mistake: because performance is ‘generally speaking’ the condition of a transfer of value.<sup>35</sup> It should come as no surprise, therefore, that the condition of the contractual rights is performance; or, to put the point differently, why ‘the right to rescind [depends] on “failure of consideration”’.<sup>36</sup>

In their formulations of the test for whether a power to terminate the contract arises, judges have explicitly invoked the concept of failure of condition. For instance, Devlin J said that:<sup>37</sup>

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<sup>34</sup> Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 32) 431.

<sup>35</sup> *Fibrosa* (n 15) 48 (Viscount Simon LC).

<sup>36</sup> CB Morison, ‘Rescission of Executory Contracts for Partial Failure in Performance I’ (1912) 28 LQR 398, 399.

<sup>37</sup> *Universal Cargo Carriers Corp v Citati (No 1)* [1957] 2 QB 410 (QB) 431 (Devlin J). Although his

To bring a contract to an end by breach of warranty there had to be a failure of consideration, that is to say, the breach had to be such as to deprive the plaintiff in effect of the benefit of his contract.

Similarly, in *The Hansa Nord* Ormrod LJ said that the power to reject goods following a sufficiently serious breach:<sup>38</sup>

recognises [a] ground for holding that a buyer is entitled to reject, namely, that, de facto, the consideration for his promise has been wholly destroyed.

These quotations draw an explicit link between failure of condition and the power to terminate a contract following breach. This explains Mustill J's claim, cited above, that:<sup>39</sup>

frustration and repudiation are aspects of the same general principle, differentiated only by the consequences which attend the discharge of the contract, and the identity of the party who is entitled to assert the discharge.

### 7.2.3.2 *Substantial* Failure to Perform and *Total* Failure

What of the first fact? That was, recall, that there must be a *substantial* failure to perform. Not every breach of contract justifies the creation of a power to terminate: in particular, a 'partial breach' will not count to give the power to discharge the contract.<sup>40</sup> Indeed, 'as a practical question the only important consideration [in

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Lordship puts the point in the past tense, the context shows that he thinks the same point applies to his present: 430–31.

<sup>38</sup> *Cehave NV v Bremer Handels GmbH (The Hansa Nord)* [1976] QB 44 (CA) 84 (Ormrod LJ).

<sup>39</sup> *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd (The Hermosa)* [1980] 1 Lloyd's Rep 638 (Comm) 649 (Mustill J).

<sup>40</sup> This is the language used by Corbin: AL Corbin, *Corbin on Contracts* (one volume, West Pub Co 1952) §1253.

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this context] is how defective the performance of a contracting party has been'.<sup>41</sup> The key question is: '[w]hat is sufficient failure of consideration to justify [termination]?'<sup>42</sup> If termination following breach is explained in terms of failure of condition, the sufficiency requirement becomes intelligible: it is to ensure that there is a *total* failure.<sup>43</sup> Although the terms of the test require modification to distinguish the enrichment (i.e. as the creation of a right rather than as a transfer of value), the test explains why there is a requirement of substantial failure of performance before termination is permitted. If the condition of the right is performance, there is a *total* failure of condition only if performance substantially fails.

This point can be emphasised by analysing the law from a different angle. In the earlier cases, a recurring theme in deciding whether substantial performance had been rendered was the ability of damages to adequately compensate the claimant for the defendant's failure to perform the contract.<sup>44</sup> For instance, Serjeant Williams' third rule, derived from *Boone v Eyre*, in his famous notes to *Pordage v Cole* was that:<sup>45</sup>

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<sup>41</sup> S Williston, 'Repudiation of Contracts I' (1901) 14 Harvard Law Review 317, 325.

<sup>42</sup> Morison, 'Rescission of Executory Contracts for Partial Failure in Performance I' (n 36) 401–02. Here, Morison uses the word 'consideration' synonymously with 'performance'; however, this simply reinforces the point.

<sup>43</sup> See 1.2.3.1 for the rule.

<sup>44</sup> *Boone v Eyre* (1779) 2 Wm Bl 1312, 1314, n 2; 96 ER 767, 768 n 2 (Court of Common Pleas) (Lord Mansfield); *Davidson v Gwynne* (1810) 12 East 381, 389; 104 ER 149, 152 (KB) (Lord Ellenborough); *Fothergill v Walton* (1818) 8 Taunton 576, 583; 129 ER 508, 510 (Court of Common Pleas) (Dallas CJ); *Roberts v Brett* (1859) 6 CB NS 611, 632–33; 141 ER 595, 603 (Court of Common Pleas) (Crompton J); *Huntoon Co v Kolynos (Inc)* [1930] 1 Ch 528 (CA) 549 (Lord Hanworth MR), 558 (Lawrence LJ). EA Farnsworth, 'The Problems of Nonperformance in Contract' (1982) 17 New England Law Review 249, 269; A Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 Modern Law Review 413, 423.

<sup>45</sup> *Pordage v Cole* (1646) 1 Wms Saund 319, 320 n 8; 85 ER 449, 454 n 8. On Williams' rules, see T Baloch, *Unjust Enrichment and Contract* (Hart 2009) 109–11.

Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant[.]

The concern was this. If substantial but imperfect performance was rendered and the court held the covenants to be dependent, the performance would enrich the defendant – and the claimant would have no claim for payment. The worry was, in other words, that the *innocent party* would be unjustly enriched. However, in modern terms, the emphasis on the importance of damages can be interpreted in a different way. If damages are sufficient to place the innocent party in the position she sought to be in, then it is arguable that the normative case for cancelling the contractual right is absent.<sup>46</sup>

### 7.2.4 Conclusion

This section has argued that the tests for liability in common mistake, frustration and termination following breach – both their *prima facie* remit and their limits – can be explained when they are understood as instances of failure of condition. In showing that the tests are similar, we have also seen why the usual riposte to the failure of condition explanation – that there has often been partial performance in such cases – is irrelevant. These points breathe new life into the failure of condition explanation. The question in the remaining two sections is to establish exactly how much life there is in the theory. The next section demonstrates the close conceptual affinities between the frustrating events cases and orthodox failure of

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<sup>46</sup> Whether this is so depends upon the resolution of the argument raised – but not concluded – at 5.4.2. See, further, Wilmot-Smith, ‘Reconsidering “Total” Failure’ (n 32) 430–31.

condition cases. Finally, we turn to the justification of the doctrines, which is where an important distinction between the doctrines is visible.

## 7.3 The Conceptual Structure of the Doctrines

### 7.3.1 Conditional Creation of Rights

#### 7.3.1.1 The Basic Structure

Chapter 2 examined in detail the nature of a conditional relationship.<sup>47</sup> There, we saw that a conditional relationship embodies the form: if C,  $\phi$ . A further clarification we made was that a condition is – as a conceptual matter – not obligating: in virtue of the conditional relationship there is no obligation as regards the antecedent proposition (C). Therefore, ‘if C,  $\phi$ ’ is consistent with a command to ensure that C, a command to ensure that  $\neg$ C, or silence as to the status of C.<sup>48</sup>

In the orthodox case of failure of condition, a transfer of value is conditional upon the recipient’s counterperformance. We represented these distinct elements of the relationship – respectively, the transfer of value and the counter-performance – with the symbols  $\phi$  (for the enrichment) and C (for the condition). The conditional relationship of failure of condition was, therefore, ‘ $\phi$  if C.’ In the case of common mistake, frustration and termination following breach, the same conditional can be stated.<sup>49</sup> In this case,  $\phi$  stands for the contractual rights in question and C stands

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<sup>47</sup> See, in particular, 2.2.1. Some of the distinctions drawn there will be re-examined below, at 7.4.

<sup>48</sup> The inquiry into what each individual must do as regards the antecedent is a separate question. In our context, the relevant question is usually whether there is a contractual obligation to ensure that C or that  $\neg$ C.

