The Law of Restitution

Second edition

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Chapter 1

Fundamental ideas

The purpose of this chapter is to introduce and explain the principles, concepts and ideas that, it is believed, run through and underpin the law of restitution; and several of the key theoretical controversies concerning the subject will be addressed. In many senses it is the most important chapter in the book for the detailed analysis of the law undertaken in the following 15 chapters is built on the framework set out here. Some of the material in this chapter is complex and its significance may only be fully appreciated on reading later chapters.

1. UNJUST ENRICHMENT AND COMPETING THEORIES

(1) A law of restitution based on unjust enrichment

There are different opinions as to the exact ambit of the law of restitution. The view taken in this book is that it is the law concerned with reversing a defendant's unjust enrichment at the claimant's expense. Although it incorporates elements of the law of property as well as the law of obligations, restitution is most akin to, and belongs alongside, contract and tort; and, just as the principles underlying and giving coherence to contract and tort can be said to be, respectively, the fulfilment of expectations engendered by binding promises and the compensation of wrongful harm, so the underpinning principle of restitution is the reversal of unjust enrichment. Like the former two principles the principle of reversing unjust enrichment is not intended to be a vague reference to individual morality. For although the principle itself is, and must be, morally justifiable[1] its essential role is as an organising tool for existing legal decisions. It enables one to see which are the like cases that

1 For a call for the philosophical foundations of the law of restitution to be carefully exposed and analysed, see Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 OJLS 457. See also McBride and McGrath, 'The Nature of Restitution' (1995) 15 OJLS 33; Ho, 'The Nature of Restitution – A Reply' (1996) 16 OJLS 517; Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas LR 2115; Stephen Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas LR 2177.

should be treated alike. One is therefore not primarily concerned with what any one individual or commentator may think is unjust enrichment but rather with what the law regards as unjust enrichment. Just as textbooks on contract and tort have for the last century sought to explain their respective territories by a readily intelligible framework of more specific principles and doctrines leading from the root principle to the legal decisions, so the primary task that has faced writers on the law of restitution in recent times has been to do the same for this long-neglected subject.

Traditionally English lawyers were hostile to a law of restitution based on unjust enrichment. Until recently powerful dicta of great judges like Lord Mansfield[2] and Lord Wright tended to fall on deaf ears. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[3] the latter said:

> 'It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.'

However, following ever-increasing judicial references to restitution and unjust enrichment, authoritative blessing was finally given to the subject in 1991 by the House of Lords in the momentous decision of *Lipkin Gorman v Karpnale Ltd.*[4] In the light of that decision it is no longer necessary to become embroiled in the long-running but arid debate as to whether the subject exists. All attention can rightly be focused on its content.

Indeed, since *Lipkin Gorman,* there have been several decisions of the House of Lords in which aspects of the law of restitution have been developed or clarified. For example, *Woolwich Equitable Building Society v Inland Revenue Commissioners*[5] on taxes demanded ultra vires by public authorities; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[6] on restitution of money paid under void contracts; *Kleinwort Benson Ltd v Glasgow City Council*[7] on the jurisdiction of the English courts to hear restitutionary claims; *Stocznia Gdanska SA*

2 See, esp, *Moses v Macferlan* (1760) 2 Burr 1005, 1012.
3 [1943] AC 32, 61.
4 [1991] 2 AC 548.
5 [1993] AC 70.
6 [1996] AC 669.
7 [1999] 1 AC 153.

v Latvia Shipping Co[8] on total failure of consideration; *Banque Financière de la Cité v Parc (Battersea) Ltd*[9] on non-contractual subrogation; *Kleinwort Benson Ltd v Lincoln City Council*[10] on restitution of payments made by mistake of law; *Foskett v McKeown*[11] on tracing and on the problematic relationship between property law and the law of restitution; *A-G v Blake*[12] on restitution for breach of contract; and *Royal Bank of Scotland plc v Etridge (No 2)*[13] on rescission of a contract for undue influence. There have also been influential judgments of the Privy Council in, for example, *A-G of Hong Kong v Reid*[14] on proprietary restitution in respect of bribes and *Dextra Bank and Trust Co Ltd v Bank of Jamaica*[15] on change of position. Add to all these, important decisions of the Court of Appeal, such as *Bishopsgate Investment Management v Homan*[16] on tracing, *Kleinwort Benson v Birmingham City Council*[17] on passing on, and *Scottish Equitable plc v Derby*[18] on change of position, and numerous decisions at first instance, and one can see that the English law of restitution has finally, albeit belatedly, come of age. As Gerhard Dannemann has powerfully expressed it, 'Preceded and helped by scholarly work, English courts have unfrozen the law of restitution and have, particularly over the last ten years, achieved a rapid development which might have taken a century in other areas of the law'.[19]

