THE GOOD CONSIDERATION RULE: AN ENRICHMENT EXPLANATION

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ABSTRACT

This thesis investigates what the correct justification in principle for the good consideration rule is. It concludes that the answer to that enquiry lies within the elements that complete a cause of action in unjust enrichment. On the best interpretation, the good consideration rule is an enrichment qualification. The defendant's prima facie enrichment through the receipt of a benefit is balanced off by the discharge of an obligation owed to the defendant. In net terms therefore, the defendant is not enriched. However, this reasoning is conditional on the acceptance of two prior premises.

First, the good consideration rule and the legal obligation qualification are distinct restrictions on claims in unjust enrichment. Two features in particular distinguish them: (**a**) the operation of a legal obligation *between the claimant and the defendant*; (**b**) the fact that the payment was *intended* to discharge a debt owed to the defendant. This thesis concerns the good consideration rule alone.

Secondly, in evaluating the defendant's enrichment, conditionally related disenrichments must be accounted for (the 'net benefit approach'). Thus, when the defendant receives a benefit on the condition shared between the parties that the defendant will in turn suffer a disenrichment, the defendant's true enrichment is the difference between those values.

At first blush, there are at least three major objections to the enrichment thesis — the decision of the High Court of Australia in *Roxborough*, the House of Lords' decision in *Deutsche Morgan* and the law on restitution of mistaken payments made

to discharge unenforceable debts. On closer examination however, all three can be overcome.

Finally, the enrichment thesis fares better than its rival explanations in accounting for the features of the good consideration rule. The ensuing doctrinal consequences are also largely in line with the prevalent judicial and academic thinking on the good consideration rule.

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INTRODUCTION

> The unqualified strict liability to make restitution of unjust enrichment, as illustrated in the mid-nineteenth century by *Kelly v Solari*, was not rationally defensible and had to be hedged about with restrictions designed to make its incidence more rare. Lord Goff saw that the proper course was, not to abandon the fierce strict liability in favour of an approach based on fault, but to qualify it by developing defences.[1]

Goff J's (as he then was) judgment in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*[2] ('*Barclays Bank*') is an exemplar of this philosophy. That decision used the 'causative mistake' approach to rescue restitution of mistaken enrichments from the shackles of the much-maligned 'supposed liability' rule. The consequent widening of the unjust enrichment cause of action was however, confined by three tightly defined restrictions. Perhaps the most controversial among them is the 'good consideration rule'. There is no greater testimony to the complexity of the problem that this qualification attempted to solve, than the fact that Lord Goff himself did not find its resolution an easy task. In the second edition of *Goff and Jones*, he had concluded that, on the facts in *Barclays Bank*, the claimant was not entitled to restitution.[3] However, a confident Evans-Lombe QC as counsel for the defendant in *Barclays Bank* cited this to Goff J, only to find that, having reconsidered this point he had changed his mind.[4]

The good consideration rule is relatively easy to state. In Goff J's words, a claim for restitution will fail if:

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[1] Peter Birks, 'The Role of Fault in the Law of Unjust Enrichment' in William Swadling & Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 175 (footnotes omitted).

[2] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

[3] Robert Goff & Gareth Jones, *The Law of Restitution* (2nd edn, Sweet & Maxwell 1978) 88.

[4] Gareth Jones, 'Lord Goff's Contribution to the Law of Restitution' in William Swadling & Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 208.

> [T]he payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt.[5]

However, to derive from this rule, the principle justifying it, is more difficult. This thesis addresses that question: what is the justification in principle for the good consideration rule? It suggests that the answer lies in the absence of the defendant's enrichment. As the consequence of the defendant's disenrichment — usually (though not necessarily) through the discharge of a debt — that is juridically linked to the receipt of the benefit, the defendant is not enriched in net terms. That is the central claim this thesis makes.

Chapter I sets the stage by answering a fundamental question: what is the good consideration rule? It suggests that the good consideration rule must be distinguished from a conceptually separate restriction on unjust enrichment — the legal obligation qualification. This thesis concerns the good consideration rule alone. Resolution of the latter principle is a project for another day.

Chapter II advances the enrichment explanation, the central claim of this thesis. That argument is developed in two parts. The first suggests that 'net benefit approach' — the idea that conditionally related disenrichments of the defendant are relevant in computing the defendant's enrichment — is well founded in English law. The second part then uses this methodology to explain the good consideration rule.

Chapter III responds to three objections to the enrichment thesis. The first arises from the decision of the High Court of Australia in *Roxborough v Rothmans of*

[5] *Barclays Bank* (n 2) 695 (Goff J).

Pall Mall[6] ('*Roxborough*'), the second, from the House of Lords' decision in *Deutsche Morgan Grenfell Group v IRC*[7] ('*DMG*') and the final hurdle, from cases that deny restitution of benefits conferred in pursuance of unenforceable obligations.

Chapter IV rejects some of the commonly advanced alternative explanations for the good consideration rule and lays out the potential consequences of accepting the enrichment thesis. These consequences are, it is suggested, largely in line with the prevalent judicial and academic thinking on the application of the good consideration rule.

Finally, there are two significant issues relating to the good consideration rule that it has not been possible to deal with in this thesis — first, the relationship between the good consideration rule and the bona fide purchase defence and secondly, the conditions (particularly, the requirement of intention) for the discharge of debts.

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

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

CHAPTER I

WHAT IS THE GOOD CONSIDERATION RULE?

This chapter is devoted to understanding the nature of the good consideration rule as a restriction on claims in unjust enrichment. It seeks to lay out, at least in broad terms, the conceptual boundaries of that rule. The central argument it advances is this: the qualification that is commonly referred to in cases and academic commentary as the good consideration rule in fact subsumes two separate restrictions. I will call one of them, the 'good consideration rule' and the other, the 'legal obligation qualification'. Separating out these distinct qualifications is an important first step towards understanding the scope and justification for the good consideration rule.

Consider two illustrations.

> *Example 1*: X owed a debt to C and D. X conveyed Blackacre to C in discharge of its debt to C. However, Blackacre was subject to a mortgage securing X's debt to D. X and C agreed that C should pay off X's debt to D. After clearing that debt, C realised that X was not entitled to Blackacre. C's claim against D for restitution failed.[8]
>
> *Example 2*: C owed £100 to both D and X. C intended to pay X but mistakenly paid D. C's claim for restitution from D failed.[9]

It has almost consistently been assumed that in both cases, C's claim is precluded by the same rule.[10] This has been differently termed the 'good

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

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

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

consideration rule',[11] the defence of 'discharge for value'[12] and the 'bona fide payee' exception.[13] This chapter will argue that C's claims in Examples 1 and 2 are denied by two distinct rules — the good consideration rule and the legal obligation qualification, respectively.

A comparison of Lord Sterndale's speech in *Steam Saw Mills*[14] and Goff J's decision in *Barclays Bank* may provide a useful starting point. In the former case, the claimant held a license from the Russian Government to import timber. As a condition of the license, the claimant was required to deposit the purchase price with the defendant. The dispute concerned payments made by the claimant on November 9, 1917. By then, the Russian government had been overthrown by revolution. The claimant argued that had it been aware of this fact, it would not have made those payments. Lord Sterndale rejected the claim for restitution. He reasoned that 'if a man pays money under a mistake of fact, there being a liability to pay it, if the fact of which he was ignorant does not discharge him from that liability, he cannot recover it back'.[15] Consider now, *Barclays Bank*. There, the claimant bank, in making the disputed payment had mistakenly overlooked a countermand order by its customer. The bank was granted restitution. That was because the payment was unauthorised and consequently, incapable of discharging the defendant's debt. Had this not been the case, Goff J would have rejected the claim. He held that the claim would fail if:

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[11] Charles Mitchell, Paul Mitchell & Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) paras 29-15–29-22; Graham Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006) 171ff.

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

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

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

[15] ibid 250. See also, *DMG* (n 7) [85] (Lord Scott); *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [177].

> the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt.[16]

In contrast to the formulation in *Steam Saw Mills*, there are three distinctive features that are noteworthy about this passage. First, it suggests that the payment must have been made 'to discharge' the debt. Prima facie, an unintentional payment is unlikely to meet this requirement. Secondly, according to Goff J, this rule was derived from *Aiken v Short*.[17] The facts of that case are identical to Example 1.[18] Reference to a decision arising from such a specialised factual matrix suggests that Goff J was not referring to a defence as general as the one formulated by Lord Sterndale.[19] Finally, Goff J further qualified the defence by reference to the payor's state of mind. The defence may fail, he said, 'if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith'.[20]

None of these restrictions appear to have been considered by Lord Sterndale. None of them are relevant to Example 2 either. Consider for example, the requirement that the payment must have been intended to discharge the debt. Example 2 fails to meet this standard. C's payment was intended to discharge a debt owed to X, but what it in fact discharged was a debt owed to D. Surely, it is insufficient that the payment was intended to discharge *some* debt.

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[16] *Barclays Bank* (n 2) 695 (Goff J).

[17] *Aiken* (n 8).

[18] See text to n 8.

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

[20] *Barclays Bank* (n 2) 695 (Goff J).

Therefore, it is difficult to disagree with Burrows when he suggests that the 'factual distinction [between Examples 1 and 2] appears to mark an important conceptual divide'.[21] This chapter substantiates that claim. It suggests that the distinction between the good consideration rule and the legal obligation qualification is justified by two features: (**A**) In Example 2 (unlike Example 1) the legal obligation operated *between the claimant and the defendant*; (**B**) In Example 1 (unlike Example 2) the payment was *intended* to discharge the debt.

A. LEGAL OBLIGATION BETWEEN THE CLAIMANT AND DEFENDANT

One of the central features that distinguishes Example 1 from Example 2 is the operation of a legal obligation between the claimant and the defendant. In Example 1, unlike Example 2, the legal obligation operated between a third party (X) and the defendant. The defendant's legal entitlement against the claimant has important consequences for the law of unjust enrichment.[22] An example.

> *Example 3*: C owes £100 to D. C does not intend to pay D, but mistakenly does so. D accepts the payment in discharge of the debt. C seeks restitution from D. C's claim will fail.[23]

Broadly, there are two views on the implications that C's debt to D has for C's claim for restitution. On one view, the legal obligation is a complete bar. To Stevens[24] and Virgo,[25] that is because absence of basis is a necessary condition for restitution. Friedmann however, explains this result on the basis that, permitting restitution under

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[21] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 168.

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

[23] *Steam Saw Mills* (n 14).

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

[25] Virgo, 'Demolishing the Pyramid' (n 10) 488ff.

these circumstances will 'nullify the obligation'.[26] Burrows advocates a second, more flexible approach. To him, this issue raises questions regarding the interplay between unjust factors, and the defendant's legal entitlement against the claimant.[27] Therefore, the question is whether 'the legal entitlement of D to the payment from C is outweighed by the injustice constituted by D receiving a payment that C mistakenly did not mean to make'.[28]

It is unnecessary to take a position on this debate presently. It suffices to note that neither of these accounts can explain the denial of restitution in cases where the legal obligation is not owed by the claimant. Take Friedmann's explanation first. It is difficult to see how reversing a transfer between C and D has the effect of 'nullifying' an obligation owed by X to D. In fact, Friedmann recognises this difficulty:

> The common explanation given for the denial of recovery from the creditor is that, since he was entitled to that which he had received, his enrichment is not 'without legal ground'… The main weakness of this argument is that the creditor, though he only received that which was due to him, had not received it from the debtor but from a third person who acted under mistake and was not liable to him.[29]

Burrows is equally clear on this point. He has repeatedly stressed that the obligation must be owed by the claimant to the defendant.[30] In fact, in a previous edition of his commentary, he had categorically suggested that the defendant's legal entitlement 'does not appear to provide a sound justification' for denying restitution

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[26] Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations' (n 22) 248.

[27] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 167.

[28] ibid 177.

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

[30] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 168; Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Andrew Burrows & Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 43–44; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 88–89.

'where, as on the facts of *Lloyds Bank*, the payee has no legal entitlement *against the payor* to be paid'.[31] This is unsurprising since it is inconceivable how, in Burrows' model, an unjust factor that operates between C and D can be weighed against a legal entitlement owed by X to D. In sum, while Example 2 may be readily explained on the basis of C's legal obligation to D, the denial of restitution in Example 1 requires a different justification.

I will now consider an important challenge to the conceptual division that this chapter seeks to draw — Virgo's suggestion that Examples 1 and 2 are both explicable on the 'presence of basis' bar. In his view, 'where there is a valid basis for the receipt of the enrichment by the defendant, this should bar the claim to restitution'.[32] Notably, he extends the presence of basis bar even to Example 1. In that case, it is the discharge of D's debt that constitutes the basis for C's payment.[33] This argument must however, be read along with Virgo's conception of 'basis':

> The bar to restitution should apply where the receipt of the enrichment by the defendant can be considered to be legally effective in some way, in the sense that the transfer to the defendant has a legal consequence, as will occur for example where the transfer has discharged an existing obligation.[34]

With respect, Virgo's extension of the presence of basis bar to Example 1 is incorrect. The point of departure in establishing this is the meaning of 'basis'. There are at least two ways in which that idea can be understood — one, subjective and the

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

[32] Virgo, 'Demolishing the Pyramid' (n 10) 488.

[33] ibid 494–495.

[34] ibid 489 (emphasis added).

other, objective. The subjective understanding links 'basis' to the claimant's purpose for making the transfer.[35] There is a failure of basis whenever the claimant's purpose fails. On the objective view however, the claimant's purpose is irrelevant. 'Basis' consists in the legal relationship between the parties. [36] In Example 3 for instance, C's indebtedness to D constitutes the basis.[37] It is unnecessary to resolve the conflict between these two competing approaches here. It suffices to note that neither conception can bridge the conceptual gap between Examples 1 and 2.

Consider the subjective notion first. Example 1 is explicable on that view. The purpose of C's transfer was to discharge X's debt to D. C's payment did achieve that purpose. Consequently, there is no failure of basis. However, this view runs into difficulties in explaining Example 2. The purpose of C's payment in that case was to discharge a *debt owed to X*. The transfer failed to achieve that purpose. On the subjective understanding of basis therefore, restitution must be available in Example 2. The subjective notion thus fails to provide a common explanation for Examples 1 and 2. Notably, Virgo rejects the subjective understanding of basis. In his view, 'basis' must be understood objectively.[38] Let us consider that argument now. The objective notion provides a ready explanation for Example 2. The basis in that case is the legal obligation between C and D. However, it cannot account for Example 1. That is because a legal obligation can constitute a valid 'basis' only if it operates between the claimant and the defendant. An illustration.

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

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

[37] Scott (n 31) 98.

[38] Virgo, 'Demolishing the Pyramid' (n 10) 489.

> *Example 4:* C, D1 and D2 were sureties for the performance of an obligation owed by X to Y. X defaulted. Y obtained judgment against C for the whole amount. C has a valid claim against D1 and D2 for contribution.[39]

C's claim against D1 and D2 is based on unjust enrichment.[40] C's payment was made in pursuance of a valid basis — the judgment. Why does this not preclude C's claim? The answer is that the basis (i.e. the judgment) operated between C and Y, and not between C on the one hand and D1 and D2 on the other.[41] As Smith argues:

> If the guarantor wanted to recover from the creditor, he would have to impugn the obligation in the guarantee in some way. But he does not have to do that to recover from the primary debtor. We might well be tempted to say that an obligation owed to someone other than the person enriched is not a juristic reason.[42]

Cases on recoupment reaffirm this conclusion.[43] Faced with this difficulty, Virgo admits that a legal basis is effective only if it operates between the claimant and the defendant:

> [I]f the claimant can establish that the liability to the third party was ultimately borne by the defendant, a claim for restitution against the defendant will not be barred by the provision of basis, since, as between the claimant and the defendant, no legal basis exists for the payment.[44]

Why then does the 'presence of basis' bar operate in Example 1? The only difference between Examples 1 and 4 is that in the former, the basis operates between a third party and the defendant whereas in the latter, it operates between a third party

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

[40] Burrows, *The Law of Restitution* (n 30) 455–460.

[41] Birks, *Unjust Enrichment* (n 35) 159. See also, Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations' (n 22) 258.