<sup>49</sup> Whether it is sensible to analyse the law in terms of conditions is only finally examined in the next

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for the non-occurrence of the frustrating event. The contractual rights are created conditionally upon that event's non-occurrence; it follows that the occurrence of the frustrating event undermines the contractual rights.<sup>50</sup> This explains why courts have reasoned in terms of 'implied conditions'.<sup>51</sup>

This basic formulation is clearest in the case of frustration. Contractual rights are created; on the occurrence of the frustrating event, those rights are cancelled. Those contractual rights are, therefore, created conditionally upon the event *not* occurring. It is not much different in the case of termination for breach. In fact, it is *closer* to the orthodox case of failure of condition, where restitution is not effected automatically but at the election of the claimant. The reason why the law distinguishes termination following breach from frustration was examined above.<sup>52</sup> Therefore, in both frustration and termination following breach, it is easy to see the conceptual link with an orthodox failure of condition case.<sup>53</sup> However, in the case of common mistake, the relationship is rather more complicated. The next subsection

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section, where I suggest that there is an important distinction between these cases and orthodox failure of condition cases. The key point of this section is to demonstrate that the relationship can be stated in conditional terms.

<sup>50</sup> If the relationship is  $\phi \rightarrow C$ , the contrapositive is  $\neg C \rightarrow \neg \phi$ .

<sup>51</sup> *Taylor v Caldwell* (1865) 3 B & S 826, 836–7; 122 ER 309, 313 (KB) (Blackburn J); *Jackson v Union Marine Insurance Co Ltd* (1879) LR 10 CP 125 (Exch) 142 (Bramwell B); *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 (HL) 404 (Earl Loreburn); *Joseph Constantine* (n 12) 169 (Viscount Maugham); *Bell v Lever Bros Ltd* [1931] 1 KB 557 (KB) 567, 576 (Wright J); *Bell v Lever Bros Ltd* [1931] 1 KB 557 (CA) 597 (Greer LJ).

<sup>52</sup> See above, 6.3.2.5.

<sup>53</sup> It may be worth stressing that in a case of termination following breach the condition itself is still not obligating. This point is obvious in a case of frustration: by definition, the doctrine can only operate when there is no promise as to the condition. However, it can be lost in the case of termination following breach, where the defendant is obligated to ensure that the condition obtains. As is clear from the clarifications at 2.2.3, the existence of a promise as regards the antecedent of a conditional – either to ensure that it obtains, or that it does not – is perfectly consistent with the conditional proposition itself.

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explains why – despite first impressions to the contrary – the relationship is not substantially different.

#### 7.3.1.2 The Problem of Common Mistake

Frustration and termination following breach are clear instances of a contractual right, initially valid, being cancelled. In that sense – though subject to the caveat of the previous subsection – it is easy to see the link between those doctrines and orthodox failure of condition cases. However, common mistake seems to pose a particular problem. The problem arises out of the fact that common mistake renders a contract *void* rather than merely voidable. This means that, unlike in the case of frustration and termination following breach, there appears to be an important difference between the doctrine of common mistake and failure of condition. The distinction is, to be precise, that although failure of condition appears to generate an entitlement – the right to restitution – common mistake does not seem to generate any such entitlement. It simply prevents a contract from being formed in the first place. Given that failure of condition's normal response is *restitution*, how can the *prevention* of a right from arising be said to arise under the same doctrine?

We need to state the argument as clearly as possible if we are to be able to respond to it. Its first premise appears to be that the response to a failure of condition is to undermine some initial transfer or – if we might expand the response to include frustration and termination following breach – created entitlement. In a normal failure of condition case, value is transferred from the claimant to the defendant; the effect of failure of condition is to unwind this transfer. Even if we include frustration and termination following breach, there is an entitlement – a contractual right – which failure of condition operates to cancel. The second premise is that this is not

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what happens in a case of common mistake. The conclusion is that common mistake cannot, be explained in terms of failure of condition. This argument appears to be valid; the question is whether it is sound.

This objection has a familiar parallel in discussions of rescission. In that field, there is a debate over whether the law of unjust enrichment can explain rescission of an executory contract.<sup>54</sup> One common objection to this thesis is that the consequences of rescission are not restitutionary – and unjust enrichment can, it is said, only effect restitution.<sup>55</sup> Although I have avoided saying that the doctrine of failure of condition is part of the law of unjust enrichment, the argument has the same structure, *mutatis mutandis*. In discussion of the argument, most attention has been concentrated on the first premise. So, although the orthodox view is that the only response to unjust enrichment is restitution,<sup>56</sup> a number of scholars have claimed that the law of unjust enrichment can also *prevent* enrichments from being transferred.<sup>57</sup> Few, if any, have challenged the second premise.

It may be that the first premise is flawed for the reasons these scholars give. However, we can demonstrate that the argument fails in any event: the second premise is also unsound. To see why, we must revisit an argument I suggested – but did not

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<sup>54</sup> See, for example, J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002) 49–51; AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012) 116–34.

<sup>55</sup> A Burrows, *The Law of Restitution* (3rd, OUP 2011) 16–21.

<sup>56</sup> P Birks, ‘Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment’ (1999) 23 Melbourne University Law Review 1, 8; Burrows, *The Law of Restitution* (n 55) 9. Even more strongly, McInnes claims that restitution is the only *coherent* response: M McInnes, ‘The Measure of Restitution’ (2002) 52 University of Toronto Law Journal 163, 181.

<sup>57</sup> C Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) paras 3.10–3.12; K Barker and L Smith, ‘Unjust Enrichment’ in D Hayton (ed), *Law’s Future(s)* (Hart 2000) 414–16; R Williams, ‘Preventing Unjust Enrichment’ [2000] RLR 492, 512–4.

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develop in depth – in the previous Chapter.<sup>58</sup> There, I argued that common mistake defeats a *prima facie* contract. Because of the amount which turns on the success of this argument – not only the unity of common mistake and frustration, but also a great deal of my argument in this Chapter – it is worth dwelling on this claim.<sup>59</sup>

We should first distinguish between the fact of a contract and a court's judgment about such a fact. Whether there is a contract between two parties is in one important sense a matter of fact. There are legal rules which dictate what the ingredients of a contract are. When those rules are in place, it is a question of fact – the truth of which is, in principle, to be established independent of a decision of any authority – whether there is a contract between the parties. Suppose that a legal system requires four facts to be the case in order for there to be a contract: A, B, C and D.<sup>60</sup> If, in such a legal system, A-D is true, there is a contract. Let me denote the question of whether there is *in fact* a contract by saying this is a question about a Contract<sub>F</sub>.<sup>61</sup> Even if A-D is true, however, a court might nevertheless fail to find that there is a contract. This might be the case if one party's counsel is incompetent (for instance, failing to prove C) or if crucial evidence is missing, etc. Let me denote the question of whether a court finds there to be a contract by saying this is a question about a Contract<sub>C</sub>.

With this distinction, a number of possibilities present themselves in any partic-

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<sup>58</sup> See above, 6.4.2.2.

<sup>59</sup> My argument here is greatly influenced by – indeed, in its crucial steps, relies upon – that of L. Duarte d'Almeida, 'Defences and Defeaters' (DPhil thesis, 2011) as regards the nature of defeasible concepts.

<sup>60</sup> A, for instance, could be 'offer and acceptance', B could be 'consideration', C could be 'consideration' and D could be 'the absence of any defeaters'.

<sup>61</sup> The 'F' locates the question as concerning whether it is *factually true* that there is a contract; that is, whether there is a contract quite apart from what any authority decides.

