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THE LAW OF RESTITUTION

by

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Restitutionary claims based on another's wrongful act

Judges often say that "restitution for wrongs is concerned with reversing the defendant's unjust enrichment."[68] At common law, some tortfeasors have been compelled to disgorge the gain made from their tortious acts, at least if they have infringed the plaintiff's proprietary or possessory rights.[69] In equity there are more significant examples; fiduciaries who have allowed their self interest to conflict with their duty of loyalty[70] and confidants who have made improper use of confidential information[71] have been required to make restitution of profits so gained.[71a]

Restitutionary claims based on title

A claim to a benefit received by a defendant may be based upon the claimant's title to property. At one time this text drew a distinction between *pure* proprietary claims, which belonged to the law of property, and *restitutionary* proprietary claims which arose by operation of law in order to prevent another's unjust enrichment. However, any argument based on this distinction will now most probably fail. For the House of Lords has now held, in *Foskett v. McKeown,*[72] that all proprietary claims, whether to the original asset or its substitute, form part of the law of property and not part of the law of unjust enrichment.[73] Furthermore, in equity and, exceptionally, at law, a defendant may be *personally* liable to make restitution because he *received* the plaintiff's money.[73a]

[68] *Quadrating and Unjust Enrichment: A Matter of Principle?* [2000] R.L.R. 257, 260 [Burrows], citing, *inter alia, My Kinda Town v. Soll* [1982] F.S.R. 147, 156, *per* Slade J., *Reading v. Attorney-General* [1948] 2 K.B. 268, 275, *per* Denning J., *Attorney-General v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, 266, *per* Lord Brightman, and *Portman Building Society v. Hamlyn Taylor Neck* [1998] 4 All E.R. 202, 206, per Millett L.J.

Friedmann, "*Restitution for Wrongs: The Basis of Liability*" in (ed. Cornish *et al.*), "*Restitution: Past, Present and Future*", 133–154, would go somewhat further; he argues that restitution may be granted where "the defendant's enrichment derives from the appropriation of the plaintiff's interest," even though no liability in tort can be established.

However, both Birks and Virgo have argued that the basis of the restitutionary claim is simply the "wrong". In their view the wrong is the cause of action, not unjust enrichment: see Birks, *Misnomer* in (ed. Cornish *et al.*), *Restitution: Past, Present and Future,* 1–29, and Virgo, *The Principles of the Law of Restitution,* 3–18. This debate is important for more than one reason: for example it may determine the appropriate limitation period (see *Chesworth v. Farrer* [1967] 1 Q.B. 407, below, para. § 36–013), and whether change of position is a defence, below, Chap. 40.

[69] See Chapter 36.

[70] See Chapter 33.

[71] See Chapter 34.

[71a] As will be seen (below, para. 1–058), a restitutionary claim to reverse another's unjust enrichment *may* be based on the defendant's unconscionable conduct. Arguably, public policy may also ground a restitutionary claim: below, para. 1–060.

[72] [2000] 3 All E.R. 97: below, para. 2–005 *et seq.*

[73] For reasons explained below, para. 2–010 *et seq.*, we have, however, retained in the text the discussion of proprietary claims and the rules for the identification of assets in another's hands.

[73a] Below, para. 33–030 *et seq.*

Restitutionary Claims based on Necessity

Finally, there is an undeveloped and meagre body of law where the ground of the plaintiff's claim is necessity.[74]

2. THE PRINCIPLE OF UNJUST ENRICHMENT[75]

Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment.[76] There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff. Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant 1–012

[74] See Chapters 17 and 18 for a discussion of these questions.

[75] There is a considerable literature. See, generally, (1934) 5 C.L.J. 204 [Gutteridge and David]; (1938) 16 Can. Bar Rev. 247, 365 [Friedmann]; (1939) 55 L.Q.R. 37 [Holdsworth]; 36 Tulane L.R. 605 (1962), 37 Tulane L.R. 49 (1962) [Nicholas]; J.P. Dawson, "Unjust Enrichment: A Comparative Analysis"; (1968) 3 *Israel Law Review* 526 [Elman]; (1969) 47 Can.B.R. 1 [Samek]; 8 Ottowa L. Rev. 156 (1976) [Fridman]; (1982) 5 Otago L.R. 187 [Sutton]; 67 Texas L.R. 1277 (1989) [Laycock]. On the Louisiana Law of Unjustified Enrichment, see [1991–1992] *Tulane Civil Law Forum* 3 [Barry Nicholas]; "The Province of the Law of Restitution" [1992] Can. B.R. 673 [Lionel Smith]; "Unjust Enrichment: A Comparative Overview" [1995] C.L.J. 100 [Dickson]; "The Nature of Restitution" (1995) 15 O.J.L.S. 33 [McBride and McGrath]; "Unjust Enrichment: Containing the Beast" (1995) 15 O.J.L.S. 457 [Barker]; "Reconstructing the Law of Restitution" (1996) 10 T.L.I. 20 [Virgo]; "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 O.J.L.S. 403; [Zimmermann]; "Rationalising Restitution" (1995) 83 Cal. L.R. 1191 [Kull]. Contrast Jackman, *The Varieties of Restitution*; (1985) 5 *Legal Studies* 56 and [1995] C.L.J. 578 [Hedley].

In recent years Professor Birks has provided a highly influential, analytical framework of the law of restitution, without accepting the desirability of a general right of unjust enrichment: see his *Introduction to the Law of Restitution* (1985), *The Law of Restitution at the End of an Epoch* (1999) 28 (1) Univ. of Western Aust. 13, "Misnomer" in (ed. Cornish *et al.*), *Restitution, Past, Present and Future,* 1 and his many articles cited in this text.

There have also been attempts to explain and rationalise restitution through such economic concepts as "least-cost avoiders," "market-encouragement," and "wealth-dependency": see 71 Virginia L.R. 65 (1985) [Levmore]; 94 Yale L.J. 415 (1984) [Long]; 49 La.L.R. 71 (1988) [Huper]; (1990) 19 Jo. of Legal Studies 691 [Levmore].

The law of restitution developed more quickly in the USA than in England, and was undoubtedly helped to do so by the publication of the *Restatement of Restitution* in 1937. The Reporters were Professors Seavey and Scott. The writings of Professors J.P. Dawson and G.E. Palmer have been most influential. In 1978 Professor Palmer published his scholarly four-volume treatise on *Restitution.* It comprehensively analyses the American case law; but an English reader will learn much from its text.

[76] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 61, *per* Lord Wright. It has been argued that it is now unsatisfactory, if not misleading, to perpetuate the divisions of the law into contract, tort and restitution: see Atiyah, *Rise and Fall of the Freedom of Contract,* 764–770, following G. Gilmore, *The Death of Contract.* It is said that the case law demonstrates that the courts have been principally concerned to compensate a person for his reliance loss, and that an independent study of restitution fails to recognise the close relationship between contractual and restitutionary liabilities. These arguments do less than justice to the body of case law which protects a person's contractual expectation interest (see (1983) 99 L.Q.R. 217, 263–267 [Burrows]); and to recognise the independent existence of the law of restitution is not to deny the "very substantial and close relationship" between contract and restitution: see below, Chap. 19, for a discussion, and generally, Birks, *Introduction,* pp. 28–74.

to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow. "Unjust enrichment" is, simply, the name which is commonly given to the principle of justice which the law recognises and gives effect to in a wide variety of claims of this kind.[77]

1–013 It has been said[78] that the principle of unjust enrichment is too vague to be of any practical value. Nevertheless, most rubrics of the law disclose, on examination, an underlying principle which is almost invariably so general as to be incapable of any precise definition. Moreover, in a search for unifying principle at this level we should not expect to find any precise "common formula," but rather an abstract proposition of justice which is "both an aspiration and a standard for judgment."[79] Unjust enrichment is no more vague than the tortious principle that a man must pay for harm which he negligently causes[80] another, or the contractual principle that *pacta sunt servanda*.[81] The search for principle should not be confused with the definition of concepts.[82]

The principle of unjust enrichment is placed to the forefront of the American *Restatement of Restitution*. Paragraph 1 states that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."[83] As Lord Mansfield said in *Moses v. Macferlan*[84] "the gist of this kind of action [for money had and received] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." We have only to substitute "make restitution" for the last three words of his statement to make it appropriate for the whole law of restitution.

