

CLARENDON LAW SERIES

# Unjust Enrichment

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## Enrichment

Enrichment at the expense of another is neutral in itself. A present of £1,000 given by proud parents on graduation day enriches the new graduate at their expense, but not unjustly. The two chapters of this part are therefore preparatory. They lead up to the crucial question whether the defendant's enrichment at the claimant's expense was unjust. This chapter asks only whether the defendant was enriched. The next asks whether that enrichment was at the expense of the claimant.

A conclusion that the recipient was not enriched puts an end to the inquiry. The defendant may still be liable, but not in unjust enrichment. He may be liable in one of the other three columns of the grid introduced in the previous chapter. For example, a person who has received a service but cannot be said to have been enriched may yet be liable to reimburse an uninvited intervener in his affairs. We placed uninvited intervention (*negotiorum gestio*) in the residual miscellany of causative events which forms the last of the four columns. Moreover, the intervener's claim is not gain-based. So far as concerns the stripes which run across the columns of the grid, it belongs in the compensation stripe, not in restitution.<sup>1</sup>

In the great majority of unjust enrichment cases the enrichment in question is passed over unnoticed. This is not because it does not require an answer but because the defendant has usually received money. Since money is the measure of wealth, there is very rarely any contest on the enrichment issue where money has been received. In our core case a mistaken payee receives money. The generalization enlarges the receipt of money to enrichment, precisely with a view to finding out whether the logic which explains restitution of a mistaken payment still works in cases in which what is received is not money. The answer may seem obvious, and in a sense it is. What works for money must work for value received in other forms. There are, however, a number of complications. Most of the problems relating to enrichment fall under one or other of two heads.

<sup>1</sup> Above, 22-4.

The first is the subjectivity of the value of non-money benefits. We all have our own priorities. Money is both the measure of value and the medium of freedom. We have to be allowed to put our own value on everything that money can buy. The market value says nothing of the value to you or me. The courts have no choice but to deal in market value, but there has to be some reconciliation between that practical necessity and freedom of choice. In this respect it is one thing when you pay me money by mistake, but quite another when you mistakenly paint my house.<sup>2</sup>

The second problem picks up the discussion of the relationship of unjust enrichment and property in the last chapter. Can a recipient be said to be enriched by some asset in his possession which still belongs to the claimant? Here 'asset' includes cash. Am I enriched when my wallet contains a £10 note which still belongs to you?

These two problems have sections to themselves below. Both prove rather difficult, partly because the case law is still thin. The need to take enrichment seriously does not assert itself so long as the law of unjust enrichment is hidden behind imaginary contracts and pretended trusts. Wherever the enrichment question does occupy attention, there is a danger of overlooking its neutrality. It does not determine liability. The enrichment question is only the first step in the five-question inquiry. Not every enrichment has to be given up, not even when it seems to attract description as a windfall.<sup>3</sup>

#### A. WEALTH AND NOT-WEALTH

There is a preliminary problem about the level of the generalization. Enrichment received is the generalization of money received. Pitching the generalization at that level has to be justified. Why not say 'thing' or 'anything'? This question also arises in relation to the law of restitution. 'Restitution' has come to denote gain-based recovery, but the word is not naturally confined within the sphere of wealth.

Even if we lay aside restitution of a person or thing to a previous condition and speak only of restitution of something to someone, there is

<sup>2</sup> The single market value of stocks and shares tends to mislead. Market value generally means the court's estimate of the fair value between these parties dealing with each other willingly or, where the supplier has a published tariff, the price there specified.

<sup>3</sup> E McKendrick, 'Inconvertible Benefit—Postscript' [1989] LMCLQ 401-3, commenting on *Procter & Gamble Philippine Manufacturing Corporation v Peter Cremer GmbH (The Manila)* (No. 2) [1988] 3 All ER 843.

no natural reason why the something should be wealth. There is a live question whether a court might order the giving up of body parts retained by a hospital for research without consent.<sup>4</sup> Again, parents turn to courts to recover abducted children. These 'things' are not wealth. Although contrary practices obtain in a particularly unpleasant sector of the underworld, there is no situation whatever in which the law allows an individual or a court to turn them into money. Textbooks on restitution do not discuss these not-wealth restitutions. The omission appears to rest on the artificial sense of 'restitution'. It is deemed to mean gain-based recovery, and 'gain' is assumed to mean material gain. Those who withhold brains and children have not gained.

Here in the law of unjust enrichment, by contrast, the restriction to enrichment is not imposed or artificial. The law of all events materially identical to the receipt of a mistaken payment is confined to enrichment because the logic of that liability extends no further. If it were objected that the word 'enrichment' could have been pitched at a still higher level of generality, say at 'things received', the first part of the answer would be that totally different considerations enter in when there is no question of making a substitutionary award in money. The logic of the strict liability to give up a mistaken payment does not stretch beyond acquisitions measurable in money. We have already seen that the character of unjust enrichment as a distinct cause of action is explained by the uncomplicated proposition that only weak facts are needed to require the surrender of a misplaced gain. Where the gain is still extant in the sense that, whether or not he still has the very thing received, the defendant's wealth remains swollen, the liability is in principle strict. The reasons why I might be able to recover £100 or the value of a gold bar or the value of a day's work are totally different from the reasons why I might recover an abducted child. While the word 'restitution' might be applied to the restoration of a child to its mother, the very notion of an extant gain is inapplicable to such a case. Unfortunately the first part of the explanation does not go far enough. Abandoning 'thing' the hostile critic might object that the generalization should be pitched at 'wealth' or 'assets'. But this would also create a

<sup>4</sup> *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA); *R v Kelly* [1998] 3 All ER 741 (CA); *AB and Others v London Teaching Hospital NHS Trust* [2004] EWHC 644 (QB) [136]-161; R Magnusson, 'Proprietary Rights in Human Tissue' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn) (Lloyd's of London Press London 1998) 25-63; S Munzr, 'Human Dignity and Property Rights in Human Body Parts' in JW Harris (ed), *Property Problems: from Genes to Pension Funds* (Kluwer London-Hague-Boston 1997) 25-38.

category wider than that which centres on mistaken payment. This exposes the problems which arise from the relationship between the law of property and the law of unjust enrichment. The short answer is that 'wealth received' embraces both enrichments to be reversed and enrichments prevented. The subject which centres on the receipt of mistaken payments is confined to the former. There must be an enrichment to be reversed. When a mistaken payment is received, a new right arises to undo an enrichment. The law of unjust enrichment is the law of events which create new rights to reverse what would otherwise be an unjust enrichment. There is noise on many boundaries, not least on this one. We return to it below in section C.

In summary, the reason why the generalization of money stops at enrichment is that if it went higher, to 'thing', it would reach the receipt of non-wealth, where adjustment in money is unthinkable. And, if it went slightly less high, to 'wealth', it would cross the line between the subject represented by the core case, which is the creation of new rights to reverse enrichments, and the assertion of pre-existing property rights, the survival of which prevents the recipient's enrichment. It is extremely dangerous to say that a difficult problem is unimportant, but this may be such a case. It is certainly very difficult but it does not cause problems in the day to day work of the law of unjust enrichment.

That the positions taken here may not be perfectly right might be inferred from the choices made by the BGB, the German civil code. Having made a commitment in the title to enrichment,<sup>5</sup> it immediately switches in the first of the paragraphs which follow to the receipt of 'something': 'If through the performance of another or in some other way at his expense a someone receives something without legal ground, he is bound to make restitution to that other.'<sup>6</sup>

## B. ENRICHMENT AS VALUE MEASURED BY MONEY

When the first of the five questions is put, it should be answered by looking narrowly at that which was received. Was it an enriching receipt? Surrounding facts should be ignored, even if they ultimately cancel out the conclusion that the recipient was or remained enriched. In Part V we

<sup>5</sup> Titel 26 BGB is 'Ungerechtfertigte Bereicherung (Unjustified Enrichment)'.

<sup>6</sup> § 812(1) BGB: '... etwas erlangt [receives something] ...? Here the English 'to make restitution' represents 'zur Herausgabe?'. In the German there is no hint that givings up which are not givings back might be excluded.

will encounter enrichment-related defences. A resolution not to syphon that matter into answers to the first question makes for clarity of thought.

### 1. MONEY RECEIVED

It is barely necessary to say anything about money received. There is no room for argument as to the value of money. There is a question, however, as to the way in which the value of money over time should be handled. When you borrow money you have to pay for its use over time. You have to pay interest. The House of Lords has held, against the dissent of Lord Goff and Lord Woolf, that only simple interest is normally payable when judgment is given in unjust enrichment. Compound interest is reserved for the case in which the money received was trust money belonging in equity to the claimant.<sup>7</sup>

Outside that case it therefore appears that the defendant has to give up less than the full value of the benefit received. Money is not available in the market place on simple interest terms. However, this issue will have to be handled very carefully when next it is revisited, for the availability of money to use is not unequivocally enriching in the same degree as the receipt of money. The use of money is in itself a non-money benefit and, whether the issue is enrichment or disenrichment, it has to pass the tests applied to other non-money benefits. In the *Westdeutsche* case the local authorities were saved from borrowing on the market, so that the use of the bank's money was an incontrovertible benefit.

### 2. ENRICHMENTS IN KIND

Money has value and is the measure of value. Things and services have a market value measured in money. It is possible to find out how much, within a certain range, such and such a thing or service costs. However, no single one of us is bound to subscribe to the demand that creates the market value. We all have our likes and dislikes, and we match our available resources to our own sense of priorities. The market price is thus often very different from the price at which you or I would buy. There are many marketable things that we would not buy at all, not at any price. There are canine beauty parlours at which the price of a dog's haircut can run to more than £100. There is a market for that service. Some people hate the very idea. They prefer their poodles shaggy. Asked to pay for an unrequested perm, they would counterclaim for damage.

<sup>7</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL).

English law accepts the subjectivity of value. It accepts that recourse to the market value would violate freedom of choice. At the same time it does not pretend to attempt the impossible task of finding out at what price the particular recipient of an unrequested benefit would have bought it. The old pleadings which made claims in respect of non-money benefits invariably recited that the thing or service in question had been conferred at the defendant's special instance and request.<sup>8</sup> Those words, together with the absence of any other form of claim, represented on their face an extreme commitment to the proposition that an unrequested benefit must be taken to have no value at all to the recipient.

Starting from that extreme position the law began to explore its limits. There were situations in which it was unreasonable or impossible to insist on the subjectivity of value, where insistence on one's right to make one's own choice would be no more than a prevarication to defeat an unwelcome claim. In such cases the market value could safely be imposed or, where the range of market prices was broad, a market price reasonable in all the circumstances of the parties.<sup>9</sup> This process began within the special instance and request counts. The courts cautiously allowed other facts to substantiate the allegation of request. Where that was done, the request became a fiction.

For example, in *Exall v Partridge*<sup>10</sup> the owner of a carriage took it for repair, but the landlord of the repairers, as he was entitled to do, seized it as security for the payment of the repairers' rent. To release his carriage the owner paid the rent. The repairers thus received a benefit, not immediately in money, but in the discharge of a debt. The owner's claim for reimbursement was made in the standard form of action alleging that he had spent money on behalf of the repairers at their special instance and request. There had been no request at all. But the law by this time took the view that these facts were as effective to create a liability as if a request had been made.

Counsel in that case argued that the request should be implied if the defendant had been unequivocally benefited. The court disagreed. In modern terms, it was asserting that within the law of unjust enrichment the enrichment of the defendant is essential but not sufficient. The case in which the allegation of request could not be traversed and thus became a fiction was that in which there was in addition a

reason, not being a contract or a tort, why that enrichment should be surrendered.

In *Exall v Partridge* itself that additional requirement was satisfied by the fact that, the enrichment of the defendants being no more than the by-product of a payment made by the claimant under legal compulsion, there was absolutely no reason as between the claimant and the defendants why the latter should be enriched at the former's expense. As between these parties, it was a by-product with no substantive explanation.<sup>11</sup> The law no longer consists in a list of standard forms of action. The modern law therefore does not need to advance by fictionalized allegations—allegations which must be made but need not be proved. It is free to explore the natural limits of the subjectivity of value without having to play that kind of game.

### 3. FIVE EXCEPTIONAL SITUATIONS

The fundamental principle is that, outside contract, non-money benefits cannot be valued unless, exceptionally, the imposition of a money value will not, in the judgment of a reasonable person, do violence to the law's respect for the individual's right to choose freely how to employ available resources. It is probably impossible to make an exhaustive list of the exceptional situations, but there are five which between them cover most of the ground.

These five belong in two groups according as they turn on one of two larger conclusions, either that, contrary to first impressions, the defendant did have a sufficient opportunity for choice or that the benefit in kind was incontrovertibly enriching just as the receipt of money is incontrovertibly enriching. The third of these five, numbered (a) (iii) below, is different from the others in that it points to valuation by reference to a defunct contract between the parties, not the market. In all five cases the crucial intermediate proposition which they support is that it is not in the circumstances reasonable for the defendant to insist on his freedom to choose how to spend his money.

#### (a) Where the Defendant had a Sufficient Choice

In this first group the reason why a defendant who is made to pay cannot be heard to complain of interference with his freedom of choice is that he did choose.