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

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

[44] Virgo, 'Demolishing the Pyramid' (n 10) 496.

and the claimant. On principle, it is difficult to see why they must be treated differently.

It may be suggested that Examples 1 and 4 can be reconciled by understanding 'basis' as the defendant's entitlement. On that view, there is a basis if the defendant has a valid right to receive the payment; it is irrelevant who owed that obligation. However, this contention seems unacceptable in the light of the judicial trend. Consider for example, *Durrant.*[45] There, the claimant was seeking restitution of overpaid tithe charges. The overpayment resulted because, in addition to land that belonged to the claimant, the collection books recorded against his name, a piece of land whose title vested with a third party. Indisputably, tithe charges in respect of that property were owed to the defendant. Furthermore, the claimant's payment was also identifiable as tithe charges in respect of that land. However, the claim was upheld.[46] This is inexplicable if the defendant's right to receive the payment alone constitutes a basis. The decision in *Baylis*[47] reaffirms this result. There, the claimants mistakenly continued to pay tithe charges to the defendant despite the expiry of their leaseholds. Here again, the defendant had a valid right to receive the payments, albeit from a third party. However, that did not preclude restitution.

In sum, the 'legal basis' analysis fails to provide a straightforward answer to Example 1. The strongest evidence of this may be found in civilian jurisdictions that adopt the 'absence of basis' approach. If Example 1 were readily explicable on that methodology, one would expect that these problems would be susceptible to

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

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

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

straightforward solutions in those jurisdictions. However, this is far from the truth. In Germany, for example, the objective conception of basis has failed to provide a clear answer to three-party cases.[48] In fact, the Bundesgerichtshof has found these problems so complex that it has had to resign itself to the conclusion that it is difficult to lay down hard and fast rules in this area.[49] This suggests that cases such as Example 1 are not answerable on the objective conception of 'basis'. Their solution lies elsewhere.

Another challenge to the conceptual division that this chapter seeks to draw arises from Lord Hope's dictum in *Kleinwort Benson*.[50] He said that 'the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him'.[51] This may be read as suggesting that it is irrelevant whether the sum was owed by the claimant or by a third party. On closer reading however, it appears that he was referring to an enrichment qualification. He went on to say:

> As for the concept of enrichment, a person is enriched when he receives a payment which the payer was not bound by any obligation to make to him…. The common law accepts that the payee is enriched where the sum was not due to be paid to him, but it requires the payer to show that this was unjust.[52]

Thus, according to Lord Hope, a defendant who merely receives what was due to her is not enriched. Interestingly, this is closely aligned with the enrichment thesis that Chapter 2 of this thesis advances. The validity of that suggestion is however

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

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

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

[51] ibid 408 (Lord Hope).

[52] ibid 408–409 (Lord Hope) (emphasis added).

contingent on a second element — the payor's intention to discharge the debt. It is to that requirement that I now turn.

B. INTENTION TO DISCHARGE THE DEBT

This section lays out the second conceptual basis for separating the good consideration rule and the legal obligation qualification — the requirement that, the good consideration rule operates only if the claimant's payment was intended to discharge the debt. Goff J's insistence in *Barclays Bank* that the payment must have been made 'to discharge'[53] the debt supports this view. Consider an example.

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

C's payment was not intended to discharge the debts owed to D1 and D2. This led to a marked split of views in the New South Wales Court of Appeal in *Hills Industries*.[54] The question was whether C's payment attracted the good consideration rule. Allsop P and Meagher JA reached opposite conclusions. Allsop P admitted that 'the expression of the matter in proposition (2)(b) in *Barclays Bank* appears to require the intention of the payer to pay off a debt'.[55] In the end however, he preferred to rely on US cases that espoused the contrary view. Meagher JA on the other hand, refused to apply the good consideration rule outside of the confines of its formulation in *Barclays Bank.* So interpreted, the good consideration rule was inapplicable to these

[53] *Barclays Bank* (n 2) 695.

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

[55] ibid [113].

facts.[56] On appeal, the High Court of Australia preferred the latter view. It concluded that the good consideration rule has no application to these facts since '[C's] payments were not made to discharge [X's companies'] debts to [D1] and [D2]'.[57]

Interestingly, as early as in 1926, the House of Lords had considered a similar factual situation in *RE Jones.*[58] There, a fraudster owed the defendant company 5000l. Unable to satisfy this debt, he induced the claimant to make that payment. The claimant paid, believing that it was making a deposit for the purchase of motorcars. The defendant however, accepted the payment in discharge of the fraudster's debt. When the fraud was discovered, the claimant sought restitution of the deposit. The House of Lords upheld this claim. Why did the good consideration rule not preclude restitution in this case? The answer lies in the fact that the payment was not intended to discharge the defendant's debt.[59] In fact, the claimant was entirely unaware of the fraudster's debt.

In both these cases, the payor's absence of intention to discharge the debt resulted from a mistake as to the existence of the debt. The same result follows even when the payor's mistake relates to the identity of the debtor.[60] *Durrant*[61] confirms this.[62] There, the question was whether the claimant can recover tithe charges it paid to the defendant under the mistaken impression that they were due from the claimant

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

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

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

[59] Daniel Friedmann, 'Payment of Another's Debt' (1983) 99 LQR 534, 551; Friedmann & Cohen (n 29) 63; Meier, 'Mistaken Payments in Three-Party Situations' (n 48) 579.

[60] Scottish Law Commission (n 46) para 2.163.

[61] *Durrant* (n 45).

[62] For the facts, see text to n 45.

whereas in fact, that liability fell on a third party. This question was answered in the negative. How can this result be reconciled with the good consideration rule? The answer must similarly be that the claimant's payment did not intend to discharge the third party's liability.[63]

The same conclusion follows even when the absence of the payor's intention resulted from a mistake as to the identity of the payee. The Scottish decision in *Bank of New York*[64] illustrates this. There, the claimant bank mistakenly transferred funds to the defendant's account. However, coincidentally, its customer was in fact indebted to the defendant for a lesser sum. The Court rejected the claimant's plea for summary judgment. However, in doing so, Lord Caplan distinguished between a 'mistake as to the identity of the due recipients' and 'a mistake as to the amount which ought to have been sent'.[65] Restitution is not available in the latter case except as to the overpayment. In the former case however, 'the debt which the [claimant] intended to discharge was not due in law to [the defendant] and the payment can be recovered from [the defendant]'.[66]

A brief overview of the Roman law equivalent of the good consideration rule — 'the suum recepit' rule — will reinforce the significance of the payor's intention. That rule, as formulated in the Justinian's Digest (D.12.6.44) translates to this: 'there is no recovery from a person who receives what is owed to him even although it is paid by

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[63] Friedmann, 'Payment of Another's Debt' (n 59) 550; Robin Evans-Jones, 'Identifying the Enriched: Some Complex Relationships Involving the Condictio Indebiti' (1992) 4 Scots Law Times 25, 29.

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

[65] ibid 614 (Lord Caplan).

[66] Evans-Jones (n 63). Many civilian jurisdictions similarly insist that the payment must have been intended to discharge the debt: see, Schlechtriem, Coen & Hornung (n 49) 412.

someone other than the true debtor'.[67] Admittedly, the requirement of intention is not apparent in this formulation. However, there is abundant academic support for the view that this requirement was understood to have been implied.[68] As Schall argues:

> [I]t did not suffice under that rule either that the mistaken payment was somehow due to the plaintiff from another person. The term 'ab alio… solutum est' suggests that the 'alius' must have been transferred intentionally in discharge of the true debtor's obligation.[69]

Now consider Example 2 again. There, the debt that C's payment discharged was not the one that C intended to discharge. Thus, Example 2 fails to meet the requirement that the payment must have been intended to discharge the debt. As demonstrated above however, that requirement is integral to the operation of the good consideration rule.[70]

It may be suggested that the decision of the Court of Appeal in *Lloyds Bank Plc v Independent Insurance Co Ltd*[71] ('*Lloyds Bank*') is inexplicable on this view. There,

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[67] Cited in Evans-Jones (n 63) 26. See also, Helen Scott, 'Unjustified Enrichment' [2012] Annual Survey of South African Law 1046, 1048.

[68] Patrick Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (Bell & Bradfute 1824) 39–40; Andrew Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Stair Society 1993-1995) 217–218; David Hume, *Baron David Hume's Lectures*, *1786-1822*, vol 3 (George Paton ed, Stair Society 1939) 34; Scottish Law Commission (n 46) para 2.175.

[69] Schall (n 31) 128.

[70] It is controversial whether 'intention' is also necessary to satisfy a prior requirement — the discharge of a debt. This thesis does not attempt to resolve that issue. However, regardless of whether intention is necessary to discharge a debt, it is suggested here that it is an element of the good consideration rule. The decision of the High Court of Australia in *Hills Industries* vindicates this claim. There, the discharge of the debt was not in dispute. However, the Court took the view that intention was a necessary element of the good consideration rule. This is also evident from Goff J's insistence in *Barclays Bank* that the payment must have been made 'to discharge and does discharge' the debt. If intention was only a requirement of the discharge of a debt, it would have been unnecessary to insist that the payment must also be made 'to discharge' the debt. The requirement that the payment 'does discharge' the debt would have subsumed that ingredient. For the debate on 'automatic discharge', see, Burrows, *The Law of Restitution* (n 30) 460–467; Virgo, *The Principles of the Law of Restitution* (n 11) 225–230; Peter Birks & Jack Beatson, 'Unrequested Payment of Another's Debt' (1976) 92 LQR 188; Friedmann, 'Payment of Another's Debt' (n 59).

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

the claimant bank, on the request of its customer, paid £162,388 to the defendant. This payment discharged a debt owed by the customer to the defendant. The bank made the payment believing that certain cheques deposited by its customer had been cleared. However, one of these cheques was dishonoured. Consequently, the customer's account was substantially overdrawn. Based on this mistake, the bank sought restitution from the defendant. The Court of Appeal rejected this claim. It was held that by discharging the debt owed by the customer, the defendant had provided 'good consideration' for the bank's payment. But it is unlikely that the bank intended to discharge that debt. As Burrows suggests, 'the claimant bank had no knowledge of the underlying purpose of the payment and did not know that it was to discharge a debt'.[72] Does this mean that the decision in *Lloyds Bank* is incorrect?[73] It does not. The necessary reconciliation may be found in the nature of the banker-customer relationship. As Zyl notes:

> A bank which effects payment of a cheque in accordance with its mandate and within its authority has no interest in the underlying agreement or in the reason for the payment by cheque. It is for all practical purposes, no more than a conduit or 'neutral functionary' whose payment of the cheque facilitates performance by the customer, as debtor in terms of the underlying agreement, to the third party payee, as creditor in terms thereof. By paying the cheque the bank does not effect performance of the customer's obligation to the third party. It is the customer who performs with the assistance or through the mediation of the bank.[74]

Consequently, in *Lloyds Bank*, the relevant intention is that of the customer, not the bank. Stated differently, if the customer's payment was intended to discharge the debt, the interposition of the bank does not mean that the payment is no longer made

[72] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 171.

[73] The result in *Lloyds Bank* is also explicable on the basis that the defendant's enrichment was not 'at the expense of' the bank, but the third-party. While that explanation may be correct on principle, it does not withstand scrutiny as an explanation for the good consideration rule: See text to n 330–n 334 in ch IV.

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

'to discharge' the debt. This view finds recognition in *Lloyds Bank* itself. There, Waller LJ said:

> It must be remembered that the formulation in the Simms case [1980] Q.B. 677 itself contemplates that 'the money is paid to discharge and does discharge a debt owed…' The case further recognises that where the bank meet a cheque payable to A which in fact pays a debt that C owes to A, the bank are paying money to discharge that debt.[75]

C. THE CONCEPTUAL SEPARATION: AUTHORITIES

The distinction between the good consideration rule and the legal obligation qualification has, albeit rarely, received judicial acceptance. The decision of the Supreme Court of Queensland in *Queensland University of Technology*[76] is an example. There, the claimant university sought restitution of its payments to the defendant builder. It argued that the defendant had committed a substantial breach of the contract by failing to maintain its building license. The defendant raised two defences — first, the payments were made for good consideration and secondly, the defendant's breach 'did not affect existing obligations to pay for past work'.[77] These defences broadly correspond to the good consideration rule and the legal obligation qualification, respectively. The Court addressed the second defence first. That was accepted on the basis that the contract only provided for a temporary suspension of payments;[78] the payment was thus, owed under the contract. Notably, the good

[75] *Lloyds Bank* (n 71) 127 (Waller LJ) (emphasis added).

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

[77] ibid [6].

[78] ibid [26].

consideration rule was considered as a separate restriction, although in the light of the earlier conclusion it was unnecessary to decide on its application.[79]

The *Third Restatement on Restitution and Unjust Enrichment* also adopts a distinction that re-affirms the conceptual separation between the good consideration rule and the legal obligation qualification. The equivalent of the legal obligation qualification, §62, provides that a prima facie right to restitution may be defeated if 'the benefit conferred did not unjustly enrich the recipient when the challenged transaction is viewed in the context of the parties' further obligations to each other'.[80] Though this provision is opaquely worded, its operation is made clear by the illustrations. Illustration 2 for instance, is identical to the two-creditor example (Example 2).

§67 of the Restatement on the other hand, corresponds to the good consideration rule. It states that the payee has a valid defence if, inter alia, she 'accepts the funds in satisfaction or reduction of the payee's valid claim as creditor of the payor or of another person'.[81] Interestingly, illustrations to §67 bear a striking resemblance to the leading English cases on the good consideration rule.[82]

The elements of separation between §62 and §67 also resemble the dividing line between the good consideration rule and the legal obligation qualification. First, as noted above, the presence of a legal obligation between the claimant and the defendant is one of the central features that distinguishes the good consideration rule from the legal obligation qualification. Similarly, §62 only takes into account the

[79] ibid [28].

[80] R3RUE (n 13) §62.

[81] ibid §67.

[82] See, ibid §67, illustration 1.

'parties'… obligations to each other'. In contrast, for the purposes of §67 it suffices that the payee was the 'creditor of the payor or of another person'. Secondly, §67 does not apply if the payee had notice of the payor's mistake. This resembles Goff J's 'footnote' in *Barclays Bank* relating to the payee's awareness of the claimant's mistake. However, as is the case with the legal obligation qualification, that requirement is irrelevant for §62.[83] Finally, as with the good consideration rule and the legal obligation qualification, there is an overlap between §62 and §67.[84] That arises because §67, just as the good consideration rule, is not confined to three-party cases. It is to this issue that I now turn.

D. LEGAL OBLIGATION AND GOOD CONSIDERATION: AN OVERLAP

In *Barclays Bank*, Goff J admitted the possibility that the debt discharged may be owed 'by the payer or by a third party'.[85] Consequently, the good consideration rule is applicable to two-party cases. The decision of the New Zealand Supreme Court in *Stiassny*[86] confirms this. The dispute in that case related to the liability of the claimant partnership to pay GST. GST was paid because the receivers of the claimant believed that a failure to pay would lead to their personal liability. In fact, this fear was misplaced. The claimant sought restitution of mistakenly paid GST. The Court rejected this claim. In doing so, the Court of Appeal applied the rule as formulated in *Barclays Bank* together with its restrictive features. It was considered relevant that the

[83] ibid §62, illustration 2.

[84] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 181.

[85] *Barclays Bank* (n 2) 695 (Goff J).

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

payment was made 'to discharge' the debt[87] and that the defendant received the payment in good faith.[88] On appeal, this was confirmed by the Supreme Court.[89] As noted previously, these features are irrelevant to the legal obligation qualification.

Now, consider an example.

> *Example 6:* C owes D £100. That debt is now time-barred. Intending to discharge the debt, though unaware of the fact that the debt is no longer enforceable, C pays £100 to D. Realising her mistake, C later seeks restitution of £100 from D. C's claim will not succeed.[90]

One explanation for the denial of recovery in this case is based on the legal obligation qualification. On that view, the presence of a legal obligation between C and D that C's payment discharges, denies C's claim. The enforceability or otherwise of that claim is irrelevant.[91] On another view, Example 6 is an instantiation of the 'natural obligation defence'.[92] It is unnecessary to resolve this debate presently. What is significant for the present purposes is that Example 6 also attracts the good consideration rule. That is because unlike in the two-creditor example (Example 2), C's payment here is intended to discharge the debt that it actually discharges. C's mistake as to the enforceability of the debt does not detract from that conclusion. In sum, both the good consideration rule and the legal obligation qualification are applicable to Example 6. To defeat C's claim therefore, it suffices for the defendant to establish that either one of these defences succeeds.