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ular contract dispute. Suppose first that a contract is void because one of the necessary elements – consideration, for example – is not present. There is, therefore, no Contract<sub>F</sub>. Suppose further that a court overlooks the absence of consideration and nevertheless (mistakenly, corruptly, etc) supposes there to be a contract. There is, on the terms suggested here, a Contract<sub>C</sub>. Such a case is both recognisable and trite. We should simply say that the decision of the court, concerning the Contract<sub>C</sub>, is wrong.<sup>62</sup>

Importantly, the decision is not incorrect simply because there is no Contract<sub>F</sub>. A court might validly find there to be a Contract<sub>C</sub> even if there is no Contract<sub>F</sub>. To see why, we need to avail ourselves of the concept of a defeasible judgment. The nature of a defeasible judgment is heavily contested; we need not adjudicate on the conceptions here. For our purposes, the important feature of such judgments is that a decision is *prima facie* correct, pending further facts. So, a court might find there to be a contract on proof of A, B and C; nevertheless, if D is proven, the decision might be that there is no contract. Suppose that A-D is true. In such a case, there is no Contract<sub>F</sub>. However, if A-C are proven in court and the defendant does not prove that D, a court might – and the adverb is crucial here – *validly* find there to be a contract.<sup>63</sup> That is, they would make no mistake in so finding. Here, we can say that there is still no Contract<sub>F</sub>; but there is a valid Contract<sub>C</sub>.<sup>64</sup>

These distinctions allow us to see why we should reject the second premise. The

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<sup>62</sup> It is, of course, a quite distinct question what the effect of the court's decision is in law: depending on the legal system in question, it might be simply void; it might instead need to be set aside by another judge if its effects are to be avoided.

<sup>63</sup> The A-C facts in this example are what Hart called 'positive facts': HLA Hart, 'The Ascription of Responsibility and Rights' (1949) 49 Proceedings of the Aristotelian Society 171, 174.

<sup>64</sup> In contrast, when there is a voidable contract, there is – prior to avoidance – a Contract<sub>F</sub>.

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second premise was, recall, that common mistake does not ‘undermine’ an ‘initial transfer’ or ‘entitlement’. Common mistake is, to use the terms of this section, similar to D: that is, a contract can be validly found to exist by a court (Contract<sub>C</sub>) even though the parties were subject to a common mistake (D) such that there is not, in fact, a contract between the parties (Contract<sub>F</sub>). It follows that it is incorrect to say that common mistake does not defeat an entitlement. It prevents an otherwise valid finding of a Contract<sub>C</sub> – it is *that* entitlement which is defeated by proof of common mistake.<sup>65</sup>

#### 7.3.2 Are These Cases Overrides?

##### 7.3.2.1 Revisiting the Distinction

As Raz claims:<sup>66</sup>

The notion of one reason overriding another should be carefully distinguished from that of a reason being cancelled by a cancelling condition. A reason can be overridden only by a fact which is itself a reason for contradictory action.

We saw, above, that the event in failure of condition cases should be understood as a condition as opposed to an override.<sup>67</sup> If common mistake, frustration and termination following breach are to be sensibly aligned with failure of condition

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<sup>65</sup> Compare Forsyth’s theory of voidness in administrative law: C Forsyth, “‘The Metaphysic of Nullity’: Invalidity, Conceptual Reasoning and the Rule of Law’ in C Forsyth and C Hare (eds), *The Golden Metwand and the Crooked Cord* (OUP 1998). Forsyth is concerned with a less nuanced case, where there is a void legal act which has factual consequences – subsequent actors relying upon the void act, for instance. Nevertheless, there is an analogy in the distinction between the facts surrounding a legal decision and the legal state of affairs.

<sup>66</sup> J Raz, *Practical Reason and Norms* (new ed, OUP 1999) 27.

<sup>67</sup> See 2.3.4 and 4.2.2.1.

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then in these cases the contractual rights cannot be cancelled due to an override.<sup>68</sup> In this subsection, I want to show that the reason for the cancellation of the rights is not an override.

To show that the cancellation of the contractual rights is not due to an override, it is worth reflecting on how an override is to be distinguished from a condition (or an assumption).<sup>69</sup> There is a crucial distinction in the aftermath of the a failure of condition as opposed to the occurrence of an override. In the first case, the condition, the reasons for the original course of action simply cease to apply – after the condition, there are no reasons at all for the original action. However, in the case of an overriding condition, the reasons for the original course of action remain: they were overridden, not cancelled.

To demonstrate this distinction, consider the following two cases:

*Overridden Promise:* ‘I promise to take [some] children to the beach today, but an emergency intervenes and I renege on the deal ... One of my students ... was in some kind of serious and urgent trouble from which only I could extricate him, and only by devoting most of the day to it.’<sup>70</sup>

*Cancelled Promise:* I promise to take some children to the beach tomorrow ‘if the weather is fine.’ It rains all day long. We do not, to the children’s chagrin, go to the beach.

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<sup>68</sup> Whether the doctrines are best understood in terms of failure of condition turns in large part on the way in which the parties’ intentions justify the cancellation of the contractual rights. That question will be examined below at 7.4.

<sup>69</sup> For further argument on this point, see 2.4.2. As conditions and assumptions intentions are, in this respect, materially the same, I will only consider the former in this section.

<sup>70</sup> I take this case from J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1, 34. Gardner, in turn, takes it from N MacCormick, ‘The Obligation of Reparation’ in *Legal Right and Social Democracy* (OUP 1982) 212.

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The crucial distinction between the two cases is this. In *Overridden Promise*, although I was perfectly justified in not taking the children to the beach, ‘I am now bound, without having to make a further promise, to take them to the beach at the next suitable opportunity’.<sup>71</sup> That is because, even though my initial reason to take the children to the beach was overridden, my reason for the course of action in question remains. The reason, therefore, demands conformity.<sup>72</sup> However, in *Cancelled Promise* I owe no such duty of repair. My reason to take the children to the beach was cancelled by the failure of the condition – that is, by the rain.

#### 7.3.2.2 The Distinction Applied

We can test whether a reason is being overridden by examining the practical consequences of the aftermath of the event.<sup>73</sup> To test whether the contractual rights are being overridden in the frustrating events cases, we need to examine whether there is any ‘rational remainder’, i.e. reasons to pursue the original course of action, after the cancellation.<sup>74</sup> If there is no such remainder, it cannot be an override.

In the case of frustration and common mistake, there seems to be no remainder.<sup>75</sup>

What obligations the parties have after the prevention or cancellation of the rights

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<sup>71</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 70) 34.

<sup>72</sup> For argument to this effect, see J Raz, ‘Personal Practical Conflicts’ in P Baumann and M Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge 2004) 189–93.

<sup>73</sup> This does not, of course, demonstrate that there is a cancelling condition – as I suggest below, the case is often closer to that of a background assumption.

<sup>74</sup> Gardner, ‘What is Tort Law For? Part 1’ (n 70) 41.

<sup>75</sup> Morris appears to disagree: AJ Morris, ‘Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases’ (1997) 56 CLJ 147, 157. Although he uses the language of ‘conflict’, his analysis is more aptly understood as a cancellation: that is because he does not entertain the possibility of any responsibility after a common mistake/ frustration to account for the rational remainder.

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– their rights to restitution and counter-restitution – do not arise in virtue of the contract itself: they arise in virtue of the failure of the condition of the transfer of value (or, now, in virtue of an Act of Parliament).<sup>76</sup>

The case of termination following breach is more difficult. As Lord Diplock says:<sup>77</sup>

Every ... breach of contract ... gives rise by implication of the common law ... to [a secondary obligation to] pay monetary compensation to the other party for the loss sustained by him in consequence of the breach.

Importantly, if the innocent party elects to terminate the contract following a sufficiently serious breach of contract:<sup>78</sup>

there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future.

In other words, there does appear to be a rational remainder – reasons to comply with the initial course of action, i.e. performance. Indeed, it is in precisely these terms that many theorists of contract law explain such a right to damages.<sup>79</sup>

How should we respond to this point? Our response depends upon the appropriate justification of the right to compensatory damages following breach.<sup>80</sup> There

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<sup>76</sup> See *Fibrosa* (n 15) and Law Reform (Frustrated Contracts) Act 1943. Compare L McTurnan, 'An Approach to Common Mistake in English Law' (1963) 4-1 Can Bar Rev 1, 2: 'there should be some ... countervailing reason for not enforcing promises.' The flaw in McTurnan's claim is that it is incorrect to say that there are always reasons to enforce promises legally.