<sup>8</sup> Below, 287-8.

<sup>9</sup> Explained in n 2 above.  
<sup>10</sup> (1799) 8 TR 308, 101 ER 1405.

<sup>11</sup> To put this in context see below, 158-60.

(i) *Where he could make Specific Restitution of the Very Thing Received*

If he received a free-standing asset such as a picture and all other conditions for a claim in unjust enrichment are in place, he cannot resist an action for the value on the ground that he had no opportunity to choose, because he has a continuing opportunity to give the picture up. The more worthless it seems to him, the easier to surrender it.<sup>12</sup> Such a case recently reached the Court of Appeal.

In *McDonald v Coys of Kensington*<sup>13</sup> a car had been expressly sold without its 'cherished' number plate, TAC 1. An administrative error in the operation of the statutory registration scheme resulted in the number nevertheless passing with the car, and the buyer sought to hang on to his good luck by saying, *inter alia*, that he had no intention of realizing its commercial value. Registration in that number was worth some £15,000 extra. But the error could easily be put right. Nothing obstructed his giving back the unintended benefit in kind. Holding that the buyer had indeed been enriched, Mance LJ, with whom Thorpe LJ and Wilson J agreed, said that in the contest over the issue of enrichment too little weight had been given to the fact that this was a benefit which was 'readily returnable'.<sup>14</sup>

(ii) *Free Acceptance*

Free acceptance, at its weakest, is foregoing an opportunity to reject the benefit. Requests and demands are *a fortiori*. The objection to market value being the law's commitment to the individual's freedom of choice, a recipient who accepted the benefit in question when he might have rejected it is in no position to resist, unless that choice was made on the assumption that it was offered gratis or at a price lower than the market price.

There are some cases which are unequivocal. In *Parvey & Matthews v Paul*<sup>15</sup> Mrs Paul had requested building work and had received all the work for which she had asked. For want of writing the builders had no action in contract. The High Court of Australia allowed them to recover the reasonable value of their work. In such a case the enrichment question poses no problems. There is no violation of the defendant's freedom of choice. In an earlier building case, *William Lacey (Hounslow) Ltd v Davis*,<sup>16</sup> the claimant builders were successful bidders for a development contract. Before any contract was signed the developer then had them do a good

deal of preparatory work. The amount went far beyond what builders often risk in the attempt to catch a contract. When the developer suddenly changed his mind and decided to sell rather than develop, the builders recovered the value of that work.

Passive acquiescence suffices. Suppose that you know that work is being done for you and you have no reason to believe that it is a gift or a simple speculation in the manner of a busker who takes his chance whether those who listen will pay. In ordinary circumstances you ought to speak out. If you could intervene without trouble to yourself, and you pass up the opportunity of finding out what is going on and putting a stop to it or making clear that you will not pay, you can hardly turn round and say that your right to choose your own priorities requires the law to abstain from putting a money value on the benefit.

In *Leigh v Dickeson*,<sup>17</sup> in which one owner in common failed to recover from the other a contribution to the cost of improvements to a house, Brett MR put it this way:

Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit, he will not be liable. But sometimes money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact he is bound to accept it: in this case he has no opportunity of exercising any option, and he will come under no liability.<sup>18</sup>

The negative proposition with which this passage ends had earlier been put very neatly by Pollock CB:<sup>19</sup>

Suppose that I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.

In the days when unjust enrichment was buried in contract and could not be seen as a distinct causative event, free acceptance was forced to operate through contract. These passages could not but envisage the freely accepting recipient of the benefit as impliedly contracting to pay. The artificialities which that entailed are no longer necessary. Nowadays the

<sup>12</sup> P. Binks, *An Introduction to the Law of Restitution* (rev edn OUP Oxford 1986) 130-1.

<sup>13</sup> [2004] EWCA Civ 47.

<sup>15</sup> (1987) 162 CLR 221 (HCA).

<sup>14</sup> *Ibid* [27], [31], [37].

<sup>16</sup> [1957] 1 W.L.R. 932.

<sup>17</sup> (1884) 15 QBD 60 (CA).

<sup>18</sup> *Ibid* 64.

<sup>19</sup> *Taylor v Laird* (1856) 25 LJ Ex 329, 332.

passages should be understood as a guide to answering the underlying question, which is whether by passing up an opportunity to reject the recipient has shut himself out from the argument based on respect for freedom of choice.

### (iii) *Incomplete Contractual Performances*

Very difficult questions arise where the benefit in question is part-performance of a contract which has been terminated, as for instance three-quarters of a house. They are not solved by squeezing such cases under free acceptance. Such claims may fall at the third question (unjust). However, for the moment we are concerned only with the question of enrichment. In *Sumpter v Hedges*<sup>20</sup> builders who ran out of money and failed to finish the houses they were putting up recovered a reasonable market price for the loose materials which the defendant had used but nothing for the incomplete houses themselves. The materials could have been rejected and were freely accepted. As for the incomplete houses they fell within the last sentence of Brett MR's analysis which is quoted immediately above: 'But sometimes money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact he is bound to accept it: in this case he has no opportunity of exercising any option, and he will come under no liability.'

A recent analysis, hostile to such claims, looks to the third question in the five-question analysis (unjust) to explain the result in *Sumpter v Hedges*.<sup>21</sup> That is, the authors do not seek to say that an incomplete house is not an enrichment. They seek a more absolute negative. At this point we are only concerned with the issue of enrichment and can agree that this is not a situation of no enrichment.

It may sometimes be that the incomplete performance has been or is destined to be realized in money, as where land with incomplete building work is sold on to a new developer or waiting to be sold or it may be for some other reason as incontrovertibly valuable as a payment of money. In the absence of facts of that kind, free acceptance cannot be relied on unless the performance is genuinely divisible into accepted units.<sup>22</sup> An order for a whole house cannot be understood as a request for or

<sup>20</sup> [1898] 1 QB 673 (CA). Cf *Bolton v Mahedeva* [1972] 1 WLR 1009 (CA).

<sup>21</sup> B McFarlane and R Stevens, 'In Defence of *Sumpter v Hedges*' (2002) 118 LQR 569, 574. A Burrows, *The Law of Restitution* (2nd edn Butterworths London 2002) 354-6 argues that the part-performer should recover and has no difficulty in seeing the recipient of part as enriched.

<sup>22</sup> But most periodical payments in the nature of income accrue from day to day under the Apportionment Act 1870 s 2.

free acceptance of part of a house. Nevertheless, independently of free acceptance in the full sense this is a situation in which the recipient cannot reasonably resist valuation in money.

The valuation must not be by the market. It must be made in the light of the contract price, even though the contract is defunct. The contract supplies the evidence of the value which the parties themselves put upon the performance. Even then, the calculation is unlikely to be *pro rata*. That is to say, three-quarters of a performance will probably not merit three-quarters of the contract price. The underlying proposition is that no money valuation will be made where the defendant is in a position reasonably to insist that such a valuation would deny him his freedom to set his own priorities.

There are two reasons why it would be unreasonable to resist a contract-based valuation here. First, the order for the whole does imply a degree of acceptance of the parts and, secondly, the valuation ceiling set by the defunct contract minimizes the degree to which the defendant's own options will be overridden. By contrast market valuation of a part performance can produce bizarre results.<sup>23</sup>

### (b) *Incontrovertible Enrichment*

Money is incontrovertibly enriching. It is the measure of enrichment. Even with benefits in kind, some are objectively enriching (where 'objectively' means independently of any choice made by their recipient). There seem to be two cases, the saving of inevitable expense and the realization in money of the benefit's otherwise doubtful value.

#### (i) *Inevitable Expenditure Saved*

It sometimes happens that the recipient of an unrequested benefit in kind is thereby saved outlay that he would have made anyway. In *Exall v Partridge*<sup>24</sup> the owner of a carriage took it for repair. The landlord of the repairers seized it as security for the payment of the repairers' rent. To release his carriage the owner paid the rent. The repairers thus received a benefit, not immediately in money, but in the discharge of a debt. The

<sup>23</sup> *Boomer v Muir* 24 P 2d 570 (1933) shows that an open market valuation can yield more for a part performance than would have been earned on completion. The March 2003 draft of the new Restatement proposes to subject the award (which it treats as 'damages') thus indicating that the cause of action is breach of contract not unjust enrichment) to a valuation cap based on the contract price: American Law Institute, *Restatement of the Law of Restitution and Unjust Enrichment, Tentative Draft No 3* (March 2004, for discussion in May 2004) Para 38 and accompanying text.

<sup>24</sup> (1799) 8 TR 308, 101 ER 1405.



repairers were enriched. Their rent would have had to be paid anyhow. In *Craven-Elles v Canons Ltd*<sup>25</sup> a managing director acted as such in the mistaken belief that he had a contract with the company. Unknown to him he had dealt with people not qualified to bind the company. He recovered the market value of his work. The company could not reasonably say that it would not have employed a managing director. As a matter of commercial reality a company has to have someone to manage its affairs.

In *Rome v Vale of White Horse DC*<sup>26</sup> the local authority had provided sewerage services to council houses which it had sold to private buyers. For thirteen years it made no demand for payment. It seems that at first the authority, by an administrative oversight, continued to service the properties as though nothing had changed. In the years within the limitation period it had recovered from that error but abstained from issuing invoices because of a suspicion that the provision of sewerage services might be ultra vires. When that doubt was resolved in its favour, it demanded six years' payments. Lightman J accepted that Mr Rowe had been enriched at the Council's expense. The extraordinary history of this particular case made it reasonable for Mr Rowe to believe, and he did believe, that the Council did not intend to charge. He had not freely accepted. But such services were necessary and it was common knowledge that they normally had to be paid for. They constituted an incontrovertible enrichment. He had been saved an inevitable expenditure.

It is clear that the breadth of this exception depends on the interpretation of 'inevitable'. If it were taken as requiring absolute inevitability, hardly any examples would be found. Even *Craven-Elles v Canons Ltd* might be squeezed out. However, the basic principle is founded on reasonableness. An exaggerated degree of inevitability is not looked for. In a commercial context it suffices that the expenditure was necessary as a matter of commercial reality.<sup>27</sup> In other contexts some guidance can be derived from the interpretation of necessities in relation to minors' contracts. The supply of a necessary anticipates an expenditure which the minor would have needed to make. This was not confined to things

<sup>25</sup> [1936] 2 KB 403 (CA) 412.

<sup>26</sup> [2003] 1 Lloyd's Rep 418. For the reason why the Council lost, see above, 43 n 31.

<sup>27</sup> *Monks v Paynter Pty Ltd* (1987) 11 ACLR 637, 640. Compare *Greenwood v Bennett* [1973] QB 195 (CA) where the owner of a Jaguar car which had been repaired and improved by another without his knowledge was himself a dealer whose business entailed making cars presentable for sale.

necessary to keep body and soul together. It was always construed broadly to include all those things needed to maintain a person in the condition in life in which he found himself.<sup>28</sup>

The discharge of a debt is a clear case of necessary expenditure saved, because the law would have compelled payment. However, when one person pays another's debt other than under compulsion, in general the debt is not discharged without the consent of the debtor. It would be a fair inference that if the discharge failed the debtor could not be said to be enriched. That is not correct. An imperfect discharge can be an enrichment. A special technique has to be used to overcome the problem posed by the imperfection.

If the facts are otherwise suitable for a claim, the law will allow the claimant who has imperfectly discharged the debt to compel the creditor to permit him to realize the undischarged right, suing in the creditor's name. This is subrogation properly so-called. Using the name of the victim an indemnity insurer who has paid a loss can sue the undischarged tortfeasor who caused it. The tortfeasor is imperfectly discharged and hence imperfectly enriched, but it would be unreasonable to leave it at that, since it is highly unlikely that the victim, having been paid off, will ever sue him, especially since the proceeds would anyhow go to the insurer.<sup>29</sup>

#### (ii) *Market Value Realized*

It sometimes happens that a benefit in kind has been turned into money. If, acting under a mistake, C, a builder, improves D's cottage, as for instance by adding to it a conservatory, and then D sells the cottage, it will be relatively easy to ascertain by how much money the price has been enhanced and, within that sum, the market value of C's input. Here D cannot reasonably argue that the benefit which he has received at C's expense must not be measured in money terms.<sup>30</sup>

The picture looks quite different before sale. The market may say that D's cottage is now worth £20,000 more, and that £15,000 of that can be said to have come from the builder, but D is fond of the cottage and has no intention of realizing that added value. D has not turned the conservatory into money; nor can it be said that D has been saved inevitable expenditure. The unchosen extension is thus not a benefit expressible in money. D is not enriched.

<sup>28</sup> *Bryant v Richardson* (1866) 14 LT 24, 26.

<sup>29</sup> *Lord Napier and Eirick v Hunter* [1993] AC 713 (HL).

<sup>30</sup> In *Greenwood v Bennett* [1973] QB 195 (CA) the improved car had indeed been sold before action.