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

[88] ibid [105].

[89] *Stiassny* (NZSC) (n 86).

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

[91] Virgo, 'Demolishing the Pyramid' (n 10) 491–492.

[92] Birks, *Unjust Enrichment* (n 35) 257–258; Duncan Sheehan, 'Natural Obligations in English Law' [2004] LMCLQ 172; Stevens, 'Is There a Law of Unjust Enrichment?' (n 24) 20–21.

To conclude, the good consideration rule is distinguishable from the legal obligation qualification on account of two features: (a) the operation of a legal obligation between the claimant and the defendant and (b) the claimant's intention to discharge the debt. The remainder of this thesis concerns the good consideration rule alone.

CHAPTER II

THE ENRICHMENT EXPLANATION

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

A. THE NET BENEFIT APPROACH

An example.

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

There are two ways of characterising D's enrichment. On one view ('the independent claims theory') D is enriched by £10,000. C's claim against D is however subject to a counter-claim for £8,000.[93] On another view, D is enriched by the 'net benefit' (£2,000).[94] The second idea (the 'net benefit approach') is based on the notion that enrichments and disenrichments within the same transaction must be netted off against each other.

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

[94] Birks, *Unjust Enrichment* (n 35) 225–226; Robert Stevens & Ben McFarlane, 'In Defence of Sumpter v. Hedges' (2002) 118 LQR 569, 583–584; Ben McFarlane, 'Unjust Enrichment, Rights and Value' in Donal Nolan & Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 584.

English law's choice between these methodologies is seemingly equivocal. In contrast, the answer is tolerably clear under German law. *Saldotheorie* ('the doctrine of balance') supports the latter view. It suggests that when parties' mutual performances are conditional on each other, the claimant is only entitled to claim against the defendant, the difference between those values.[95] The remainder of this section is devoted to establishing that the net benefit approach is well founded in English law.

1. The Positive Case for the Net Benefit Approach

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

> *Example 2*: C swaps her horse for D's cow. After the transfer, the cow dies while it is in C's possession. C discovers a ground for rescission, avoids the contract, and demands the return of the horse.[96]

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

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

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

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

Example 2B: C swaps her horse for D's cow. After the transfer, C *intentionally* kills the cow believing in good faith that the loss is her own. C rescinds the contract, and demands the return of the horse.[97]

C is entitled to the return of the horse in both cases. D has no claim in either case. C's negligence does not prevent her from relying on the defence of change of position.[98] Consequently, in Example 2A, C can plead change of position as regards the death of the cow. Similarly, in Example 2B, as long as C was unaware of the ground for rescission, even C's intentional act of killing the cow does not disentitle her from pleading change of position.[99] Intuitively, these results seem questionable. There are also reasons of principle that point in the same direction.

i. The Net Benefit Approach: Principle

First, the independent claims thesis leads to an indefensible allocation of risks. In general, the party in control of an asset must also bear the risk of its loss.[100] Ensuring the identity of control and risk in this way protects third parties from losses that they cannot possibly prevent. It also respects the autonomy of parties to decide whether to incur expenses for the protection of assets.[101] However, the independent claims theory leads to the consequence that the claimant-recipient of an asset no longer assumes the

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[97] ibid.

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

[99] Krebs (n 48) 102.

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

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

risk that her own actions may deteriorate that asset.[102] That risk is passed on to the defendant although she is entirely incapable of exercising control over the asset.[103] In sum, each party acts as 'the insurer of the other — each bears the risk for the mistakes that the other might make'.[104]

One may wonder whether the risk reasoning is incorrect because, if accepted, it seemingly negates the application of the change of position defence even to unilateral transfers. After all, 'the accidental destruction… of a benefit… forms the paradigm example of disenrichment that attracts the application of the… change of position defence'.[105]

The answer to this suggestion leads me to my second objection to the independent claims thesis. That derives from the notion of 'conditionality'. When mutual exchanges are conditional on each other, their 'factual reciprocity' must also influence their unwinding.[106] In the case of mutually conditional performances, each party confers a benefit on the other on the basis that the other will reciprocate. Splitting the transaction up into two individual transfers ignores this facet. Further, since the parties conferred enrichments on each other acting in furtherance of a

[102] Reinhard Zimmermann, 'Restitution after Termination for Breach of Contract in German Law' [1997] Acta Juridica 121, 129; ibid 498.

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

[104] Visser, *Unjustified Enrichment* (n 101) 104.

[105] Bant, *The Change of Position Defence* (n 93) 99.

[106] Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 142–143; Häcker (n 96); Hellwege (n 100) 271.

common basis, reversing the transaction without regard to it also violates their autonomy.[107]

With that background, we can now return to Bant's objection. The answer to that objection is that unilateral enrichments and mutual exchanges of benefits have different consequences for the change of position defence. Admittedly, the operation of that defence in unilateral transfers does, as Bant suggests, shift the risk of loss to the claimant. Interestingly, some have argued on that basis that the scope of this defence must be curtailed.[108] However, that objection is significantly stronger for conditional transfers. An example.

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

Under the independent claims thesis, C has a change of position defence against D's claim. Arguably, that defence protects C's autonomy.[109] In Example 3 however, that defence must be weighed against the interests of protecting D's autonomy. D's decision to transfer the car was based on the expectation of C's payment. Therefore, reversing that payment without restoring the value of the car infringes D's autonomy.

Unsurprisingly, excluding the change of position defence when the conferral of benefits are conditional is quite unremarkable in English law. *Goss v Chilcott*[110] illustrates this. The defendants, Mr. and Mrs. Goss had obtained a loan from the claimant. The loan agreement was subsequently rendered void. The claimant brought

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[107] Hellwege (n 100) 274. See also, James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston University Law Review 1009, 1024–1025.

[108] Zweigert & Kötz (n 100) 593; Visser, *Unjustified Enrichment* (n 101) 717–718.

[109] Edelman (n 107).

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

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

> [The defendants] had… allowed the money to be paid over to Mr. Haddon in circumstances in which, as they well knew, the money would nevertheless have to be repaid to the company. They had, therefore, in allowing the money to be paid to Mr. Haddon, deliberately taken the risk that he would be unable to repay the money.[111]

A similar approach was adopted in *Haugesund Kommune*.[112] There, the defendant municipality argued that it had changed its position by investing unsuccessfully, the sums received under a void swap agreement. In a passage that in substance affirms the risk-allocation reasoning, Tomlinson J rejected this claim:

> The case is far removed from that where the recipient of what he reasonably believes is an out and out payment to him pays that amount away to charity. Here the municipalities always knew that they had to repay the money… I can see no basis upon which it can begin to be suggested that in these circumstances it would be inequitable to require the municipalities to make restitution. That would be to impose upon Depfa the risk of investments over which they were not consulted and over which they had no control.[113]

These decisions are best rationalised on the basis that change of position is ruled out by the conditionality associated with the enrichment.[114]

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

> *Example 4A*: C buys a pen worth £2 from D for £4. C pays £5 and D returns the £1 balance. Later, C rescinds the transaction for misrepresentation.

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[111] ibid 799 (Lord Goff) (emphasis added).

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

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

[114] Edelman (n 107) 1025; Stevens, 'Is There a Law of Unjust Enrichment?' (n 24) 32.

> *Example 4B*: Facts are identical to Example 4A, except that C pays £4 exact change for the pen. C rescinds the transaction for misrepresentation.

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

> [T]he two-claim approach can produce bizarre results. One claimant may fortuitously encounter an obstacle or bar which the other escapes, with the consequence that for very slight reasons the parties to the one exchange may end up in very different situations.[115]

ii. The Net Benefit Approach: Authorities

The net benefit approach has also been accepted by Courts. The most cited example is Hobhouse J's decision in *Westdeutsche*.[116] One of the claims there sought to reverse a void interest rate swap between Kleinwort Benson and Sandwell Borough Council. Overall, Kleinwort Benson had made a net payment of £196,322 to Sandwell. However, it was argued that the six-year limitation period must be calculated from the date of each payment. This would have meant that the recovery of the first three

[115] Birks, *Unjust Enrichment* (n 35) 226.

[116] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QB) (Hobhouse J). See also Mitchell, Mitchell & Watterson (eds), *Goff & Jones* (8th edn) (n 11) paras 31-18–31-20.

payments was time-barred. Rejecting this argument Hobhouse J held that the claim could only be for the defendant's net enrichment:

> Where there have been a whole succession of payments one way and the other in respect of a single underlying transaction, both equity and justice require that one should have regard to the totality of those payments and the resultant overall benefit and detriment…. At no time during the history of this transaction has there been a cause of action for more than the net balance existing at any given time.[117]

The net benefit approach also derives support from Lord Templeman's speech in *Lipkin Gorman*.[118] There, Lord Templeman proceeded on the basis that the defendant club was only enriched by the difference between the sums staked with it (£561,014.06) and the winnings it paid out (£378,294.06). He said:

> [I]f Cass had paid £20,000 derived from the solicitors to a car dealer for a motor car priced at £20,000, the car dealer would not have been enriched. The car dealer would have received £20,000 for a car worth £20,000. But an innocent recipient of stolen money will be enriched if the recipient has not given full consideration.[119]

Admittedly, Lord Goff analysed the club's disenrichment in terms of change of position. However, that was based on his finding that independent bets could not be aggregated as if they constituted a single transaction.[120] In other words, enrichments and disenrichments across different bets are not conditional on each other. Hobhouse J's decision in *Kleinwort Benson*[121] vindicates this. The facts were identical to *Westdeutsche*. However, the claimant attempted to circumvent the limitation period

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[117] *Westdeutsche* (n 116). See also, *South Tyneside Metropolitan Borough Council v Svenska International Plc* [1995] 1 All ER 545 (QB) 548 (Clarke J).

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

[119] ibid 560 (Lord Templeman).

[120] ibid 582 (Lord Goff).

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

by aggregating payments across five different interest rate swaps. This was rejected on the basis that 'each interest rate swap contract was an independent transaction'.[122]

Henderson J's recent decision in *Littlewoods*[123] also impliedly accepts the net benefit approach. The question there was, should corporation tax that would have been paid had it not been for the disputed VAT payments, be taken into account in computing the Revenue's enrichment? This question was answered in the negative. However, that was only because it could not be said that these two liabilities 'arose out of the same underlying transaction'.[124] Consequently, 'the position is not analogous with that considered… in [*Westdeutsche*]'.[125]

The net benefit approach has also been approved in other common law jurisdictions. Consider the New Zealand High Court's decision in *Nimmo.*[126] There, a fraudster embezzled money from the claimant and converted them into cheques at the defendant bank. Rejecting a 'knowing receipt' claim against the bank, Blanchard J held:

> [The bank] undoubtedly received the moneys… [It] immediately put Mr. Eaton in possession of bank cheques and travellers cheques and debited its books accordingly. The net result… was that [the bank] was in no better position as a result of the transaction. It had not been enriched.[127]

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[122] ibid 979 (Hobhouse J).

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

[124] ibid [434].

[125] ibid.

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

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

On similar facts, in *Cigna Insurance*[128] the Court refused to hold a bank liable as a constructive trustee for 'knowing receipt' because it had paid out an amount equal to an initial deposit. The bank, the Court held, was 'merely a depository or channel through which the moneys are transferred'.[129]

iii. The Net Benefit Approach: Operation

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

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

Secondly, the requirement of 'conditionality' also precludes the application of net benefit approach to cases where the defendant was aware of the claimant's mistake. A leading German decision illustrates this.[130] There, the plaintiff bought a used car from the defendant. The defendant had knowingly misrepresented to the plaintiff that the car was accident-free. Later, the plaintiff met with an accident which rendered the car valueless. After this, the plaintiff learnt about the previous accidents. A claim for restitution was brought. The question was whether *Saldotheorie* — the German equivalent of the net benefit approach — applied here. The Bundesgerichtshof answered this question in the negative:

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

[129] ibid 87.

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

> The basic principle of the Saldotheorie… also illustrates the limits of its application… The defendant caused the purchaser to conclude the sale contract by fraud, which the plaintiff, as the defendant knew, had he known that the car purchased had been involved in an accident, would certainly not have concluded… The defendant company must therefore allow itself to be treated as if… it had already known when it received the purchase price and transferred the car to the plaintiff of the defect in the legal basis for the exchange of performances rendered by both parties… Thereby however, the internal justification for an application of the Saldotheorie in the present case lapses.[131]

Notably, the Court placed emphasis on the fact that the defendant was aware of the claimant's mistake. This is because it is the defendant's knowledge of the claimant's mistake that vitiates the common basis underlying the transaction. That is fatal to the application of the net benefit approach.[132]

2. Objections to the Net Benefit Approach

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

i. Structural Differences Between English and German Legal Systems

Two major differences between the English and German legal systems have been relied on as precluding the adoption of the net benefit approach in England. First among them is the dichotomy between immediate enrichment and extant enrichment.

[131] ibid, cited in Dannemann (n 106) 237 (emphasis added).

[132] Hellwege (n 100) 279.

The former is accepted in English law,[133] and the latter, in Germany. The second is the fact that German law adopts the 'absence of basis' approach whereas English law requires positive reasons for reversing enrichments.[134]

a. Immediate Enrichment and Extant Enrichment

The distinction between the immediate and extant enrichment approaches has been relied on to support two distinct arguments. First, it has been argued that the net benefit thesis is derived from the extant enrichment approach adopted by German law.[135] Secondly, it has been suggested that *Saldotheorie* is inconsistent with English law's commitment to the immediate enrichment approach.[136] I will examine each of these contentions in turn.

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

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

One could apply §818(3) in conjunction with the independent claims thesis to this example. On that view, C's claim against D and D's claim against C are both restricted to the value surviving. Therefore, C is entitled to the return of £10,000. C is

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[133] Mitchell, Mitchell & Watterson (eds), *Goff & Jones* (8th edn) (n 11) para 4-24.

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

[135] Bant, *The Change of Position Defence* (n 93) 98.

[136] Lodder (n 93) 22.

however, not under a liability to return the car or its value. In fact, German law had adopted this approach (Zweikondiktionenlehre) in the past.[137] Minor pockets of German law (claims by the mentally incapable and minors for example) still follow that view.[138] Of course, such claims are not exceptions to §818(3). This must indicate that *Saldotheorie* is not contingent on that provision. In fact, the net benefit approach is often seen as an exception to §818(3).[139] Consider for instance, this passage from Dawson's influential article:

> The effort so far has been to show that 'innocent' receivers of unjustified enrichment have been protected by every available means against every loss that can cause enrichment to diminish or disappear… the addition of only one other feature will be enough to throw into reverse the usual exemption from all forms of risk that is granted to 'innocent' receivers of gain. If the receiver gave something of value in exchange for his gain that has since diminished or vanished, then to the extent of the value given the risk of loss shifts and any loss that occurs is his. This is the result of the 'net balance' (Saldo) theory.[140]

Thus, the net benefit theory is 'an exception to the protection normally granted to the enrichment debtor by… §818(3)'.[141] It does not follow from the extant enrichment rule. Neither is its validity conditional on the acceptance of that approach.

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

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[137] Zimmermann & Du Plessis (n 103) 41.

[138] Häcker (n 96) 73.

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

[140] Dawson (n 95) 294 (emphasis added).

[141] Zimmermann & Du Plessis (n 103) 40. See also, Jewell (n 139) 31.

test of timing — that is what immediate enrichment is — cannot resolve the second question. That much is clear from that the fact that the defendant's disenrichment may be antecedent to or simultaneous with the enrichment. Lodder seems to admit that 'antecedent or simultaneous events and conduct' are excluded if they are 'extraneous to the receipt of value in a defective transaction factually enriching the defendant'.[142] Disenrichments on which the conferral of a benefit are conditional are almost never 'extraneous to the receipt of value'. Therefore, in effect, Lodder's approach draws a sharp distinction between disenrichments that are antecedent to or simultaneous with the enrichment on the one hand, and disenrichments that are subsequent to the enrichment on the other. This is indefensible because, within a transaction, whether the defendant's disenrichment is antecedent or subsequent to the enrichment is often fortuitous.