[77] See, generally, (1983) 99 L.Q.R. 217, 232–239 [Burrows].

[78] "To ask what course would be *ex aequo et bono* to both sides never was a very precise guide": *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140, *per* Hamilton L.J. See, generally, Winfield, *Province*, pp. 131 *et seq.*; (1939) 55 L.Q.R. 37, 51–53 [Holdsworth]; and *cf.* Birks, *Introduction*, pp. 22–25.

[79] Dawson, *Unjust Enrichment*, p. 5, is speaking of Pomponius' statement in D. 50. 17. 206.

[80] *Problems of Restitution*, 8 Okla.L.Rev. 257 (1954) [W. Seavey].

[81] *cf. Carl Zeiss Stiftung v. Herbert Smith (No. 2)* [1969] 2 Ch. 276, 301, *per* Edmund Davies L.J.

[82] For some definitions of quasi-contract, see Winfield, *Province*, pp. 119–120. Winfield concluded that "genuine quasi-contract signifies liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit" (see *Province*, p. 119). This definition is, like many other definitions, open to criticism. The words, "not exclusively referable to any other head of law" are curious. Obviously if the liability is exclusively referable to a head of law other than quasi-contract, it cannot be quasi-contractual; a definition which defines by excluding everything else is not very helpful. But, in any event, what is meant by another "head of law"? It is impossible to tell whether such matters as salvage, general average, subrogation, contribution, or equitable claims analogous to claims for money had and received, do or do not fall within the definition. Moreover, if claims are to be included which were not enforced by the common *indebitatus* counts, it is difficult to see why the field should be restricted to money claims. Winfield's attempt appears, therefore, to provide another warning against the hazards of definition, on which see (1954) 70 L.Q.R. 37 [H.L.A. Hart].

[83] § 1 of the Tentative Draft of the *Restatement of Restitution* 2d, which the American Law Institute has now decided to reject, states: "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment". *cf.* the Canadian cases of *Deglman v. Guaranty Trust of Canada* (1954) S.C.R. 725; *Pettkus v. Becker* (1980) 117 D.L.R. (3rd) 257; and *Sorochan v. Sorochan* (1986) 29 D.L.R. (4th) 1. And see the BGB, § 812(1), discussed in Zweigert and Kötz, *An Introduction to Comparative Law* (trans. Weir) (1992, single volume edition), pp. 578 *et seq.*; Israeli Unjust Enrichment Law, 5739–1979, s.1.

[84] *Moses v. Macferlan* (1760) 2 Burr. 1005, 1012; but see above, para. 1–008, n. 43, and Chap. 44.

1–014 For some years Lord Mansfield's statement of principle gained acceptance.[85] But the change of climate which encouraged or accompanied the advance of the implied contract theory also led to a reaction against his enunciation of principle. Scrutton L.J., no doubt with Lord Mansfield's influence in mind, went so far as to describe the history of the action for money had and received as a "history of well-meaning sloppiness of thought."[86] Earlier, in 1913, Hamilton L.J. had said that "whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.' "[87] Such remarks are merely pejorative. Others are more revealing of the error under which these critics were labouring. In *Sinclair v. Brougham*, Lord Sumner, as Hamilton L.J. had now become, confessed[88] that "it is hard to reduce to one common formula the conditions upon which the law will imply a promise to repay money received to the plaintiff's use," a view with which Scrutton L.J. was later to express agreement.[89] It is indeed impossible to produce any such common formula in this branch, as in other branches, of the law.

Lord Sumner's opinion[90] that the scope of the action for money had and received was fixed by the decided cases was expressed at a time when the legacy of the forms of action inhibited the development of the law of restitution. Few, if any, English judges would now endorse it. The insistence on any notional promise no longer closes "the door to any theory of unjust enrichment in English law."[91] The old common law counts should be seen as "a practical and useful, if not complete or ideally perfect instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available."[92]

1–015 The case law[93] now demonstrates that the courts recognise that the principle of unjust enrichment unites restitutionary claims, and that the law is not condemned

[85] See, *e.g. Munt v. Stokes* (1792) 4 T.R. 561, *per* Lord Kenyon; *Edwards v. Bates* (1844) 7 Man. & G. 590, 597–598, *per* Tindal C.J.; Bullen & Leake's *Precedents of Pleadings* (3rd ed., 1868), p. 44. Professor Dawson dates the reaction against Mansfield to the 1850s: see *Unjust Enrichment*, pp. 15–16.

[86] *Holt v. Markham* [1923] 1 K.B. 504, 513.

[87] *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140, referring to *Sadler v. Evans* (1766) 4 Burr. 1984, 1986, *per* Lord Mansfield.

[88] [1914] A.C. 398, 454.

[89] *Holt v. Markham* [1923] 1 K.B. 504, 514.

[90] *Sinclair v. Brougham* [1914] A.C. 398, 453.

[91] *Nissan v. Att.-Gen.* [1968] 1 Q.B. 286, 352, *per* Winn L.J., endorsing Lord Wright's observations in *Legal Essays and Addresses* (1939, C.U. Press).

[92] *ibid.*

[93] See, *e.g. Craven-Ellis v. Canons Ltd* [1936] 2 K.B. 403 (see below, pp. 587 *et seq.*); *Morgan v. Ashcroft* [1938] 1 K.B. 49 (see below, p. 188); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. (see below, pp. 511–512); *Larner v. London County Council* [1949] 2 K.B. 683 (see below, p. 187); *William Lacy (Hounslow) Ltd v. Davis* [1957] 1 W.L.R. 932 (see below, p. 666); *Shamia v. Joory* [1958] 1 Q.B. 448 (see below, p. 691); *Kiriri Cotton Co. Ltd v. Dewani* [1960] A.C. 192 (see below p. 221); *Greenwood v. Bennett* [1973] 1 Q.B. 195 (see below, p. 246); *British Petroleum Exploration Co. (Libya) Ltd v. Hunt (No. 2)* [1982] 1 W.L.R. 783, (aff'd). [1981] 1 W.L.R. 232, CA; [1983] A.C. 352 (see below, pp. 557 *et seq.*); *Barclays Bank Ltd v. W. J. Simms & Son* [1980] Q.B. 677 (see below, pp. 208 *et seq.*); *Lipkin Gorman (A Firm) v. Karpnale Ltd* [1991] 2 A.C. 548 (see below, Chaps. 3 and 40); *Woolwich Equitable Building Society v. IRC* [1993] A.C. 70, HL, (see below Chap. 27); *Dextra Bank and Trust Co. v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 132 (see below, paras 40–005—40–006).

to "no further growth in this field."[94] In *Woolwich Building Society v. IRC*,[95] Lord Goff predicted that this growth will continue.[96] That decision and others demonstrate that the law of restitution is not petrified and that the courts may possibly recognise other "unjust factors", to adopt Professor Birks' terminology,[97] such as unconscionability.[98]

Some years ago Lord Diplock denied the existence of any "general doctrine" of unjust enrichment.[99] He was correct to assert that the concept of unjust enrichment does not confer on a judge a discretion "to do whatever idiosyncratic notions of what is fair and just might dictate."[1] But it is also true that, although "as yet there is in English law no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense, the concept of unjust enrichment lies at the heart of all individual instances in which the law does give a right of recovery".[2] In Professor Dawson's words, "The aims of . . . this common enterprise are obviously to scale down the apparently unlimited mandate of the general clause, to restructure it into distinct subordinate norms that become intelligible and manageable through their narrowed scope and function."[3]

In restitution, as in other subjects, recourse must be had to the decided cases in order to transfer general principle into concrete rules of law. As Lord Wright once said of Lord Mansfield's famous dictum in *Moses v. Macferlan*: "Like all large generalisations, it has needed and received qualifications in practice . . . The standard of what is against conscience in this context has become more or less canalised or defined, but in substance the juristic concept remains as Lord Mansfield left it."[4]

[94] *Re Cleadon Trust* [1939] Ch. 286, 314, *per* Scott L.J.; see also *Morgan v. Ashcroft* [1938] 1 K.B. 49, 74, *per* Scott L.J.