*Goff & Jones* would distinguish between a unique asset, such as a cottage, and a chattel such as a car, one car being much the same as another. In the case of the car, they take a more robust attitude. The law should not scruple to order or assume a sale.<sup>31</sup> Professor Burrows is of the same view, but with the further proviso that it must appear to be reasonably certain that the added value will be realized by the defendant.<sup>32</sup> It now seems likely that, with or without that additional qualification, this less tender approach will prevail, although it takes a considerable step back from the law's traditional sensitivity to the subjectivity of value and its respect for freedom of choice.

We have seen that in *McDonald v Coys of Kensington*,<sup>33</sup> where a car had been expressly sold without its 'cherished' number plate, TAC 1, but, owing to an error, in fact passed to the buyer with that valuable registration still intact, the Court of Appeal decided the enrichment issue on the basis of the easy returnability of the unintended benefit. However, the Court also considered the matter from the standpoint of incontrovertible benefit and was clearly inclined to favour the robust approach of *Goff & Jones*.<sup>34</sup>

#### 4. EXTANT ENRICHMENT AND INSTANT DISENRIICHMENT

It has been a question whether a pure service, meaning either one which leaves no end-product or is for the moment contemplated as distinct from an end-product which it does leave, can ever qualify as an enrichment.<sup>35</sup> In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* a joint venture between the parties to find oil in the Libyan desert was first hugely successful and then frustrated by Libyan expropriation. Robert Goff J, applying the Law Reform (Frustrated Contracts) Act 1943 section 1(3), concluded that, in the assessment of the valuable non-money benefit conferred on the defendant by the claimant, the statute required him to look only at the end-product of the claimant's work for the defendant. By finding oil, BP had enormously enhanced the value of the concession over the empty

<sup>31</sup> G Jones (ed), *The Law of Restitution* (6th edn Sweet & Maxwell London 2002) [1-024], accepted as 'common ground' by Hirst J in *Procter & Gamble Philippine Manufacturing Corporation v Peter Cremer GmbH (The Mantila)* (No. 2) [1981] 3 All ER 843, 855, and preferred *obiter* by Judge Bowsler QC in *Marston Construction Co Ltd v Kigas Ltd* (1989) 46 Build L.R. 109.

<sup>32</sup> A Burrows, *The Law of Restitution* (2nd edn Butterworths London 2002) 19.

<sup>33</sup> [2004] EWCA Civ 47; cf text to n 13 above.

<sup>34</sup> *Ibid* [35], [36], [40]. These paragraphs are also disinclined to accept the intermediate position of Professor Burrows. Cf text to n 32 above.

<sup>35</sup> J Beatson, *Use and Abuse of Unjust Enrichment* (OUP Oxford 1991) 31-44.

desert which the Libyan government had granted Hunt. That was the end product. Yet at the same time he indicated that, but for the wording of the statute, he would himself have regarded exploration services as capable in themselves of counting as an enrichment, quite independently of their end-product.<sup>36</sup>

The terms of the debate have changed since the defence of change of position was secured. Unless the enrichee is disqualified from that defence, his liability now extends only so far as he is still abstractly enriched. Singers and violinists command handsome fees, but the song and the sonata leave behind no material end-product. Even if the circumstances would otherwise permit a claim in unjust enrichment, it could not lie here unless the defendant were disqualified from pleading the instant disenrichment.

Bad faith disqualifies.<sup>37</sup> Free acceptance will often but not always involve shabby, even dishonest, conduct, for the circumstances in which a recipient passes up an opportunity to reject a benefit are likely to be such that, in the words of Griffith ACJ, a man is bound by the rules of honesty not to be quiescent.<sup>38</sup> Freely accepting defendants of that kind will therefore be disqualified. The effect of the defence across the board is to drive the analysis away from the work itself and to the end-product, the house or the book, as opposed to the labour of building or writing. Where a pure service is such as to save an inevitable expenditure, the inevitable expenditure saved will be the relevant end-product.

#### C. WHERE PROPERTY DOES NOT PASS

A difficult enrichment question arises from the relationship between unjust enrichment and property, which was discussed in the previous chapter. We have to distinguish between two situations. In one, C's asset falls into D's hands in circumstances in which no property in that asset passes. C retains his pre-existing title. This may happen because the asset reaches D absolutely without C's knowledge or, although with his knowledge, in circumstances in which his apparent consent is nullified by an extreme species of mistake or duress. In the other, property passes to D but in circumstances in which he is unjustly enriched and in which the law reverses that unjust enrichment by raising a new property right in C,

<sup>36</sup> [1979] 1 W.L.R. 783, 801-2.

<sup>37</sup> Details in Chapter 9 below, 214-8.

<sup>38</sup> *City Bank of Sydney v McLaughlin* (1909) 9 CLR 615 (HCA) 625 (Griffith ACJ).

as for instance by turning *D* into a trustee and thus giving *C* an equitable beneficial interest: *C* begins as owner at law but ends as owner in equity. The difference is between surviving property rights which passively prevent enrichment and new ones which actively reverse enrichment.

#### 1. PRE-EXISTING TITLE SURVIVES

Can it be said that *D* is enriched by *C*'s £50 note in his wallet or *C*'s car in his garage? To the layman *D*'s position is ambiguous. On the one hand he can see that there is a sense in which *D* is not enriched, because nothing has been added to his wealth, and on the other there is a robust sense in which he is enriched, since the fact is that he is in control of the asset. English law agrees with the layman that both analyses make sense. It allows *C* to choose between them. In fact, if we keep an eye on the probable availability of an action in tort, three kinds of claim can be made by *C* in this situation.

##### (a) The *vindicatio*

*C* can say 'That car is mine!' or 'That £50 note is mine!' Throughout this book that direct assertion of ownership, and nothing else, is referred to in Latin as a *vindicatio*. The Latin term is used in order to distinguish the technical term from the loose usage into which English lawyers sometimes fall in which 'vindicating property' can refer to any kind of claim which has the object of protecting or realizing proprietary rights.

Although direct assertions of property rights are common enough out of court, if it comes to litigation *C* will find that the common law does not entertain any *vindicatio* of moveables. It only protects ownership obliquely. It is different in equity, where a claimant can ask for a declaration that the defendant holds the asset in question on trust for him. If it comes to litigation, that is as near to a *vindicatio* as English law gets. In or out of court the *vindicatio* is incompatible with the proposition that *D* is enriched. The foundation of the demand is precisely that the asset forms no part of *D*'s estate.

*Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*,<sup>39</sup> which arose from the collapse of the Maxwell empire, provides a model of an equitable *vindicatio*. The claimant company, Macmillan, sought to vindicate Berlitz shares which Maxwell had caused it to transfer and which he had used as security for last minute loans. Legal title had passed to the

<sup>39</sup> [1996] 1 W.L.R. 387 (Ch.).

Maxwell company, Bishopsgate, but not equitable title. Macmillan wanted the court to declare that all the banks which held the shares as security for their loans actually held on trust. 'Declare that the banks are trustees for us' is synonymous with 'We own these shares in equity.' Hence the bold assertion that this is no less than a *vindicatio* in the technical sense.

This claim fell at the hurdle of bona fide purchase of the legal estate without notice. But what Macmillan wanted can be expressed in two simple sentences. It wanted the court to declare that the shares belonged to it in equity, or, synonymously, that the banks held as trustees for it. And it wanted the court to order the banks to transfer the legal title to them. The second sentence is a demand for restitution, but not on the basis of unjust enrichment.<sup>40</sup> No claim in unjust enrichment was attempted. The first of the two sentences shows that Macmillan denied that the defendants were enriched.

We have seen that debt is multi-causal. 'You owe me £100!' might be substantiated by contract or in the absence of contract. At the non-contractual end of the spectrum, it might be substantiated by unjust enrichment, as where I earlier paid you that sum by mistake. In this respect the vindication 'That's mine!' behaves in the same way. 'The proprietary right asserted must have arisen from a causative event, and it may have arisen in any one of the four categories. Thus, where a pre-existing property right survives a change of possession, it may have arisen from consent, from a wrong, from unjust enrichment, or from some other event. For instance, a jeweller who makes a ring from your gold acquires the ring by *specificatio*, the creation of a new thing. *Specificatio* belongs in the fourth category. It is not a manifestation of consent, not a wrong and not an unjust enrichment.

Mistaken payment is the paradigmatic unjust enrichment. Suppose that it still remains true that a mistaken payment turns the payee into a trustee.<sup>41</sup> If the payee uses the mistaken money to buy a picture and then gives the picture to his friend, the payer can vindicate the picture from the friend. His proprietary right will have arisen from unjust enrichment. The *vindicatio*—the assertion 'That's my picture!'—is incompatible with an allegation of present enrichment but it is not incompatible with prior acquisition from unjust enrichment. The right vindicated, which

<sup>40</sup> Above, 27-8.

<sup>41</sup> *Chase Manhattan Bank NA Ltd v Israel-British Bank Ltd* [1981] Ch 105, now under some pressure.

now denies the enrichment of this donee, arose to reverse the unjust enrichment. There is no contradiction.

### (b) Wrongful Interference

The oblique protection of property rights comes in two kinds. One is an action for a wrong. The claimant then complains of a wrongful interference with his asset. At law the wrong will usually be conversion, more rarely trespass. The claim in respect of the wrong can have a variety of outcomes the most common of which is a money judgment, either compensatory or, under *United Australia Ltd v Barclays Bank Ltd*,<sup>42</sup> restitutionary. Payment of damages then extinguishes the claimant's title to that interest.<sup>43</sup>

Such a claim, no less than the direct *vindicatio*, also supposes that the asset did not become part of *D*'s estate. It is no less incompatible with an allegation of enrichment than is the *vindicatio*. *C*'s case is precisely that *D* tortiously interfered with an asset which did not belong to him. Where *C* complains of a wrong but claims gain-based damages, he is claiming that *D* was enriched by his wrong, as by receiving the price of the asset, not that the asset itself was an enrichment to him. *C*'s claim to gain-based recovery for the wrong is again absolutely incompatible with an allegation that *D* was unjustly enriched at his expense. Unjust enrichment is never a wrong, and the premiss of this particular wrong is that *D* had no right to the thing.

### (c) Unjust Enrichment

The other oblique protection is an action in unjust enrichment. There is no parallel provision for extinguishing the title of the claimant. Nor should there be. The reason is that *C*'s election to assert that *D* has been unjustly enriched at his expense supposes a renunciation of his title. Asserting his title or complaining of a wrongful interference he denies the enrichment but in claiming the value of the asset as an enrichment of the defendant at his expense he is renouncing his title. That is the choice which the claimant has in this kind of situation. He can insist on his title, in which case he will either bring a *vindicatio* or complain of wrongful interference, or he can renounce his title and claim the value of the asset as an unjust enrichment. The unjust enrichment option is commonly

used in respect of *C*'s money in *D*'s hands,<sup>44</sup> but there is no reason why it should be confined to money cases, the relevant axiom being that the law of unjust enrichment applies symmetrically to all enrichments.

Mr Virgo says that claims of this kind where no title has passed to the defendant are not properly described as actions in unjust enrichment. They belong in the law of property and have the function of 'vindicating' the claimant's property right.<sup>45</sup> This entails using the language of vindication in a very loose sense, to include any claim which has the function of defending or protecting a proprietary right, even obliquely. This extended notion of vindication is part of his view, encountered in the last chapter, that property and unjust enrichment are categories in exclusive opposition to each other. We have already rejected that view as akin to an assertion that no animal can be both aquatic and a mammal.

At this point it is only necessary to say that Mr Virgo's extended notion of vindication can only be supported by an analysis which very strongly favours substance over form. That is to say, analysis of his complexion must assert that the proposition which underlies the claim in unjust enrichment is a kind of fiction, which conceals what is in truth a *vindicatio*. Similarly, where the claimant sues for conversion, claiming loss-based or gain-based damages,<sup>46</sup> the same analysis will have to say that what is formally an action for a tort is in substance a vindication of the proprietary right.

The competing analysis will seem preferable to many jurists. The actions in unjust enrichment and conversion are not fictions. They are what they appear to be, genuine recourses to the law of obligations. They are certainly not vindications in the true sense. They realize proprietary rights obliquely, by the assertion of rights *in personam* arising from unjust enrichment or from tort. For Mr Virgo even *Lipkin Gorman v Karpyale Ltd*,<sup>47</sup> in which the House of Lords recognized for the first time that English law has a law of restitution of unjust enrichment, was not a case of unjust enrichment. It was a vindication of a property right.<sup>48</sup>

It will be recalled that the claimant firm successfully recovered a sum of money from the defendant casino. A partner in the firm had raided its client account to feed his gambling habit. The firm recovered

<sup>44</sup> *FC Jones & Sons v Jones* [1997] Ch 159 (CA), cf *Hobday v Sigill* (1826) 2 C & P 176, 172 ER 81; *Moffatt v Kazana* [1969] 2 QB 152.

<sup>45</sup> G Virgo, *Principles of the Law of Restitution* (OUP Oxford 1999) 11-17.

<sup>46</sup> A choice warranted by *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).

<sup>47</sup> [1991] 2 AC 548 (HL).

<sup>48</sup> Virgo (n 45 above) 591-4.

<sup>42</sup> [1941] AC 1 (HL).