Furthermore, the authorities that Lodder relies on for the immediate enrichment argument[143] are cases where the Courts did not have occasion to consider the implications of a conditionally related disenrichment of the defendant. Further, in many of these cases, the reason the claim was restricted to original receipt was because subsequent benefits were not 'at the expense of' the claimant.[144] Consider for instance, *Greenwood.*[145] There, the defendant was enriched by both the benefits — the value of services rendered (£226) and appreciation in the car's value (£325) —

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[142] Lodder (n 93) 198.

[143] *Baker v Courage & Co* [1910] 1 KB 56 (KB); *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (CA); *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QB); *Pavey & Mathews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221; *Kleinwort Benson* (n 50); *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561; *Yeoman's Row Management Limited v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752.

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

[145] *Greenwood v Bennett* [1973] QB 195 (CA). See also, *Yeoman's Row Management* (n 143).

simultaneously. However, the claimant was only awarded the value of his services. It is difficult to see how this result is dictated by the immediate enrichment rule. Faced with this difficulty, Lodder admits that the 'at the expense of' requirement may provide 'a second reason in support of the immediate enrichment approach'.[146] However, in fact, this may have been the only reason for the results in these cases.

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

b. Absence of Basis and Unjust Factors

English and German legal systems adopt different approaches to the 'unjust' enquiry. This has also been relied on as precluding the adoption of the net benefit approach in English law.[147]

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

[146] Lodder (n 93) 204.

[147] Bant, *The Change of Position Defence* (n 93) 98.

of the defendant's enrichment.[148] Similarly, Romanian law distinguishes between claims arising out of payment of an undue debt and other claims in unjust enrichment. The net enrichment approach only applies to the latter category.[149] Under the Portuguese Civil Code, enrichment is understood broadly as 'the thing acquired'. As it is unclear whether this precludes the net benefit approach, both the net benefit approach as well as the independent claims theory have attracted adherents.[150] Similar is the case under Dutch law.[151] Thus, English law's commitment to unjust factors does not automatically commit it to the independent claims theory.

ii. The 'Transfer of Value' Objection

Lodder builds a case against the net benefit approach based on the notion of 'transfer of value'. To him, the net benefit approach rests on the assumption that a transaction at market value involves no transfer of value. That, according to him, is incorrect. Even in such cases there are two equal and opposite transfers of value.[152]

There are two possible responses to this argument. First, let us assume that Lodder is correct in suggesting that a transaction at market value does involve two opposing transfers of value. That still leaves open the question whether they must be treated independently, or netted off. Secondly, his argument incorrectly understands the idea that value is an inherently 'relational'[153] concept — a proposition Lodder

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

[149] ibid 362.

[150] ibid 362.

[151] ibid 363.

[152] Lodder (n 93) 22.

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

accepts. The notion 'relational' subsumes two distinct ideas. The first of them is that value is a quantitative notion that facilitates comparison of distinct assets by reducing them to a single comparable dimension.[154] Thus, 10 apples and 20 oranges are comparable when reduced into monetary terms. Lodder accepts this. However, 'relationality' also has a second meaning. This is what Klimchuck calls relationality in a 'deeper sense':

> Value… is not a kind of asset, first in the transferor's and then in the transferee's possession. Instead it is an intrinsically relational concept, because the value of a thing is ascertained only in the process of exchange… Saying that there has been a transfer of value in a transaction expresses the fact that the transferee has got something for nothing… the substance of the transfer at issue conforms, in a deep way, to the correlativity essential to the structure of corrective justice, because we cannot identify a transfer of value outside of a particular transaction.[155]

Stated differently, the inherent relational character of value means that the question whether there has been a transfer of value cannot be answered outside of a transaction. As noted before, the contrary argument commits itself to the conclusion that when I buy a pen for £4, the consequences of that transaction for the law of unjust enrichment differ depending on whether I pay £4 exact change or I pay £5 and accept £1 back.[156] Weinrib is therefore right in concluding that, 'Exchange features a movement of things of value… from each party to the other. It does not, however, feature any movement of value'.[157]

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

[154] Lodder (n 93) 20.

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

[156] Compare Examples 4A and 4B, text to n 114.

[157] Weinrib, 'Correctively Unjust Enrichment' (n 153) 36–37.

iii. Enrichment as Value and Enrichment as Rights

It has been suggested by Chambers, and subsequently by Lodder that enrichment may consist in either value or rights.[158] Assuming the correctness of that thesis, this section considers whether it poses significant challenges for the net benefit approach.

On one view, the rights and value thesis is entirely unproblematic for the net benefit approach. Rights can be netted off against each other just as value.[159] With respect, this is incorrect. Value is a quantitative notion that facilitates the comparison of different assets.[160] That is what makes it possible to net off values against each other. This is untrue of rights. Consider an example.

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

In terms of value, D is not enriched at all. This is because D gave a car worth £10,000 in return for £10,000. But what about the rights involved? Assume that the £10,000 is traceable in D's hands. D has been enriched by the right to that sum. At the same time, D has been disenriched by her right to the car. It is impossible to net these rights off against each other. When Bant suggests that exchange of rights leaves the defendant in an 'enrichment-neutral position',[161] she is referring to the value of those rights, not rights themselves.

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[158] Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell & James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 242; Lodder (n 93) chs 3, 4, 5.

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

[160] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 153) 21; Weinrib, 'Correctively Unjust Enrichment' (n 153) 36.

[161] Bant, 'Rights and Value in Rescission' (n 159) 615.

However, conceding that netting is impossible when the enrichment consists in rights does not negate the net benefit approach. This is because characterising the enrichment as rights does not permit the claimant to evade results that would have been reached if the enrichment had been characterised as value. Consider Example 6 again. Assuming that C's payment is traceable in D's hands, C has the liberty to frame D's enrichment as consisting in either rights or value.[162] As suggested before, D is not enriched in the form of value. Can C overcome this result by arguing that D is enriched by the receipt of the right to £10,000? In the guise of restitution of rights to that sum then, can C recover £10,000 from D? C cannot. The first step in defending this view is to note that in Example 6, D's enrichment consists only in rights and not value. That is because D's enrichment in the form of value has already been netted off against a corresponding disenrichment. The second step is the proposition that when a defendant's enrichment consists solely in rights, restitution must also consist of rights alone. That process cannot involve an incidental reversal of value. This is what permitting C to recover £10,000 would amount to.

Lodder seems to offer some support for this proposition. He suggests that in combining claims for rights and value it must be ensured that 'restitution of one would not incidentally achieve restitution of the other'.[163] Cases that insist that restitution of rights over land may be awarded only when credit is given for the value of improvements carried out by the defendant[164] further vindicate this claim. An example.

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[162] Lodder (n 93) 219.

[163] ibid.

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

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

C's claim can succeed only if C gives credit for the value of improvements effected by D.[165] Thus, in *Cooper v Phibbs*[166] the House of Lords insisted that the claimant's right to restitution of rights over land was subject to a lien in favour of the defendant securing the value of the defendant's improvements. This was so despite the fact that the claimant was seeking restitution of the very rights that were transferred to the defendant. Defendant's improvements did not change the nature of that right.[167]

Further support for this argument may be derived from *Greenwood*.[168] Holding that Mr. Harper was entitled to claim against the owners of the car, the value of services that he mistakenly carried out, Lord Denning reasoned that:

> [I]f [the owners] had brought an action for conversion… the company would have to give credit for the work which Mr. Harper had done on it… if [the owners] had brought an action in detinue… they could have recovered from him the value of the car… as improved by Mr. Harper's work… I should think that justice would require that Mr. Harper should be able to recover the cost of his work from [the owner]. Otherwise, you would get the very odd result that the company… could - by this indirect means - recover from Mr. Harper more than they could by suing him directly in conversion.[169]

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

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

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

[167] McFarlane (n 94) 588.

[168] *Greenwood* (n 145).

[169] ibid 201 (Lord Denning).

by Mr. Harper. Thus, Bant is right in suggesting that 'even if value is irrelevant in establishing enrichment by receipt of rights, this does not mean that value is irrelevant to restitution of those rights'.[170]

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

B. THE GOOD CONSIDERATION RULE AS AN ENRICHMENT QUALIFICATION

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

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

An example.

> *Example 8*: X owed a debt to C and D. X conveyed Blackacre to C in discharge of its debt. However, Blackacre was subject to a mortgage securing D's debt. X and C agreed that C should pay off D's debt. After clearing that debt, C realised that X was not entitled to Blackacre. C's claim against D for restitution failed.[171]

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

[170] Bant, 'Rights and Value in Rescission' (n 159) 637.

[171] *Aiken* (n 8).

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

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

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

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

Interestingly, there is some judicial support for the application of the net benefit approach to Example 9. Consider the decision of the High Court of Australia in

Lumbers.[172] There, a building sub-contractor claimed against the owner of the land, the value of its work. In computing the owner's enrichment, the Court took account of his disenrichment in the form of his obligation to pay the main contractor, a third party to the claim:

> [I]t was said that the [owners] would receive a "benefit", a "gain" or a "windfall" if they were not found to be liable to [the sub-contractors]… The accuracy and the relevance of any such characterisation depends upon whether the [owners] had performed their obligations under their contract with [the main-contractor]. If the [owners] have not fully performed their obligations under their contract with [the main-contractor], by not paying all that is due to [it], it is evident that the [owners] have not received any benefit, gain or windfall. They would remain liable to [the main contractor]. Questions of benefit, gain or windfall could arise only if [the main contractor] has no further claim against the [owner].[173]

In other words, the owner is enriched only if the benefit consisting of the building work is not offset by an obligation owed by him to the main contractors.[174] Thus, the owner's disenrichment (consisting of the obligation owed to the main contractor) is relevant to the evaluation of his enrichment. More relevantly, the fact that the disenrichment was directed towards a third party and not the claimant does not preclude the application of the net benefit approach. The same view was adopted by the New Zealand High Court in *Cigna Insurance*.[175] There, the Court refused to hold a bank liable as a constructive trustee for 'knowing receipt' on the basis that it had paid out to a third party (other than the claimant), an amount equal to the initial deposit.

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

[173] *Lumbers* (n 172) [119]–[120].

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

[175] *Cigna Life Insurance* (n 128). See also, *Compagnie Commerciale Andre SA v Artibell Shipping Company Ltd (No 2)* 2001 SC 653 (OH) [16].

In *Barclays Bank*, Goff J imposed two qualifications to the application of the good consideration rule. One concerned the state of mind of the claimant and the other, the defendant. The enrichment thesis explains both these restrictions. It was established in Chapter II that the net benefit approach applies only when the enrichment and disenrichment are conditional on each other i.e. linked by a common basis between the parties.[176] With that premise in mind, we can now turn to the qualifications.

Consider first the requirement that the good consideration rule is only attracted by payments that are intended to discharge the debt.[177] When analysed from the lens of the net benefit approach, this requirement confines the good consideration rule to cases where the claimant's payment is made on the basis, shared by both parties,[178] that the debt will be discharged. Consider an example.

> *Example 10*: C owes £100 to both D and X. C intends to pay X but mistakenly pays D. C seeks restitution from D. C's claim will fail.[179]

Here, the condition underlying C's payment is not the discharge of D's debt. However, that is the basis of D's disenrichment. As suggested in Chapter I therefore, the good consideration rule is inapplicable here.[180]

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

> [E]ven if the payee has given consideration for the payment… that transaction may itself be set aside (and so provide no defence to the claim)

[176] See text to n 106 in ch II.

[177] See text to n 53–n 75 in ch I.

[178] *Mahme Trust Reg v Nezhet Tayeb* [2002] EWHC 1543 (Ch), [2003] WTLR 21 [148].

[179] Based on dicta in *Platt* (n 9).

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

> if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith.[181]

The net benefit thesis explains this qualification as well. As the previous section demonstrated, the net benefit approach has no application in cases where the defendant was aware of the claimant's mistake.[182] Similarly, the fact that the payor's mistake was induced by the payee or the payee's knowledge of the mistake, defeats the common basis between the parties. This is fatal to the application of the net benefit approach and consequently, the good consideration rule.[183] As noted previously, Courts in Germany have treated the defendant's awareness of the claimant's mistake as precluding the application of *Saldotheorie*. German Courts have also applied that qualification in circumstances that attract the good consideration rule. Thus, in claims for restitution of mistaken payments by banks, German Courts have routinely awarded restitution when the defendant was aware of the claimant's mistake.[184]

2. The Enrichment Explanation: Authorities

There is ample support in academic writing for the view that the good consideration rule is best explained on the basis of the absence of defendant's enrichment.[185]

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[181] *Barclays Bank* (n 2) 695 (Goff J). See also, *Lloyds Bank* (n 71) 130.

[182] See text to n 130–n 132.

[183] Hellwege (n 100) 279.

[184] BGH 16 June 1983, BGHZ 87, 393; BGH 19 January 1984, BGHZ 89, 376, cited in Markesinis, Lorenz & Dannemann (n 95) 734, 796, 798.

[185] Graham Virgo, 'Recent Developments in Restitution of Mistaken Payments' (1999) 58 CLJ 478, 481; James Edelman & Elise Bant, *Unjust Enrichment in Australia* (OUP 2006) 99–100; William Swadling, 'Restitution and *Bona Fide* Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (United Kingdom National Committee of Comparative Law 1997) 79; Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations' (n 22) 247; Zyl (n 74) 25; Ross Grantham, 'Security of Contract: The Challenge from Restitution' (2000) 16 Journal of Contract Law 102, 112–113; Visser,

Interestingly, South African Courts have also openly adopted the enrichment explanation. The leading decision is *Govender*.[186] A customer ('S') of the claimant-bank entered into a contract with the defendant for hiring a bus. Later, S decided to not use the bus. However, the agreement with the defendant was not cancelled. Despite this, S instructed the claimant bank to stop payment on a cheque he had issued to the defendant. The bank paid, overlooking the countermand. On discovering the mistake, the bank sought recovery. This claim was rejected.[187] The Court reasoned:

> The question which must be posed is whether plaintiff has shown that defendant was unjustifiably enriched by the payment of the cheque. The fact of the payment of money is itself prima facie proof of enrichment, but not conclusive proof. In assessing whether defendant has been enriched by the payment account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money.[188]
>
> [T]he defendant who has performed, or held himself ready and willing to perform a contractual obligation, here the hiring out of the bus, is prima facie not unjustifiably enriched by the receipt of a payment in consideration for the hire of the bus.[189]

A little over a decade later, a similar issue arose for consideration in *B & H Engineering*.[190] There, the Court reiterated that:

Unjustified Enrichment (n 101) 200, 203; Daniel Visser, 'Searches for Silver Bullets: Enrichment in Three-Party Situations' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 534–542; Niall Whitty, 'Indirect Enrichment in Scots Law: Part 1' (1994) 2 Juridical Review 200, 203; Hector MacQueen, 'Payment of Another's Debt' in David Johnston & Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 482; Andrew Kull, 'Rationalizing Restitution' (1995) 83 California Law Review 1191, 1236–1239; Du Plessis, (n 36) 213.

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

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

[188] ibid 511.

[189] ibid 513.

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

> If this payment served to discharge [the defendant's] debt, [the defendant] would have lost its claim for that amount against [a third party]. [The defendant's] net position would accordingly have remained the same. There would have been no enrichment.[191]

3. Explaining the Case Law on the Good Consideration Rule

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

i. Three Party Cases

Consider first, *Aiken v Short.*[192] The facts are identical to Example 8.[193] There, Bramwell B rejected the claim on the basis of the now discarded 'supposed liability' test.[194] According to Platt B however, the claim was precluded because the payment was owed to the defendant.[195] Though Pollock CB agreed with this reasoning, his speech offers some guidance on what 'consideration' means. He said:

> The [claimant] had paid the money in one sense <u>without any consideration</u>, but the defendant had a perfect right to receive the money from [the third party], and the [claimant] paid for him.[196]

In other words, it is immaterial that the 'consideration' did not benefit the claimant. 'Good consideration' is a defendant-oriented enquiry. Notably, this is entirely in accord with the enrichment explanation. The application of the defence stands or falls with the enrichment of the defendant. Whether the relevant

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

[192] *Aiken* (n 8).