The last decade has also seen an explosion of academic writing on the law of restitution. When the first edition of this book was published, there were only two texts on the English law of restitution (Goff and Jones, *The Law of Restitution*[20] and Birks, *An Introduction to the Law of Restitution*)[1] and a few collections of essays.[2] In addition to this book, Goff and Jones and Birks, we now have one other 'practitioner work' (*The Law of Restitution,* edited by Hedley and Halliwell),[3] three other

8 [1998] 1 WLR 574.
9 [1999] 1 AC 221.
10 [1999] 2 AC 349.
11 [2001] 1 AC 102.
12 [2001] 1 AC 268.
13 [2001] UKHL 44, [2001] 3 WLR 1021.
14 [1994] 1 AC 324.
15 [2002] 1 All ER (Comm) 193.
16 [1995] Ch 211.
17 [1997] QB 380.
18 [2001] EWCA Civ 369, [2001] 3 All ER 818.
19 Dannemann, 'Unjust Enrichment by Transfer: Some Comparative Remarks' (2001) Texas LR 1837, 1843.
20 Then in its 3rd edition but now in its 6th edition (2002).
1 Revised edition, 1989.
2 *Essays on Restitution* (ed Finn, 1990); Beatson, *The Use and Abuse of Unjust Enrichment* (1991); *Essays on the Law of Restitution* (ed Burrows, 1991).
3 (2002). There is also a succinct and important chapter headed 'Unjust Enrichment' written by Birks and Mitchell in *English Private Law* (ed Birks, 2000), ch 15.

textbooks (Tettenborn, *The Law of Restitution in England and Ireland*;[4] Virgo, *The Principles of the Law of Restitution*;[5] and McMeel, *The Modern Law of Restitution*)[6] as well as the first texts in Australia[7] and New Zealand.[8] In addition to several casebooks,[9] and numerous collections of essays,[10] the last decade has also seen the publication of a series of important monographs on particular aspects of the English law of restitution: these have included, for example, Mitchell's *The Law of Subrogation*;[11] Lionel Smith's *The Law of Tracing*;[12] Chambers' *Resulting Trusts*;[13] Alison Jones' *Restitution and European Community Law*;[14] Panagopoulos' *Restitution in Private International Law*;[15] Edelman's *Gain-Based Damages*;[16] and Rotherham's *Proprietary Remedies in Context*.[17] Hundreds of articles on the law of restitution have been published in recent years and the subject has had its own dedicated law journal, the *Restitution Law Review*, since 1993. There is a very helpful Restitution web-site run by Steve Hedley from Cambridge[18] and a thriving internet discussion forum organised by Lionel Smith from Canada. In sharp contrast to its earlier neglect, the law of restitution can lay claim to have been the most debated subject in English private law over the last ten years.[19]

A further feature of the last few years has been the increased interest shown, both amongst academics and judges, in the comparative law of restitution, especially comparisons with Germany and other

4 Now in its 3rd edition (2002).
5 (1999).
6 (2000).
7 Mason and Carter, *Restitution Law in Australia* (1995). This is reviewed at length by several commentators at [1997] RLR 229.
8 Grantham and Rickett, *Enrichment and Restitution in New Zealand* (2000). The first text in Canada was Maddaugh and McCamus, *The Law of Restitution* (1990).
9 Eg, McMeel, *Casebook on Restitution* (1996); Burrows and McKendrick, *Cases and Materials on the Law of Restitution* (1997); Grantham and Rickett, *Restitution: Commentary and Materials* (2001).
10 Eg, *Laundering and Tracing* (ed Birks, 1995); *Restitution and the Conflict of Laws* (ed Rose, 1995); *Restitution: Past, Present and Future* (eds Cornish, Nolan, O'Sullivan and Virgo, 1998); *Restitution and Banking Law* (ed Rose, 1998); *Lessons of the Swaps Litigation* (eds Birks and Rose, 2000); *Restitution and Insolvency* (ed Rose, 2000); *Restitution and Equity* (ed Birks and Rose, 2000); Birks, *The Foundations of Unjust Enrichment* (2002).
11 (1994).
12 (1997).
13 (1997).
14 (2000).
15 (2000).
16 (2002).
17 (2002).
18 www.law.cam.ac.uk/restitution
19 The experience in the United States has been very different. Until a recent mini-revival led, for example, by Professor Andrew Kull of Boston University, the subject had virtually disappeared as a separate law school course (albeit sometimes taught as part of a Remedies course) and rarely featured in law journals. See Langbein, 'The Later History of Restitution' in *Restitution: Past, Present and Future* (eds Cornish et al, 1998), pp 57, 60–62.