<sup>43</sup> *Torts (Interference with Goods) Act 1977* s 5.

from the casino the amount of his stakes, less his occasional winnings. This was not a *vindictio*. The firm never made any attempt to point to money in the possession of the defendant in order to say of it 'That money is ours!' Besides, by the time the case reached the House of Lords, it had by agreement been confined to the parties' common law rights, and the common law has no *vindictio* of moveables. The firm's claim was made in the law of obligations. It was not a claim in tort. Lord Goff went out of his way to say that the casino could not be said to have committed any tort, having lawfully received money which at the moment of receipt belonged to the gambler.<sup>49</sup> The claim was simply that the defendant owed them the sum in question. It was a debt born of unjust enrichment. There is no element of fiction. The claim in unjust enrichment cannot be represented as a *vindictio* in disguise. When no property has passed to a recipient in possession, the claimant has different options. One of them is to renounce his title and make his claim in unjust enrichment.

## 2. NEW PROPRIETARY RIGHTS

The tripartite realization regime introduced above as available when an asset passes into a new possessor's hands is also encountered immediately upon some unjust enrichments. Recourse to the law of unjust enrichment can be recourse to the law of property because sometimes the unjust enrichment itself generates both personal rights and property rights. Thus, immediately on your receiving a mistaken payment from me and even if the property passes to you at law, I have both a personal claim and proprietary claim, both arising from unjust enrichment.

Everything said above applies. My *vindictio*, if I choose that route, will say that you are not enriched, meaning no longer enriched: the new equitable interest, arising immediately from the unjust enrichment, has already carried the wealth back to my estate. My personal claim in unjust enrichment will say that you are enriched and must repay. In the latter case the animal will sometimes seem to eat its own tail. But that turns out on reflection not to be a cause for anxiety.

The only reason for separating the case of the new proprietary right from the passively surviving proprietary right is that the case of the new right demonstrates very vividly that the law has no aversion whatever to concurrency between proprietary and personal claims and in particular

<sup>49</sup> [1991] 2 AC 548 (HL) 573 (Lord Goff, describing the structure of rights contingent on tracing as requiring something analogous to ratification).

no hostility to an option between a personal claim in unjust enrichment and a proprietary claim. If this were otherwise, in *Chase Manhattan Bank NA Ltd v Israel-British Bank Ltd*,<sup>50</sup> the claimant, which had paid £2m and then, mistakenly, paid it again, could not possibly have had both kinds of claim at once.

This then reflects back on the cases in which the proprietary right is not new, as for instance *Holiday v Sigul*,<sup>51</sup> where the claimant simply lost his £500 note and the defendant found it. It was the claimant's note all along and, at the same time, the finder incurred a debt born of unjust enrichment. Such a claimant does indeed have two inconsistent rights, but the common law allows a choice to be made between them.

## D. TWO CONCEPTIONS OF WEALTH

There are two ways of contemplating a person's wealth. Each has to be kept in mind since the law uses both, often without expressly noticing the passage from one to the other. The first sees the person's wealth as a list of particular assets, some corporeal, some incorporeal. This can be called the discrete conception of wealth, wealth as an inventory of distinct items such as a house, car, jewels, money, bank accounts, bonds, shares, and so on. The other conception envisages an individual's wealth as a single fund with a money value. When a celebrity is said to be worth millions, the speaker is thinking in terms of an abstract fund. This can be called the abstract conception of wealth.<sup>52</sup>

An enrichment, or gain, is an addition to wealth. The words can be used in that sense whichever conception of wealth is in play. Gain is marginally the more neutral of the two. Enrichment inclines slightly towards the abstract conception. Some people may deny that nuance and affirm that the two words are perfectly synonymous. There is not much in it. It may not be possible for any law of unjust enrichment to function entirely satisfactorily with only one of these conceptions of wealth. In the end, however, absurdities result if the abstract conception is not made dominant.

At common law money unjustly received and other benefits unjustly received through the claimant's laying out money to third parties have always created money debts. That is, they always ask for the surrender of an abstract slice of the defendant's wealth, not a discrete item. The

<sup>50</sup> [1981] Ch 106 (Ch).

<sup>51</sup> (1826) 2 C & P 176, 172 ER 81.

<sup>52</sup> BA Rudden, 'Things as Things and Things as Wealth' (1994) OJLS 81-97.

relevant claim for goods received was that the recipient should pay *tantum quantum valetant* (so much as they were worth) and for services received *tantum quantum meruit* (so much as he deserved).<sup>53</sup> These are by no means the only techniques known to English law as a whole for undoing unjust enrichment, but they have been central. Quite differently from German law, there is no suggestion that the obligation to pay the money value was to be regarded as a substitute for an obligation to surrender the very asset received. It is a legitimate inference that from the outset the law has been intuitively committed to the abstract conception of enrichment.

There are, however, particular areas in which there is a contrary commitment. The early law of rescission can be represented as a law of unjust enrichment tied to specific things transferred and consequently to all-or-nothing solutions depending on the possibility of exact reversal of the transaction. The law relating to traceable substitutes of assets received also supposes that enrichment survives, not in the level of the abstract fund, but in particular assets in which the value of the original is re-invested.

In both those areas the law is currently struggling, at the level of defences, to ensure that the discrete conception of wealth is always ultimately trumped by the abstract conception. A mistaken payment invested in a painting will, by the one conception, survive in that substitute, even although according to the other the enrichment may have been eliminated from the fund by a banquet thrown to celebrate the purchase. If the abstract conception, represented by the defence of disenrichment, did not trump the discrete conception, represented by the rights in the traced substitute, a single event would concurrently produce inexplicably diverse responses.

A mistaken payer would then have an indefensible incentive to pursue those which happened to suit him best, as where the innocent payee has, in the abstract perspective, totally disenriched himself by making a wild investment in reliance on his enrichment but still happens to hold the discrete sum actually received or its traceable substitute.<sup>54</sup> It is a matter of pure chance whether the relevant disenrichment uses up the very money received or other funds. That is why the defence of change of position, which deals solely in the abstract conception of wealth, has to apply to every species of claim which arises from the generic event which we identify as an unjust enrichment.

<sup>53</sup> Below, 286-8.

<sup>54</sup> Below, 209-10.

## E. CONCLUSION

The first of the five questions usually slips past unnoticed, because money received unequivocally swells the abstract fund which is the sum of the recipient's wealth. Non-money benefits are more problematic. They will be given a reasonable market value where that can be done compatibly with respect for the subjectivity of value. In the most recent case of *McDonald v Coys of Kensington* the Court of Appeal, taking the same line as *Goff and Jones*, has indicated, *obiter*, a willingness to incline to a less tender attitude to the subjectivity of value. Within strict limits, that will be beneficial. For instance, it will strengthen the view that part performance under a defunct contract will be valued subject to a ceiling set by the contract—a valuation ceiling—which a too fastidious respect for subjectivity cannot fully explain.

Where money or some other asset passes to a recipient who acquires no title to it, the claimant who still has title has a choice whether he will assert his title and thus deny the recipient's enrichment or assert the recipient's enrichment and thus forego his title. There is no other satisfactory explanation of the English cases.

The law of unjust enrichment operates for the most part on an abstract conception of enrichment. That is to say, it views the enricher's wealth as a single fund measured in money. The enricher remains enriched so long as that abstract fund is swollen. Sometimes, however, the law falls back to the discrete conception of wealth which sees wealth as locked in particular assets which are rolled over from time to time, thus in effect reinvesting those particular units of value. This is most evident in relation to traceable substitutes. In the past that part of the law of unjust enrichment which is represented by the law of rescission has also operated on the premises of the discrete conception of wealth. To avoid the absurdities which could arise if claimants were able to exploit the different implications of the two conceptions of wealth, the abstract conception has to be made dominant.

The vital instrument which guarantees that dominance is the defence of change of position. The defence ensures that all claims arising from unjust enrichment are in principle capped by the amount of abstractly surviving enrichment. We will see in Chapter 9 that the defence of change of position has to be cut in half, between the defence of disenrichment and other, non-disenriching changes of position. The treatment of enrichment and the treatment of disenrichment must increasingly be seen as two parts of the same discussion.

In the phased inquiry which unlocks all problems in unjust enrichment, enrichment is question 1, while disenrichment belongs to question 5. However, since extant enrichment—that is, abstractly extant enrichment—is the key to the peculiar normativity of unjust enrichment, this relation between the two must always be kept in mind. When it is overlooked the development of the defence of change of position threatens to come off the rails.

## 4

## At the Expense of the Claimant

Categories which are conceptually certain are rare. The blood relatives of *X* are those who share a common ancestor with *X*. The class is conceptually certain because that test will determine whether any person is or is not a member and has no competitors. It leaves only evidential difficulties outstanding. Unjust enrichment is a category of the much more common kind, with a core where all agree and a periphery where reasonable people begin to differ. At a certain point all agree once more that an outer limit has been overstepped. If a tidier boundary is to be defined, it has to be artificial. The law is used to that. It makes choices all the time to iron out uncertainties which would otherwise leave the law unstable. Such peripheral doubts beset the limits of 'at the expense of the claimant'. The choices which every system therefore has to make turn out to have a profound effect on the range of its law of unjust enrichment.

This book began in the core of the core with the case of the receipt of a mistaken payment of a non-existent debt. In that example the connection between the claimant and the enrichment in the hands of the enricher is a transfer knowingly, albeit mistakenly, made by himself. In the great majority of cases that is all there is to it. However, the generic description of the event contemplates the money as having been received 'at the claimant's expense'. This phrase of imprecise meaning is used to identify the full range of proper claimants.<sup>1</sup> It asks what variations upon knowing transfer are possible without losing touch with the logic which explains the right to restitution of a mistaken payment. When I drop my wallet and you pick it up, there is a transfer but one which happens without my knowledge or active participation. That suffices.<sup>2</sup> What other departures from the core case are possible?

This inquiry turns inevitably into a discussion of the meaning of 'at the expense of', but the real question is not what those words mean but what

<sup>1</sup> *Re Byfield* [1982] 1 All ER 249, 256.

<sup>2</sup> *Holiday v Sigill* (1826) 2 C & P 176, 172 ER 81; *Neave v Harding* (1851) 6 Ex 349, 155 ER 577; *Moffatt v Kazana* [1969] 2 QB 152.



constitutes a sufficient connection between the would-be claimant and the enrichment he wants to claim. The words are there to label the right answer to that question.

### A. THE 'WRONG' SENSE

There are usages of 'at the expense of' which have to be ruled out. A joke might be said to have been made at my expense, meaning that it was calculated to diminish or embarrass me. Closely related is the 'wrong' sense. *C* is beaten up by *D*. *D* was paid £5,000 by *X*. Here *D* is enriched at *C*'s expense in the sense that he has obtained money by doing a wrong to *C*. We encountered this sense in Chapter 1 when we introduced the notion of restitution for wrongs as something different from restitution for unjust enrichment. Had the spy Blake been paid his royalties he would have been enriched at the Crown's expense in that he would have committed a profitable breach of his contract not to write without clearance.<sup>3</sup>

This is the 'wrong' sense of 'at the expense of': *C* relies on a wrong to connect himself to *D*'s enrichment. It is also the wrong sense in that it cannot be admitted to the law of unjust enrichment. A wolf in sheep's clothing is not a sheep. Where a claimant identifies himself as the victim of a wrong he is relying on the wrong and, albeit in the language of unjust enrichment, asking the court whether that wrong is one which yields a right to a gain-based award. The law of unjust enrichment cannot answer that question. It belongs to the law of wrongs. Failing any general answer, the question whether defamation, conversion, breach of fiduciary duty, and so on, yield rights to gain-based awards is a matter for the law of each particular wrong.<sup>4</sup>

### B. THE 'FROM' SENSE

That leaves only the subtractive sense according to which an enrichment at the expense of another is one which is drawn from that other. The subtractive sense is the 'from' sense. 'From' is not straightforward. It is at this point that choices need to be made. There are questions which different legal systems answer differently. In the core case there is a simple transfer from claimant to defendant, and the transfer entails a plus

<sup>3</sup> *A-G v Blake* [2001] 1 AC 268 (HL), introduced above, 12–3.

<sup>4</sup> A large step towards sound general answers has now been taken by J Edelman, *Gain-Based Damages* [Contract, Tort, Equity and Intellectual Property] (Hart Oxford 2002).

to the defendant corresponding to a loss to the claimant. Both limbs require examination. The subtraction can take the form of an interception. And it is a difficult and doubtful question whether the claimant must have suffered a loss.

### I. INTERCEPTIVE SUBTRACTIONS

In the standard case the asset moves from the claimant's possession to that of the defendant. Is it sufficient that it was on its way from a third party to the claimant when the defendant intercepted it? Where there is an interceptive subtraction the enriching assets are never reduced to the ownership or possession of the claimant. They will have been on their way, in fact or law, to the claimant when the defendant intercepted them. The choice has gone in favour of accepting the sufficiency of interceptive subtractions, albeit without much analysis and hence with many untidy loose ends.