<sup>77</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 849 (Lord Diplock).

<sup>78</sup> *Photo Production* (n 77) 849 (Lord Diplock).

<sup>79</sup> See, for example, A Ripstein, *Force and Freedom* (Harvard University Press 2009) 304–05.

<sup>80</sup> For a brief discussion of this debate, see 6.4.3.1.

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are two main theories which seek to justify the right to damages: the ‘wrongs’ view and the ‘rights’ view. On the wrongs view, the right to damages arises due to the wrong of breach of contract. On the rights view, the right to damages is a rational remainder of the original duty. We do not need to decide between these views as neither view is – on a full analysis – inconsistent with the argument of this Chapter. Consider first the wrongs view. The termination of the contract brings to an end the obligations of both parties but the wrong generates a new right to compensation for breach. On that view, the right to compensation is not a difficulty for the claim of this chapter: it is not a rational remainder of the original obligation, but a new claim.

The position is more complicated on the rights view. There, the right to compensation is justified by the reasons in favour of the original course of action. To see why this is not a threat to the argument of this section, it is important to have the full picture of the legal facts post-termination. The wrongdoer must, as we have seen, pay damages for the wrongful failure to perform her primary obligations.<sup>81</sup> However, importantly, ‘the unperformed primary obligations of [the innocent] party are discharged’.<sup>82</sup> Therefore, the precise effect of termination is ‘that the injured party is thereby absolved from future performance of his obligations under the contract’.<sup>83</sup> On the rights view, therefore, it is not the contract rights *simpliciter* which are created conditionally. Instead, it is only the contractual duty of the innocent party which is conditional.<sup>84</sup>

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<sup>81</sup> *Photo Production* (n 77) 849 (Lord Diplock).

<sup>82</sup> *Photo Production* (n 77) 849 (Lord Diplock).

<sup>83</sup> *Heyman v Darwins* [1942] AC 356 (HL) 399 (Lord Porter).

<sup>84</sup> This formulation is not begging the question – we have not yet established *why* the contractual rights are conditional.

### 7.3.2.3 Conclusion

These arguments demonstrate that the cancellation of the contractual rights in the case of common mistake, frustration and termination following breach is not due to an override. This point demonstrates a further affinity between failure of condition and these doctrines.

## 7.4 The Justification of the Doctrines

### 7.4.1 Introduction

The rationale of failure of condition was explored in detail in Chapters 3-5. Although the argument of those Chapters was at times complex, the crucial claim was that restitution is – in an orthodox case – justified by the claimant’s intention. Her intention to benefit was conditional; that condition failing, restitution is a justifiable response. This section will argue that frustrating event cases can be of two kinds. In one set of cases, the same principle as in classic failure of condition cases applies, *mutatis mutandis*. That is, the rationale of the doctrines of common mistake, frustration and termination following breach is that the intention to create the contractual rights was conditional; when the condition fails, the justification of the contractual rights is no longer present. Hence they are cancelled. However, in another set of cases – perhaps the more central set – a distinct principle operates. The underlying normative principle seems to be closer to a background assumption.<sup>85</sup> That is, given the change in circumstances the reasons for the initial course of action

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<sup>85</sup> For the distinction, see 2.4.2.2.

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are not as strong – or have no force at all. I will conclude by arguing that, though we should recognise this distinction, it is arguable that such cases should in practice be considered together.

My argument will proceed as follows. I will first distinguish between two roles the parties' intentions could have in justifying the doctrines: a positive role and a negative role. The positive role – best known as the 'implied term' theory – is then rejected as an explanation of the doctrines. The negative role – that there is no intention to be bound by the contract in the circumstances – is then argued to be the best justification of the doctrines. Finally, it is demonstrated that the negative rationale is sometimes nothing more than a reformulation of the rationale of failure of condition; but at other times it concerns the undermining of a background assumption being undermined, as detailed in Chapter 2.<sup>86</sup> This clarifies precisely what the difficulty is with the failure of condition explanation of the frustrating events cases – and therefore the nature of the argument that is needed to make such a claim.

### 7.4.2 Two Intention-Based Rationales

#### 7.4.2.1 Introduction

We should distinguish two roles which the parties' intentions might play in justifying the effect of common mistake, frustration and termination for breach. Intention might play a 'positive' role. In that case, the justification of the effect is that the parties intended *that effect*. However, intention might also play a 'negative' role. In such a case, the role of intention is more complicated. If a particular effect – for instance, the creation of contractual rights – can be justified only by reference to

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<sup>86</sup> See 2.4.2.2.

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the parties' intention, and the parties do not have such an intention, their intention plays a negative role when its *absence* is the justification of a legal effect.

### 7.4.2.2 The 'Positive' Rationale

A number of judges have justified common mistake and frustration with a positive intention rationale. For instance, in *Bell v Lever Bros* Lord Atkin argued that '[a] condition derives its efficacy from the consent of the parties, express or implied', adding that '[t]he condition [in the case of common mistake] is contractual'.<sup>87</sup> Similarly, in *FA Tamplin*, Earl Loreburn stressed that 'no Court has an absolving power' in a frustration case.<sup>88</sup> By this, he seems to have meant that the implied condition of the contract is supplied by the parties themselves – i.e., that the parties intended that the contract would be discharged. As judges and theorists are not always clear about their understanding of the condition, the precise level of support for the theory is not easy to establish. However, there is undoubtedly much judicial<sup>89</sup> and some academic<sup>90</sup> support for the theory.

There is a similar – positive – rationale for the power to terminate following

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<sup>87</sup> *Bell v Lever Bros Ltd* (HL) (n 13) 225 (Lord Atkin).

<sup>88</sup> *F A Tamplin* (n 51) 404 (Earl Loreburn). See also *Joseph Constantine* (n 12) 185 (Lord Wright); *Larrinaga & Co Ltd v Société Franco Américaine des Phosphates de Medulla* [1923] All ER Rep 1 (HL) 7 (Lord Atkinson).

<sup>89</sup> *Howell v Coupland* (1876) 1 QBD 258 (CA) 261 (Lord Coleridge CJ) and 263 (Cleasby B); *Horlock v Beal* [1916] 1 AC 486 (HL) 518 (Lord Parmoor) and 525–6 (Lord Wrenbury); *F A Tamplin* (n 51) 422 (Lord Parker of Waddington); *Scottish Navigation Co Ltd v W A Souter & Co* [1917] 1 KB 222 (CA) 243–4 (Banks LJ) and 251 (Lawrence J); *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 (HL) 127 (Lord Dunedin), 131 and 135 (Lord Atkinson) and 137 (Lord Parmoor); *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 455 (Lord Sumner); *Re Badische* [1921] 2 Ch 331 (Ch) 379 (Russell J); *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 (HL) 501 (Lord Sumner); *Joseph Constantine* (n 12) 163–4 (Viscount Simon LC).

<sup>90</sup> A McNair, 'Frustration of Contract by War' (1940) 56 LQR 173, 178–9; J Smith, 'Contract, Mistake, Frustration and Implied Terms' (1994) 110 LQR 400; MA Eisenberg, 'Mistake in Contract Law' (2003) 91 California Law Review 1573, 1627.

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breach. For instance, in *Bunge v Tradax* Lord Scarman claimed that:<sup>91</sup>

An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach.

Writing extrajudicially, Lord Diplock explained *The Hongkong Fir* in similar terms.

He described the test established by that case in these terms:<sup>92</sup>

Look first at the event that constituted the breach; then ask yourself what did the parties when they entered into the contract intend their respective rights should be if that particular breach occurred?

In these passages, the judges seem to claim that the reason why the claimant is awarded a power to determine a contract following a sufficiently serious breach of an innominate term is that the parties agreed to this from the start. The important unity of the models is that they both source the justification for the claimant's non-performance in the agreement of the parties.