codified civil jurisdictions.[20] A particularly important aspect of this is the ongoing work of the 'Study Group on a European Civil Code' headed by Walter van Gerven. The proposed code would include unjust enrichment. Also worthy of close attention in this regard is the formidable work of Eric Clive in producing a draft code on the Scottish law of unjustified enrichment.[1] Views differ as to the purpose and consequent merits of such codes. A legislative European code would be highly controversial in England as being contrary to the common law tradition. A non-binding European code, on the model of the Restatements of the American Law Institute, would seem to offer a more beneficial, and less contentious, way forward.

(2) Quadrating restitution and unjust enrichment

As has been said above, the view taken in this book is that the law of restitution is the law concerned with reversing a defendant's unjust enrichment at the claimant's expense. That is, the view taken is that the law of restitution and the principle against unjust enrichment are two sides of the same coin. Following Peter Birks' early work,[2] the law of restitution may be regarded as having a central divide between unjust enrichment by subtraction (or autonomous unjust enrichment) and unjust enrichment by wrongdoing. This division is marked by the two meanings of 'at the expense of' the claimant; 'by subtraction from' and 'by a wrong to'. The divide is one between where unjust enrichment is the cause of action or event to which restitution responds and where a wrong is the cause of action or event to which restitution responds.

In recent years Peter Birks has favoured abandoning the automatic link – the quadration – between restitution and unjust enrichment.[3]

20 See, eg, Zimmermann and Du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' [1994] RLR 14; Dickson, 'Unjust Enrichment Claims: a Comparative Overview' [1995] CLJ 100; Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15 OJLS 403; Markesinis, Lorenz, Dannemann, *The German Law of Obligations* (1997), ch 9; *The Limits of Restitutionary Claims: A Comparative Analysis* (ed Swadling, 1997); Verse, 'Improvements and Enrichment: A Comparative Analysis' [1998] LR 85; Mitchell, 'Claims in Unjustified Enrichment to Recover Money Paid Pursuant to a Common Liability' (2001) 5 ELR 186; Krebs, *Restitution at the Crossroads: A Comparative Study* (2001); *Unjustified Enrichment: Key Issues in Comparative Perspective* (eds Johnston and Zimmermann, 2002); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.
1 *Draft Rules on Unjustified Enrichment and Commentary* published as an Appendix to Scottish Law Commission, *Judicial Abolition of the Error of Law Rule and its Aftermath*, Discussion Paper No 99 (1994).
2 Birks, at pp 26, 44–45.
3 'Misnomer' in *Restitution: Past, Present and Future* (eds Cornish, Nolan, O'Sullivan and Virgo, 1998), pp 1–29; 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 Texas LR 1767. See similarly Lionel Smith, 'The Province of the Law of Restitution' (1992) 71 Can BR 671.

On his new approach, one should classify the law by cause of action (or event). This book should therefore be confined to the law concerning the cause of action (or event) of unjust enrichment and should be called the law of unjust enrichment. Restitution for wrongs should be excluded and seen as part of the different subject of wrongs.

While in the long-term it may be that Birks' new approach proves to be justified, it is submitted that at least at this stage in the law's development (and, in particular, before we can be sure of the scope of restitution for wrongs or of the change of position defence), it would be premature to abandon the quadration between the law of restitution and the principle against unjust enrichment.[4] That quadration approach has served the subject well. It has been the basis upon which the Anglo-American law of restitution has been developed since 1937;[5] and in England it is an approach, pioneered by Goff and Jones[6] and built on by Birks,[7] which has produced an astonishing advance in the understanding of the relevant law over the last twenty years or so. There is a danger that some of this ground will be lost if the quadration approach is abandoned. Moreover, while elegance or neatness of structure may be enhanced by such an abandonment, it is hard to see its practical advantages. This book therefore adopts the position of '[continuing] to sing to the old hymn-sheet which quadrates the principle against unjust enrichment and restitution'.[8]