#### (a) Illustrations

One early example was where *D* usurped an office of profit which ought to have been occupied by *C*. *D* thus received fees which ought to have been paid to *C*. *C* could claim those profits intercepted by *D*.<sup>5</sup> In 1998 in *Montana v Crow Tribe of Indians* the Supreme Court of the United States upheld the principle, although on the facts the majority found that it did not apply, that where authority *D* has wrongfully levied a tax payable to authority *C*, *C* can recover from *D*.<sup>6</sup> Similarly, a self-appointed executor or administrator who receives what was due to the estate is liable to make restitution to the incoming rightful personal representative.<sup>7</sup> Again, if *D* receives rent from *X* which was due to *C*, he will have to account to *C*.<sup>8</sup> Of the same kind but rather more difficult are the cases, which are discussed by Professor Chambers, of land intended to be conveyed by *X* to *C* being mistakenly conveyed to *D*. In such a case *C* has sometimes been allowed to claim against *D*.<sup>9</sup>

<sup>5</sup> *Arris v Stakeley* (1677) 2 Mod 260, 86 ER 1060; *Howard v Wood* (1679) 2 Lev 245, 83 ER 330. Although these provide a root for waiver of tort, they do not need to be analysed as instances of wrongful enrichment.

<sup>6</sup> 523 US 696 (1998) 715–16 (Souter and O'Connor JJ dissenting, 722–3). Both majority and minority approved *Valley County v Thomas* 109 Mont 345, 97 P 2d 345 (1939) where one county recovered vehicle tax levied by another.

<sup>7</sup> *Jacob v Allen* (1703) 1 Salk 27, 91 ER 26; *Yardley v Arnold* (1842) C & M 434, 174 ER 577.

<sup>8</sup> *Official Custodian for Charities v Mackey* (No 2) [1985] 1 WLR 1308, where Nourse J acknowledged the principle but found it not to apply on the particular facts.

<sup>9</sup> *Lenny v Hillas* (1858) 2 De G & J 110; *Cradock Brothers v Hunt* [1923] 2 Ch 136 (CA). R Chambers, *Resulting Trusts* (OUP Oxford 1997) 127.



However, the claimant has a heavy onus when his case rests on a factual rather than a legal inevitability the enrichment was en route to him. In *Hill v van Erp*<sup>10</sup> a solicitor's negligence caused a will to be invalid. The solicitor was liable in tort, but it was said that the intended beneficiaries could not sue the next of kin to whom the estate had gone. They could not say that those who benefited under the intestacy had intercepted assets which were on their way to those who, but for its invalidity, were entitled under the will.

If the boot had been on the other foot and the money been paid out under the invalid will, the mispaid beneficiaries would have been held to have intercepted money destined to those who were indisputably entitled as a matter of law, as in *Ministry of Health v Simpson*.<sup>11</sup> There, failing to notice the nullity of the bequest, the executors of Caleb Diplock had paid to charities sums which ought as a matter of law to have gone to the next of kin. The next of kin recovered directly from the charities. The money which the charities received was, as a matter of law, destined to go to them.

Professor Lionel Smith has exposed difficulties in all these cases, arguing that, where the defendant has received from a third party money which the claimant says should have come through to him, the claimant should never be allowed to recover if his rights against the third party are still intact.<sup>12</sup> He points out that if executors pay the wrong people they remain liable to pay the true beneficiary. Hence those who ought to have been paid cannot be said to have suffered an interceptive subtraction, because they are no less entitled to be paid by the executors after the misdirection than they were before. *Ministry of Health v Simpson* can only be explained, in his view, by understanding the Court to have complied with the requirement that the next of kin's continuing claim against the executors be discharged by insisting on prior exhaustion of all possible remedies against them.

<sup>10</sup> (1997) 188 C.I.R. 159 (HCA). In *Lac Minerals Ltd v International Corona Resources Ltd* [1980] 2 S.C.R. 574, 61 D.L.R. (4th) 14 the Supreme Court of Canada found that the defendants had intercepted a goldfield which as a matter of fact would otherwise have been acquired by the claimants, but the case was decided in favour of the claimants as the victims of the wrong of either abuse of confidential information or breach of fiduciary duty. Once the case was presented as restitution for a wrong, the finding of factual interception ceased to be relevant.

<sup>11</sup> [1951] A.C. 251 (H.L.).

<sup>12</sup> L.D. Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481.

That requirement has few defenders.<sup>13</sup> It is incompatible with the principle *cuius commodum eius periculum* (the one who takes the advantage also bears the risk).<sup>14</sup> The money which the executors had paid to the charities, viewed as a mistaken payment, was at the time irrecoverable by the executors themselves, since in those days a payer had to bear the risk of a mistake of law. But the executors' liability to the next of kin should have been regarded as secondary to that of the charities, who enjoyed all the associated benefits, with the consequence that, in respect of such sums as they repaid the next of kin, the executors should have been entitled to reimbursement from the charities, just as a surety is entitled to reimbursement from a principal debtor. That in turn makes nonsense of the requirement that the next of kin recover from the charities only those sums irrecoverable from the executors.

The only general answer to Professor Smith's keen analysis is that the law sometimes prefers the reality to the technicality. In *Agip (Africa) Ltd v Jackson*,<sup>15</sup> for instance, the claimant company's account with a bank in Tunisia was debited with large sums on the basis of forged payment warrants. Technically their claim against the bank remained intact. They had not authorized the debiting of their account. Strictly, the bank should have been the claimant, but factually the Agip account had been debited. Agip had not been able to induce the Bank of Tunis to re-credit the account. They were allowed to sue the defendant accountants who had acted for the fraudsters and had received the money into their account. The reality was that the recipients had intercepted money due to Agip. On some facts of this pattern a solution can be found by subrogating the claimant to the third party's right against the defendant.

#### (b) False Interceptions

Sometimes what looks at first sight to be a clear case of interceptive subtraction turns out on closer inspection not to be. Suppose that, intending a gift to you standing below, I throw down a bundle of notes from an upper window, expecting you to catch them. *D* jumps up to intercept them. At law the notes are mine, since you have not obtained the

<sup>13</sup> G. Jones (ed), *Goff and Jones on Restitution* (6th edn Sweet & Maxwell London 2002) [30-002].

<sup>14</sup> Digest 50.17.143 (Paul), more congruent to which is *Evans v Hickson* (1861) Beav 136, 54 E.R. 840.

<sup>15</sup> [1990] Ch 205, aff'd [1991] Ch 547 (CA). On this aspect see E. McKendrick, 'Tracing Misdirected Funds' (1991) LMCLQ 378.

possession which is essential to the perfection of the gift by delivery. But equity raises a beneficial interest in you as soon as I have done all that lies in me to do in order to transfer the legal title.<sup>16</sup> The physical interception comes a second or two later, when you already have a proprietary interest in the notes. The subtraction is not interceptive. The money is yours and is taken from you.

Again, suppose that I give X £50 to give to you. We might say that that money is now on its way to you. However, if X absconds with it, the question whether he is enriched at my expense or, interceptively, from you admits of no natural answer. The law therefore adopts an inevitably artificial criterion. The claim stays with me until X has attorned to you, which means until X has informed you that he is holding for you. But the attornment passes the property at law with the result that when X pockets the money the subtraction is no longer interceptive. He has taken the money from you.

Such an interception is not always short-circuited in this way. In *Shennia v Joory*<sup>17</sup> there was no identified fund, so that no property could pass. The defendant, who owed a sum of money to a third party, was told by that creditor to pay the claimant. The defendant attorned to the claimant. The claimant, though not owner, was able to obtain restitution. It is sometimes said that the case was wrongly decided for the very reason that no property could pass. But it is defensible as an instance of interceptive subtraction. The attornment, though it could not pass the property in any specific thing, nevertheless served as an indication that the sum in question was finally en route to the claimant. Accordingly, in withholding it the defendant had enriched himself by interceptive subtraction from the claimant.

## 2. CORRESPONDING LOSS?

The narrowest understanding of a sufficient connection between claimant and enrichment requires an arithmetic subtraction, a plus to the defendant and a corresponding minus to the claimant. In all the interceptive examples which have just been reviewed, the claimant does suffer a loss in that he fails to receive that which he was about to receive. Our two big questions—interception and corresponding loss—are separate questions, although they do overlap on some facts.

<sup>16</sup> *Re Rose* [1952] Ch 499 (CA).

<sup>17</sup> [1958] 1 QB 448.

### (a) An Argument Finely Balanced

Under French influence transmitted through Quebec the law of Canada now uses words which appear to insist that the claimant must always have suffered such a corresponding loss.<sup>18</sup> However, 'from' does not necessarily imply loss, and English law appears not to insist that the claimant must have suffered one.

Suppose that when I am taking my summer holidays you use my bicycle for a month without my permission, then put it back in perfect condition; or that you stow away on my ship intending to take a free ride across the Atlantic. In these cases you have gained a valuable benefit but I have suffered no loss. I am no worse off. As long ago as 1776 in *Hambly v Trot* Lord Mansfield indicated that a claim for the value of these benefits would lie.<sup>19</sup> Such a claim might be explained as restitution for a wrong, but it is not obvious that it should be and it is very unlikely that Lord Mansfield was thinking on those lines.

There is other evidence that a claimant in unjust enrichment need not have suffered a loss. Attempts have been made to forge a defence out of facts which show that, if the claimant suffered a loss initially, he has since eliminated it. These arguments have been thrown out in Australia<sup>20</sup> and England.<sup>21</sup> One reason has been that loss is beside the point, an action in unjust enrichment being concerned with gains not losses. This is also what the German jurists say.<sup>22</sup>

<sup>18</sup> *Parkus v Becker* [1980] 2 SCR 217, 227-8; M McInnes, 'The Measure of Restitution' (2002) 52 U Toronto LJ 163; M McInnes, 'At the Plaintiff's Expense: Quantifying Restitutionary Relief' [1998] CLJ 472. This Canadian position is vigorously supported by RB Grantham and CEF Rickett, 'Dissempowerment for Unjust Enrichment' [2003] CLJ 159.

<sup>19</sup> (1776) 1 Cowp 371, 375, 98 ER 1136, 1138. The later refusal in *Phillips v Homfrey* (1883) 24 Ch D 439 (CA) to treat use, and hence saving of expense, as an enrichment is roundly repudiated by Goff and Jones (n 13 above) [30-003]. Compare the case of the stowaway on the plane to New York BGNJW 609 (7.1.1971) translated by G Dannemann in B Markesinis, W Lorenz, and G Dannemann, *German Law of Obligations Vol 1 The Law of Contracts and Restitution: A Comparative Introduction* (OUP Oxford 1997) 771.

<sup>20</sup> *Rotherough v Rothman of Pail Mail Australia Ltd* (2002) 76 ALJR 203 (HCA). Kirby J dissenting. *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA), where Mason ACJ adopted the view of Windeyer J in *Mason v NSW* (1959) 102 CLR 108, 146.

<sup>21</sup> *Kleinwort Benson v Birmingham City Council* [1996] 4 All ER 733 (CA).

<sup>22</sup> In this area of law only the enrichment of the person liable is relevant. Whether the enrichment-creditor has been impoverished is of no significance. . . . It would therefore be a serious mistake to withhold a claim founded on unjust enrichment on the ground that the enrichment-creditor had suffered no detriment HJ Wieling, *Bereicherungsrecht* (Springer Berlin 1993) 1-2 (my translation).

There is a counter-argument to be found in *BP Exploration Co (Libya) Ltd v Hunt (No2)*.<sup>23</sup> It carries great weight, because the judge was Robert Goff J, co-author of the leading textbook. He had to consider the question of enrichment in the context of the Law Reform (Fraudulent Contracts) Act 1943 section 1(3). Before oil was discovered in the Libyan desert BP and Hunt entered into a joint venture to exploit a concession obtained from the Libyan government by Hunt. BP took a half share in the concession and then, under the terms of the joint venture, began prospecting. Success vastly enhanced the value of the concession, but the joint venture was later frustrated by expropriation. Where one party has conferred a valuable non-money benefit on the other the Act gives the court a discretion to make an award of a just sum, within a limit set by the value of that benefit. Robert Goff J assessed the enhancement of Hunt's half-share of the concession at some \$85m but ordered him to pay, by way of just sum, less than one-quarter of that valuable benefit.

While the discretionary nature of the jurisdiction conferred by the Act, which was emphasized when the case went on appeal, may to some extent distort the picture, Robert Goff J clearly thought of it as a statutory application of the law of unjust enrichment. Against that background it is certainly possible to understand his premises as having been that a claimant in unjust enrichment must have suffered loss. Otherwise it is not obvious why, having already made an allowance in the valuation of the benefit for that element which was not due to the efforts of BP, he nevertheless allowed them to recover only a much lower amount, seemingly the amount that it cost them to confer that benefit. The same premise appears to be assumed in the treatment of 'at the expense of' by *Goff and Jones*, which, however, does not directly confront the issue.<sup>24</sup>

The requirement that the claimant must have suffered a corresponding loss is a choice which some systems make, thereby giving themselves a

<sup>23</sup> [1979] 1 W.L.R. 783, aff'd [1981] 1 W.L.R. 232 (CA), [1983] 2 A.C. 352 (H.L.).