The positive rationale is particularly attractive to one kind of contract theorist. The ideas of contract law developed in the nineteenth century are generally known as 'classical.'<sup>93</sup> As customarily interpreted,<sup>94</sup> the prevalent philosophical individual-

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<sup>91</sup> *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL) 717 (Lord Scarman).

<sup>92</sup> Lord Diplock, 'The Law of Contract in the Eighties' (1981) 15 *University of British Columbia Law Review* 371, 377. Further, HG Beale, *Chitty on Contracts* (31st, Sweet & Maxwell/Thomson Reuters 2012) 12.086.

<sup>93</sup> e.g. LM Friedman, *Contract Law in America: A Social and Economic Case Study* (University of Wisconsin Press 1965) 20–4; PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) Ch 21. Further, JW Salmond and PH Winfield, *Principles of the Law of Contracts* (Sweet & Maxwell 1927) 24; J Williams, *Salmond and Williams on Contracts* (2nd, Sweet & Maxwell 1945) 25.

<sup>94</sup> Compare B Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 433.

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ism aimed to restrict the interference of the state in the parties' dealings.<sup>95</sup> This was, curiously,<sup>96</sup> thought to require the state to enforce any bargain which the parties agreed to. For instance, Sir George Jessel once claimed that:<sup>97</sup>

if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

For those influenced by such concerns, there is a perennial worry that common mistake and frustration '[put] palm tree justice in place of party autonomy.'<sup>98</sup> The attraction of the theory that the parties agreed to the cancellation of their contract rights is that it purports to meet this worry, formally reconciling the excuse with classical notions of freedom of contract.<sup>99</sup>

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<sup>95</sup> S Williston, 'Freedom of Contract' (1921) 6 Cornell Law Quarterly 365, 373; J Beatson and D Friedmann, 'Introduction' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 7.

<sup>96</sup> Compare D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2005) 117–35.

<sup>97</sup> *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (Ch) 465 (Sir George Jessel). Further, *Churchward v The Queen* (1865) LR 1 QB 173 (QB) 211 (Lush J).

<sup>98</sup> *Great Peace Shipping Ltd v Tsaviris Salvage (International) Ltd* (QB, 9th November 2001) [120] (Toulson J). Further, *Aspdin v Austin* (1844) 5 QB 671, 684; 114 ER 1402, 1407 (QB) (Lord Denman).

<sup>99</sup> In *James Scott & Sons v R&N Del Sel* 1922 SC 592 (IH) 596, Lord Sands calls the notion that the condition is consensually based a 'pious fiction' because it pays 'homage to ... the sanctity of contract.' See, for a further explanation, *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA) 70–1 (Diplock LJ).

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### 7.4.2.3 The ‘Negative’ Rationale

The negative rationale for frustration is most clearly captured in Lord Radcliffe’s speech in *Davis Contractors*. His Lordship claimed that:<sup>100</sup>

frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.

Here, the intention of the parties is important to the rationale of frustration. However, it does not function in the same way as the theory of the previous subsection. The justification is not that the parties agreed to discharge the contract. It is, instead, that the parties did not agree to *enforce* the contract in the circumstances as they now are. That is, their agreement is not ‘wide enough to apply to the new situation’.<sup>101</sup> Although it is difficult to find an explicit endorsement of this theory in common mistake cases, the same rationale should apply to common mistake as frustration – the justification would be that there is an insufficient intention to enforce the contract in the circumstances as they truly are.

A similar theory can be found in the older cases on termination following breach. Although it is ‘second nature’ for lawyers to think of contractual promises as dependent, ‘for a long time [the law] proceeded on the basis that contractual promises

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<sup>100</sup> *Davis Contractors* (n 14) 729 (Lord Radcliffe). Lord Radcliffe’s Virgilian allusion is often repeated. See, further, *Bank Line Ltd v Arthur Capel & Co* (n 89) 442 (Lord Finlay LC); *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1960] 2 QB 318 (CA) 371 (Harman LJ); *Panalpina* (n 33) 688 (Lord Hailsham LC).

<sup>101</sup> *Davis Contractors* (n 14) 720–21 (Lord Reid). See also *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 (HL) 274 (Lord Wright); *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 (HL) 185 (Viscount Simon).

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were independent.’<sup>102</sup> The result was that a party, A, could claim the other’s (B’s) performance even when A had not performed her own duty.<sup>103</sup> However, the law has moved in favour of a ‘presumption of dependency’.<sup>104</sup> This means that A can claim B’s performance only if A has herself performed. As Serjeant Williams put it in his notes to *Pordage v Cole*:<sup>105</sup>

where the covenants, etc. are *dependent*, it is necessary for the plaintiff to aver and prove a performance of the covenants, etc. on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant.

This means that whether a party has the power to refuse performance depended on ‘whether the stipulation (which [the defendant] had broken) was a condition precedent or not’.<sup>106</sup> Although the failure of performance by the defendant might be a breach of contract, breach is not the reason for the claimant’s entitlement to refuse her own performance. As Lord Millett put it:<sup>107</sup>

the common law treated the innocent party as discharged from further performance, not because the other party had committed a breach of contract, but because he had failed to perform a condition precedent to the obligation of the innocent party.

This rationale can be developed to explain the power to terminate following breach. The claimant can terminate the contract because she did not agree to its enforce-

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<sup>102</sup> Baloch, *Unjust Enrichment and Contract* (n 45) 97–8.

<sup>103</sup> e.g. *Nichols v Raynbred* (1615) Hob 88, 80 ER 238. For a helpful discussion, see Baloch, *Unjust Enrichment and Contract* (n 45) 99–100.

<sup>104</sup> The history of this move has been unsettled somewhat by Baloch, *Unjust Enrichment and Contract* (n 45) 101–06.

<sup>105</sup> *Pordage v Cole* (1646) 1 Wms Saund 319, 320; 85 ER 449, 454.

<sup>106</sup> *The Hansa Nord* (n 38) 57 (Lord Denning MR).

<sup>107</sup> *Hurst v Bryk* [2002] 1 AC 185 (HL) 193 (Lord Millett).

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ment in the circumstances – that is, after all, what non-satisfaction of a condition precedent means.

### 7.4.2.4 Conclusion

I have here set out the two ways the parties' intention might justify common mistake, frustration and termination following breach: either positively or negatively. The next subsection argues that the positive intention theory is insufficient to explain the doctrines.

## 7.4.3 Evaluating the Two Rationales

### 7.4.3.1 Rejecting the Positive Rationale

There are two reasons to reject the positive intention rationale as an explanation of common mistake, frustration and termination following breach. One is that the model relies upon an implausible conception of intention. To see why, consider how precise the intention would have to be for the positive rationale to be correct. The parties would have to intend not only to create the contract, but also to have a positive (express or implied) intention to discharge the contract in the event of the frustrating event.<sup>108</sup> Such a construction of the facts is no longer thought to be plausible. For that reason, the positive rationale has been rejected in the case of both common mistake<sup>109</sup> and frustration.<sup>110</sup> There has been no such explicit rejection in

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<sup>108</sup> To continue with the manner of expression developed above, the intention would be:  $I((\phi) \vee (\neg\phi \text{ if } \neg C))$ .

<sup>109</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 (CA) [82] (Lord Phillips MR).

<sup>110</sup> *Davis Contractors* (n 14) 728 (Lord Radcliffe).

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the case of termination following breach. This may simply be a consequence of the fact that the positive rationale is extremely rarely invoked as a rationale.

Secondly, prevention of or immediate cancellation of contractual rights is a highly improbable construction for an agreement. As Lord Wright said in *Denny, Mott*:<sup>111</sup>

It is not possible ... to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.