It should be added here that in his excellent book, *The Principles of the Law of Restitution*[9] Graham Virgo also advocates abandoning the quadration approach. In his view, the law of restitution is founded not upon one principle but upon three different principles, namely the reversal of unjust enrichment, the prevention of a wrongdoer from profiting from his or her wrong, and the vindication of property rights with which the defendant has interfered.[10] But, with respect, Virgo's third principle cuts across the first because, crucially, property rights may be created to reverse an unjust enrichment.[11] The other essential difference between us is, again, in relation to whether one regards

4 For a detailed defence of the quadration approach, see Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle?' [2000] RLR 257. See also McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadration Thesis' [1999] RLR 118.

5 This was the date of publication of the *Restatement of Restitution* by the American Law Institute. Professor Andrew Kull is the Reporter for the (Third) Restatement of Restitution (the second having been abandoned while in draft form): his work, which is ongoing, is expected to take several years to complete.

6 *The Law of Restitution* was first published in 1966; the 6th edition was published in 2002.

7 Especially in *An Introduction to the Law of Restitution* (1989).

8 [2000] RLR 257, 269.

9 (1999).

10 *The Principles of the Law of Restitution*, esp pp 6–17.

11 See below, pp 60–75.

restitution for wrongs as helpfully underpinned by the principle against unjust enrichment (Virgo thinks not). It should also be noted that if one recasts Virgo's principles, using Birks' distinction between events and responses, one can clearly see that Virgo's anti-quadration approach leads him to the diametrically opposite conclusion to Birks; that is, that the law of restitution is a useful category concerned with the response of restitution to various events (only one of which is unjust enrichment).

(3) Competing theories

Over the years, various theories have been advanced that have sought to challenge the relevance and importance of the principle against unjust enrichment. In giving an outline of the most important of these theories,[12] it is convenient to consider them under five sub-headings: (a) implied contract; (b) Stoljar's proprietary theory; (c) unjust sacrifice; (d) the views of Dietrich, Jackman and Jaffey; (e) Hedley's critique.

(a) Implied contract

The 'implied contract' theory was the main reason why, traditionally in England, restitution was pushed into the shade of contract and tort. According to this theory, most of the common law part of restitution[13] (which comprises the bulk of the subject) was satisfactorily explained as resting on an implied promise by the defendant to pay the claimant. This area of the law was therefore seen merely as an adjunct to the law of contract: hence the label 'quasi-contract'. By this theory, if the claimant paid the defendant £100 under a mistake of fact, his legal remedy to recover the £100 rested on the defendant's implied promise to him to pay it back. But this approach was fictional and said nothing about why the promise should be implied. By masking the underlying basis for recovery the theory obscured the important similarities and differences between the cases reversing benefits received. Moreover it was contrary to the rule of law for judges to

12 One should also note the views (albeit, in my opinion, profoundly mistaken!) of the distinguished Australian judge, Gummow J. While not developing an alternative theory (albeit that he seemed to favour 'unconscionability') he used his judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68 to attack the 'theory' of unjust enrichment. See also Finn, 'Equitable Doctrine and Discretion in Remedies' in *Restitution, Past, Present and Future* (eds Cornish, Nolan, O'Sullivan and Virgo, 1998) pp 251–274, esp pp 251–253. For persuasive criticism of Gummow J's judgment see, eg, Beatson and Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 LQR 352; Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 OUCLJ 1.

13 More specifically, that part of common law restitution concerned with the actions for money had and received to the claimant's use, money paid to the defendant's use, *quantum meruit* and *quantum valebat*.

reach decisions without properly explaining their reasoning. This is not to say that judges applying the implied contract theory reached results that were inconsistent with unjust enrichment reasoning. On the contrary, it is believed that, whatever language was overtly adopted, the courts were throughout applying the principle of unjust enrichment. It follows that the implicit rejection of the implied contract theory in *Lipkin Gorman*, and its explicit rejection in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[14] has not altered, and will not alter, decisions at a stroke.