<sup>24</sup> *Goff & Jones* (n 13 above) [1-045] [1-046]. Very recently *Re BHT (UK) Ltd* [2004] EWHC 201 (12 February 2004) decided that a liquidator could not recover on behalf of the insolvent company an overpayment made to a secured creditor, one ground being that the company had suffered no loss: even if it recovered it would not be able to keep the money but would have to pay the sum over to preferential creditors [24]–[27]. This is certainly incorrect. It suffices here to say that, in the same paragraphs, the deputy judge showed that he contemplated the law of unjust enrichment as part of the law of wrongs and the law of wrongs as requiring a loss: especially [26]. This case is not even properly one in which the claimant suffered no loss, merely one in which it was likely that if it recovered it would be swiftly disenriched.

narrow law of unjust enrichment. English law appears not to have made that choice. Germany certainly has not. Arguing for the narrow view, Grantnam and Rickett have recently maintained that a system which abandons the requirement of corresponding loss cannot have an independent law of unjust enrichment. The choice of the broader view is, in their view, a choice in favour of merging the law of unjust enrichment and the law of restitution for wrongs.<sup>25</sup>

That is incorrect. As will become apparent in the next sub-section, the effect of the broader view is to enlarge the incidence of alternative analysis. That means that there will be more cases in which a claimant will have two distinct restitution-yielding causes of action, one in unjust enrichment and one in civil wrongs. The two different events remain analytically distinct. It is not even true that every example of restitution for wrongs will be susceptible of alternative analysis. There will be facts on which the law of civil wrongs will give the claimant a right to the defendant's gain (restitution for the wrong) but the law of unjust enrichment will be excluded for want of any not-wrong connection between claimant and enrichment. *A-G v Blake* is one such case.

Nevertheless, a very powerful new article in the Cambridge Law Journal by the Canadian Professor Mitchell McInnes will persuade many people that the law of unjust enrichment must restrict itself to those cases in which the claimant has suffered a loss corresponding to the defendant's gain.<sup>26</sup> In that article he quite rightly decouples the issue of interception and the issue of corresponding loss.<sup>27</sup> He is also right in insisting that the rationale for restitution is at its strongest when the defendant is occupying an extant gain *and* the claimant has suffered a corresponding loss.<sup>28</sup> It does not follow, however, that this or indeed any subject must be confined to the case in which it is most strongly underpinned. We might also concede, more generally, that there is nothing particularly desirable about the broad version of the law of unjust enrichment which emerges when the requirement of corresponding loss is abandoned, especially in a system which, unlike German law, does not shrink from gain-based recovery for wrongs.

There is nonetheless one serious weakness in this excellent study, namely that it has nowhere to put the cases which chiefly compel the adoption of the proposition that English law does not insist on loss to

<sup>25</sup> Grantnam and Rickett (n 18 above) 174–5.

<sup>26</sup> M. McInnes, 'Interceptive Subtraction, Unjust Enrichment and Wrongs—A Reply to Professor Birks' [2003] CLJ 697.

<sup>27</sup> *Ibid* 705.

<sup>28</sup> *Ibid* 706.

the claimant. Those cases, starting with *Hamby v Trot* itself, appear to be satisfied with a proposition the short version of which would be 'from my property, therefore sufficiently from me'. One cannot create and adopt an elegant view of the law of unjust enrichment by sweeping awkward bits of it into no-man's land.

### (b) From My Property

It is clear that if I invest your money and double it, you are entitled to the doubled proceeds. That is the law. This is what happened in *FC Jones (Trustee in Bankruptcy) v Jones*.<sup>29</sup> There Mr Jones had transferred money from the firm's bank account to Mrs Jones. As the law then stood, in the firm's insolvency the account then vested retrospectively in the trustee in bankruptcy. She multiplied the money she had received fivefold by speculation in potato futures. The trustee in bankruptcy recovered all that she had made. There is no hint that the outcome turned on wrongdoing. The only satisfactory explanation is that she was unjustly enriched at his expense to the extent of the whole sum.

More recently, as we have already seen, the House of Lords has held, in *Foskett v McKeown*,<sup>30</sup> that, where a trustee misappropriates trust property, the beneficiaries under a trust are entitled to choose between a security interest and a beneficial interest in the traceable proceeds. In the case itself they thus obtained many times what they had lost. This outcome is fully compatible with, if not dictated by, the law relating to resulting trusts based on contributions to the purchase price of a house or other asset.<sup>31</sup>

The taxonomy of these cases is disputed.<sup>32</sup> They fit the unjust enrichment analysis if we say that the earning opportunities inherent in an asset are attributed to its owner. Anyone who takes those opportunities intercepts what is already attributed in law to that owner. In speculating with the firm's money Mrs Jones intercepted the firm's earning opportunities. The actual loss to the firm and its trustee was one fifth of that which they recovered from her. The fivefold increase was from the firm's property and therefore from it.

<sup>29</sup> [1997] Ch 159 (CA). The analysis of this case in Grantham and Rickett (n 18 above) 170-5 is vitiated by their view that it is 'property, not unjust enrichment', as to which see 32-8 above.

<sup>30</sup> [2000] AC 51 (HL), discussed above, 34-6.

<sup>31</sup> Compare below, 304-7.

<sup>32</sup> Above, 32-8.

### (c) The Future

There is a great deal at stake. The taxonomic disputes surrounding such cases as *Jones* and *Foskett* will determine the scope of the English law of unjust enrichment. Are these cases in which the defendant was enriched 'at the expense of the claimant' within the way that the law understands the 'from' sense of that phrase? Or, bearing in mind that we are not construing a statutory phrase, are they cases in which the connection between the claimant and the enrichment is sufficient to keep them within the logic which drives the recovery of the mistaken payment of a non-existent debt? If they are, the reach of the law of unjust enrichment is much longer than we thought.

Chapter 1 observed that in *United Australia Ltd v Barclays Bank* the House of Lords held that conversion was a tort which generated both compensatory and restitutionary rights.<sup>33</sup> The House did not say whether a claimant could also reach the proceeds of a conversion through an alternative analysis in unjust enrichment. If the previous paragraphs are correct, the answer is yes. If I sell your bicycle for £200, I usurp the earning opportunities inherent in your ownership of the bicycle and intercept £200 which the law attributes to you. On these facts there are therefore two paths to restitution, either by standing on the tort but asking for restitution rather than the more usual compensation or by ignoring the tort and treating the facts as an enrichment at your expense and absolutely without your consent.

A claimant who takes the second route is not waiving the tort, merely ignoring it. Since the *United Australia* case there has been no such thing as 'waiver of tort' except in the rare case of one who, without authority, holds himself out as an agent for a principal. There, by ratification, the principal does extinguish any tort the originally unauthorized agent committed. That genuine case apart, the *United Australia* view was that 'waiver of tort' was nothing but a fiction disguising the first of the two routes to restitution, where the cause of action remains the tort itself but the claimant seeks, and the law allows, gain-based recovery. *United Australia* said nothing about the other route to restitution, where there is a sufficient connection between the claimant and the enrichment even if the character of the facts as a wrong is entirely ignored. If you by fraud induce me to believe that I owe you money, and I then pay, I may choose to ignore the fraud and treat the facts only as revealing a mistaken payment of a non-existent debt. Our question is whether the same is true

<sup>33</sup> [1941] AC 1 (HL) on which see above, 15-6.

of these cases where there is no correspondence between the gain obtained from the claimant's property and the loss suffered by the claimant?

If future cases confirm that the implication of *Jones* and *Foskett* is that the choice has gone in favour of treating the victim of these interceptive subtractions as a proper claimant in unjust enrichment, we will have intuitively chosen a broad law of unjust enrichment on the German lines, rather than the narrower version of the jurisdictions which follow France. One consequence will be a much greater overlap with restitution for wrongs. The *Jones* case, where nothing was said of any wrong, leads directly to the proposition that the House of Lords in *United Australia Ltd v Barclays Bank Ltd* should have recognized the two different routes to restitution after the tort of conversion, neither of them requiring a genuine waiver of tort. Moreover, no line can be drawn between, on the one hand, sale and exchange of another's asset and, on the other, hiring it out. If I hire out your car the rental which I receive is an interceptive subtraction from you, of the same kind as in the case of a sale, and much more obviously may exceed the loss to you.

*Edwards v Lee's Administrator*,<sup>34</sup> the case of the Great Onyx Cave in Kentucky, was an example of a profitable trespass. Edwards found on his land the entrance to a wonderful scenic cave. He started up a thriving tourist business. Unfortunately one third of the cave extended into Lee's neighbouring land. Far below the surface the trespassing tourists caused no loss, but profits were being made from the use of his land. Edwards had to pay Lee's estate one-third of his profits.

The result is easily explained as restitution for the trespass itself. In that light it is an instance of gain-based recovery for a wrong. Can it be understood, by alternative analysis, as restitution of unjust enrichment at Lee's expense? The language used by the court is equivocal, not to say muddled, but once we break away from the requirement of corresponding loss the answer must be that it can. *Jones* and *Foskett* tell us that we have, unequivocally, made that break.

In order to understand the likely future reach of our law of unjust enrichment we need to distinguish between the use of the land and the profits of that use. These are two steps on one path. The use of the land was taken directly from Lee. Despite Lee's having suffered no loss, he would clearly have had a claim in unjust enrichment for the reasonable

rental, being the value of what Edwards had taken.<sup>35</sup> But he wanted and got a share of the profits. The money came from the tourists, and its receipt by Edwards even more obviously caused Lee no corresponding loss. Nevertheless, the case is materially indistinguishable from the *Jones* case discussed above. Edwards earned that money from Lee's property and hence by interceptive subtraction from Lee. It follows that Lee's estate did not have to rely on the trespass to connect himself to Edwards' profits. Ignoring the wrong, he could say that it was money obtained, interceptively, from him: from his property and therefore from him.

The discussion of this case is then a model for many. For example, gain-based recovery in respect of infringements of intellectual property is amenable to the same dual analysis. Indeed early relief by way of account of profits in equity may in retrospect be more easily understood as based on interceptive unjust enrichment rather than as applying the analogy with tort which nowadays seems elementary.<sup>36</sup>

It is tempting to push these cases where there is no corresponding loss back into restitution for wrongs. There are insuperable obstacles. One is illustrated by *Jones*.<sup>37</sup> The wife in that case received the trustee's money by two cheques. To explain the outcome in the law of wrongs, one must, as the court did not, tie it to conversion of the cheques. But that would mean that, if the transfer had been paperless, the result would have been completely different. That is probably acceptable to nobody. The other obstacle concerns traced substitutes in general. Again, tracing depends on substitutions, not on wrongful substitutions. *Foskett*<sup>38</sup> shows that, if it is not explained by unjust enrichment, the right in the substitute has to be explained by a fiction of persistence.<sup>39</sup> It is very doubtful whether the law could now withdraw from the broad version of unjust enrichment, to which it has committed by not requiring corresponding loss, without retreating into that fiction. We are in the business of escaping fictions. We

<sup>35</sup> In *Osball v Nye & Nissen Co* 26 Wash 2d 282, 173 P 2d 652 (SC Washington 1946) this difference between use and profits was centrally in issue. The defendant was liable for the profits of wrongfully using the claimant's egg-washing machine. *Beck v Northern Natural Gas Company* 170 F 3d 1018 (10th Cir 1999) confines the recovery of profits to cynical deliberate wrongdoing. On this see J Edelman, *Gain-Based Damages* (Hart Oxford 2002) 138-9. The law of wrongs takes that stance, but the analysis in the text above, showing that an action lies in unjust enrichment, cannot.

<sup>36</sup> *Watson v McLarn* (1858) EB & E 75, 120 ER 435; *Edelsten v Edelsten* (1863) 1 De GJ & S 185, 46 ER 72; *Neilson v Bevis* (1871) LR 5 HL 1.

<sup>37</sup> [1997] Ch 159 (CA).

<sup>39</sup> Above, 35-6 and below, 198.

<sup>38</sup> [2001] AC 102 (HL).

<sup>34</sup> 96 SW 2d 1028 (Kentucky CA 1936).



have to find out why, by way of holding operation, the fiction seemed acceptable. The only answer is unjust enrichment.

### C. THE IMMEDIATE ENRICHEE

It is usually perfectly obvious who is enriched at whose expense. The reason is that in most cases there are only two parties in view. Even when there are more than two players it is often obvious who is whose immediate enrichee. I pay you money by mistake; you make a present of it to X. We can arrange these three parties in a straight line. You are my immediate enrichee, and X is your immediate enrichee. So far as X can be said to be enriched at my expense, he is a secondary or remote enrichee. Immediacy matters. I can only sue a remote enrichee if the rules of leapfrogging do not forbid it. 'At the expense of the claimant' means, in the first instance, 'immediately at the expense of the claimant'. Thereafter the problems of leapfrogging set in. It is essential to be able to recognize the immediate enrichee. One cannot otherwise tell whether the claimant faces leapfrogging problems.