[95] [1993] A.C. 70, 165.

[96] See also *Lipkin Gorman (a firm) v. Karpnale Ltd* [1991] 2 A.C. 548, HL; *Westdeutsche Landesbank Girozentrale v. Islington London B.C.* [1996] A.C. 669, HL; *Kleinwort Benson Ltd v. Glasgow City Council* [1997] 4 All E.R. 641, HL; *Banque Financière de la Cité v. Parc (Battersea) Ltd* [1998] 1 All E.R. 737, 740, *per* Lord Steyn HL (see below Chap. 3).

[97] "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q. 473, 482, who describes *unjust* as the "generalisation of all the factors which the law recognises as calling for restitution".

[98] See below pp. 670 *et seq. cf.* the role of the doctrine of "unconscionability" in Australia: see Mason and Carter, *op. cit.*, § 235; and *Roxborough v. Rothmans of Pall Mall Australia Ltd* (2001) 185 A.L.R. 335.

[99] Deane J. in *Pavey and Matthews Pty. v. Paul* (1987) 162 C.L.R. 221, 256–257, described unjust enrichment as a "unifying legal concept, which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case."

[1] *Pavey & Matthews Pty. Ltd v. Paul* (1987) 162 C.L.R. 221, 256, *per* Deane J.

[2] *Woolwich Equitable Building Society v. Commissioners of Inland Revenue* [1993] A.C. 70, 196–197, *per* Lord Browne-Wilkinson. Contrast *Re Byfield* [1982] Ch. 267, 276, *per* Goulding J.

[3] Professor Dawson was commenting on the concept of *unconscionability* in Article 2–302 of the Uniform Commercial Code: "Unconscionable Coercion: The German Version," 89 Harvard L.R. 1041, 1042–1044. But his comment is equally apt to describe the role of *unjust enrichment* in English law. *Cf.* Ernst von Caemmerer and Detlef König: "According to the modern German view the task of transforming the general principle into concrete rules of law can only be achieved by elaborating typical fact situations of unjust enrichment and refining the conditions and extent of recovery for each type individually."

[4] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 62–63.

1–016 As might be expected a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a *benefit*. Secondly, that benefit must have been gained *at the plaintiff's expense*. Thirdly, it would be *unjust* to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary claims and the principle of unjust enrichment.[5] We will consider these subordinate principles in turn.

(A) *The Benefit Conferred*

(a) What is a benefit?

1–017 A restitutionary claim is for the *benefit*, the *enrichment*, gained by the defendant at the plaintiff's expense; it is not one for loss suffered.[6] As will be seen,[7] in English law the concept of *benefit* is not synonymous with that of objective enrichment (in the sense that the wealth of the defendant has increased), but also embraces expense saved and "requested for performance."

Whether a plaintiff's claim is successful may depend on the nature of the benefit conferred. Different principles govern claims arising from the payment of money from claims based on the receipt of services or the delivery of goods.[8] Moreover, at one time it was thought that a plaintiff had to demonstrate that the defendant had gained a positive, as distinct from a negative, benefit.[9] Today few would deny that the saving of expense is a legal as well as an economic benefit. So, if you use my electrical equipment without my consent you must compensate me for its use even though I may never have used it[10]; and it has been long recognised that the essence of a claim for contribution or recoupment is that the

[5] It has been argued that the duty on an unjustly enriched defendant "to restore his unjust enrichment to the person at whose expense it was obtained" should be replaced by the following assumption: "the restitutionary duty is a duty on an unjustly enriched defendant to make his unjust enrichment a just one by acting in a certain way towards the person at whose expense that enrichment was obtained". The analysis is based on the defendant's knowing employment of the plaintiff's property (assets) to which the plaintiff has not assented. The defendant's obligation to make restitution is, however, limited: McBride and McGrath; "The Nature of Restitution" (1995) 15 Oxford Jo. L.S. 33, 43. We are not convinced that this account of the restitutionary duty is "truer to the nature of the common law." (It is persuasively criticised by Ho in "The Nature of Restitution—a Reply" (1996) 16 Oxford Jo. L.S. 517).

[6] *English v. Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, 112, *per* Slade J. *cf. Sorrell v. Finch* [1977] A.C. 728 (estate agents absconding with deposit), noted in [1976] C.L.J. 237, 239 [Markesinis]; and contrast *Anglia T.V. v. Reed* [1972] 1 Q.B. 60; *Lloyd v. Stansbury* [1971] 1 W.L.R. 538.

[7] See below, pp. 20 *et seq.*

[8] Jurists have suggested that this asymmetry is indefensible, given the abolition of the forms of action and the development of the modern law of restitution; for a further discussion, see below, para. 1–056.

[9] *Phillips v. Homfray* (1883) 24 Ch.D. 439, 454–455, *per* Bowen L.J.; see below, para. 36–002; and *Government of India v. Taylor* [1955] A.C. 491, 513, *per* Lord Keith: see below, para. 5–015. But *cf. Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097, 1105–1106, *per* Templeman J.

[10] *cf. Strand Electric and Engineering Co. v. Brisford Entertainments Ltd* [1952] 2 Q.B. 246: see below, para. 36–010.

plaintiff has discharged the defendant's duty to make a payment to a third party.[11]

Money

1–018 The most common example of a positive benefit is *money*, which has the peculiar character of a universal medium of exchange. The mere receipt of money is therefore a benefit to the recipient. It is for this reason that restitutionary claims for money had and received are so frequent. Such claims are generally personal rather than proprietary[12] for the legal title to money, being currency,[13] will generally have passed to the recipient with delivery. The defendant may also benefit if money is paid not to him but to a third party, to his use.[14] But at common law he will only benefit if the plaintiff's payment discharges a debt which he owes to a third party.[15] It is not easy to discharge another's debt in English law.[16] This will occur only if the debtor authorised, or subsequently ratified, the payment.[17]

[11] See below, Chaps 13 and 14.

[12] But a proprietary claim may lie in equity even though the money has become currency: see below, Chap. 2.

[13] *Miller v. Race* (1758) 1 Burr. 452, 457–458, *per* Lord Mansfield.

[14] See above, para. 1–002.

[15] See below, n.17, and Chaps. 13–15.

[16] In Scotland it has been held that a stranger can discharge another's debt. It is immaterial whether the debtor was or was not aware of the payment, or that the payment was made against his wishes: *Reid v. Lord Ruthven* (1918) 55 Scottish Law Reporter 616, 618, *per* Lord Anderson; affirmed by the Inner House, without calling on counsel for the pursuer, at pp. 618–19. However, both Lord Kames and Baron Hume took the view that the debt was not discharged. For a comprehensive analysis, see H. McQueen, *Payment of another's debt* (Johnston and Zimmermann, eds.), *Unjustified Enrichment*, 458, 469–472.