Nevertheless the acceptance of the unjust enrichment principle can occasionally lead to differences in the results of cases. This is for three main reasons. First, the recognition of unjust enrichment in *Lipkin Gorman* was combined with the Lords' acceptance of a change of position defence which, at the defence stage, allows a more rigorous examination of the defendant's enrichment than was possible under the previous law. Moreover, with that important defence in place, the courts feel less constrained in pushing forward the scope of prima facie restitutionary liability. Secondly, recognising unjust enrichment has enabled the courts to see clearly that certain areas of the law (most obviously, the mistake of law bar and the general insistence that a failure of consideration be total)[15] represent restrictions on the pure principle of unjust enrichment that do not withstand close scrutiny. Thirdly, recognition of the principle brings together areas of the law (for example, restitution for common law and equitable wrongs) that might otherwise have appeared disparate and may reveal inconsistencies that require eradication. In the words of Maddaugh and McCamus, 'Giving a rational structure to the material ... serves to expose anomalies in the past treatment of restitutionary questions and facilitates the development of doctrine which will afford similar treatment to cases which can now more clearly be seen to be similar in material respects.'[16]

The weakness of the implied contract theory has long rendered it easy prey for those who support unjust enrichment. Of far more interest

14 [1996] AC 669. Lord Browne-Wilkinson, with whom Lords Slynn and Lloyd agreed said, at 710: 'The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay ... In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v Brougham* [1914] AC 398 on this point.'

15 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (rejection of the mistake of law bar); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, *Goss v Chilcott* [1996] AC 788, *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, *Guinness Mahon & Co v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (all casting doubt on, while not removing, the general need for a failure of consideration to be total).

16 *The Law of Restitution* (1990), p 14.

and difficulty are the modern challenges to the unjust enrichment approach that we shall now turn to consider.[17]

(b) Stoljar's proprietary theory

The late Professor Stoljar put forward his proprietary theory in *The Law of Quasi-Contract*.[18] He argued that much of the law that has traditionally been classified as quasi-contractual, for example that dealing with the recovery of money paid by mistake or under duress, is best viewed as giving the claimant a remedy because, without the claimant's consent, the defendant received property that at the time of receipt belonged to the claimant. In the first edition of his book Stoljar presented his theory as the antithesis of unjust enrichment thinking[19] but by the second edition he saw it rather as a more concrete clarification of what is meant by unjust enrichment. It is possible to argue that the theory is consistent with the common law on personal restitution from an indirect recipient of money that belonged to the claimant (ie, where the claimant's money has been paid to the defendant by a third party).[20] But as an explanation of the usual case of restitution, where the claimant has itself paid its money to the defendant, the theory is seriously deficient for in only a limited number of cases does the property in the money not pass to the payee. For example, it is only where a mistake is fundamental that it prevents property passing. Yet for restitution a mere causative mistake is sufficient. Moreover the proprietary theory clearly cannot explain the recovery of money on a total failure of consideration for it is trite law that property passes to the payee; Stoljar was therefore unsatisfactorily forced to see that area as some sort of off-shoot of contract. Nor can the proprietary theory explain the award of a *quantum meruit* for services rendered, necessitating yet a third Stoljar theory – all the time impairing the unity of the subject – namely that loss to the claimant not enrichment of the defendant is in issue in the services cases.[1]

17 See also Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p 768. He does not appear to dispute the importance of the unjust enrichment idea but considers it miscor ceived to treat its study as a separate subject rather than running through several subjects, for example, property, tort, family law, company law, and, most importantly for his work, contract. This view is convincingly rejected by Birks 'Restitution and the Freedom of Contract' (1983) 36 CLP 141. For Atiyah's reply to Birks see Atiyah, *Essays on Contract* (1986), pp 47–52.

18 (2nd edn, 1989) pp 5–10, 113, 250. See also 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 MLR 603.

19 (1st edn, 1964) p 6.

20 See below chapter 4.

1 *The Law of Quasi-Contract* (2nd edn, 1989), pp 9–10, 250. See also (1987) 50 MLR 603; *International Encyclopedia of Comparative Law*, vol X chapter 17 (*Negotiorum Gestio*) pp 15–17. A somewhat similar approach to Stoljar's, albeit differing in its detail, is put forward by Watts, 'Restitution – a A Property Principle and a Services Principle' [1995] RLR 49.

(c) Unjust sacrifice

The above discussion leads directly on to a further theory put forward by scholars, including Stoljar, who argue that 'unjust sacrifice' is a better explanation than unjust enrichment of many of the so-called restitution cases, especially those involving services.[2] The argument is that one should not use an overinclusive concept of benefit and thereby artificially force into the unjust enrichment framework cases that are better viewed as concerning loss not benefit.