#### 1. THE PROPRIETARY CONNECTION

There is one recurrent three-party situation in which the intervention of a third hand makes no difference at all. If the defendant has received the claimant's property, it does not matter how many intermediate hands it has passed through. There is an illusion of leapfrogging, but in reality there is none. In *Lipkin Gorman v Karpnale Ltd*<sup>40</sup> a partner in a firm of solicitors who was addicted to gambling fed his addiction from the firm's client account. He gambled the money away at the defendant's casino. There was no point in suing the gambler. He was penniless and in prison. The firm succeeded in recovering from the casino, seemingly leapfrogging the addicted gambler. Although the facts were actually more complex, the model from which the House of Lords worked was this. If X takes C's money without C's consent and gives it to D, then, subject to possible defences, D becomes indebted to C in the sum received.

A number of cases show that the model holds good where the claimant's interest in the thing is a power to avoid a voidable title. In *Banque Belge pour l'Étranger v Hambrouck*<sup>41</sup> the bank had paid out money

to a fraudster who had forged cheques. On the strength of its power to avoid his title, it was able to go against his mistress, to whom he had given some of the money. On a larger scale *El Ayou v Dollar Land Holdings Plc*<sup>42</sup> is structurally similar: The claimant was the victim of a huge share-selling fraud. He was able to reach across a world-wide money laundering operation to the defendant company in cooperation with which the rogues had invested in the development of New Covent Garden.

It is necessary to bear in mind the operation of the defence of bona fide purchase. Where bona fide purchase destroys prior property rights, there will be no proprietary connection between the claimant and the bona fide purchaser, and in the case of money bona fide purchase always does clear off earlier interests.<sup>43</sup> In *El Ayou v Dollar Land Holdings Plc* the defendant developers were found to have known of the provenance of the funds in question. They were not bona fide purchasers. Subject to that caveat, where there is a sufficient proprietary connection there are no remote recipients. If I find your wallet it makes no difference whether I am the first recipient or the second or the twenty-second. Suppose a pickpocket took it and, in alarm, threw it down, and then I found it. My position would be exactly the same as if your wallet had fallen from your pocket into the road in front of me without your noticing its loss. A receipt of your money is always a receipt directly from you.

#### 2. ENRICHMENTS CONFERRED BY ONE BUT PROCURED BY ANOTHER

Appearances can deceive. It is quite often true that a defendant is not the immediate enrichee of the person who actually conferred the enrichment. This happens where that person, in conferring the enrichment, acts at the behest of and on the credit of another. If I want to pay off a debt to you or build you a garage, I will almost certainly do it through another person. To pay my debt to you, I will draw a cheque in your favour which my bank will honour. To build the garage, I will employ a builder to do the work. The builder works under a contract with me and on my credit. Likewise my bank in making the payment to you. In such cases you appear at first sight to be immediately enriched by the builder and the bank, but the builder and bank act for me and look to me to pay them. You are my immediate enrichee.

<sup>40</sup> [1991] 2 AC 548 (HL).

<sup>41</sup> [1921] 1 KB 321 (CA). Cf undue influence: *Bainbridge v Brown* (1881) 18 Ch D 188, 196-7; *Midland Bank v Perry* [1988] 1 FLR 161, 167.

<sup>42</sup> [1993] 3 All ER 717 (Miller J) rev'd on one point as to attribution of knowledge [1994]

<sup>2</sup> All ER 685 (CA). In the CA the defendants were no longer seen as bona fide purchasers.

<sup>43</sup> Below, 240-5.

Although they conferred the enrichment and although it is true that you are enriched at their expense, you are as regards them a remote or secondary enricher. You are my immediate enricher, and you are their remote enricher. If I fail to pay the builder or the bank, they may want to go against you. Because there is no direct enricher-enricher relationship between them and you, they have to satisfy the rules which control leapfrogging. We will come back in the next section to cases of this kind, where the defendant is a remote enricher. The liability of a remote enricher depends on the rules of leapfrogging.

In *Klan v Permayer*<sup>44</sup> the claimant restaurateur and his partner, in financial trouble, wanted to sell the restaurant and the sub-lease of its premises to X, who was willing for them to continue to run it as his employees. The landlord, Permayer, made it a condition of the assignment of the lease that a debt owed to him be paid. It was agreed that X would pay it and the partners would repay him. X then by deed assumed responsibility to Permayer and paid off the debt, and the restaurateurs repaid X from their salaries. Much later it emerged that the supposed debt had not existed. In earlier insolvency proceedings which played no part in this story, it had been extinguished. That was before X ever came into the picture. Nobody argued that the debt survived even as a natural obligation, like a debt barred by limitation.

The Court of Appeal allowed the restaurateur to recover directly from Permayer, the supposed creditor. However, the Court made the problem more difficult than it was. Despite holding that there was no separate and distinct deal between X and the defendant but only a mechanism for the discharge of the restaurateur's debt, the Court treated the restaurateur as though it were leapfrogging X to attack a remote enricher. In fact the defendant was the immediate enricher of the restaurateur, since X had paid on the partners' credit, just as a bank pays on the credit of its customer. If X himself had not been repaid and had then attempted to recover the money from the defendant, he would have had to sue the defendant as a remote enricher and would almost certainly not have been allowed to leapfrog the restaurateur. He would have been a person who conferred an enrichment on another on behalf of and on the credit of a third party. The next section deals with actions brought by persons in that position.

<sup>44</sup> [2001] Bankruptcy and Personal Insolvency Rep 95 (CA).

## D. LEAPFROGGING

There is no absolute bar against leapfrogging. This section asks when, if ever, the claimant in unjust enrichment is confined to his action against the immediate enricher. If I mistakenly pay X £1,000 and X is thereby enabled to give to you £500, it is not nonsense to say that you have been enriched at my expense. However, you are manifestly not my immediate enricher. Can I leapfrog X and recover from you? It is important that you are a donee. Many remote recipients will be bona fide purchasers from the immediate enricher and will therefore have a defence. We are only concerned here with those who do not have that protection. A remote enricher, properly so-called, is one who would not have been enriched but for the enrichment of the immediate enricher. The connection is causal. We have already seen that if there is a proprietary connection the requirement of immediacy is satisfied all down the line.

It is not easy to state the law for merely causal connections, for two reasons. First, the question whether the remote enricher can be liable has never been directly addressed in the English cases. Secondly, the incidence of the proprietary connection is unclear because of the confused state of cases on the proprietary consequences of unjust enrichment.<sup>45</sup> If, for example, it is true that a mistaken payment turns the recipient into a trustee, the payee's donee is not a remote enricher of the payer, because there is a proprietary connection between them. The donee receives that which in equity belongs to the claimant. We can hardly do more than nibble at the problem here.

The picture seems to be that there is one common case in which leapfrogging is ruled out. For the rest the policy of the law is not hostile to leapfrogging. It leaves remote recipients to the protection of normal defences.

### 1. INITIALLY VALID CONTRACTS

At this point we return to those cases in which one party confers an enrichment which is procured by another. Where a defendant receives a benefit from or because of the performance of a contract between two others and the party making the performance and thus conferring the benefit had a valid contractual right to be paid for that performance by the other party to the contract, the recipient of the enrichment is the

<sup>45</sup> On which see Chapter 8, below, esp 203-4.



immediate enricher of the latter party, the party bound to pay, and the remote enricher of the former, the party conferring the enrichment. In such a case the former, who procured the performance, may never be leapfrogged by the latter, who conferred it. Leapfrogging out of an initially valid contract is not allowed. One may never attack one's contractual counter-party's immediate enricher.

A simple model is an unsecured loan. If a bank extends overdraft facilities to a customer, and the customer thus has funds enough to give £1,000 to his son, the bank will have no recourse against the son. If the father becomes insolvent, the bank will have to line up with the other unsecured creditors. One reason for not allowing the bank to sue the son is precisely that the bank must not wriggle round the risk of insolvency inherent in its contract with the father. Contracts entail the risk of insolvency.

The cases often do not declare on their face that they are of this kind. In *Lloyds Bank Plc v Independent Insurance Co Ltd*<sup>46</sup> the bank paid its customer's creditor a large sum with its customer's authority but by reason of a grave mistake as to the funds available to the customer. It thought a very large cheque in favour of the customer had been cleared, but it had not. The customer became insolvent. The bank tried and failed to recover from the creditor-payee. The reason given was that the bank got what it paid for. It obtained the discharge of the debt. That cannot be quite sufficient. It is inconceivable that the result would have been any different if the payee had been a donee receiving a birthday present by the wish of the customer.

The stronger reason is that, even though the bank made the payment directly to the customer's creditor, the bank's immediate enricher was the customer against whom it had a valid contractual claim for repayment. The bank lent the customer more money which, at the request of the customer, it paid directly to the creditor. The creditor was indeed enriched at the expense of the bank, but only through the customer. It was the bank's remote enricher. The enrichment which the bank wanted to get back from the remote enricher was initially the subject of a valid contract between the bank and its customer under which the bank had a right to be repaid by the customer.<sup>47</sup> No leapfrogging is allowed in that situation. Any other rule would subvert the insolvency regime. This case

is the opposite of *Khan v Pemayer*, discussed immediately above. There the claimant was the party who paid for the performance which enriched the defendant, not the party with a contractual right to be paid for it. The defendant was the claimant's immediate enricher.

*Brown and Davis v Galbraith* illustrates the same rule in a different context.<sup>48</sup> A garage does work on a car which has been damaged in a crash. The car's owner is the ultimate beneficiary of the work. In almost all cases the garage works under a contract with an insurance company. If after the work is done and the customer has taken the car back into his possession, the insurance company becomes insolvent, the unpaid garage has no claim against the owner. The enrichment of the owner of the car was initially the subject of a contract between the garage and the insurance company. The latter is thus the garage's immediate enricher. The customer is its remote enricher. The garage has to take the risk of the insolvency of the insurance company with which it validly contracted. If the contract is terminated and a claim is made in unjust enrichment, it too must be made against the insurance company. There can be no leapfrogging out of a disappointing contract.

*Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)*<sup>49</sup> is more difficult. It has excited controversy.<sup>50</sup> But it ultimately reduces to a similar analysis. The facts are best taken in two stages. Pan Ocean were the charterers of the Trident Beauty. Her owners were in financial trouble. They were bound to pay the hire in advance, which they did. It turned out that they had paid for some periods when no freight had been carried. Had there been no complications, that money would have been recoverable as having been paid on a basis which failed.

There were, however, two complications. One was that the contract contained a term covering the return of hire paid in advance which was not earned. Lord Goff appears to say that such a term, creating a contractual debt, displaces the law of unjust enrichment altogether.<sup>51</sup> The

<sup>48</sup> [1972] 1 W.L.R. 997 (CA); *Gray's Trust Centre Ltd v Olaf L. Johnson Ltd* (CA 25 January 1990).

<sup>49</sup> [1994] 1 W.L.R. 161 (HL).

<sup>50</sup> A Burrows, *The Law of Restitution* (2nd edn Butterworths London 2002) 348–50 favours Lord Goff's second reason [1994] 1 W.L.R. 161, 166, which was that Creditcorp were in a position analogous to a bona fide purchaser in that they had given value for the assignment and should not have their bargain undermined. Cf A Burrows 'Restitution from Assignees' [1994] *Restitution* L. Rev 52. Rather different: D Visser in D Johnston and R Zimmerman, *Unjustified Enrichment in Comparative Perspective* (CUP Cambridge 2002) 526, 548–50.

<sup>51</sup> [1994] 1 W.L.R. 161 (HL), 164, made more difficult by the fact that he calls unjust enrichment 'the law of restitution'.

<sup>46</sup> [1999] 2 W.L.R. 986 (CA).

<sup>47</sup> This explanation also applies to the leading case of *Aiken v Short* (1856) 1 H & N 210, 156 ER 1180, the facts of which were materially identical.

other and greater complication was that they had not in fact paid the owners at all, but rather the owners' assignee. The owners had borrowed heavily from Creditcorp and the security which they gave included the assignment to Creditcorp of their right to receive the hire from the charterers. Pan Ocean had therefore paid Creditcorp. They argued that this was nonetheless a payment made upon a basis which had failed. They were denied recovery and thus remitted to their claim against the insolvent owners.

If Pan Ocean had merely been requested to pay Creditcorp by the owners, this case would have been indistinguishable from the others. There was a valid contract between Pan Ocean and the owners which obliged Pan Ocean to take the risk of the creditworthiness of the owners. Pan Ocean would have conferred the enrichment on Creditcorp but it would have been the owners' payment, made through Pan Ocean. Creditcorp would have been the remote enricher of Pan Ocean, barred by the rule that there can be no leapfrogging out of a valid contract. The direct enricher-enriched relationship would have been between the owners and Creditcorp.

It is at first sight strange to say that it makes no difference that Pan Ocean were liable to pay, by virtue of the assignment. Can it be that a payer liable to the payee was not in an immediate enricher-enriched relationship with the payee? The answer is yes, because recourse to the machinery of assignment does not alter the facts that the payment to Creditcorp was procured by the owners on the faith of their either earning it or repaying it, and that to allow the restitutionary claim against Creditcorp would be to allow Pan Ocean to wriggle out of the risk of insolvency which their contract with the owners entailed. The fact that their contract contained a term for repayment may make this extra-clear. But the result would have been the same without it. What we know from this case, although we could have worked it out without its help, is that the veto on leapfrogging out of an initially valid contract is very strong, strong enough to protect even an assignee.