This point has been made a number of times by judges.<sup>112</sup> In consequence, it has been said that the positive intention rationale 'does not represent the truth'.<sup>113</sup>

There is also one subsidiary reason to reject the rationale. The explanation faces a particular difficulty in explaining the operation of frustration. Discharge of the contractual rights is automatic. If frustration arose from a term of the contract, one might expect there to be inquiry into whether the parties had waived the particular term or were estopped from relying on it.<sup>114</sup> Robert Goff J rejected any such possibility in *BP v Hunt (No 2)*, on the basis that '[f]rustration is not a right; it is legal doctrine'.<sup>115</sup>

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<sup>111</sup> *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* (n 101) 275 (Lord Wright). See, further, *Patterson* (n 17) 946; *Salmond and Winfield* (n 93) 53.

<sup>112</sup> *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, 195 (Latham CJ); *Davis Contractors* (n 14) 720 (Lord Reid).

<sup>113</sup> *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 (CA) 238 (Lord Denning MR).

<sup>114</sup> *Bell v Lever Bros Ltd* (HL) (n 13) 225 (Lord Atkin).

<sup>115</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) 809 (Robert Goff J).

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### 7.4.3.2 Support for the Negative Rationale

There is support for the negative rationale in both the cases and the academic literature. A number of judges have explicitly endorsed this rationale.<sup>116</sup> Certain other formulations suggest a similar rationale. For instance, Lord Haldane in *FA Tamplin* said that in circumstances of frustration ‘the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation’.<sup>117</sup> This is because the event is treated ‘as being one about which no bargain at all was made.’<sup>118</sup>

Many academics have been attracted to this analysis.<sup>119</sup> For instance, Kull finds the best justification of the common mistake and frustration doctrines to be that enforcement of the contract would, in the circumstances, ‘be to enforce a contract different from the one [the parties] actually made.’<sup>120</sup> As we saw above, a number of courts have invoked the language, and it has also attracted those influenced by classical notions of contracting.<sup>121</sup> Others have endorsed a similar account in the realm of termination following breach. As Nolan puts it:<sup>122</sup>

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<sup>116</sup> See above, n 100–101.

<sup>117</sup> *F A Tamplin* (n 51) 406 (Viscount Haldane).

<sup>118</sup> *F A Tamplin* (n 51) 407 (Lord Haldane).

<sup>119</sup> A Kull, ‘Mistake, Frustration, and the Windfall Principle of Contract Remedies’ (1991) 43 *Hastings Law Journal* 1, 38–9; M De Gregorio, ‘Impossible Performance or Excused Performance? Common Mistake and Frustration after *Great Peace Shipping*’ (2005) 16 *King’s College Law Journal* 69; R Stevens, ‘Objectivity, Mistake and the Parol Evidence Rule’ in A Burrows and WE Peel (eds), *Contract Terms* (OUP 2007) 319, 339. *Quaere* L Smith, ‘Unjust Enrichment: Big or Small?’ in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 35, 43.

<sup>120</sup> Kull, ‘Mistake, Frustration, and the Windfall Principle of Contract Remedies’ (n 119) 39.

<sup>121</sup> *Baily v De Crespigny* (1868) LR 4 QB 180 (QB) 186 (Hannen J); *Horlock v Beal* (n 89) 406–07 (Viscount Haldane); *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 KB 632 (CA) 667 (Asquith LJ); *British Movietonews* (HL) (n 101) 185 (Viscount Simon LC).

<sup>122</sup> DP Nolan, ‘*Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)’ in

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a person is ... discharged from his contractual obligations only if to require continued performance would in effect be to hold him to an obligation into which he did not enter in the first place.

This rationale also explains why contractual rights are prevented or cancelled. Although a complete justification of contractual rights is far beyond the scope of this Chapter, a key rationale for the creation of contractual rights is the parties' intentions to create those rights. In a case of common mistake, frustration or termination following breach, although the parties do have sufficient intention to form a contract, that intention is – on a deeper level – flawed in the circumstances as they have turned out. That is, although the initial undertaking appeared to give a reason for the proposed course of action – i.e. to perform the obligations under the contract – in light of the change of circumstances it does not.

The greatest flaw of the positive rationale is, as we saw, that it requires an implausible conception of intention: the parties must intend not only to create the contract but also to discharge it if the frustrating event occurs. The content of the intention for the negative rationale is less than this and so is more acceptable. To demonstrate this, consider in detail the propositional content of each intention. If the doctrines were justified by a positive intention, the content would be: 'to create a contract; unless a frustrating event occurs, in which case to cancel the contract.' I will, in the next subsection, suggest that the intention can take one of two forms. Either there is a positive intention to create the contract conditionally upon the frustrating event in question; or, there is a positive intention to create the contract but which does not cover the events as they turn out. Both of these intentions can be rep-

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C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008) 295.

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resented as an intention ‘to create a contract, unless a frustrating event occurs.’<sup>123</sup> As there is less content to the intention, the negative rationale is not subject to the same criticisms of fictitiousness as the positive rationale.

### 7.4.4 The Negative Rationale and Failure of Condition

#### 7.4.4.1 Two Negative Rationales

There is – as Chapter 2 made clear – an ambiguity about such negative rationales.<sup>124</sup> A party might have no intention to be bound in the circumstances either because her initial intention to be bound was conditional *or* because her intention to be bound was premised upon a background assumption which turned out to be false. Failure of condition cases are classically conditional intention cases. If frustrating events cases were to be the *same thing* as failure of condition cases, they too would have to be conditional intention cases. However, although some cases might be analysed in this way, it seems incorrect to characterise all such cases in this manner.

#### 7.4.4.2 Conditional Intention Cases

Frustrating events cases might sometimes concern conditional intentions.<sup>125</sup> For instance, in *Krell v Henry* money was paid for the hire of a room.<sup>126</sup> The intention was for the room to be used to view the forthcoming Coronation, which was then cancelled. Here, the Coronation procession was so fundamental to the parties’ object

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<sup>123</sup> Recall that the content of a positive intention would be:  $I((\phi) \vee (\neg\phi \text{ if } \neg C))$ . The content of a negative intention would be:  $I(\text{if } C, \phi)$ .

<sup>124</sup> See, in particular, the distinctions at 2.4.2.2.

<sup>125</sup> The proper analysis of any individual case will, of course, be highly fact specific.

<sup>126</sup> *Krell v Henry* (n 18).

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that the parties' intentions can sensibly be characterised as conditional. That is, the parties only intended the contract to be created on condition that the Coronation took place (on that day). In such a case, both parties 'intend that the existence of the contract shall depend upon the truth of a particular assumption.'<sup>127</sup> For a case to be plausible, the event in question has to be something the parties might have conceived of as occurring. Otherwise it will clearly be a background assumption. So, even if *Krell* is not accepted, one can imagine a possible case: in the days preceding the cancellation, there were rumours of the King's ill health, and so it is quite plausible that agents formed intentions conditional upon his good health.

If this explanation is accepted for some cases, it is consistent with the negative rationale, and it also helps to explain two important features of frustrating events cases. It explains, first, why some theorists find the implied term analysis congenial in some cases: many are drawn to the view that the parties' intentions are important to the justification of why contracts cease to apply upon frustrating events. It explains, further, why failure of condition has been such an attractive rationale. Although it has not been formulated in these terms before, there is a simple elegance to the following claim: contractual rights can be created conditionally; when the condition fails, they may be cancelled. This formulation is simply failure of condition applied to the creation of contractual rights.

### 7.4.4.3 Background Assumption Cases

We should – a point I have laboured – distinguish between a condition and a background assumption.<sup>128</sup> The line between these concepts is, of course, very difficult

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<sup>127</sup> GC Cheshire, 'Mistake as Affecting Contractual Consent' (1944) 60 LQR 175, 176.

<sup>128</sup> See 2.4.2.2.

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to draw. Although it is sometimes appropriate to regard frustrating events cases as cases of conditional intentions, in some – perhaps most – cases it seems correct to say that the frustrating event is so far beyond the parties' contemplation that it is better understood as a case of a background assumption. This seems to be the best way to understand *Taylor v Caldwell*. There, the concert hall continuing to exist might have been a fact upon which the parties' intention depended, but not upon which it depended expressly or implicitly such as to make the conditional intention thesis plausible.<sup>129</sup> It seems more plausible to suppose that the parties simply assumed that the concert hall would continue to exist.