[17] In spite of dicta to the contrary (see *Welby v. Drake* (1825) 1 C. & P. 557; *Pellatt v. Bossey* (1862) 31 L.J.C.P. 281, 284, *per* Willes J.; *Cook v. Lister* (1863) 13 C.B. (N.S.) 543, 594–597, *per* Willes J.; *Hirachand Punamchand v. Temple* [1911] 2 K.B. 330, 339, *per* Fletcher Moulton L.J.), it is probably now settled that if A, a stranger, pays B's debt to C, such payment will not of itself discharge B's liability to C, unless it has been made on B's behalf and has been subsequently ratified by him: see *James v. Isaacs* (1852) 12 C.B. 791; *Simpson v. Eggington* (1855) 10 Ex. 845; *Lucas v. Wilkinson* (1856) 1 H. & N. 420; *Re Rowe* [1904] 2 K.B. 483; *Smith v. Cox* [1940] 2 K.B. 558; *Barclays Bank v. W. J. Simm (Southern) Ltd* [1980] Q.B. 677; *Electricity Supply Nominees Ltd v. Thorn EMI Retail Ltd* (1991) 63 P & CR 143, 148, *per* Fox L.J.; *Crantrave Ltd v. Lloyds Bank plc* [2000] 4 All E.R. 473, CA, also *M'Intyre v. Miller* (1845) 13 M. & W. 725; *Jones v. Broadhurst* (1850) 9 C.B. 173; *Belshaw v. Bush* (1851) 11 C.B. 191; *Kemp v. Balls* (1854) 10 Ex. 607; *Aiken v. Short* (1856) H. & N. 210; *Purcell v. Henderson* (1885) 16 L.R.Ir. 213.

The cases in which a plaintiff is entitled to restitution in respect of payment of the defendant's debt are, therefore, fairly limited; see below, Chap. 15 and, in particular, *Esso Petroleum Co. Ltd v. Hall Russell & Co., "The Esso Bernicia"* [1989] 1 A.C. 643: see below, para. 15–002. There are several cases in which a claim by A to reimbursement by B has failed (see, *e.g. Stokes v. Lewis* (1785) 1 T.R. 20; *Tappin v. Broster* (1823) 1 C. & P. 112; *Ram Tahul Singh v. Biseswar Lall Sahoo* (1875) L.R. 2 Ind. App. 131; *Re National Motor Mail-Coach Co. Ltd* [1908] 2 Ch. 515; *Re Cleadon Trust Ltd* [1939] Ch. 286).

In cases where A's payment is ineffective to discharge B's liability to C, it is prima facie still open to C to sue B for his debt, despite A's payment (*Lucas v. Wilkinson* (1856) 1 H. & N. 420), unless such an action would be a fraud on A and would constitute an abuse of the process of the court, or for some other similar reason (see *Welby v. Drake* (1825) 1 C. & P. 557; *Cook v. Lister* (1863) 13 C.B. (N.S.) 543, 594, *per* Willes J.; *Hirachand Punamchand v. Temple* [1911] 2 K.B. 330; *Re L. G. Clarke Ltd* [1967] Ch. 1121; *Snelling v. John Snelling & Co.* [1973] Q.B. 87, 98–99; *cf. Arnett and Wensley Ltd v. Good*, 64 D.L.R. (2d) 181 (1967). If it is open to C to sue B and he does so, B will in all probability ratify A's payment, but if he does not do so and pays C, A should be entitled to recover his money from C on grounds of total failure of consideration, or alternatively to recover B's payment

There are few exceptions to this principle,[18] which only the House of Lords can reject. This principle appears to be of little merit now that debts are freely assignable.[19] The most important common law exceptions are if the plaintiff is compelled to make the payment by compulsion of law,[20] and if he pays because he has an interest in the defendant's property which he wishes to protect.[21] Furthermore, in *Crantrave Ltd v. Lloyds Bank plc* Pill L.J. was of the view that:

> "There will be circumstances in which a court may intervene to prevent unjust enrichment either by the customer in having his money from the bank as well as having

from C on the grounds that C received it as a trustee for him, A (see *Hirachand Punamchand v. Temple* [1911] 2 K.B. 330, 337 *per* Vaughan Williams L.J., 342, *per* Farwell L.J.). Even if C simply keeps A's payment and does not sue B, A can claim reimbursement from B, and if B refuses to ratify A's payment, A may be entitled to recover his money from C on grounds of total failure of consideration (*Walter v. James* (1871) L.R. 6 Ex. 124, 127, *per* Kelly C.B.).

It has been said that C is entitled to retain A's payment, and to disregard B's repudiation unless B also offers to pay him the same debt: see (1983) L.Q.R. 534 [Friedmann], who also argues that A's payment discharges B's debt to C but that C may revive it by repaying A. In other cases, A may protect himself by taking an assignment from C of B's debt. (*Williston on Contracts*, §§ 1857–1860, concludes, on the weight of American authority, that C, after accepting A's tender, cannot sue B; but the basis of his conclusion is accord and satisfaction, not legal discharge). Contrast Birks and Beatson, *Unrequested Payments of Another's Debt* (1976) 92 L.Q.R. 188, discussing *Owen v. Tate* [1976] 1 Q.B. 402; and for a rejoinder to Friedmann, see Beatson, *The Use and Abuse of Unjust Enrichment*, pp. 200–205. See below, Chap. 3 on whether A can be subrogated to C's rights against B.

[18] It would appear that, in these exceptional cases, B is deemed to have been benefited because he adopted the benefit conferred by A: see below, para. 3–048 *et seq.* And *cf.* the situation where A without authority pays B's debt to C, where the debt is due under an executory contract for the sale of goods, and subsequently C delivers goods to B who accepts them: see (1983) 99 L.Q.R. 534, 542–543 [Friedmann], arguing that A may then recover from B. *cf. Restitution for Benefits Conferred without Request*, 19 Vand.L.Rev. 1183, 1206–1208 (1966) [Wade].

[19] Banks may be in a special position. In *Crantrave Ltd v. Lloyds Bank plc* [2000] 4 All E.R. 473, 479, Pill L.J. thought that in *"relation to a banker,* the principle applied appears . . . to be soundly based . . . As against a customer, a contrary principle would place the bank in a position to act as debt collector for creditors of the customer." (Emphasis supplied.) It is more doubtful whether the bank could decide, as the Lord Justice argued, "in what priority the claims of creditors would be met out of the sums in account, without the customer having recourse against the bank." If a liquidation occurred after payment, this may be a voidable preference: Insolvency Act 1986 s.239; on which see *Re MC Bacon Ltd* [1990] B.C.L.C. 324.

If the customer refuses to ratify the bank's payment, the bank may be entitled to recover its payment from the creditor on the ground of total failure of consideration (see *Walter v. James* (1871) L.R. 6 Ex. 124, 127, *per* Kelly C.B.), or, on some facts, mistake.

In *Crantrave* May L.J. emphasised that the bank's customer would not have to prove its loss to justify recovering from the bank. Its claim is a liquidated claim in debt and not for damages for loss suffered: at p. 479.

For a further discussion of *Crantrave* see below.

[20] See below, Chaps 13–15.