[193] See text to n 171.

[194] *Aiken* (n 8) Hurl & N 215, ER 1182.

[195] ibid Hurl & N 214–215, ER 1182.

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

disenrichment moved to the claimant or to a third party is inconsequential.[197] For the purposes of the good consideration rule, all that matters is that the payment discharged a debt owed to the defendant.[198]

The two leading English cases on the good consideration rule — *Barclays Bank* and *Lloyds Bank* are also explicable on this basis. The results in these cases turned crucially on whether the payment discharged a debt owed to the defendant.[199] In *Barclays Bank*, the customer had countermanded the cheque. The bank's payment was therefore unauthorised and did not discharge the defendant's debt.[200] Consequently, the defendant was enriched by the receipt of the payment. The claim succeeded. In *Lloyds Bank* in contrast, the claim was denied. There, the mistake consisted in the bank's unawareness that the customer's account was overdrawn. Notably, this does not affect the bank's authority to pay. Thus, the payment did discharge the defendant's debt. As a result, the defendant was not enriched.

ii. Two Party Cases

The enrichment explanation can also account for the application of the good consideration rule to two-party cases. The only feature that distinguishes these cases from three-party cases is that here, the defendant's debt is owed by the claimant and not a third party. But that is inconsequential. The decision of the New Zealand

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[197] Virgo, *The Principles of the Law of Restitution* (n 11) 175–176. See also, text to n 171–n 175.

[198] See also, *Australian Financial Services* (n 57).

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

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

Supreme Court in *Stiassny*[201] illustrates this. There, the claimant sought restitution of GST it paid under a mistake, although it was owed to the Revenue. Applying Goff J's qualification 2(b), the Court rejected the claim. It reasoned that 'the [claimant] did owe the amount of GST which it paid… Therefore [the defendant] gave good consideration in accepting its payment in discharge of the debt'.[202]

iii. Disenrichment Other Than Through the Discharge of a Debt

It must follow as a logical corollary of the enrichment explanation that 'consideration' provided by the defendant need not consist in the discharge of a debt. This is evident from Goff J's formulation in *Barclays Bank* — the good consideration rule applies 'in particular if the money is paid to discharge, and does discharge, a debt'.[203] The disenrichment of the defendant may consist in the discharge of any other obligation or even in the provision of other benefits. The decision of the Victoria Court of Appeal in *Ovidio Carrideo* illustrates this.[204] There, the dispute arose from the failure of the landlord to provide the tenant a disclosure statement. Under the relevant statute, this nullified the tenant's obligation to pay rent. In ignorance of this, the tenant paid the rent. The tenant's claim for restitution was rejected. Chernov JA noted that the defendant landlord had permitted the claimant to use the premises. This constituted 'good consideration'. Similarly, 'consideration' may consist in the provision of

[201] *Stiassny* (NZSC) (n 86). For other examples of application of the good consideration rule to two-party cases, see, *National Mutual Life Association* (n 86); *Orix Australia Corporation Ltd* (n 86).

[202] *Stiassny* (NZSC) (n 86) [65].

[203] *Barclays Bank* (n 2) 695 (Goff J) (emphasis added).

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

services[205] or security,[206] or even the release of an obligation to pay tortious damages.[207]

iv. Unjust Factors Other Than Mistake

The enrichment thesis also suggests that the good consideration rule applies regardless of the unjust factor involved. Thus, it has been applied in claims based on duress.[208] Consider *Flower v Sadler.*[209] The claimant employee sought to set aside certain bills of exchange drawn in favour of the defendant. Allegedly, those bills were procured by the defendant's threat to prosecute him. Even if that were true, the payment would have been irrecoverable because 'a debt was actually due from [the claimant], and there is nothing illegal in a creditor endeavouring to obtain payment of his debt'.[210] In *Ward v Lloyd*[211] similarly, a claim for restitution based on duress was rejected on the basis that the claimant did nothing more than demand what was legitimately owed to him. Similarly, in *Astley v Reynolds*,[212] the claimant had pawned his plate with the defendant for 20l. The defendant threatened to not return the plate unless an additional 10l was paid. Though the claim based on duress succeeded, the claimant was only entitled to recover the surplus of 10l. One explanation for this result is that the sum of 20l was legally due.[213]

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[205] *National Mutual Life Association* (n 86).

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

[207] *Re Magarey Farlam* (n 15).

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

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

[210] ibid 575.

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

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

[213] Virgo, 'Demolishing the Pyramid' (n 10) 495.

Australian Courts also support the view that the good consideration rule is not restricted to claims for the restitution of mistaken enrichments. For example, three judges of the Supreme Court of Western Australia affirmed the view that a claim based on duress will not succeed if the disputed payment was owed to the defendant.[214] Giles J endorsed a similar approach in *Equiticorp Financial Services*.[215] There, the defendant was not enriched by the receipt of the disputed payment since it was owed a greater sum.[216]

Finally, in *Stiassny*, the New Zealand Supreme Court also suggested that the good consideration rule may deny claims based on the *Woolwich* principle.[217]

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

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

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

[216] ibid 300–301. See also, Edelman & Bant (n 185) 346.

[217] *Stiassny* (NZSC) (n 86) [67].

CHAPTER III

OBJECTIONS TO THE ENRICHMENT EXPLANATION

Chapter II argued that the good consideration rule is best rationalised as an enrichment qualification. This Chapter responds to three potential objections to that suggestion: (**A**) Does the decision of the High Court of Australia in *Roxborough*[218] contradict the enrichment thesis? (**B**) Can the decision of the House of Lords in *DMG*[219] be reconciled with that approach? (**C**) Does the denial of restitution of mistaken payments that discharge unenforceable obligations challenge the enrichment thesis?

A. *ROXBOROUGH:* RESTITUTION WITHIN A CONTRACT

Can cases that permit restitution within a contract be reconciled with the enrichment explanation? In particular, does the decision in *Roxborough* contradict that approach? These are questions that this section considers.

1. The Decision In *Roxborough*

The claimant and respondent were retailers and wholesalers of tobacco, respectively. They were both licensees under the New South Wales Business Franchise Licences (Tobacco) Act, 1987 ('the Act'). The contractual arrangement between the parties was that, in anticipation of the wholesaler's payment of license fee, the retailer would advance an equivalent sum to the wholesaler. On 5 August 1997 the High Court of Australia declared the imposition of license fee under the Act invalid.[220]

[218] *Roxborough* (n 6).

[219] *DMG* (n 7).

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

Consequently, the respondent was no longer required to pay this sum. However, the claimant had already paid the wholesaler an amount attributable to the fee. The claimant sought restitution of that sum.

The High Court of Australia awarded restitution. The Court held that failure of consideration is not limited to the failure of contractual reciprocation, it includes the disappearance of a contemplated state of affairs — here, the wholesaler's license fee liability.[221] The finding that there was a failure of consideration in these circumstances raised for the first time, several significant questions: Did the retailer's obligation subsist despite the invalidity of the license fee? Would granting restitution in these circumstances contradict contractual obligations? The majority does not provide a satisfactory answer to these questions. It merely asserts that:

> [W]hile the wholesale price, exclusive of the tax, was arrived at by the operation of forces of supply and demand in the market for tobacco products, and reflected the negotiated agreement of the parties, the tax was imposed externally by government.[222]

At first blush, the conclusion of the majority contradicts the enrichment thesis. That is because the retailer's payment was seemingly made to discharge a contractual obligation. Thus, the defendant's enrichment was offset by the discharge of a claim against the retailer. This must mean that the defendant was not enriched.[223] On closer examination however, the majority's conclusion is justifiable. It may also be reconciled with the enrichment explanation. The key to such reconciliation lies in understanding the conditional nature of the retailer's contractual obligations. Before

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

[222] ibid [13].

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

substantiating that claim however, I will briefly examine two other commonly advanced explanations for *Roxborough*.

2. Negotiability Reasoning

Burrows supports the decision in *Roxborough*. According to him, restitution in that case did not interfere with contractual allocation of risks. This is because the 'tax element was imposed outside the risks bargained for'.[224] Similarly, to Birks, the 'crucial fact is that neither the payment of the tax nor the amount of that payment were viewed as negotiable'.[225]

With respect however, this explanation is incorrect. It is true that the statute imposed the license fee liability on the wholesaler. However, it does not follow that it was not subject to negotiation. A close examination of the statutory scheme vindicates this claim. Under Section 41(1)(c) of the Act, the primary liability for the license fee fell on the wholesaler.[226] By virtue of the contractual arrangement between parties however, that burden had been shifted to the retailer. The claim that the license fee was not subject to negotiation between parties is thus, inaccurate. As O'Brien notes:

> Although the payment of the tax by *someone* was non-negotiable, as between themselves the retailer and wholesaler had clearly engaged in negotiation ending in an agreement that the retailer in effect pay the tax.[227]

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

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[224] Andrew Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 767–777; Burrows, *The Law of Restitution* (n 30) 90.

[225] Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 OUCLJ 1, 5 (emphasis added). See also, *Roxborough* (n 6) [13].

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

[227] O'Brien (n 174) 95 (emphasis in original).

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

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

The negotiability explanation also fails to explain the judicial trend. Consider for example, *Orphanos*.[228] There, the claimant was a student of the defendant college. When the dispute arose, he had only lived in the UK for three years. The college denied him the benefit of being charged fees at 'home rate' on the basis that living in the EEC for the purposes of education did not constitute 'ordinary residence'. Subsequently, the House of Lords clarified that 'ordinary residence' included educational residence.[229] On this basis, the claimant sought restitution of the excess fee. If the negotiability explanation is correct, restitution should have been granted. That is because the quantum of fees was externally imposed. The House of Lords however, denied restitution. What proved conclusive was the fact that fees at 'overseas rate' was due under a contract between the parties. The House of Lords' finding that fees should have been levied at 'home rate' did not absolve the claimant from that liability.

Equally, restitution within a contract has been granted in circumstances where no part of the bargain was 'externally imposed'. Consider for instance, the decision of

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[228] *Orphanos v Queen Mary College* [1985] AC 761 (HL). See also, Birks, 'Failure of Consideration and its Place on the Map' (n 225).

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

the Supreme Court of South Australia in *Shuman.*[230] The claimants purchased from the defendant what they believed to be an invaluable dinosaur bone. In fact it turned out to be worthless. Restitution of the purchase price was granted. Here, no part of the consideration was externally imposed; it was wholly subject to negotiation between the parties. As subsequent sections will demonstrate, the correct explanation for this result is that the payment was conditional on the defendant's performance. Failure of the counter-performance meant that the purchase price was not due. Thus, restitution did not contradict the claimant's contractual obligation.

3. Allocation of Risks Reasoning

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

> If the reason for not allowing concurrence of action between restitutionary and contractual claims before discharge is to do with not subverting risk allocation and contractual valuation then doctrine should be directly focused on those factors… Except in the case of speculative contracts, it should not be assumed, as it has been in the past, that all risks have been distributed to one side or the other. Where all risks have not been so distributed, there will be a gap in the contractual allocation and there is room for adjustment either by applying the principle of unjust enrichment or some other principle.[231]

Under this approach, results in cases such as *Roxborough* turn crucially on whether the risk that the license fee may be declared invalid was distributed between the parties.[232]

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[230] *Shuman v Coober Pedy Tours Pty Ltd* [1994] SASC 4401, (1994) 175 LSJS 159. See also, Edelman & Bant (n 185) 267.

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

[232] Peter Birks, 'Failure of Consideration and its Place on the Map' (n 225); Ralph Cunnington, 'Failure of Basis' [2004] LMCLQ 234.

In so far as the 'allocation of risks' reasoning relies on factors other than the operation of contractual obligations, it faces insuperable problems. First, this argument presumes that the only reason for not allowing restitution within subsisting contracts is to prevent subversion of risk allocation. As Chapter II demonstrated however, at least in some cases, there is a more fundamental reason for denying restitution — absence of the defendant's enrichment. If that view is accepted, the focus must turn to parties' contractual obligations; the more abstract question of whether particular risks were allocated is unhelpful.

Secondly, the determination of whether certain risks were allocated between parties is replete with indeterminacies. This is especially so since proponents of the allocation of risks reasoning offer no concrete methodology for identifying gaps in contractual bargains.[233] Otherwise than through express or implied contractual terms, it is unclear how this exercise works.[234] It is unsurprising therefore that the application of this methodology to *Roxborough* has led to radically opposite results. Beatson and Virgo argue that *Roxborough* is incorrectly decided since the burden of proving that there was no allocation of risks must fall on the claimant. The claimant cannot discharge that burden.[235] Cunnington on the other hand, applies the same

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

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

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

methodology to reach the opposite result.[236] The intermediate position, that this risk was 'shared' between the parties, has also found adherents.[237]

Finally, the 'allocation of risks' reasoning is based on the incorrect assumption that contractual silence on particular eventualities equates to a gap in the parties' bargain. That is untrue if the gap is one that cannot be filled through contractual methods, such as the implication of terms. As Smith suggests:

> Read literally, what such contracts state is that the parties' obligations are unconditional (save as provided for in the contract)… Indeed, the claim that silence indicates a gap in a contract is inconsistent with the basic idea that contractual obligations are promissory obligations.[238]

Consider an example.

> *Example 2*: C enters into a contract with D under which C promises to lend her car to D on hire. One week before the commencement of the hire, C realises that the market price of car hires has doubled. The rise in market prices was unforeseen and consequently, not subject to negotiation.[239]

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

> It is not an appropriate approach to construction to hold that, where the parties had contemplated an event A, and they did not contemplate event B, their agreement must be taken as applying only in event A and cannot apply in event B.[240]

In sum, the fact that parties in *Roxborough* did not contemplate the invalidity of the license fee at the time of contracting does not mean that that there is a gap in the

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[236] Cunnington (n 232) 250–251.

[237] Peter Jaffey, 'Failure of Consideration: Roxborough v Rothmans' (2003) 66 MLR 284.

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

[239] ibid 285–286.

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

allocation of risks. That conclusion can only be reached if the claimant's obligation was conditional on the validity of the license fee. It is to that question that I now turn.

4. Conditionality Reasoning

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

> [W]hat would the position have been if [the retailer] had not been paid at the time when invalidity of the tax had been discovered? …Is this portion of the price earned even where the purpose of charging it, payment of a tax to the state, will never be fulfilled. Precisely the same question is determinative of the issue where the price has been paid in advance.[241]

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

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

> In the *Roxborough* case, the tax element was a fixed separate element from the rest of the price... Separated out in this way, one can see that, once the tax was held not to be owing, that part of the price could also be said not to be owing albeit that no particular clause could be struck down as void.[242]

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[241] Stevens, 'Is There a Law of Unjust Enrichment?' (n 24) 29. See also, Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Charles Rickett & Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 174–175.

[242] Burrows, 'Restitution of Mistaken Enrichments' (n 224) 767.

There is also some judicial support for this view. In *Warne County Produce*[243] for example, Cardozo CJ considered a fact situation nearly identical to *Roxborough*. He held:

> This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events… This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise. [244]

Notably, this reasoning was cited with approval in *Roxborough*.[245] *123 East Fifty-Fourth Street* is another example.[246] There, the defendant restaurant owner paid tax which was in fact, not due. The defendant recovered the tax amount. However, that amount had already been passed on by the defendant to its patrons. The question was whether the patrons could recover the tax component from the defendant. The second circuit Court of Appeals held:

> [I]f, before the plaintiff had paid it, the treasury had declared that the tax was not due, the plaintiff could not have successfully resisted the guests' demand that it be turned back to them, the very purpose for which they had paid it having then become incapable of execution.[247]

In other words, the obligation of the patrons to pay the tax component was conditional on the validity of the defendant's tax liability. This reasoning has also been adopted in Australia.[248] In fact, in the New South Wales Court of Appeal, Gyles J had decided *Roxborough* on this basis.[249]

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

[244] ibid 669 (Cardozo CJ).

[245] *Roxborough* (n 6) [18].

[246] *123 East Fifty-Fourth Street v United States* 157 F 2d 68 (2d Cir 1946).

[247] ibid 71.