The negated background assumption rationale closely tracks the explanations given in the cases for the negative rationale. For instance, when Lord Haldane says that the event in these cases is treated 'as being one about which no bargain at all was made',<sup>130</sup> his Lordship seems to claim that the parties simply had *no* intention on these facts, rather than an intention to contract unless these facts arose (i.e. a conditional intention).

When we understand frustrating events cases in this way, the true difficulty of the failure of condition explanation of frustrating events cases becomes clear. It is not, as customarily claimed, that failure of condition can only be concerned with total failure of performance. It is, instead, that the rationale of the doctrines seems *at times* to differ. While failure of condition concerns itself with conditional intentions, frustrating events cases often seem to be concerned with *prima facie* intentions. Beyond this, there is little to distinguish the two situations. Therefore, the work of this thesis has not only revitalised the failure of condition explanation of these

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<sup>129</sup> *Taylor v Caldwell* (n 9).

<sup>130</sup> *F A Tamplin* (n 51) 407 (Lord Haldane).

cases, it has also clarified precisely where the distinction – if and when there is a meaningful distinction – lies.

### 7.5 Conclusion

This Chapter has re-examined an old theory, that common mistake, frustration and termination following breach are best understood as instances of the doctrine of failure of condition. It explained that the usual reason given for rejection of the explanation rests upon an incorrect conception of the nature of failure of condition. The challenge was then to see how good an explanation the theory is, in the light of this clarification. We saw that there are many similarities between failure of condition and the frustrating events cases. The three contractual doctrines were shown to have a conceptual unity with failure of condition, to inquire into the same facts, and to have the same normative rationale in many cases. However, we also saw what sets the doctrines apart.

These remarks might suggest that there is no perfect analogy between classical failure of condition cases and frustrating events cases. But this would be too swift a conclusion. Recall, first, that although frustrating events cases appeared to blend both conditional intentions and background assumptions, so, too, do standard cases of failure of condition.<sup>131</sup> The categories are not perfectly distinguished in the cases.

The fact that the categories are blended together in the law leads to the second point. There may well be sufficient parallels between these cases to justify doctrinal unity – that is, to justify their being considered as part of the same doctrinal structure. This Chapter has illustrated a number of conceptual similarities between the

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<sup>131</sup> I explained this point at 2.4.2.4.

two. It has also demonstrated that in each case the test of liability is broadly the same. In terms of their justification, the role of intention is always ‘negative’: there is insufficient voluntariness for the parties to be bound in the situations that have materialised. The key distinction is between those cases where an intention is conditional and those where it is premised upon a background assumption.

As I have said, that distinction appears to cut across the doctrine of failure of condition. We might respond to this in one of two ways. We might try to separate out conditional intention cases from background assumption cases. But, if we did this, we would have to do it for *both* failure of condition *and* frustrating events cases. So, on that approach, the two categories – failure of condition and frustrating events – would be united, albeit within two separate categories. Or, we might accept the practical overlap between these cases and – for doctrinal analysis – categorise conditional intention cases with background assumption cases. This, too, would unite failure of condition and frustrating events cases. On any analysis, therefore, frustrating events cases and failure of condition cannot be cleanly separated. This is an important insight. The failure of condition explanation of frustrating events cases was supposed to be defunct, but the work done in this thesis suggests that in fact it is impossible to separate these categories.

## 8 Conclusion

### 8.1 A Summary of the Thesis

This thesis has been an extended inquiry into the doctrine which is customarily known as ‘failure of consideration’, but which has here been called ‘failure of condition’. The doctrine has been much analysed, but the thesis undertakes the first in-depth inquiry into its conceptual and normative foundations. Building on this work, the thesis then revisited an old theory of common mistake, frustration and termination following breach, that these doctrines are simply instances of failure of condition.

The thesis began with a basic statement of the doctrine and the claim that it should be understood in terms of conditional transfers. A transfer can be made conditionally; and on failure of the condition, the transferor can reclaim the value of the transfer. Although that analysis is not new, the thesis placed an emphasis on the structure which is somewhat novel. This core insight prompted an inquiry into the conceptual and normative foundations of the doctrine. A number of distinctions were made concerning the conceptual foundations of the doctrine. These primarily concerned the nature of a *conditional relationship* and the nature of a *conditional intention*.

The conceptual foundations do not give much, if any, indication of the value of the doctrine. Chapters 3–5 therefore inquired into the normative foundations of failure of condition. Chapter 3 set out the questions that a theory of failure of condition should answer. There are, at core, two questions. First, why are *these* parties – this claimant and this defendant – brought together by the law such that one can make a claim against the other? Secondly, why does the law give the particular response (i.e. restitution) that it does? Chapter 4 detailed the various answers in the literature given to these questions, which broadly endorses a view of the doctrine centred on the claimant’s conditional intentions. Chapter 4 also identified a number of difficulties with the existing answers. This set up the task of Chapter 5, which was to find answers to those questions. Although the arguments of Chapter 5 are complex, the core claim was that the claimant is endowed with a claim because her intention to make the transfer was qualified; the defendant is responsible to the claimant because the defendant knew that the claimant made the transfer subject to that condition. The response of restitution is justified because it ensures that the claimant is not held to a transfer she did not intend to carry out in the circumstances as they have materialised. This (again, largely orthodox) analysis was defended against the suggestion that the law should aim to cure the failure of condition.

Chapters 6 and 7 turned to common mistake, frustration and termination following breach. These doctrines are widely understood to be part of the law of contract. In light of the earlier clarifications of the thesis, the chapters revisited an old argument, that the doctrines are justified by failure of condition. The doctrines were introduced in Chapter 6. Chapter 7 did two things. First, it demonstrated that the orthodox reasons for rejecting the failure of condition explanation of these cases are flawed: there is no reason of *scope* to reject failure of condition. Secondly, it

showed quite how similar failure of condition is – doctrinally, conceptually and normatively – to common mistake, frustration and termination following breach. The one distinction of importance was that although orthodox failure of condition cases concern failures of implicit conditions of an intentional transfer, frustrating events cases often appear to concern background assumptions to intentions. These reflections suggested that the old claim – that the doctrines are explained by failure of condition – might be the best explanation of the doctrines which we have.

## 8.2 Implications of the Thesis

### 8.2.1 The Classification Debates

In this thesis I have strained to avoid taking a stand on what is perhaps the most controversial issue in this context, the classification of liability.<sup>1</sup> This agnosticism was prompted by two distinct thoughts. First, that the classification of liability is a substantial topic, the discussion of which would have required more space than was available. Secondly, that we cannot draw conclusions on the classification of liability without paying close attention to the conceptual and normative foundations of individual doctrines. As the second of these points implies, this agnosticism does not mean that the thesis has no implications for the classification of liability.

Quite what these implications are will depend upon the classificatory commitments of the individual theorist. However, any classificatory approach which seeks to unite areas of law according to the reasons for the law's intervention should consider bringing together – as no current theorist appears to – common mistake,

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<sup>1</sup> For more discussion, see 3.4.1.

frustration and termination following breach with the orthodox doctrine of failure of condition. Whether a theorist is compelled to do this depends upon a number of further commitments, especially the theorist's view of the arguments detailed at 7.5. These have the potential to unseat radically a number of current orthodoxies. In particular, although these doctrines are widely perceived to form part of the law of contract, for many theorists the reclassification would put the doctrines within the law of unjust enrichment. Some might try to resist this reclassification by arguing that failure of condition should be placed in the law of contract. As we saw above, there are grave difficulties with such a move.<sup>2</sup>

Assuming that – as the orthodox categorisation holds – failure of condition is best understood as part of the law of unjust enrichment, there are important implications for that category of law. As we saw above,<sup>3</sup> the ‘near universally held view’<sup>4</sup> is that restitution not simply the most common response but the *only* response to an unjust enrichment.<sup>5</sup> A number of scholars have argued that the law of unjust enrichment can also *prevent* an unjust enrichment from arising.<sup>6</sup> These scholars will find the claims of this thesis congenial. It has been argued – albeit on slightly unorthodox grounds – that we have good reason to align common mistake with frustration and termination following breach.<sup>7</sup> This was despite the fact that common mistake

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<sup>2</sup> See 4.4.2.1.