[21] *Kleinwort Benson plc v. Vaughan* [1996] C.L.C. 620, CA (where the plaintiff mortgagee redeemed a third person's prior charge which partially defeated its right to claim the beneficial interest in the property; the court held that the defendant mortgagor could not deny the plaintiff's entitlement to perfect that right.) Sutton, *Payments of Debts Charged Upon Property* in Burrows (ed.), *Essays on the Law of Restitution*, Chap. 4, comprehensively discusses the case law, which allows the payer to be subrogated to the secured rights of another whose debt he has discharged. See also Burrows, *op. cit.*, 209–211; and Mitchell, *The Law of Subrogation*, pp. 167–170, who suggests that the principle underlying the decisions is that the part owner paid under mistake of fact (in some cases) and practical compulsion (in others), but concedes that "the element of compulsion . . . seems rather notional." But contrast *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234 (the mortgagor does not have a "sufficient interest").

the claim of his creditor met, or by the creditor who has double payment of the debt. The onus is in my judgment on the bank to establish the unjust enrichment on the evidence."[22]

Services

1–019 **(1) The principle of free acceptance** The receipt of money always benefits the defendant. But *services* may not do so. From their very nature services cannot be restored; and the defendant may never have wished to receive them or, at least, to receive them if he had to pay for them. As Pollock C.B. laconically once remarked: "One cleans another's shoes. What can the other do but put them on?"[23] For that reason the common law originally concluded that a defendant could be said to have benefited from the receipt of services only if he had requested them. A true request will normally lead to the conclusion that the defendant who requested the services has contractually bound himself to pay for them.[24] But a defendant, who is not contractually bound, may have benefited from services rendered in circumstances in which the court holds him liable to pay for them. Such will be the case if he *freely accepts* the services.[25] In our view, he will be held to have benefited from the services rendered if he, as a reasonable man,[26] should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services.[27] Moreover, in such a case, he cannot deny that he has been *unjustly* enriched.[28]

It is said that the recognition of free acceptance, so defined, is in principle objectionable for it erodes the right of a person to determine his own choices; only if he has *requested* services can he be said to have "chosen" and gained a

[22] [2000] 4 All E.R. 473, 479. The circumstances envisaged by the Lord Justice are these:

The bank paid its customer's creditor. The customer can nevertheless recover from the bank. For, as May L.J. emphasised In *Crantrave*, the customer, its debtor, would not have to prove its loss to justify recovering from the bank; its claim is a liquidated claim in debt and not for damages for loss suffered; at p. 479.

Alternatively, the creditor, having been paid by the bank, intending to discharge its customer's debt but without having been authorised to do so, is able to recover from his debtor since his debt is not discharged at law. For a further analysis, see below, para. 3–051, suggesting that there may be no unjust enrichment..

[23] *Taylor v. Laird* (1856) 25 L.J. Ex. 329, 332.

[24] *Ellis v. Hamlen* (1810) 3 Taunt. 52, 53, *per* Sir James Mansfield C.J. In cases of money paid, such a request will often arise by virtue of some relationship between the parties. It is the foundation of the right to indemnity which, for example, an agent has against his principal, a surety against his principal debtor, an assignor of a lease against his immediate assignee, and a transferor of shares against his immediate transferee; and since the right is founded on contract, it may entitle the plaintiff to be indemnified against expenditure which has not in fact benefited the defendant: see *Brittain v. Lloyd* (1845) 14 M. & W. 762 (see below, para. 15–021, n. 24). Similarly, in case of services rendered or goods supplied, a true request, express or tacit, by the defendant to the plaintiff to render the services or supply the goods will, in the absence of special circumstances which show that they were not intended to be paid for, impose on the defendant a contractual obligation to pay for services rendered or goods supplied pursuant to such request.

[25] See below, paras 1–020—1–021.

[26] See text below.

[27] *Brenner v. First Artists' Management Pty. Ltd* [1993] 2 V.R. 221, 257–260, *per* Byrne J. *cf. Restatement of Contracts* 2d, § 69(1).

[28] Contrast Virgo, *Principles of Restitution*, p. 79 *et seq.* citing Bower L.J.'s dictum in *Falcke v. Scottish Imperial Assurance Co.* (1886) 34 Ch. D 249 and *Re Cleadon Trust Ltd* [1939] Ch. 286 below, para. 3–048 *et seq.*

benefit.[29] If a principle of free acceptance is recognised, a defendant may be compelled to pay for services which he asserts, honestly if perversely, are of no benefit to him; or he may be indifferent, not caring one way or the other, whether the services are rendered or not.[30] Again, the defendant may concede that the services are beneficial but plead that he had "more important things on which to spend his money."[31] But, in these exceptional circumstances, the burden should be on the defendant, who is not the reasonable man, immediately to tell the plaintiff that he is perverse, indifferent or that he has more important things to do with his money. If he does not do so, he cannot deny that he has gained a benefit.

In the past few judges have explicitly adopted a principle of *free acceptance*.[32] 1–020
But the principle enshrined in that concept is the most satisfactory explanation of those decisions which recognised the plaintiff's claim that his services, which had not been requested,[33] had benefited the defendant. Many of the successful claims have arisen in the context of ineffective contracts.[34] A plaintiff who rendered services under a contract which was void because the parties had not agreed on essential terms was awarded a sum which was "what the services were worth"[35]; a builder who did extra work, thinking that a contract was about to be

[29] *cf.* "Freedom, Unrequested Improvements, and Lord Denning" [1981] C.L.J. 340 [Matthews]; Virgo, *op, cit.*, p. 83.

[30] "Free Acceptance and the Law of Restitution" (1988) 104 L.Q.R. 576, 577–580 [Burrows]. (" . . . [A] defendant is just as likely to accept what the plaintiff is conferring on him where he considers it neither beneficial nor detrimental as where he considers it beneficial"; and Burrows, *The Law of Restitution*, pp. 11–15. See also "Free Acceptance: Some Further Conclusions" (1989) 105 L.Q.R. 460 [Mead]. For a criticism, see Birks in *Essays on the Law of Restitution* (ed. Burrows), Chap. 5, pp. 127 *et seq.* And contrast Simester, "*Unjust Free Acceptance*" [1997] L.M.C.L.Q. 103 (no recovery on the ground of free acceptance since the intervenor is a risk taker, although he suggests that it has a role to play if some of the assumptions underlying restitution are abandoned.)

[31] "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 Oxford Jo. of Legal Studies 42 [Garner] who argues that it must be shown that the defendant wanted, and was willing to pay for, the services.

[32] But see, more recently, *Bridgewater v. Griffiths* [2000] 1 W.L.R. 524; *L/M International Construction Inc. v. Circle Ltd Partnership* (1995) 49 Con. L.R. 12; *Andrew Shelton & Co Pty Ltd v. Alpha Healthcare Ltd* (2002) Victoria Supreme Court, 248, § 98 *et seq.*, *per* Warren J. (in Australia free acceptance is a recognized restitutionary ground). *Becerra v. Close Bros Corporate Finance Ltd*, unreported but noted in [2000] R.L.R. § 110. See also *Lamb v. Bunce* (1815) 4 M. & S. 275; *Weatherby v. Banham* (1832) 5 C. & P. 228; *Paynter v. Williams* (1833) 1 Cr. & M. 810; *Alexander v. Vane* (1836) 1 M. & W. 511, on which see Birks, (ed. Burrows), *Essays on the Law of Restitution*, Chap. 5.

[33] In *Pettkus v. Becker* [1980] 2 S.C.R. 834, 849, Dickson J. imposed a constructive trust over the property of the defendant's partner of 19 years. He held that,

"where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it."

In some situations the defendant may have gained an incontrovertible benefit from the rendering of the services: see below, paras 1–023—1–026. See, *e.g.*, *Leigh v. Dickeson* (1884) 15 Q.B.D. 60, below, para. 14–024.

[34] It must also be demonstrated that the defendant's enrichment is unjust: see below, pp. 41 *et seq.*

[35] *Way v. Latilla* [1937] 3 All E.R. 759 at 765, *per* Lord Wright, HL: see below, paras 23–002.

made, recovered a "reasonable price"[36]; and the High Court of Australia has granted a restitutionary claim for services rendered under a contract which was executed but was unenforceable by action.[37]

The principle of free acceptance may also explain the line of authority which holds that a *quantum meruit* claim will lie for the value of services rendered under an entire contract which had not been substantially performed and which the defendant had wrongfully repudiated.[38] It should not be open to the party in breach to deny that he had been benefited when it was his breach which prevented full performance.[39] Conversely, as the law now stands, if the plaintiff was in breach his restitutionary claim will normally fail.[40] The Law Commission has, however, proposed that he should be granted a restitutionary claim to the extent that his services have benefited the defendant.[41] It is a distinct and difficult question how the benefit gained by the defendant is to be valued and what is the ground of his claim.[42]

1–021 As will be seen,[43] in equity the principle of free acceptance finds its expression in the equitable doctrine of acquiescence which protects the mistaken improver of land in circumstances where the landowner encouraged him to improve the property, or stood by and allowed him to do so.[44] In such a situation it is unconscionable for the landowner to deny that he has received a benefit.[45]

It is more controversial to conclude that the defendant has received a benefit simply because he requested services, in circumstances where he gained no objective benefit from what the plaintiff has done or, possibly, is yet to do. The germ of this principle is to be found in the well-known case of *Planché v. Colburn*,[46] as subsequently interpreted in later decisions.[47] The defendant publisher had wrongfully repudiated his contract before the author, the plaintiff, had delivered a single page of the manuscript. Nevertheless, the author recovered on a *quantum meruit*.[48] But, as an Italian scholar, Professor Gallo, has pointed out,[49] common lawyers characterise *benefit* not only in terms of a benefit which has in fact been received but in terms of "requested for performance." It is tempting to claim that the defendant has received a benefit in circumstances where the claimant has suffered only a nominal loss, or where he has no contractual claim.