There are three main difficulties with this approach. The first is that it appears to adopt an unnaturally narrow view of benefit. So, for example, Muir thinks that for restitutionary purposes 'benefit' must mean 'a positive accretion to wealth'.[3] However, if the receipt of £100 is indisputably a benefit to the defendant, how can one deny that the claimant's payment of the defendant's debt of £100, which the defendant was about to pay, is not equally a benefit to the defendant? Muir finds himself having to distinguish standard uses of the term benefit so that only some count as restitutionary; for him unjust enrichment is concerned only with actions which *confer benefits* on defendants and not actions which are merely *of benefit* to defendants. He writes, '... situations in which an action is a benefit to the defendant without involving the conferral of a benefit upon him require ... a compensatory remedy rather than disgorgement'.[4] With respect, this is to take an underinclusive approach to benefit.

The second difficulty is that, without the element of *gain* inherent in the unjust enrichment principle, it is not easy to see the moral justification for legal intervention outside breach of promise or tortious or equitable wrongdoing. What is the moral force behind an autonomous principle of 'unjust sacrifice'? Why should a defendant be made to pay for loss suffered by the claimant unless he is causally responsible for it or has benefited from it? Muir is aware of this for he writes, 'It is in fact very difficult to explain why there is any obligation to reward or compensate an unjust sacrifice and the reality is probably that no one explanation is sufficient'.[5] By contrast the unjust enrichment principle has an intuitively appealing force for, leaving aside cases of wrongdoing, it principally rests on the claimant's loss

2 Apart from Stoljar, see, eg, Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp 21–44; Muir, 'Unjust Sacrifice and the Officious Intervener' in *Essays on Restitution* (ed Finn, 1990), pp 297–351; Hedley, 'Unjust Enrichment as the Basis of Restitution – An Overworked Concept' (1985) 5 Legal Studies 56, 60–63. Some of Hobhouse J's reasoning in *The Batis* [1990] 1 Lloyd's Rep 345, 353 could also be interpreted as supporting this approach.

3 *Essays on Restitution* (ed Finn, 1990), p 301.

4 Ibid.

5 Ibid at 308.

becoming the defendant's gain. This gives it a force lacking in a principle concentrating solely on the claimant's position.

The third difficulty is that the 'loss only' view appears, ironically, to ignore the importance of loss in the unjust enrichment principle. That principle dictates that the enrichment must be 'at the expense of' the claimant. As is explained later in this chapter, 'at the expense of' may mean wrongdoing by the defendant in which case there is no need for the claimant to suffer any loss. But for the bulk of restitution one is principally concerned with the claimant's loss becoming the defendant's gain.

(d) The views of Dietrich, Jackman and Jaffey

In recent books, Dietrich, Jackman and Jaffey have rejected the unjust enrichment principle by arguing that the law of restitution is best structured and categorised in ways that do not rely on that principle. Although their basic approach may therefore be regarded as somewhat similar, the suggested restructuring differs significantly from author to author and it is best to look at each of the three separately.

(i) Dietrich

Joachim Dietrich, in *Restitution – A New Perspective*,[6] argues that no part of the so-called law of restitution is best explained by the principle against unjust enrichment. Rather the law of restitution largely comprises four separate and unlinked categories. First, fault-based liability, akin to breach of contract and tort, where the primary emphasis is on compensating loss. This covers liability for losses incurred in anticipation of a contract or under an invalid or unenforceable contract. It also covers liability for the defendant's duress, undue influence or exploitation of weakness. Secondly, a principle of 'just sharing' which applies where parties, having a common interest, have not provided for particular events. It applies, for example, where contracts are frustrated, where domestic relationships have failed, or where the law imposes an obligation to make 'contribution' to another. Thirdly, a principle of 'justifiable sacrifice' which applies in cases where a person performs necessitous services. Fourthly, there is liability based on a 'fair outcome'. Here strict liability is imposed on an innocent person who has received money, services, or goods from another that was or were transferred, for example, by mistake or for a consideration that has failed.

6 (1998). For a helpful review, see Rotherham [2000] RLR 254.

A major difficulty with Dietrich's thesis is that his fourth category is very vague and seems artificial in rejecting an unjust enrichment explanation. Indeed the notion of a 'fair outcome' can be regarded as underpinning all law. Moreover, as regards his first three categories, to recognise unjust enrichment is not to deny that there could be situations where, outside breach of contract and tort, the law compensates loss. But, traditionally, the law has not required a person to compensate another's loss unless he or she has committed a civil wrong against the other person. The present law does not regard, for example, the breaking off of contractual negotiations or undue influence as the commission of a wrong triggering compensation. Even if the law were to move to that position, a less controversial first position is that (non-wrongful) unjust enrichments should be reversed.