<sup>3</sup> See 4.3.

<sup>4</sup> R Williams, ‘Preventing Unjust Enrichment’ [2000] RLR 492, 513.

<sup>5</sup> e.g. P Birks, ‘Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment’ (1999) 23 Melbourne University Law Review 1, 8; M McInnes, ‘The Measure of Restitution’ (2002) 52 University of Toronto Law Journal 163, 181 A Burrows, *The Law of Restitution* (3rd, OUP 2011) 9.

<sup>6</sup> See, for example, K Barker and L Smith, ‘Unjust Enrichment’ in D Hayton (ed), *Law's Future(s)* (Hart 2000) 414–16; Williams, ‘Preventing Unjust Enrichment’ (n 4) 512–14; C Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) paras 3.10–3.12.

<sup>7</sup> See 6.4.2.2 and 7.3.1.2.

*prevents* the creation of an enrichment and the other two doctrines *cancel* valid enrichments. This – particularly if the analogy with failure of condition is accepted – provides grist for the mill of the ‘prevention’ theorists.

### 8.2.2 The Scope of Failure of Condition

One of the controversial questions within orthodox discussions of failure of condition is whether the doctrine can justify restitution of the value of non-money benefits. The doctrine has been applied to such claims.<sup>8</sup> This means that the scope of failure of condition but in this respect, seems to no longer be controversial. A more contentious topic is whether the doctrine can justify the restitution of legal rights.<sup>9</sup> I have not, in this thesis, made any claims about that debate. However, if I am correct to closely align common mistake, frustration and termination following breach as instances of failure of condition, the doctrine of failure of condition is much broader than is generally appreciated. Not only does it justify the restitution of value transferred, it also is able to prevent the creation of and cancel created contractual rights.

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<sup>8</sup> Two recent examples are *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 and *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351.

<sup>9</sup> See R Chambers, ‘Two Kinds of Enrichment’ in R Chambers, C Mitchell and P Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 273–75.

## 8.3 Unanswered Questions

### 8.3.1 The Mistake/ Failure of Condition Anomaly

I suggested above that there is a *prima facie* anomaly in the law's treatment of causative mistakes and failures of condition.<sup>10</sup> The anomaly is that:<sup>11</sup>

a claim based on a failure of [condition] cannot be totally [claimant]-sided. A mistake claim can be based on a mistake of which the defendant had no knowledge, but a “secret [condition]” will not generate a claim when it fails.

This prompted a discussion of the explanations for the objectivity of failure of condition that have been offered by other writers, which were rejected in favour of my own suggested explanation.<sup>12</sup> It was not claimed that this *resolved* the anomaly, but the anomaly is *partially* resolved by my institutional argument for the objectivity of the conditions. My claim was that the particular role of failure of condition in the contractual context necessitated an objectivity to the construction of conditions. Unilateral mistake – which cannot, it is generally conceded, contradict any contractual regime – does not face this institutional difficulty.

Even if all that is true, some doubt must remain. Can the institutional answer explain the whole difference between the two? Perhaps not. However, *if* not, my analysis suggests that the difficulty is not for a theorist of failure of condition. As we saw at paragraph 5.2.4, part of the argument in favour of the objectivity of the

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<sup>10</sup> See 4.4.

<sup>11</sup> L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2143 fn 115.

<sup>12</sup> See 4.4.2 and 5.2.

### 8.3. UNANSWERED QUESTIONS

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conditions is to help justify the defendant's responsibility. The orthodox analysis of causative mistakes cannot, due to its unilaterality, avail itself of such an argument. Our response to this should, I suggest, be to inquire more closely into the justification of restitution for causative mistakes. That is, the anomaly has been inverted: the question is not 'why is failure of condition objective?' Instead, the question is: 'why is mistake subjective?'

A related strand of the mistake jurisprudence suggests that inverting the anomaly in this way is the right thing to do. In *Pitt v Holt* the Supreme Court examined the test of equitable rescission for mistake.<sup>13</sup> A number of aspects of the case are difficult. However, one point does seem clear. The Supreme Court has rejected 'but for' mistake as the test. Lord Walker formulated the test in these terms:<sup>14</sup>

The court ... must consider in the round the existence of a distinct mistake ..., its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

Interestingly, in justifying this more narrow test, Lord Walker said that:<sup>15</sup>

the fact that a purely unilateral mistake may be sufficient to found relief is arguably a good reason for the court to apply a more stringent test as to the seriousness of the mistake [than a mere 'but for' test].

This suggests some judicial dissatisfaction with the unilateral, subjective mistake test. This, combined with the reflections of this thesis, suggest the need for an urgent re-examination of the current orthodoxy concerning unilateral mistake.

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<sup>13</sup> *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

<sup>14</sup> *Pitt v Holt* (n 13) [128] (Lord Walker).

<sup>15</sup> *Pitt v Holt* (n 13) [114] (Lord Walker).

### 8.3.2 Free Acceptance and Failure of Condition

One point of controversy amongst academic theorists is the status of the ‘unjust factor’ known as free acceptance.<sup>16</sup> A clear statement of what the principle is supposed to stand for – its doctrinal content and normative justification – is hard to find. That is because free acceptance has been a chiefly academic concept, promoted by earlier editions of Goff and Jones’ *The Law of Restitution* and by Birks. However, there are traces of the idea in older cases. The clearest statement is in *Leigh v Dickeson*. There, Brett LJ put the idea in these terms:<sup>17</sup>

Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable.

Whether free acceptance should be accepted by courts as a principle of liability remains a matter of controversy.<sup>18</sup> However, it remains to be seen whether there is any sensible role for free acceptance when failure of condition is properly understood. It may be, as Burrows has previously argued, that free acceptance is swal-

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<sup>16</sup> Free acceptance is also – indeed, primarily – used to establish enrichment of the defendant. However, we are not concerned with that aspect of it here. As Goff and Jones say, ‘[t]he principles of free acceptance applicable to enrichment and to free acceptance as an unjust factor are not necessarily interchangeable’: C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) para 17.02.

<sup>17</sup> *Leigh v Dickeson* (1884) 15 QBD 60 (CA) 64–65 (Brett LJ).

<sup>18</sup> The principle received sustained and influential criticism in A Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 LQR 576. However, courts have invoked the principle of late: *Becerra v Close Brothers* (QBD, 25th June 1999); *R (on the application of Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd’s Rep 418; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 WLR 1580; *Benedetti v Sawiris* [2009] EWHC 1330 (Ch) [572]–[575].

lowed up by the principles of failure of condition.<sup>19</sup> The argument of this thesis strengthens Burrows' claim. The supposedly distinct aspect of free acceptance was its concentration upon the defendant's intention.<sup>20</sup> The problem with free acceptance was always that there was apparently no requirement that the claimant should have qualified her intention, and this made it hard to understand why the law should intervene. As it has been explained in this thesis, failure of condition has the potential to explain part of what is puzzling about free acceptance – its concentration upon the defendant. When failure of condition is shown to be conceptually bilateral, i.e. when it is shown to embrace both the claimant *and* the defendant in its justificatory structure, it becomes even less likely that there is a separate role for free acceptance to play in justifying restitution of enrichments.

## 8.4 Conclusion

These remarks demonstrate that my investigations have implications for debates beyond the scope of the thesis. However, the implications of the thesis are not the justification of the thesis. The work must stand and fall on its own merits, upon the arguments of the previous seven Chapters.

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<sup>19</sup> See Burrows, 'Free Acceptance and the Law of Restitution' (n 18).

<sup>20</sup> See, for an explanation, Mitchell, Mitchell and Watterson (n 16) para 17.03.

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