[36] *cf. William Lacey (Hounslow) Ltd v. Davis* [1957] 1 W.L.R. 932 at 934: see below, para. 26–008.

[37] *Pavey & Matthews Pty. Ltd v. Paul* (1987) 162 C.L.R. 221. Contrast Birks, *Essays* (ed. Burrows), pp. 109–112: see below, para. 1–079.

For the argument that these cases are best explained through the principle of failure of consideration: see (1988) 104 L.Q.R. 576 [Burrows].

[38] See below, para. 20–019 *et seq. cf.* Birks, *op. cit.*, pp. 126–127, who describes this acceptance as "limited acceptance"; see also *Essays on Restitution* (ed. Burrows), pp. 127–141.

[39] *cf.* (1988) L.Q.R. 576, 582–583 [Burrows].

[40] See below, paras 20–036 and 20–037.

[41] See below, para. 20–045 *et seq.*

[42] See below, paras 20–044 and 20–046.

[43] See below, Chap. 6.

[44] The improver may recover even if the landowner shared his mistake.

[45] See below, Chap. 3. *cf.* Birks, *Essays* (ed. Burrows), *op. cit.*, pp. 128–132.

[46] (1831) 8 Bing. 14.

[47] See below, para. 20–023, n. 30.

[48] See "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P. 71 [Beatson] and Beatson, *The Use and Abuse of Unjust Enrichment*, Chap. 2: see below, para. 20–023.

[49] *L'Arricchimento Senza Causa* (Padova 1990), pp. 87 *et seq.* We are indebted to Professor Gallo for the text and to Luigi Chessa Ll.M. (Cantab.) for the translation.

In *Planché v. Colburn*, the plaintiff's claim to recoup his reliance loss would have failed if he would have made a greater loss from the entire performance of the contract.[50] Again in *William Lacey (Hounslow) Ltd v. Davis*,[51] since there was no contract there could be no claim for damages based on its breach.[52] As the latter case demonstrates, the concept of "requested for performance" may be sufficiently generous to embrace the situation where a plaintiff incurred expenses, anticipating that he and the defendant would soon enter into a contract, in circumstances where the defendant, knowing that the plaintiff expected to be recompensed for the service rendered, withdrew from the contractual negotiations.[53] In all these cases the restitutionary claim for benefits conferred conceals a claim for reliance loss.[54]

The concept of benefit has consequently been extended to embrace services **1–022** which have been requested but which have not been rendered and accepted.[55] In our view, if no services have been rendered *and* accepted, the defendant should not be deemed to have received a benefit. But *Planché v. Colburn* appears to be established law: a defendant receives a benefit simply from the fact that he requests services. This principle may lead to the acceptance of an impossibly fine distinction, which United States courts have formulated,[56] between acts preparatory to performance and the performance itself. Is it enough, for example, that Planché went to the British Museum and began to take notes if he had not delivered them in publishable form to Colburn?

However, if a person has requested services which have been rendered and accepted, he is deemed to have gained a benefit even though he obtains thereby no economic benefit.[57] Similarly, a defendant receives a benefit even though the requested and freely accepted services do not leave a "marketable residuum" or do not increase his "human capital".[58] But "pure" services will generally have a market value. It surely cannot be denied that the plaintiff who cuts the defendant's hair or feeds him has rendered services which, if freely accepted, have benefited the defendant.[59]

There is the related question: can D be said to have received a benefit if P performs services which benefit a third person, T, but not D? If these services are requested by D under an agreement which is or becomes ineffective, a court may well find that D has benefited from the services rendered; and the Law Commission has recommended that a person who, having partly performed a contract,

[50] *cf. CCC Films (London) Ltd v. Impact Quadrant Films Ltd* [1984] 3 All E.R. 298.

[51] [1957] 1 W.L.R. 932, below, para. 26–008.

[52] In the United States a plaintiff has successfully argued that his claim, which was essentially for reliance loss, was a restitutionary claim and was therefore outside the Statute of Frauds: see Farnsworth, *Contracts*, §§ 6.11–6.12.

[53] See below. *cf. Essays* (ed. Burrows), pp. 141–143 [Birks], discussing, *inter alia*, *Sabemo Pty. Ltd v. North Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880.

[54] See below, para. 1–022.

[55] Contra: *Restitution without Enrichment* (1981), 61 Boston Univ.L.R. 563 [Dawson], followed by Birks, *Essays* (ed. Burrows), pp. 137–141.

[56] *cf. Hosmer v. Wilson*, 7 Mich. 294 (1859) with *Curtis v. Smith*, 48 Vt. 116 (1875); Palmer, *op. cit.*, Vol. I, § 4.2.

[57] *BP Exploration Co. (Libya) Ltd v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 803, *per* Robert Goff J.; *Brenner v. First Artists' Management Pty. Ltd* [1993] 2 V.R. 221, 258–259, *per* Byrne J.; below paras 20–059 and 20–060.

[58] Contrast Beatson, *Use and Abuse*, p. 21.

[59] Below para. 1–034 *et seq.*

then wrongfully repudiates it, should be entitled to claim the value of the benefit conferred if he has benefited a third person at the defendant's request.[59a]

We discuss later in this Chapter how services which have been freely requested are valued.[59b] It is sufficient here to say that the value is normally the reasonable value of the services at the date when the services were rendered, although the price, or proportion of it,[59c] agreed by the parties may, in many cases, be the ceiling to any award even if that price is embodied in a contract which is or becomes ineffective.[59d]

1–023 **(2) The principle of incontrovertible benefit** At one time English courts did not inquire whether a defendant had been incontrovertibly benefited[59e]; he was not deemed to have received a benefit unless he requested or freely accepted the services. But other jurisdictions did consider it critical that he had been incontrovertibly benefited, even though he had not requested the services. The Indian Contract Act[59f] provides that: "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." The Supreme Court of Canada has held that a defendant was benefited when the plaintiff mistakenly discharged, without the defendant's knowledge, the defendant's statutory duty to support an indigent[59g]; and, in the United States, some states, following the civilians, have granted restitution to the mistaken improver of land.[59h] There is much to be said for the view that a person has been incontrovertibly benefited[59i] if a reasonable person would conclude that he has been saved an expense which he otherwise would necessarily have incurred or where he has made, in consequence of the plaintiff's acts, a realisable financial gain. As McLachlin J. said in *Regional Municipality of Peel v. Her Majesty*[59j]:

> "[an] "incontrovertible benefit" is an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture . . . [it] is limited to situations where it is clear on the facts (on a balance of probabilities) that had the plaintiff not paid, the defendant would have done so. Otherwise, the benefit is not incontrovertible."