At first sight the numerous *O'Brien* cases<sup>52</sup> seem to defy this rule. The *O'Brien* doctrine stands guard at the gate where business, red in tooth and claw, comes knocking at the door of the cosier world of family and friends. Two parties, usually but not necessarily man and wife, agree that one of them, usually the wife, will mortgage or join in the mortgage of the

family home and stand surety for the other's business borrowing. The security once given, the lender, usually a bank, makes the advance. Later, when the pound of flesh is called for, the security-giver wants the mortgage and the guarantee set aside, maintaining their invalidity on the ground of misrepresentation or undue influence. This bid for restitution sometimes can succeed. It is not an attempt to leapfrog out of a valid contract between the security-giver and the business borrower. It belongs in the next sub-section.

## 2. NO INITIAL CONTRACT

In the *O'Brien* configuration there is no valid contract between security-giver and the business borrower. Even if the deal between them survives the presumption in family matters against intent to create legal relations, it will be invalid from the outset for misrepresentation or because of the impaired autonomy of the security-giver. Although it appears to be a three-party situation, with one party seeking to leap out of a bad contract which has benefited a third party, the now defendant, in fact the three-some resolves itself into a simple two-party transfer between the security giver and the lender.

This resembles the case in which a bank mistakenly pays its customer's creditor believing it has its customer's authority but in fact having none. There the bank can recover directly from the creditor. For the enrichment of the creditor is not the subject of a valid contract between bank and customer, merely a mistaken payment by the bank to the creditor-payee, who is the immediate and only enricher.<sup>53</sup> None of these apparently three-party situations are attempts to leapfrog. It will be recalled that we said the same of *Klan v Pomeroy*.<sup>54</sup> In that case there was an arrangement whereby the outgoing sub-tenants' supposed debt would be paid off by the new sub-tenant, who was to be, and was, repaid by the supposed debtors. We said that there was a direct enricher-enriched relationship between the supposed debtors and the supposed creditor.

Leapfrogging supposes a claimant who could, however unsatisfactorily, sue an immediate enricher but who wants to sue a remote enricher instead,

<sup>52</sup> *Barclays Bank Ltd v W J Simms & Son Ltd* [1980] QB 677. Compare *Customs and Excise Comrs v National Westminster Bank Plc* [2002] EWHC 2204 (Ch), [2003] 1 All ER (Comm) 327 where the claimant Commissioners owed money to a taxpayer creditor but recovered their payment to the defendant Bank. They had thought that they had their creditor's agreement and authority to pay the Bank, which was indeed his bank, but they had overlooked instructions forbidding payment via the Bank and requiring payment via named solicitors.

<sup>54</sup> Above, 88.

<sup>53</sup> *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, reviewed in *Royal Bank of Scotland v Etridge (No 2)* UKHL 44, [2001] 3 WLR 1021.

on the ground that, but for the unjust enrichment of the first recipient, the remote recipient would not have been enriched. In the previous subsection we saw that there is no hope of leapfrogging out of an initially valid contract with the immediate enricher. But in the absence of any such contract, it seems that such leapfrogging is permitted. This is controversial. Professor Burrows assumes a general principle against actions against anyone but the immediate enricher, but recognizes a series of exceptions.<sup>55</sup> Professor Tettenborn takes a strongly negative stance. He puts this case:

C inadvertently overpays his creditor A by £1000; A, pleasantly surprised on reading his next bank statement but entirely unsuspecting . . . proceeds to give £1000 from his other account to his son B. . . . A can almost certainly plead change of position as a defence. Hence the potential significance of a direct claim by C against B; can C say (in effect): 'I have paid money by mistake, but for this B would not have been enriched; therefore B has been unjustifiably enriched at my expense and ought to refund?'<sup>56</sup>

His answer is no. In German law it is certainly yes, for this very case is provided for in the BGB.<sup>57</sup> The answer must also be yes in English law. The paragraphs which follow show that our law is not absolutely averse to leapfrogging claims.

Professor Tettenborn's example is one in which the claimant's rights against the first recipient, the immediate enricher, are extinguished as a matter of law by the defence of change of position. The same is true of the case in the BGB. It is impossible at the moment to say whether that or some other restrictive requirement must be satisfied in addition to the requirement of 'but for' causation. A slightly milder restriction would be that remedies against the first recipient must have been exhausted. A more severe precondition would be traceability: the remote recipient would then have to be shown (i) to have received because the first recipient received and (ii) to have received the very assets which the first recipient received or their traceable substitutes. The severest restriction of all would be to insist, in addition to 'but for' causation, on both extinction

<sup>55</sup> Burrows (n 50 above) 31–41. His basic rule is not specific to leapfrogging. It is much wider: 'the claimant is not entitled to the restitution of benefits conferred by a third party rather than himself' 32.

<sup>56</sup> A Tettenborn, 'Lawful Receipt—A Justifying Factor' [1997] RLR 1, 1. Cf Burrows (n 50 above) 41.

<sup>57</sup> 822 BGB: If the recipient disposes of the thing received to a third party gratuitously, then, so far as the first recipient's restitutionary obligation is thereby barred, the third party incurs a restitutionary obligation just as though the disposition had been made to him by the creditor without legal ground (my translation).

tion or exhaustion and traceability. The only purpose of such restrictions would be to reduce the incidence of leapfrogging claims. If there is no well-founded objection to leapfrogging, other than to leapfrogging out of a valid contract, there is no real justification for additional restrictions. The remote recipient will anyhow have the protection of defences.

It will be noticed that Professor Tettenborn's example is carefully constructed to exclude traceability. The father's gift to his son came from a separate account, but the gift was nonetheless caused by the arrival of the unjust enrichment. Traceability figures in this discussion merely as a restriction, not as a preliminary to the assertion of a proprietary right, but by eliminating it from the example Professor Tettenborn also sidesteps the possibility of there being a sufficient proprietary connection between the bank and the son, which would render the inquiry into the causal connection superfluous.

The validity of the proposition that a remote recipient can be reached on the basis of the causal argument rests partly on the real state of things in *Lipkin Gorman v Karpnale Ltd*, which differed markedly from the model on which their Lordships relied. If its peculiarities cannot be fitted to that model, the outcome may have to be explained on the basis that it is possible to reach a secondary recipient on a purely causal basis.<sup>58</sup> One nagging worry, if that revision were otherwise acceptable, is that there was a contractual relationship between the partners. If the property connection breaks down, other explanations would very likely be caught by the bar against leapfrogging in that context.

The difficulty with the *Lipkin Gorman* case is that the money in the gambler's hands, though taken from the firm's account, belonged to the gambler. He was an authorized signatory on the account, although his gambling was of course not an authorized purpose. It was expressly held that the property passed to him.<sup>59</sup> The money was traceable money from the account. But tracing does not in itself confer proprietary rights. Tracing identifies substitutes. The proprietary right in the substitute depends on there being a proprietary right in the first asset received. The *Lipkin Gorman* judgments do not say that the gambler's title to the money first received was voidable, so as to give the firm at least a power *in rem* in it.

If I give you £100 for your birthday and then trace the £100 to a water-colour on your wall, I will not give myself any right in the watercolour. Nor will I obtain any such right by pointing to the fact that, a moment before I

<sup>58</sup> Above, text to n 40.

<sup>59</sup> [1991] 2 AC 548 (HL), 578 (Lord Goff).

handed it over, the money was mine. There is a certain danger that, in starting the tracing chain from the bank account, which certainly belonged to the firm even if the money withdrawn did not, the case may have fallen into the error of finding the proprietary base too early in the story. If that is what happened, the outcome needs a new explanation.

A reinterpretation of one major case would not suffice if the causal argument were not rooted in other decisions. There is a group of cases, lucidly explained by Mitchell,<sup>60</sup> in which mistaken payments have been recovered from remote recipients on proof that the enrichment did come through to them. In *Bannatyne v D&C MacIver* the London agents of the defendant firm borrowed money for them without authority. The claimant lenders mistakenly believed that they did have authority. The Court of Appeal upheld the claim against the firm to the extent that the money had been turned to their advantage. Romer LJ said:

Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.<sup>61</sup>

This is the same doctrine as underlies *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*,<sup>62</sup> a decision of Wright J which was reinterpreted by the Court of Appeal in *Re Cleadon Trust Ltd*.<sup>63</sup> In the *Liggett* case a bank had paid out money believing that it had the authority of a company which was its customer, when in fact it had only the insufficient authority of one director of the company. It was allowed to debit the company's account.

The explanation of the *Liggett* case which was advanced by the majority of the Court of Appeal in *Re Cleadon Trust Ltd* was that the money must be regarded as a mistaken payment to that one director but that the company nevertheless had to make restitution because he had discharged the company's debts. In short it was enriched and it would not have been enriched but for his enrichment. He had no authority to borrow, but he

did have authority to discharge debts.<sup>64</sup> The emphasis on discharge may be misplaced. Imperfect discharge should not have been fatal, since the bank could still have been subrogated to the creditors' imperfectly extinguished rights against the company. That is what subrogation proper is for.<sup>65</sup>

*Butler v Rice*,<sup>66</sup> though in some respects confusing, is factually more straightforward. Butler, who had been misled by Mr Rice, mistakenly thought that Mr Rice owned a house subject to a charge. He made a payment to him thinking he was lending to discharge that particular charge. Mr Rice had no such interest and in fact used the money to discharge a mortgage on property belonging to his wife. Mrs Rice, who had not known of her husband's doings, regarded herself as entitled to a windfall, leaving Butler to his remedy against her husband. But Warrington J held that Butler was entitled to be subrogated to the claim and security which had been paid off. In other words Mrs Rice, as second recipient, had to surrender the enrichment which she would not have received but for the unjust enrichment of the first recipient. Butler was not leaping out of a valid contract.

Mr Rice had misrepresented the facts. The contract with him was therefore voidable. The voidability not only shows that there was no leaping out of a valid contract but also allows the case to be explained on the basis of a proprietary connection between claimant and defendant. However, before adopting that explanation it is necessary to ask whether there is any reason at all why the causal connection should not suffice. When one bargains one does not take the risk of mistakes induced by misrepresentation. It seems to follow that one does not take the risk of the insolvency of the misrepresenter. One cannot leapfrog out of a valid contract because one has taken the risk of one's counter-party's insolvency. Where the law relieves you of that risk, there is no convincing objection to leaping.

Although the principle of these cases is found chiefly in relation of mistakes in the context of agency, it is both attractive and deeply rooted in the western legal tradition.<sup>67</sup> It cannot reasonably be confined to one particular context. It would not be rational to admire the clarity and good sense of Romer LJ's statement of principle while at the same time adhering

<sup>60</sup> C Mitchell, *The Law of Subrogation* (OUP Oxford 1994) chapter 9, especially 124–9, 133–5.

<sup>61</sup> [1906] 1 KB 103 (CA) 109. In *Reid v Rugby & Co* [1894] 2 QB 40 recovery was allowed at law, the facts being materially identical.

<sup>62</sup> [1928] 1 KB 48.

<sup>63</sup> [1939] Ch 286 (CA), discussed by Mitchell (n 60 above) 127–8, 162–5.

<sup>64</sup> [1939] Ch 286 (CA) 318 (Scott LJ), 326 (Clauson LJ).

<sup>65</sup> *Below*, 296–9.

<sup>67</sup> It comes from the *actio de in rem verso* (the action for things applied to the defendant's use). R Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (OUP Oxford 1996) 878–87.

<sup>66</sup> [1910] 2 Ch 277.

to the stern opinion that a donee should be immune from suit even though he would have received no gift but for the unjust enrichment of his donor at the mistaken claimant's expense.

### E. CONCLUSION

This chapter has considered questions of great importance to the scope of the English law of unjust enrichment. When offered choices the cases have inclined to the broader options. They do not seem to insist that the claimants must have suffered loss. They do not exclude claimants who found their claim on interception. In consequence they enlarge the number of situations in which a claimant seeking restitution can claim in the alternative, in the law of wrongs and in the law of unjust enrichment. Since there is no question of cumulating both claims, there is no obviously pressing reason for imposing restrictive requirements. A pressure may, however, build up in relation to the defence of change of position. There is such a thing as an innocent wrong. Defendants in conversion are often innocent wrongdoers. The defence of change of position does not apply to wrongs. It may be difficult to hold that line, but it will also be difficult to know how to cross it.<sup>68</sup>

When it comes to suing remote enriches, the choice again goes in favour of allowing such claims, so long as the claimant is not trying to escape the insolvency of a contractual counter-party. To allow leapfrogging out of an initially valid contract would make a mockery of the insolvency regime.

A considerable degree of uncertainty persists. For one thing the questions have so far been answered without being explicitly asked. For another, until there is a secure and stable answer to the fourth of the five questions, which determines the incidence of the proprietary response to unjust enrichment, we will not be able to see clearly when causation-based leapfrogging is rendered superfluous by a sufficient proprietary connection between the claimant and the enrichment. In the meantime, it is best to assume that such leapfrogging is permissible. Remote recipients, like other defendants, are nowadays sufficiently protected, where they need to be, by vigorous defences.

<sup>68</sup> Below, 213.