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

[249] *Roxborough v Rothmans of Pall Mall Australia Ltd* [1999] FCA 1535 [100] (Gyles J). See

5. *Roxborough*: The Conditionality Explanation

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

The proposition that restitution can follow from the failure of conditional obligations, even within a subsisting contract commands some judicial support. *British American Continental Bank* is one example.[250] There, the dispute concerned a currency exchange transaction. Bankruptcy proceedings had been commenced against the purchaser. Unaware of this, the claimant paid the defendant. Later, the claimant sought restitution. It was argued that the payment was made in fulfillment of the claimant's liability and was hence, irrecoverable. This argument was rejected on the basis that the payments were mutually conditional. Failure of one defeated the other.[251]

The conditionality reasoning establishes two propositions. First, the retailer's obligation in *Roxborough* was conditional on the wholesaler's license fee liability. Secondly, in cases where conditional obligations fail, restitution may operate within a subsisting contract. When read together, these propositions reconcile *Roxborough* with the enrichment thesis. The invalidity of the license fee meant that the retailer was not under a liability to pay the defendant. Therefore, the payment did not discharge the wholesaler's claim against the retailer. The invalidity of the statute defeated that

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also, *James More & Sons Ltd v University of Ottawa* 49 DLR (3d) 666 (Ont HC).

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

[251] ibid 344–345 (Scrutton LJ), 341 (Warrington LJ).

claim. Overall therefore, the defendant was enriched by that payment. Consequently, the award of restitution in *Roxborough* does not contradict the enrichment thesis.

B. *DMG*: A 'COMMUNITY ESTOPPEL' EXPLANATION

The decision of the House of Lords in *DMG* is a puzzling one. The characterisation of the claimant's mistake, the true import of ECJ's judgment in *Metallgesellschaft*,[252] whether the tax was due when it was paid and finally, the significance of the claimant's failure to opt for a Group Income Election ('GIE') — none of these points are free from controversy. The focus of this section is on a narrower issue. It suggests that the decision in *DMG* can be reconciled with the enrichment thesis based on the principle of 'community estoppel'.[253]

1. The Decision in *DMG*

The dispute concerned the claimant's obligation to pay Advance Corporation Tax ('ACT'). Under the Income and Corporation Taxes Act, 1988 ('the Act') dividend distributions by UK resident companies were subject to ACT. However, ACT could later be set off against Mainstream Corporation Tax ('MCT'). Notably, the Act provided for an exemption for distributions between companies that had opted for GIE. However, this exemption was only available if the paying company and the receiving company were both resident in the UK.[254] This provision was challenged before the ECJ in *Metallgesellschaft*. The ECJ found that the discriminatory nature of the GIE provisions breached the freedom of establishment guaranteed by the EC

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

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

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

Treaty.[255] The remedial consequences of this conclusion were however left to national Courts.[256] That issue arose for the consideration of English Courts in *DMG*.

The claimants were a German holding company and its UK subsidiaries. The residence requirement had denied them the opportunity to opt for GIE. Had this not been the case, they argued, a GIE would have been made. This would have meant that subsidiary was not liable for ACT. Consequently, the claimants sought restitution from the Revenue. Two features of the claim are notable. First, the claimant's ACT had been set off against its MCT liability. Consequently, the Revenue's enrichment consisted solely in a timing advantage. Secondly, to take advantage of the extension of the limitation period for claims seeking 'relief from the consequences of a mistake',[257] the claimant chose to rely on the unjust factor of mistake.

At first instance, Park J granted restitution.[258] He made two significant findings. First, the judgment in *Metallgesellschaft* did not nullify DMG's tax liability. Secondly, DMG's mistake consisted in not realising that it 'could have made group income elections… which would have had the effect of preventing the ACT from being payable'.[259] The Court of Appeal took a different view. According to Parker LJ, ECJ's judgment nullified the claimant's obligation to pay tax.[260] Thus, DMG's mistake consisted in its belief that ACT was payable; in fact, it was not. The House of

[255] *Metallgesellschaft* (n 252) para 76.

[256] ibid para 96.

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

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

[259] ibid [21].

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

Lords reversed this judgment.[261] Leaving aside the wide array of issues addressed by the law lords, the discussion here is confined to two questions: was the ACT due when it was paid? If it was, what implications does that conclusion have for restitution?

None of the judges except Lord Scott convincingly addressed the difficulty posed by the fact that the claimant was seeking restitution of a sum due under a valid obligation. Lord Hoffmann agreed with the Court of Appeal that 'the mistake was about whether DMG was liable for ACT'.[262] Further, in his view, ECJ's judgment did not nullify the tax liability. This conclusion, read with the fact that the claimant did not exercise the GIE should have led him to consider the implications of the fact that the claimant was seeking restitution of a sum that was due. He sought to overcome that difficulty in this passage:

> The election provisions were purely machinery, which DMG would undoubtedly have used, by which it could enforce its right to exemption from liability.[263]

Lord Walker similarly dismissed GIE as a 'procedural requirement'.[264] Lord Hope in contrast, characterised the mistake differently. Agreeing with Park J, he held that the claimant's mistake consisted in its belief that GIE was not available.[265] Beyond this, he did not address the difficulty posed by the fact that ACT was in fact due. Lord Scott dissented. In his view, the ECJ's judgment did not nullify the claimant's ACT liability. Based on that premise, he reasoned:

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[261] *DMG* (n 7).

[262] ibid [32] (Lord Hoffmann).

[263] ibid [32] (Lord Hoffmann).

[264] ibid [143] (Lord Walker).

[265] ibid [62] (Lord Hope).

> [I]f the legal obligation under which the money was paid cannot be, or has not been, invalidated, then, in my opinion, whether or not it can be shown that 'but for' the mistake in question the money would not have been paid, a restitutionary remedy for the recovery of the money would not be available.[266]

2. Reconciling *DMG* with the Enrichment Thesis

At first blush, the decision in *DMG* contradicts the enrichment thesis. That is because the claimant's payment was arguably made to discharge a statutory obligation. In net benefit terms, this must mean that the Revenue was not enriched. On closer examination however, the decision in *DMG* can be reconciled with the enrichment explanation. That claim is premised on three propositions: (**1**) The ACT was owed when it was paid; (**2**) Proposition (1) dictates the characterisation of the mistake; (**3**) The principle of 'community estoppel' precludes the Revenue from relying on Section 247(1) against the claimant.

i. The ACT Was Due When It Was Paid

The view that ECJ's decision in *Metallgesellschaft* nullified the claimant's ACT liability is incorrect. First, this reasoning misunderstands the relationship between EC norms and national legislations.[267] The European Communities Act, 1972, incorporates obligations created by the European Union into the English legal system.[268] In cases of conflict they take precedence over domestic norms. However, the appropriate remedy to rectify national legislations that contravene EU norms is the process of 'disapplication' by national Courts.[269] Non-compliance with EU norms

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[266] ibid [85] (Lord Scott).

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

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

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

does not automatically nullify primary legislations. This was the view adopted by the Court in *Thoburn*.[270] As Craig remarks:

> What Lord Justice Laws said in *Thoburn* was that the constitutional impact of EU law on national law was not going to be dictated top-down by the European Court of Justice on our courts… So it is for our courts to decide what they believe to be the impact of EU law within our national constitutional order.[271]

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

> [W]hat is contrary to Community law… is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement.[272]

Finally, and this must follow from the second point, there were at least two ways in which the breach of EC Treaty could have been rectified — to make GIE available to all companies regardless of residence or to make them inapplicable even for UK resident companies. Either would have ensured that the taxation regime was not discriminatory. The choice between these two methods must be left to the member-state. The view that ACT liability is automatically nullified by the ECJ's decision affords inadequate attention to this consideration.

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

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

[272] *Metallgesellschaft* (n 252) para 83. See also, Robert Chambers, '*Deutsche Morgan Grenfell Group Plc v IRC*' (2006) 6 OUCLJ 227, 228; Stevens, 'Justified Enrichment' (n 267) 143.

ii. Characterising the Mistake

The previous section established that the ACT was due when it was paid. This must mean that the Court of Appeal's characterisation of the mistake was incorrect. The claimant's belief that it was liable to pay ACT was true.[273] Rather, the relevant mistake consisted in DMG's belief that it was not eligible to make a GIE. On the true state of the law, that belief was false.

iii. Community Estoppel

The principle of 'community estoppel' was first evolved by the ECJ in the context of 'direct effect' of unimplemented directives.[274] Its first authoritative formulation is found in Advocate General Warner's opinion in *Enka*:

> A member state that fails fully to give effect to a directive is in breach of the Treaty… to allow it… to rely upon that fact as against a private person in proceedings in its own Courts would be to allow it to plead its own wrong.[275]

Within a span of two years, 'community estoppel' was adopted as a full-fledged rationale for the direct effect of unimplemented directives.[276] ECJ first made that move in *Ratti*.[277] There, criminal proceedings had been initiated against Mr. Ratti under an Italian law which required manufacturers of chemical products to affix labels indicating the substances present in them and their volume. At the time of prosecution, the charging legislation ought to have been amended to ensure

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[273] *DMG* (Ch) (n 258) [231].

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

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

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

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

compliance with Directive 73/173. This would have resulted in the repeal of the provision under which Mr. Ratti was charged. ECJ concluded that the proceedings against Mr. Ratti were unlawful. It held:

> [A] member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the Directive entails.[278]

Subsequent case law of the ECJ has reaffirmed the 'community estoppel' principle. ECJ's decision in *Faccini Dori*[279] for instance, reinforced the estoppel reasoning. It held that the *Ratti* line of cases were intended to 'prevent a State from taking advantage of its own failure to comply with Community law'.[280] The State's failure to comply with EU norms must not deprive individuals of the benefit of those norms. Subsequently, the estoppel rationale has been reiterated by the ECJ, inter alia, in the context of directives intended to ensure equality of working conditions between men and women,[281] social security benefits,[282] and employment in the armed forces.[283] English Courts have also affirmed the community estoppel doctrine.[284]

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[278] ibid para 22.

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

[280] *Faccini Dori* (n 279) para 2.

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

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

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

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

iv. Reconciling DMG With The Enrichment Thesis

As established in Section (ii), the claimant's mistake in *DMG* consisted in its belief that it was not eligible to make a GIE. That mistake was causally linked to Revenue's enrichment. This establishes a prima facie case for restitution. There are however, two complications. First, it may be suggested that the claimant's mistake did not cause the Revenue's enrichment. That is because even if the claimant had applied to exercise GIE, Revenue would have rejected that claim relying on the residence requirement in Section 247.[285] Secondly, it may be argued that the claimant's valid statutory obligation to pay ACT precludes restitution. That liability subsisted as long as the claimant did not exercise GIE. As Stevens puts it, 'the election was like a lever which, when pulled, could prevent liability from arising'.[286] In *DMG*, the claimant never pulled that lever.

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

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

[286] Stevens, 'Justified Enrichment' (n 267) 142–143.

Treaty. In essence, the Revenue would be relying on its own breach of the EC Treaty to deny restitution to the claimant. That is impermissible.

Consider now, the second objection. The crux of that objection is this: since the claimant did not in fact exercise a GIE, its ACT payment was made in pursuance of a valid statutory obligation. This precludes a remedy in unjust enrichment. The first step towards establishing the incorrectness of this argument lies in examining the circumstances under which the claimant failed to exercise GIE. As Park J found at first instance, the only reason the claimant chose to not exercise the GIE was because Section 247 — a provision in breach of the EC Treaty — precluded that option.[287] For the Revenue to rely on the liability of the claimant that arose solely by virtue of its failure to exercise the GIE, therefore amounts to the Revenue relying on its own unlawful act (in the form of Section 247) to deny the claimant a restitutionary remedy that would otherwise have been available.[288] The principle of community estoppel precludes this result.

v. Advantages of the 'Community Estoppel' Explanation

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

> *Example 3A*: C seeks restitution of tax from the Revenue. C argues that she would not have had to pay the tax had she not mistakenly failed to exercise an election in a deed of variation.[289]

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[287] *DMG* (Ch) (n 258). See also, *DMG* (n 7) [61].

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

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

> *Example 3B*: C seeks restitution of tax from the Revenue. C argues that, had she not used up her tax reliefs against an earlier unlawful exaction by the Revenue, she would have been able to offset those reliefs against the later levy of lawful tax.[290]

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

C. UNENFORCEABLE OBLIGATIONS

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

> *Example 4*: C owes D £100. That debt is now time-barred. Intending to discharge the debt, though unaware that the debt is unenforceable, C pays £100 to D. C later seeks restitution from D. C's claim will not succeed.[291]

Here, D's disenrichment consists in the discharge of a valueless debt. Since the notion of enrichment is a factual enquiry,[292] D's receipt of £100 and her loss of a valueless claim cannot be balanced off against each other. Consequently, D is enriched in net terms. How then can the denial of restitution in Example 4 be explained? The answer lies in the legal obligation qualification. As suggested in

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

[291] *Moses* (n 90); *Bize* (n 90).

[292] Burrows, *The Law of Restitution* (n 30) 408.

Chapter I,[293] the claim in Example 4 is susceptible to two distinct defences, the good consideration rule and the legal obligation qualification. Despite the unavailability of the good consideration rule therefore, the legal obligation that operates between C and D denies C's claim. Unsurprisingly, Courts have never purported to apply the good consideration rule in cases resembling Example 4. Their reasoning in those circumstances have almost entirely relied on the legal (or natural) obligation owed by C to D.[294]

However, that reasoning is inapplicable to three-party cases. An illustration.

> *Example 5*: X owes D £100. That debt is now time-barred. X pays £100 to D through an account held with C bank. C makes the payment mistakenly overlooking the fact that X's account is in overdraft. C later seeks restitution from D.

Here, the obligation discharged is owed by a third party and not the claimant. Consequently, the legal obligation qualification is inapplicable. Thus, the success of C's claim depends entirely on the good consideration rule. English authority on the application of the good consideration rule in these circumstances is exceedingly hard to find. However, the enrichment thesis suggests that the good consideration rule is inapplicable here. That is because D's disenrichment through the discharge of a valueless debt does not balance off her enrichment (£100).

In sum, this chapter demonstrated that three major challenges to the enrichment thesis — *Roxborough*, *DMG* and the law on restitution of payments made to discharge unenforceable obligations — may, on closer examination be reconciled with that approach.

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[293] See text to n 85–n 92 in ch I.

[294] *Moses* (n 90) Burrow 1012, ER 680–681; *Bize* (n 90) Term Reports 286–287, ER 1098; *Larner v London County Council* [1949] 2 KB 683 (CA) 688; *Re Magarey Farlam* (n 15) [168], [169], [177].

CHAPTER IV

ALTERNATIVE EXPLANATIONS & CONSEQUENCES

Chapter II argued that the justification for the good consideration rule lies in the absence of the defendant's enrichment. Some objections to that suggestion were then addressed in Chapter III. This chapter (**A**) examines some of the alternative explanations for the good consideration rule and (**B**) lays out the potential consequences of adopting the enrichment explanation.

A. ALTERNATIVE EXPLANATIONS

1. Change of Position Explanation

In *Lloyds Bank* Waller LJ conceived the good consideration rule as a change of position qualification. In his view, 'if a payment has discharged the debt, then unless an order to return the money reinstates the debt, the payee will have changed his position in no longer having a remedy against the debtor'.[295] With respect, this explanation runs into insuperable problems.[296]

First, all leading authorities on the good consideration rule treat it as a defence distinct from change of position. In the seminal decision in *Barclays Bank* for instance, Goff J listed good consideration [2(b)] and change of position [2(c)]

[295] *Lloyds Bank* (n 71) 126 (Waller LJ). See also, *K&S Corp Ltd v Sportingbet Australia Pty Ltd* [2003] SASC 96, [2004] ALMD 250 [161]; Robert Goff & Gareth Jones, *Goff & Jones: The Law of Restitution* (Gareth Jones ed, 6th edn, Sweet & Maxwell 2002) 41-001–41-002; Robert Goff & Gareth Jones, *Goff & Jones: The Law of Restitution* (Gareth Jones ed, 7th edn, Sweet & Maxwell 2007) para 41-001–41-002.

[296] See generally, Virgo, *The Principles of the Law of Restitution* (n 11) 174; Meier, 'Mistaken Payments in Three-Party Situations' (n 48) 588.

separately.[297] Thereafter, English Courts have consistently maintained the distinction between these two rules.[298] Leading authorities in Australia,[299] Canada[300] and Hong Kong[301] have also recognised this separation.