[59a] Law Commission *Report, No. 121, Law of Contract: Pecuniary Restitution on Breach of Contract* (1983), para. 2.47: see below, paras 20–046 and 20–047.
[59b] See below, para. 1–034 *et seq.*
[59c] *cf.* (1989) 12 Sydney L.R. 76 [Hunter].
[59d] See below, para. 1–036.
[59e] Above, para. 1–002.
[59f] § 70, which has also been adopted in Malaya. But no compensation will be granted unless "(1) the thing must be done lawfully; (2) it must be done by a person not intending to act gratuitously; and (3) the person for whom the act is done must enjoy the benefit of it": Pollock and Mulla, *The Indian Contract Act*, p. 245. (This principle is then wider than that of incontrovertible benefit). *Cf. Siow Wong Fatt v. Susur Rotan Mining Co. Ltd* [1967] 2 A.C. 269, 276, *per* Lord Upjohn, PC. The principles of Scots law are somewhat comparable: see *The Lawrence Building Co. Ltd v. Lanarkshire C.C.*, 1977 S.L.T. 110, 111, 113, *per* Lord Maxwell.
[59g] *County of Carleton v. City of Ottawa* (1963) 39 D.L.R. (2d) 11: see below.
[59h] See below.
[59i] Contrast the position if there is a "free acceptance" of services: see above, 1–019.
[59j] (1992) 98 D.L.R. (4th) 159, 160.

Any principle of incontrovertible benefit will, of course, be refined by judicial decisions. In determining what is a *necessary* expense the Supreme Court of New South Wales has accepted[60] Professor Birks' qualification that unrealistic or fanciful possibilities should be discounted.[61] Again, it is sufficient, in our view, that the benefit is *realisable*; it should not be necessary to demonstrate that it has been *realised*. It is said that the principle of respect for the subjectivity of value would be subverted if this were accepted.[61a] But it may not be unreasonable, in some circumstances, to compel a person to sell an asset which another has mistakenly improved.[62] Not every financial gain may be said to be *realisable*.[63] It is long established that, subject to the application of the equitable doctrine of acquiescence,[64] a landowner is not obliged to make restitution to the mistaken improver even though the land can, of course, be sold or mortgaged.

1–024 To accept the principle of incontrovertible benefit will not be to adopt a novel principle. There are a number of decisions which are best explained on this ground, even though the courts may not have adopted in terms that principle.[65]

For example, there is nineteenth-century and modern authority which holds that a trustee, who improved property which he improperly bought from the trust, can obtain restitution of the value of the benefit conferred, if the beneficiaries set aside the purchase[66]; and a purchaser who improved land, in circumstances in which both vendor and purchaser mistakenly thought the contract of sale was valid, was held entitled to recover the value of the improvements.[67] In *Société Franco Tunisienne D'Armement v. Sidermar SPA*[68] Pearson J. held that shipowners were entitled to reasonable freight on a *quantum meruit*, though the contract of carriage had been frustrated by the closure of the Suez Canal; the cargo had been carried to its destination and the cargo owners had therefore undoubtedly been benefited. Lord Denning M.R.[69] was of the view that a person,

[60] *Monks v. Poynice Pty. Ltd* (1987) 11 A.C.L.R. 637, 640.
[61] Birks, *Introduction*, p. 120.
[61a] Birks and Mitchell, § 15.43.
[62] This was accepted by Judge Bowsher Q.C. in *Marston Construction Co. Ltd v. Kigass Ltd* [1989] *Construction Industry Law Letter*, 476, doubted, but not on this ground, in *Regalian Properties plc v. London Docklands Development Corp.* [1995] 1 W.L.R. 212, 227–229, *per* Rattee J.
[63] In German law it appears that a gain is realisable, even if a chattel is unique, if the owner had evinced an intention to sell it: *Improvements and Enrichment: A Comparative Analysis* [1998] R.L.R. 85 [Verse]. *Cf.* Burrows, *The Law of Restitution*, p. 10, who takes an intermediate view: a defendant will be incontrovertibly benefited if the court regards it as "reasonably certain that he will realise the positive benefit"; and Virgo, *op. cit.*, pp. 72 *et seq* (if it is "inevitable" he will realise the benefit.)
[64] See below, Chap. 6.
[65] In *Peel (Regional Municipality) v. Ontario* (1993) 98 D.L.R. (4th) 140, the Supreme Court of Canada accepted the principle of incontrovertible benefit "for the purpose of argument."
[66] The authorities, which are somewhat conflicting, are collected in *Holder v. Holder* [1968] Ch. 373–374, *per* Cross J. (reversed on a different point in [1968] Ch. 353); see below, para. 33–009 for a fuller discussion.
[67] *Lee-Parker v. Izett (No. 2)* [1972] 1 W.L.R. 775. But the vendor was entitled to a set-off for the rental value of the purchaser's occupation.
[68] [1961] 2 Q.B. 278, overruled on other grounds in *Ocean Tramp Tankers Organisation v. V/O Soyfracht ("The Eugenia")* [1964] 2 Q.B. 226. *cf.* the deviation cases: below, para. 20–043.
[69] *Greenwood v. Bennett* [1973] 1 Q.B. 195, 202: see below, paras 6–009—6–011. *cf. The Swan* [1968] 1 Lloyd's Rep. 5.

who mistakenly improved another's chattel, should be "recompensed" by the owner; and, by statute,[70] in "proceedings for wrongful interference with goods" the court must make the honest improver an allowance to "the extent to which . . . the value of the goods is attributable to the improvement." Again, the Law Commission[71] has proposed that an innocent party should make restitution for benefits conferred on him by a party in breach of contract, although those benefits were conferred under an entire contract which was not wholly performed.[72] Restitution is granted in all these cases because it is apparent that the defendant has been incontrovertibly benefited.[73] Indeed, this may be the only satisfactory explanation of the leading decision of *Craven-Ellis v. Canons Ltd.*[74] In that case the plaintiff, whose contract of employment with the defendant company was void, was allowed a *quantum meruit* claim, even though there was "nobody for want of authority, at any material time, who could act for the company . . . who could make requests for the company, or who could enter into any contract express or implied."[75] The company had benefited because it had received services which it "would have had to get some other agent to carry out."[76]

1–025 More recently, in *The Manila*,[77] Hirst J. expressly accepted the principle of incontrovertible benefit, although he held on the facts that there was no such benefit. The question had arisen some years before in *The Winson*.[78] Salvors salvaged cargo, depositing it on a wharf. They asked the cargo owners for instructions and received no reply. Consequently, they stored the cargo in order to preserve it, and subsequently sued the cargo owners for the expenses which they had incurred. At first instance Lloyd J. held that the salvors had the right as bailees to be reimbursed these expenses even though there was no emergency and it was not essential to store the cargo.[79] But he also went on to say, following *Craven-Ellis v. Canons Ltd*,[80] *Société Franco Tunisienne D'Armement v. Sidermar SPA*[81] and Lord Denning M.R.'s judgment in *Greenwood v. Bennett*,[82] that, even if the salvage agreement had come to an end, the salvors would have succeeded on the ground that the cargo owners had nonetheless gained a benefit

[70] Torts (Interference with Goods) Act 1977, ss.1 and 6: see below, para. 6–013.
[71] Report, No. 121. *Law of Contract: Pecuniary Restitution on Breach of Contract*: see below, pp. 553–555.
[72] The innocent party will have, of course, his action for damages.
[73] *cf.* Birks, *Introduction*, pp. 116 *et seq.* for a somewhat similar principle.
[74] [1936] 2 K.B. 403: see below and see Birks, *Introduction*, pp. 119–120. But *cf. Kepong Prospecting Ltd v. Schmidt* [1968] A.C. 810, PC.
[75] [1936] 2 All E.R. 1066, 1069, *per* Croom-Johnson K.C., *arguendo*; this passage does not appear in the law reports. *cf.* the observations of Wilberforce J. in *Phipps v. Boardman* [1964] 1 W.L.R. 993, 1018, cited in *Guinness plc. v. Saunders* [1990] 2 A.C. 663, 700–701, *per* Lord Goff: below para. 1–041.
[76] [1936] 2 K.B. 403, 412, *per* Greer L.J. See generally on this point Birks, *Negotiorum Gestio and the Common Law* [1971] C.L.P. 110.
[77] [1988] 3 All E.R. 843, 855, noted in [1989] L.M.C.L.Q. 397, 401; *Peel (Regional Municipality) v. Canada* (1993) 98 D.L.R. (4th) 140, above, n. 59j.
[78] *China Pacific S.A. v. Food Corporation of India (The Winson)* [1982] A.C. 939. *cf.* the cases on compulsory discharge of another's liability: see below, Chap. 15.
[79] [1979] 2 All E.R. 35; and see the arguments for the salvors before the House of Lords: [1982] A.C. 939, 947–948.
[80] [1936] 2 K.B. 403.
[81] [1961] 2 Q.B. 278: see above, para. 1–024.
[82] [1973] Q.B. 195, 202: see below, paras 6–009—6–011.