(ii) Jackman

Ian Jackman in *The Varieties of Restitution*[7] argues that, apart from restitution for wrongs, there are two main principles in play in the law of restitution. Neither concerns the reversal of an unjust enrichment. They are first, the reversal of a non-voluntary transfer of money or another incontrovertible benefit; and, secondly, the fulfilment of non-contractual promises where benefits in kind have been voluntarily conferred on the promisor. The first category comprises, for example, the restitution of money paid by mistake or for a total failure of consideration or under duress or undue influence and restitution for necessitous intervention and compulsory discharge of another's liability. The second category covers, for example, the restitution of the value of benefits in kind conferred under invalid or discharged or anticipated contracts.

However, it is submitted that, while there is nothing inaccurate about Jackman's description of his first category, it rests, at a higher level of generality than Jackman explains it, on the reversal of unjust enrichment. That is, if one asks, 'why does the law reverse non-voluntary transfers of money or other incontrovertible benefits?' the answer is because such transfers unjustly enrich the defendant at the claimant's expense. Moreover, Jackman's second category is better viewed as linked to his first because benefits in kind, such as services, may benefit a particular defendant (for example, because it requested them) even though the benefit is not 'incontrovertible' like money. And once the common link of benefit is seen across these two categories, it naturally follows that, whether or not the law should move to enforcing non-

7 (1998). Jackman's book is critically analysed by Birks, 'Equity, Conscience and Unjust Enrichment' (1999) 23 Melbourne ULR 1.

contractual promises as Jackman advocates, the law should (and does) accept the (less controversial) position of reversing the value of unjust benefits in kind received at the claimant's expense.

(iii) Jaffey

Peter Jaffey in his complex book *The Nature and Scope of Restitution*[8] argues that, apart from restitution or disgorgement for wrongs, the so-called law of restitution comprises two main categories neither of which is best viewed as reversing unjust enrichment. A first category, which Jaffey argues should be treated as part of an expanded law of contract, comprises so-called restitutionary remedies in respect of a contract discharged for breach or frustration, pre-contractual liability, liability under ineffective contracts, necessitous intervention, discharge of another's liability, or use of another's property. In these situations, the repayment of money or a reasonable payment for, for example, work done rests on imposing liability for reliance loss under an actual contract (which has been discharged) or an 'imputed contract'. A second category, which Jaffey argues should be tied to the law of property, is restitution for vitiated transfers, such as transfers made by mistake, lack of authority or duress.

Two main comments on Jaffey's approach can be made. First, the second category relies on unconventional and difficult views of the law of property. With respect, the argument fails to defeat the claim that at a higher level of generality this category is underpinned by the principle against unjust enrichment. Secondly, the first category seems to rely on the fiction of an imputed contract. Like the rejected implied contract theory, it is defective in failing to explain why a contract to make reasonable payment or to repay is imputed. Jaffey purports to explain this by what he terms 'a reliance theory of contract', the heart of which is that contracts do not entail promises of performance but promises to be responsible for another's reliance. A more convincing explanation is that the requirement to make reasonable payment or to repay is triggered by the court's concern to reverse the defendant's unjust enrichment.

(e) Hedley's critique

Steve Hedley has been the most consistent, and fiercest, critic of the modern unjust enrichment school of thought. For over fifteen years, he has written articles[9] and, more recently, books[10] arguing that to

8 (2000). For a helpful review, see Barker [2001] RLR 232.

9 See, eg, Hedley, 'Unjust Enrichment as the Basis of Restitution – An Overworked Concept' (1985) 5 Legal Studies 56; 'Unjust Enrichment' [1995] CLJ 578; 'Restitution: Contract's Twin?' in *Failure of Contacts* (ed Rose, 1997), pp 247–274.