Secondly, the change of position explanation fails to account for the requirement that, for the good consideration rule to operate, the payment must have been intended to discharge the debt.[302] Change of position rests on the basis of a causal relationship between the claimant's payment and the defendant's discharge of the debt. On that view, it is immaterial whether the claimant's payment was intentional.

Thirdly, as Waller LJ expressly recognised,[303] the change of position explanation rests on the assumption that a debt once discharged, cannot be revived.[304] However, as Moore has convincingly demonstrated, that assumption is questionable.[305] In *Aiken v Short* — on which Goff J premised the good consideration rule in *Barclays Bank* — Bramwell B proceeded on the basis that restitution may lead

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[297] *Barclays Bank* (n 2) 695 (Goff J). See also, *Lloyds Bank* (n 71) 130 (Peter Gibson LJ); Burrows, 'Is There a Defence of Good Consideration?' (n 19) 171–172.

[298] *Stephen John Edmond Jones v Kelly Churcher, Abbey National Plc* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [48]–[55], [56]; *Mahme Trust* (n 178) [146], [147]; *Midland Bank Plc v Guadalupe ValeroConchita Foulis* (CA, 4 March 1991); *DMG* (n 7) [84] (Lord Scott); *Gulf International Bank BSC v Albaraka Islamic Bank BSC* (QB, 24 July 2003).

[299] *David Securities v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 CLR 353, 379; *ANZ Banking Group Ltd v Westpac Banking Corporation* (1987) 164 CLR 662, 673; *Australian Financial Services* (n 57) [100], [101]; *Hills Industries* (n 54) [81].

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

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

[302] See text to n 53–n 75 in ch I.

[303] *Lloyds Bank* (n 71) 126.

[304] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 171.

[305] Jonathon Moore, 'Restitution from Banks' (DPhil thesis, University of Oxford 2000) 306–307. See also, Dawson (n 95) 289.

to the revival of debts.[306] The judicial trend also vindicates that view. Consider for example, *Colonial Bank.*[307] The claimant bank's client wished to remit some money to the British bank. Due to an error, that amount was credited to the defendant bank. The client happened to be a customer of the defendant. The defendant credited the mistaken payment against the client's overdraft. On realising the mistake, the claimant sought restitution. The defendant argued that the sum had been used and could not be recalled. Rejecting this argument, the Court held, 'Nothing was done except by private entries made by the defendants in their own book… They had not in any way altered their position'.[308] By crediting the payment against the customer's overdraft, the bank had discharged the debt. This is evident from the fact that, if the claimant had never sought restitution, that payment would have been received in satisfaction of the debt. Thus, 'the reduced balance in the overdrawn account… reflect[ed] the legal relationship between bank and customer'.[309] However, the fact that the debt was discharged did not preclude restitution.

Recently, the High Court of Australia in *Hills Industries* confirmed the possibility that, at least rarely, debts may be revived.[310] There, a fraudster induced the claimant to make to the defendant, payments that were accepted in discharge of debts owed by third parties. The Court found it difficult to regard 'the discharge as irreversible, given that it was founded in [the third party's] fraud against [the claimant]'.[311]

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[306] *Aiken* (n 8) Hurl & N 216, ER 1182.

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

[308] ibid 88.

[309] Moore (n 305) 307.

[310] *Australian Financial Services* (n 57).

[311] ibid [102].

Fourthly, it is difficult to reconcile the causation element of the change of position defence with the good consideration rule. That is because the good consideration rule 'applies even if the client would have discharged the debt in any event and therefore could not claim a change of position'.[312] An example.

> *Example 1*: A owes B, £100. A does not intend to pay B, but does so by mistake. B would have voluntarily waived the debt the next day anyway. Can A recover £100 from B?

Here, the change of position defence is not available to B. To satisfy that defence, the defendant must establish that, 'but for' the enrichment (£100), she would not have suffered the disenrichment (the discharge of the debt).[313] B would have suffered that detriment in any event, the next day. Thus, there is no causal link between B's enrichment and disenrichment. In contrast, since the good consideration rule does not contain a causation qualification, B is entitled to rely on that rule.

Finally, the Supreme Court of New Zealand has suggested that the good consideration rule may also deny claims based on the *Woolwich* principle.[314] However, the change of position defence is not available in such cases.[315]

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

This section considers two related explanations for the good consideration rule. Consider first, the contractual restriction explanation. This suggests that the denial of restitution in cases such as *Lloyds Bank* is based on the need to protect contractual

[312] Edelman & Bant (n 185) 345.

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

[314] *Stiassny* (NZSC) (n 86) [67].

[315] *FII Test Claimants* (Ch) (n 289) [337]–[342].

bargains.[316] The focus here is on the contract between the customer (third party) and the bank (the claimant). According to this explanation:

> [T]he bank should not be entitled to restitution from [the defendant] because this would undermine the contractual risks (especially the risk of the customer's insolvency) undertaken by the bank in the contract with its customer.[317]

An example.

> *Example 2*: Under a contract, X owes £10,000 to D. X discharges this debt through a payment from her account with C bank. C makes the payment to D overlooking the fact that X does not have sufficient funds in her account. C cannot recover the payment from D.[318]

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

Burrows relies on *Costello*[319] in support of his argument. There, in pursuance of a contract with Oakwood (a company), the claimant constructed houses on the

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[316] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 170; Birks, *Unjust Enrichment* (n 35) 90–91; Peter Birks, 'The Burden on the Bank' in Francis Rose (ed), *Restitution and Banking Law* (Mansfield 1998) 220.

[317] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 172–173.

[318] *Lloyds Bank* (n 71).

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

defendant's land. It was held that the claimant could not proceed against the defendant, as that would disturb the contract between the claimant and Oakwood. In contrast to Example 2 however, there was no contract between the defendant and Oakwood. Thus, the defendant had not assumed the risk of Oakwood's insolvency. As Etherton LJ said, 'legally enforceable promises were made only between Oakwood and the claimants'.[320] The decision in *Pan Ocean*[321] is susceptible to a similar analysis. There, the owner of a ship (X) had assigned the benefit of a charter (with C) to the defendant (D). C's claim against D for the restitution of overpaid hire was denied, inter alia, on the basis that that would permit C to evade the risk of X's insolvency. In contrast to Example 2 however, it is difficult to argue that, under the assignment contract between X and D, D had assumed the risk of X's insolvency as regards hire payments. This is because, generally, D would look to C, and not X for those payments. In any event, there was another reason in that case for concluding that the risk of non-payment must be borne by C and not D — the remedial consequences of overpayment of hire were specifically governed by the contract between C and X.[322] Lord Goff said:

> [T]he relevant contract imposes on the assignor [X] an obligation of repayment in the circumstances in question, and that there is nothing in the assignment which even contemplates, still less imposes, any additional obligation on the assignee [D] to repay.[323]

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

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[320] ibid [21] (Etherton LJ).

[321] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL). See also, *Lumbers* (n 172).

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

[323] *Pan Ocean* (n 321) 166 (Lord Goff).

Consider now, the 'at the expense of' explanation. It suggests that the defendant's enrichment is not 'at the expense of' the claimant-bank, but its customer.[324] That is because in making the disputed payment, the bank acted on behalf of its customer. Initially, Birks favoured this reasoning.[325] However, he subsequently resiled from this view because, according to him:

> it would… endanger the bank's right to recover from the immediate payee any mistaken payment made in the belief that it was paying on the credit of its customer, even an accidental second payment.[326]

Despite this, it has been argued that this explanation must not be abandoned. Moore for instance, argues that this explanation may be saved if it is confined to cases where the claimant is 'in fact paying on the credit of the [procurer]' and not merely mistakenly believing so.[327] However, what of cases where a third party fraudulently induces the claimant to make a payment to the defendant?[328] In such cases, the third party's fraud vitiates the procurement of the claimant's performance. Thus, the claimant's performance is not made 'on behalf of' the third party in any meaningful sense. It is unsurprising therefore that Birks subsequently reformulated the 'at the expense of' explanation. According to his new formulation, the validity of this explanation is contingent on an 'initially valid contract' between the claimant and the third party. Birks insisted that 'the party making the performance and thus conferring the benefit had a valid contractual right to be paid for that performance by the other

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

[325] ibid.

[326] Birks, 'The Burden on the Bank' (n 316) 219-220.

[327] Moore (n 305) 306–307, 316.

[328] *Australian Financial Services* (n 57); *Gaffner v American Finance Co* 206 P 916 (Wash 1922); *Associates Discount Co v Clements* 321 P 2d 673, 679 (Okla 1958).

party to the contract'.[329] Instances of fraudulent procurement of the claimant's performance fall outside the purview of this formulation. The operation of the good consideration rule in these cases is hence inexplicable on the 'at the expense of' explanation.

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

First, neither of these explanations attempts to account for the good consideration rule on its own terms. They both suggest that the good consideration rule masks the real reason for denying restitution.[330] Consequently, they must give way to an explanation that takes the good consideration rule seriously on its own terms. As an earlier edition of Goff and Jones noted:

> [The 'at the expense of explanation'] is an attractive analysis, but it was not the ground of the Court of Appeal's decision [in *Lloyds Bank*] which was that the defendant-payee had given good consideration… The fact that the decision may be explained on other grounds does not mean that the Court of Appeal's reasoning was unsound.[331]

Secondly, both explanations fail to account for the operation of the good consideration rule in two-party cases. In such cases, there is no separate contractual

[329] Birks, *Unjust Enrichment* (n 35) 89–90.

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

[331] Goff & Jones (7th edn) (n 295).

assumption of risks that requires protection. Neither is it plausible in those cases to argue that the enrichment is not 'at the expense of' the claimant.

Thirdly, both these explanations also fail to explain two significant qualifications to the good consideration rule. First, the requirement that the payment must have been intentional,[332] and second, that the good consideration rule will not apply if the payor's mistake was induced by the payee or if the payee was aware of the payor's mistake.[333] Neither of these qualifications are relevant to protecting the integrity of the contract between the claimant and the third party.[334] The state of mind of the defendant is also irrelevant to the 'at the expense of' requirement.

Finally, the contractual restriction explanation bases itself on the validity of the contractual obligations between the claimant and the third party.[335] No question of protecting contractual risks arises if that contract is void. Notably however, the invalidity of the contract between the claimant and the third party has not been seen as precluding the application of the good consideration rule. Consider for example, *Hill Industries*.[336] There, a fraudster (the third party) procured a financier (the claimant) to make payments to the defendants. The contract between the claimant and the third party concerned non-existent goods and was hence, void.[337] In the New South Wales Court of Appeal, Allsop P and Meagher JA disagreed on whether the requirement of

[332] See text to n 53–n 75 in ch I.

[333] *Barclays Bank* (n 2) 695; *Lloyds Bank* (n 71) 130 (Peter Gibson LJ).

[334] Moore (n 305) 313.

[335] Birks, *Unjust Enrichment* (n 35) 90.

[336] *Australian Financial Services* (n 57). See also, *Gaffner* (n 328).

[337] See also, Burrows, 'Good Consideration in the Law of Unjust Enrichment' (n 56) 329 (noting that the contract between the claimant and the defendant was also void for common mistake).

intention was necessary.[338] However, neither suggested that the invalidity of the contract was relevant to the application of the good consideration rule. Nor was there any suggestion to that effect in the High Court of Australia.[339]

3. Compromise Explanation

This explanation suggests that the good consideration rule is an instantiation of the defence of 'contractual compromise' or 'honest receipt'.[340] However, elements of the good consideration rule do not vindicate this claim. First, the good consideration rule does not require a settlement between the parties. Secondly, the contractual compromise defence is restricted to cases where the contract operates between the claimant and the defendant.[341] The good consideration rule is not so confined. Finally, the compromise defence is primarily oriented to ensure finality of litigation. As Edelman notes however, it is difficult to see how the good consideration rule which does not require 'threatened litigation, compromise or even demand by the plaintiff' can be concerned with protecting the finality of disputes.[342]

4. Bona Fide Purchase Explanation

It has also been suggested that the good consideration rule is an application of the bona fide purchase defence. Though that view was preferred in the 3rd edition of Goff

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[338] *Hills Industries* (n 54).

[339] *Australian Financial Services* (n 57).

[340] *Peter Hookway v Racing Victoria Limited* [2005] VSCA 310, 13 VR 444 [39]; Mason, Carter & Tolhurst (n 10) 878–882.

[341] *Peter Hookway* (n 340).

[342] Edelman & Bant (n 185) 345. See also, Kull, 'Rationalizing Restitution' (n 185) 1238.

and Jones,[343] later editions resiled from this view.[344] Interestingly however, this explanation has reappeared in the latest edition of Goff and Jones.[345]

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

Virgo and Swadling afford a narrow scope for the bona fide purchase defence. To them, this defence is an exception to the *nemo dat* principle; it has no role to play in cases that are not concerned with the vindication of property rights.[346] Since none of the leading cases on the good consideration rule were based on subsisting property rights, this version of the bona fide purchase defence cannot explain the good consideration rule.

To Key, the operation of the bona fide purchase defence turns on the nature of the claim; this defence 'will operate… to vest property rights in the defendant… a bona fide purchase does not remove an *in personam* claim'.[347] Almost all leading cases applying the good consideration rule were *in personam* claims. Therefore, this

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

[344] Goff & Jones (6th edn) (n 295) 41-001; Goff & Jones (7th edn) (n 295) 41-001.

[345] Mitchell, Mitchell & Watterson (eds), *Goff & Jones* (8th edn) (n 11) para 29-21. See also, *Lloyds Bank* (n 71) 133 (Peter Gibson LJ).

[346] Virgo, *The Principles of the Law of Restitution* (n 11) 656; Swadling (n 185) 79–105.

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

account of the bona fide purchase defence also fails to satisfactorily account for the good consideration rule.

On a broader view, the bona fide purchase defence ensures consistency between unjust enrichment and property law.[348] As Birks suggests, 'the personal claim has to be killed off by the defence of bona fide purchase in order to avoid the stultification of the proprietary exception to *nemo dat*'.[349] According to this view however, the good consideration rule only operates where the bona fide purchase defence in property law applies to exclude the *nemo dat* rule. It has never been suggested however that the application of the good consideration rule is linked to the application of the *nemo dat* principle. Birks himself thought that the good consideration rule was not so confined.[350] Consequently, this version of the bona fide purchase defence also fails to explain the good consideration rule.

The broadest version of the bona fide purchase defence is the one proposed by Barker.[351] To him, this defence is oriented to promote 'transactional security'; it protects the sanctity of the contract between the defendant and a third party. This account however restricts the operation of the bona fide purchase defence to cases where the defendant received the benefit by way of exchange with a party other than the claimant.[352] It is unsurprising therefore that Barker himself admits that cases applying the good consideration rule cannot be explained on the basis of bona fide purchase:

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[348] Burrows, *The Law of Restitution* (n 30) 576–577; Burrows, 'Is There a Defence of Good Consideration?' (n 19) 168.

[349] Birks, *Unjust Enrichment* (n 35) 240–245.

[350] Birks, 'The Role of Fault in the Law of Unjust Enrichment' (n 1) 256.

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

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

> [A]lthough the idea that D has given 'good consideration' in good faith sounds very like the defence of bona fide purchase, the latter is, to my mind, also a blind alley. This is because the policy of transactional security underpinning the bona fide purchase defence need only be invoked where the defendant has received a benefit by way of exchange with a party other than the plaintiff.[353]

Finally, there is at least one objection that applies in common to all accounts of the bona fide purchase defence considered above. It is that bona fide purchase is a complete defence; it applies regardless of the value of the consideration provided.[354] However, the good consideration rule operates in a pro tanto manner.[355]

5. Presence of Basis Explanation

Virgo argues that the good consideration rule must be understood as an instantiation of the 'presence of basis' bar. In his view, restitution is denied in these cases because the defendant's retention of the enrichment is justified by a valid 'basis'.[356] This view was considered and rejected in Chapter I.[357] In sum, it was suggested that 'presence of basis' can only explain the denial of restitution in cases where the basis operates between the claimant and the defendant. However, the good consideration rule operates even when the obligation is owed between the defendant and a third party.