10 *Restitution: Its Division and Ordering* (2001). See also *A Critical Introduction to Restitution* (2001).

regard the law of restitution as underpinned by a principle against unjust enrichment is misguided and leads to undesirable results. While he has concentrated his attacks on exposing what he considers to be the flaws of the unjust enrichment approach, he has more recently turned from a 'deconstructionist' stance to sketching out an alternative thesis for at least some of the law of restitution. He suggests that the law that is called the law of restitution is residual and falls just outside the established categories of contract, tort and property. His tentative proposal is that most of that law can, and should, be returned to those categories.[11] He writes, '[R]ather than searching for a new principle outside "property", "contract" and "tort", we need to expand our understandings of those concepts to accommodate the neglected areas'.[12] So, for example, he argues that a properly-understood law of contract would absorb consensual transfers of value that are, at present, treated as triggering non-contractual liability (such as restitution in respect of anticipated or informal contracts).[13] Tracing and proprietary remedies should be seen simply as part of the law of property.[14] And he is sceptical about the merits, and scope for, 'restitutionary damages', rather than compensatory (or punitive) damages for torts and breach of contract.[15] In addition, Hedley offers particular alternative explanations for particular pockets of law, such as payment of another's debt and subrogation.[16]

Much of Hedley's work is thought-provoking, interesting and valuable, particularly his latest book, *A Critical Introduction to Restitution*,[17] in which he describes and analyses, applying various approaches, the main areas within what has traditionally been called the law of restitution. But it is arguable that some of his work adopts an approach to law that appears to reject, or to downplay, the importance of principles and principled reasoning. By so doing, it undermines the importance of like cases being treated alike.[18] Coherence in the law is lost if categories and ideas are unprincipled and if particular areas are analysed separately without the discipline of referring to underlying and wide-ranging principles that link different areas together. For

11 *Restitution: Its Division and Ordering* p vii, chapter 9.
12 Ibid at p 224.
13 Ibid, chs 1–3. See also *A Critical Introduction to Restitution*, chs 2–5, 8.
14 Ibid, chs 1–3. See also *A Critical Introduction to Restitution*, ch 9.
15 Ibid, chs 1–3. See also *A Critical Introduction to Restitution*, ch 10.
16 Ibid, chs 1–3. See also *A Critical Introduction to Restitution*, ch 11.
17 See similarly Hedley, 'Unjust Enrichment – A Middle Course?' (2002) 2 OUCLJ (forthcoming); Hedley, 'Restitution and Unjust Enrichment' in *The Law of Restitution* (eds Hedley and Halliwell, 2002), ch 1.
18 For my criticism of Hedley's view that the recognition of the principle against unjust enrichment serves no useful goal see Burrows, *Understanding the Law of Obligations* (1998), pp 99–108.

example, one would have thought that it was incumbent on Hedley to try to explain precisely what principles underpin the existing categories of contract, tort and property if their expansion is being seriously put forward as a preferable development to recognising a law of restitution based on unjust enrichment. It should also be observed that, whatever the position when Hedley's attacks on the unjust enrichment school of thought first started, the judicial tide of opinion has turned in favour of explicitly applying the unjust enrichment principle.

2. THE UNJUST ENRICHMENT PRINCIPLE AND ITS FOUR ESSENTIAL ELEMENTS

Stripping the unjust enrichment principle down into its component parts, there are four questions to be answered:[19]

(1) has the defendant been *benefited* (ie enriched)?
(2) was the enrichment *at the claimant's expense*?
(3) was the enrichment *unjust*?
(4) are there any *defences*?

If the first three questions are answered affirmatively and the fourth negatively the claimant will be entitled to restitution.

The law of restitution is therefore built around the four concepts of 'benefit', 'at the claimant's expense', 'unjust factors',[20] and 'defences'. Each of these fundamental building blocks in the theoretical structure of restitution will now be examined in turn with the aim of providing easy steps from the underlying principle of unjust enrichment to the black letter law. The restitutionary remedies by which the unjust enrichment is reversed will be considered later in this chapter.

19 That these are the four questions to be answered in a restitutionary claim was expressly approved by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea Ltd)* [1999] 1 AC 221, 227. Similarly, albeit not identically, Lord Hoffmann, at 234, spoke of there being three questions: 'first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy'. In *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 206, Millett LJ referred to the first three questions but did not go on to mention defences. Writing extra-judicially, Sir Peter (now Lord) Millett has added a fifth question, 'What remedies are available to the plaintiff?': see, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 408.
20 This term coined by Birks may be inelegant but saves repeating the long-winded formulation that the question at issue is whether the enrichment at the claimant's expense is *unjust*. One could alternatively and more elegantly refer to 'the ground for restitution': but that phrase has to be used with care if one is not to confuse it with the general ground for restitution being unjust enrichment at the claimant's expense. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 Lord Hope used the terminology of 'unjust factor'. See p 49 below.