B. CONSEQUENCES OF THE ENRICHMENT EXPLANATION

This section outlines the consequences that flow from the acceptance of the enrichment thesis. These results are largely in line with the accepted understanding of

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[353] Barker (n 351) 200.

[354] *Lipkin Gorman* (n 118) 580–581.

[355] See text to n 366–n 381.

[356] Virgo, 'Demolishing the Pyramid' (n 10) 493–495.

[357] See text to n 38–n 47 in ch I.

the good consideration rule. That is an additional reason why the enrichment explanation is preferable to its alternative formulations considered above.

1. The Good Consideration Rule is a Qualification on Primary Liability

The enrichment explanation helps identify where the good consideration rule fits within the unjust enrichment analysis. According to the enrichment thesis, the good consideration rule denies a primary element of the unjust enrichment cause of action.[358] Lord Scott supported that view in *DMG*.[359] So did Lord Hope in *Kleinwort Benson.*[360] He said, 'the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him'.[361]

Understanding the good consideration rule as a restriction on primary liability has significant practical implications. The most important of these is on the burden of proof.[362] Generally, the burden of establishing the defendant's enrichment is on the claimant. As a logical corollary, the burden of disproving the good consideration rule must similarly fall on the claimant.[363] Thus, if the defendant was entitled to the benefit, a claim for restitution will fail unless the claimant can establish that the defendant was enriched despite the defendant's entitlement.[364] There are strong reasons of equity that support this view. If it appears that the defendant received

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[358] In the taxonomy proposed by Goudkamp and Mitchell, good consideration is a 'denial', not a 'defence': James Goudkamp & Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in Charles Mitchell & William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2013) 133. See also, Burrows, 'Is There a Defence of Good Consideration?' (n 19) 167.

[359] *DMG* (n 7). See also, *David Securities* (n 299) 392 (Brennan J).

[360] *Kleinwort Benson* (n 50).

[361] ibid 408 (Lord Hope).

[362] Cf James Goudkamp, *Tort Law Defences* (Hart 2013) 138–139.

[363] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 182–183.

[364] *National Mutual Life Association* (n 86).

nothing more than what he was entitled to, it is only fair that the burden of disproving that fact must fall on the claimant. As Burrows suggests:

> D is merely receiving what it was, on the face of it, entitled to receive from C… Why should D be put to the burden of proving that the obligation was valid rather than putting the burden on C, who after all is bringing the claim, to prove that the prior obligation is not as it seems?[365]

2. The Good Consideration Rule operates Pro Tanto

The enrichment thesis also implies that the good consideration rule must preclude restitution only to the extent that consideration provided by the defendant negatives her enrichment. Consequently, the good consideration rule must operate in a pro tanto fashion.

Interestingly, English Courts had implicitly adopted this approach even before the decision in *Barclays Bank*. *Devaux v Conolly*[366] illustrates this. There, the claimants had ordered two parcels weighing 25 tons and 150 tons from the defendants. The claimant had paid in advance for these quantities. However, the defendant only shipped two parcels of 23 tons and 132 tons. It was held that the claimant was only entitled to recover the difference in price between the quantity promised and the quantity supplied.[367] When analysed through the good consideration lens, this means that the defendant only gave consideration for part of the claimant's payment (amounting to 23 tons and 132 tons). Consequently, the claim was defeated to that extent.[368] The same view was adopted in *Behrend*.[369] There it was held that if

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[365] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 183. For a contrary view, see, Virgo, *The Principles of the Law of Restitution* (n 11) 173.

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

[367] *Devaux* (n 366) CB 668, ER 670.

[368] Virgo explains the decision in *Astley* (n 212) on the same basis. He argues that 'where some money is lawfully due to the defendant and he receives more because of duress, the

the claimant chooses to accept short-delivery of goods, 'he must pay for the goods kept at the contract price… he can recover the price paid for the undelivered portion'.[370]

Australian Courts have adopted the same view.[371] In the leading decision in *David Securities*[372] the High Court of Australia held that, only:

> to the extent that a payment satisfies a defendant's right to receive it, the defendant gives good consideration and is not unjustly enriched. If the defendant receives more than his due, he may be unjustly enriched to the extent of the excess and restitution may be ordered pro tanto.[373]

There is also some academic support in favour of the pro tanto application of the good consideration rule.[374] In a recent article however, Burrows seems to prefer the contrary view:

> These commentators suggest that 'good faith' should probably be an integral part of the defence… and that it might be more acceptable in principle if the defence were to operate *pro tanto* to the extent of the value of the consideration provided. Neither of these modifications is at all appropriate.[375]

However, on close reading, it appears that the 'defence' Burrows refers to in this passage is the legal obligation qualification, not the good consideration rule.[376]

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claimant will only be able to recover the excess amount for which no basis exists': Virgo, 'Demolishing the Pyramid' (n 10) 495. See also, text to n 212–n 213 in ch II.

[369] *Behrend & Co Ltd v Produce Brokers Co Ltd* [1920] 3 KB 530 (KB).

[370] ibid 535 (Bailhache J).

[371] *York Air Conditioning & Refrigeration (A/asia) Pty Ltd v The Commonwealth* [1949] HCA 23, (1949) 80 CLR 11.

[372] *David Securities* (n 299).

[373] ibid 392 (Brennan J).

[374] Goff & Jones (7th edn) (n 295) para 41-002; Goff & Jones (6th edn) (n 295) 41-002; Virgo, *The Principles of the Law of Restitution* (n 11) 173; Virgo, 'Demolishing the Pyramid' (n 10) 495.

[375] Burrows, 'Is There a Defence of Good Consideration?' (n 19) 183.

[376] For the distinction between these two rules, see ch I.

That is clear from his reference to Lord Scott's remarks in *DMG* regarding the denial of restitution of enrichments conferred under a contract.[377] What Lord Scott saw as precluding restitution there was the presence of a legal obligation between the claimant and defendant. This explains why there is no reference in Lord Scott's reasoning to the fact that the defendant gave 'consideration' for the enrichment or indeed, the value of that consideration.

One possible objection to the argument advanced here remains to be considered. That arises from claims based on failure of consideration where part performance is rendered in pursuance of an entire obligation. An example.

> *Example 3*: C pays D £10,000 in advance to construct a building. Subsequently, D leaves the construction midway. C seeks restitution of £10,000 from D.

Assuming that D's obligation is entire, C can recover £10,000 from D. That is because D's payment is earned only on the completion of the building.[378] The fact that the payment was made in advance is inconclusive.[379] Prima facie, the result that C is entitled to restitution of £10,000 from D contradicts the pro tanto operation of the good consideration rule. Why is C's recovery of £10,000 not precluded, at least in part, by D's provision of 'consideration' i.e. the incomplete building? The answer is that whether the incomplete building constitutes 'consideration' cannot be judged independently of the bargain between the parties. *Mahme Trust*[380] illustrates this. There, the claimant trust sought restitution of unauthorised payments made to the

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[377] The same is true of Burrows' own example: see, Burrows, 'Is There a Defence of Good Consideration?' (n 19) 168.

[378] *Sumpter v Hedges* [1898] 1 QB 673 (CA); Law Commission, *Law of Contract: Pecuniary Restitution on Breach of Contract* (Law Com No 121, 1983) para 2.7.

[379] *Baltic Shipping Co v Dillon* [1993] HCA 4, (1993) 176 CLR 344, 385 (Gaudron J); Stevens, 'Is There a Law of Unjust Enrichment?' (n 24) 25–26; Wilmot-Smith (n 330) 427.

[380] *Mahme Trust* (n 178).

defendant employee. The defendant argued that the claim was precluded by the good consideration rule. The consideration consisted in the services he provided the claimant. Rimer J rejected this argument:

> I do not accept that it is enough for the defendant merely to be able to show that he has purported to confer a benefit on the claimant in exchange for the money mistakenly paid to him. If the benefit was so conferred pursuant to a bargain with the claimant, then the defence may well be available... But in this case there was no bargain. [The claimant] expected [the defendant] to provide his services, but it never agreed to pay for them.[381]

In other words, what constitutes 'consideration' must be judged in the light of the 'bargain' between the parties. The bargain in Example 3 was that D will be paid £10,000 on the *completion* of the building. The consequence of the conclusion that the construction obligation is an 'entire obligation' is that an unfinished building was no part of the bargain.

3. Discharge of Claims against Insolvent Debtors

According to the enrichment explanation, the good consideration rule operates by netting off the defendant's enrichment against her disenrichment. The value of the defendant's disenrichment is therefore, crucial. What happens if the defendant's claim was practically valueless, say, a debt owed by an insolvent debtor? On one view, this is entirely unproblematic. To Palmer for example, 'pragmatic reasons', not least, 'the difficulties that would arise from attempts to ascertain the actual value of a money claim'[382] dictate that the value of the defendant's claim must be left out of account. However since the evaluation of the defendant's enrichment is a factual enquiry,[383] the contrary view is preferable. On that view, the discharge of a debt owed by an

[381] ibid [148] (Rimer J) (emphasis added).

[382] Palmer (n 12) 497.

[383] Burrows, *The Law of Restitution* (n 30) 408.

insolvent debtor does not disenrich the defendant. Thus, in net terms, the defendant remains enriched. Consequently, the good consideration rule is inapplicable.

The timing of the debtor's insolvency is however, crucial. This is because the defendant's enrichment is computed at the moment of its receipt.[384] Therefore, a fall in the value of the debt (as a consequence of the defendant's insolvency at a later stage, for example) subsequent to its discharge will not influence the defendant's enrichment. That was the case in *Lloyds Bank*. There, the debtor succumbed to insolvency subsequent to the discharge of the debt.[385] The High Court of Australia debated a similar issue in *Hills Industries*,[386] albeit, in the context of change of position. Though the Court did not consider this question, it appears that the debtor's insolvency would not have precluded the application of the good consideration rule in that case. That is because there too, the debtor's insolvency was subsequent to the discharge of the debt.[387]

At first blush, the non-application of the good consideration rule in cases involving insolvent debtors may seem anomalous. However, closer examination dispels that suspicion. Compare two examples.

> *Example 4A*: X owes D £100,000 under a contract. X instructs C bank to make a payment to D to clear that debt. C bank makes a payment of £100,000 mistakenly believing that X has enough credit. X is in fact insolvent at the time of C's payment. C seeks restitution of £100,000 from D.

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[384] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) 836 (Goff J); Mitchell, Mitchell & Watterson (eds), *Goff & Jones* (8th edn) (n 11) para 4-34.

[385] *Lloyds Bank* (n 71) 128–129 (Thorpe LJ).

[386] *Australian Financial Services* (n 57).

[387] Compare ibid [44] and *Hills Industries* (n 54) [5]. See also, *Banque Worms v Bankamerica International* 570 NE 2d 189 (NY 1991).

> *Example 4B*: X owes D, £100,000 under a contract. X becomes insolvent before she could discharge the debt.

In Example 4B, the risk of X's insolvency falls on D. D assumed that risk under a contract with X. Should the fact that X chose to make the transfer through its bank radically alter that distribution of risk? In my view, it must not. The fact that X transferred the sum through C bank should not have the consequence of 'fortuitously shifting' the incidence of the risk in its entirety from D to C.[388] However, that is the consequence that application of the good consideration rule in Example 4A has. As Kull argues:

> [D's] relationship with [X] was based on the voluntary assumption of a credit risk, on terms that [X] found acceptable and that [X] expected to be profitable. [C's] relationship to [X] was, by contrast, merely one of agency: it undertook to transfer money in accordance with [X's] instructions, not to extend credit to it. In these circumstances it seems relatively easy to conclude that [C's] mistake has caused the unjust enrichment of D, to the same extent as if the [payment] had been directly but involuntarily contributed to the assets of [D].[389]

4. Claims Against Donees

Can a donee of the enrichment in respect of which restitution is sought rely on the good consideration rule? That is the question that this section considers. An example.

> *Example 5*: X makes a gift of £1000 to D by transferring that sum from an account held with C bank. C makes the transfer mistakenly believing that X has sufficient funds. In fact, X's account was overdrawn. C seeks restitution of £1000 from D.

The good consideration rule, understood as an enrichment qualification, has no application here. That is because D's enrichment is not accompanied by a corresponding disenrichment. There is some support in US authority for this view.

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[388] Andrew Kull, 'Defences to Restitution: The Bona Fide Creditor' (2001) 81 Boston University Law Review 919, 922.

[389] Kull, 'Rationalizing Restitution' (n 185) 1239.

Palmer for instance, denies the application of the good consideration rule to donees.[390] Similarly, §67 of the Restatement, the equivalent of the good consideration rule, confines its application to cases where D accepts the enrichment 'in satisfaction or reduction of [D's] valid claim'.[391] Clearly, Example 5 falls outside the purview of that rule.

However, the non-application of the good consideration rule does not mean that C's claim will succeed. Birks and Burrows share the intuitive inclination that it must not.[392] That result must however be attributed to reasons other than the good consideration rule. First, in Example 5, D's enrichment was procured by X. Consequently, D's enrichment is 'at the expense of' X, not C.[393] Secondly, the 'contractual restriction' reasoning — the objection that C's claim for restitution against D absolves C of the risk of X's insolvency — may provide an additional reason for denying C's claim. The application of that reasoning to mistaken payments by banks was rejected in a previous section.[394] However, that is because, in those cases, both the bank as well as the defendant had assumed the risk of the third party's insolvency. However, D, a donee, is differently situated. The absence of a contractual regime operating between D and X suggests that D had not assumed the risk of X's insolvency. As was the case in *Costello*[395] therefore, as between C and D, the risk of

[390] Palmer (n 12) 165, 166.

[391] R3RUE (n 13) §67.

[392] Birks, *Unjust Enrichment* (n 35) 90; Burrows, 'Is There a Defence of Good Consideration?' (n 19) 172.

[393] Note that an earlier section did not dispute the correctness of this reasoning, but only doubted its validity as an explanation for the good consideration rule: see text to n 329.

[394] See text to n 318–n 323.

[395] *MacDonald* (n 319). There was no contract between the defendant and Oakwood (the procurer of the enrichment) in this case.

X's insolvency must fall on C. C's claim for restitution against D attempts to evade that risk. It must hence be denied.

In sum, the commonly offered alternative explanations for the good consideration rule do not withstand scrutiny. Further, the enrichment thesis has the added advantage that the doctrinal consequences it leads to are largely in line with the prevalent judicial and academic thinking on the operation of the good consideration rule.

CONCLUSION

Goff J's decision in *Barclays Bank* has proved both 'influential' and 'controversial' in equal measure.[396] Not many decisions at first instance can have occupied the attention of both practitioners and commentators alike, and as deeply as this judgment has. A particularly controversial aspect of this decision is the denial of restitution on the basis that the defendant provided 'good consideration' for the enrichment. In 1983, delivering the Maccabaean lecture, Lord Goff warned judges and jurists against what he called the 'dogmatic fallacy—seeing law in terms of rules rather than in terms of principles'.[397] Along similar lines, the attempt in this thesis was to evolve from the good consideration rule, a cogent principle justifying its operation.

This thesis concluded that the good consideration rule is best justified as an enrichment qualification. The 'consideration' provided by the defendant offsets the enrichment received. In net terms, this leaves the defendant in an enrichment-neutral position. However, this conclusion is premised on two propositions. First, the good consideration rule and the conceptually separate legal obligation qualification have often been conflated. These rules must be separated out. Secondly, conditionally related disenrichments must be taken into account in computing the defendant's net enrichment (the 'net benefit approach').

One of the conceptual attractions of the enrichment thesis is its ability to explain the good consideration rule within the scheme of the unjust enrichment analysis. However, an account of the relationship between claims in unjust enrichment and

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[396] Gareth Jones (n 4) 211.

[397] Robert Goff, 'The Search for Principle' (Maccabaean Lecture at the British Academy 1983) reprinted in William Swadling & Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 320.

countervailing legal obligations remains incomplete without also explaining the basis for the legal obligation qualification. Is that restriction susceptible to a similar internal justification? Or does it raise larger questions regarding the interplay between unjust factors and the defendant's legal entitlement? Might its resolution lead to the conclusion that the unjust factors scheme of restitution and the absence of basis model are not as far apart as they are commonly thought to be? These questions await further exposition.

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