at the salvors' expense and it would be unjust to allow them to retain it.[83] The House of Lords held[84] that there was a direct pre-existing relationship of bailor and bailee between the cargo owners and the salvors and that the relationship continued to subsist after the cargo had been deposited. The salvors would have been liable in damages for any diminution in the value of the goods; and, having fulfilled their duty to preserve the cargo, they had a correlative right to charge expenses reasonably incurred in preserving the cargo where the owner had failed to give any instructions what should be done with it. Lord Diplock went on to cite with approval the decision of the Court of Session in *Garriock v. Walker*,[85] where the cargo owner did not acquiesce in the steps taken by his bailee to preserve the cargo. "Nevertheless he took the benefit of them by taking delivery of the cargo thus preserved at the conclusion of the voyage."[86]

Given the history of the law of restitution, it is not surprising that until recently **1–026** the courts did not rationalise these decisions in terms of incontrovertible benefit. Today, as we have seen, they are more ready to do so.

To allow recovery because a defendant has been incontrovertibly benefited is to accept that he may be deemed to have benefited[87] even though he did not request or freely accept the benefit. In the past, the principle embodied in Bowen L.J.'s well-known dictum in *Falcke's* case,[88] that "liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will," has been regarded as paramount. Free choice must be preserved inviolate.[89] To accept the principle of incontrovertible benefit is to admit a limited and, in our view, desirable exception. The burden will always be on the plaintiff to show that he did not act officiously,[90] that the particular defendant has gained a realisable financial benefit or has been saved an inevitable expense and that it will not be a hardship to the defendant, in the circumstances of the case, to make restitution.

(3) Necessitous intervention There is one situation where a defendant may be deemed to have benefited from services even if he did not freely accept them and received no actual benefit from them. Decisions in other common law jurisdictions suggest that a plaintiff who intervenes in an emergency to save another's life and (possibly) his property should be recompensed, even though the services did not benefit the defendant because the plaintiff's intervention was unavailing.[91] But the recognition of this claim, which has received only a limited

[83] [1979] 2 All E.R. 35, 43–44.
[84] [1982] A.C. 939, reversing the Court of Appeal.
[85] (1973) 1 R. (Ct. of Session) 100.
[86] [1982] A.C. 939, 961.
[87] But the enrichment must be an *unjust* enrichment on which see below, para. 1–052 *et seq.*
[88] *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234: see below, para. 17–009.
[89] See [1981] C.L.J. 340 [Matthews]. In his *Unjust Enrichment*, pp. 58–60 and 95–98, Klippert draws a distinction between irrebuttable benefit (the unofficious discharge of obligations) and incontrovertible benefit. Such a distinction is drawn in an attempt to reconcile such cases as *County of Carleton v. City of Ottawa* (1963) 39 D.L.R. (2d) 11 with the principle of free choice. But it cannot accommodate the facts of *Greenwood v. Bennett* [1973] Q.B. 195 (see below, para. 6–009), and for that reason we would reject it.
[90] On which see below, para. 1–077.
[91] See below, para. 17–016.

recognition in this country,[92] may simply reflect society's concern to encourage intervention in an emergency rather than its desire to deprive a defendant of an unjust benefit.

Goods

1–027 The receipt of *goods* may also benefit the defendant. Unlike services, goods can be returned. Consequently, a restitutionary claim is never appropriate if the right to immediate possession remains in the plaintiff and the defendant is in a position to return the goods; the plaintiff then has his remedies for wrongful interference.

1–028 **(1) The principle of free acceptance** Conversely, when property in goods has passed to the defendant, a restitutionary claim may fail because the defendant consumed the goods not knowing that he had to pay for them.[93] It is for this reason that the plaintiff must normally show that the defendant has requested or freely accepted the goods. As in the case of services, a restitutionary claim for the price of the goods delivered will lie if the defendant had a reasonable opportunity to reject the goods but consumed them in circumstances in which, as a reasonable man, he should have known that the plaintiff expected to be paid for them.[94] This may occur if the defendant consumes goods which have been delivered under a contract void for want of authority[95] or under a contract which is ineffective because the parties have failed to agree the price. In such cases it is evident that he has received a benefit which has enriched him. It is another question, which we discuss later,[96] how the enrichment is valued.

1–029 **(2) The principle of incontrovertible benefit** The analogy of the cases on services also suggests that an English court may allow a *quantum valebat* claim for goods delivered, in the absence of a request or free acceptance, if their delivery has incontrovertibly benefited the defendant.[97]

1–030 **(3) Necessitous intervention** Finally, if goods are delivered in an emergency, the defendant may possibly be bound to make restitution even though the goods did not in fact benefit him.[98]

Land

1–031 Land is a very special case. If title has passed to another, the requisite formalities will have been observed. Restitution may, therefore, be affected by rescission or rectification of the contract, by rectification of the conveyance or by rectification of the land register. A plaintiff may have improved another's property in circumstances where title to that property has not passed to him. Whether he will then obtain restitution will depend on whether the defendant has requested or freely

[92] See below, Chap. 17.
[93] *cf. Boulton v. Jones* (1857) 2 H. & N. 564: see below, para. 23–005.
[94] *cf.*, Sale of Goods Act 1979, s.30(1), below, para. 20–052.
[95] See below, Chap. 22.
[96] See below, para. 1–034 *et seq.*
[97] See above, para. 1–023 *et seq* for a discussion of the concept of incontrovertible benefit.
[98] See above, para. 17–016 *et seq.*

accepted the services or acquiesced in what he did. As the law now stands, it is generally not enough that he has incontrovertibly benefited the defendant by improving the defendant's land.[99] Moreover, it is, on the present authorities,[1] doubtful whether the defendant can be held liable in restitution[2] to restore any benefit accruing to him from the use and occupation of the land. However, he may be estopped from denying that the claimant's services have not benefited him.[3]

Other benefits

1–032 Money, services, goods and land are the principal, though not the exclusive, types of benefit which may give rise to a claim in restitution. The cases provide many other examples of benefits which have been recognised as restitutionary benefits. A defendant's contractual or statutory liability to a third party may be discharged[4]; his chattel may be improved[5]; he may use profitably another's asset[6]; he may utilise confidential information[7]; he may profit from a position of trust[8]; he may save himself expense[9]; or he may receive the benefit of a chose in action.[10]

(b) The valuation of the benefit

General Principles

Money

1–033 Money claims rarely present any problem of valuation if the plaintiff simply seeks to make the defendant personally liable to make restitution. If the plaintiff is successful, the defendant will be required to repay a sum equivalent to that received or applied for his benefit. His assets have been increased to that extent, and that is the value of his benefit.

Difficulties can arise, however, if a plaintiff seeks to recover profits which, he alleges, the defendant has gained at his expense. First, a plaintiff has no right to an account. It is an equitable remedy granted at the court's discretion[11]; for example, it may be denied if a defendant acted innocently in using another's trade secret.[12] Secondly, it is a personal remedy which renders a defendant liable

[99] See below, Chap. 8.
[1] See below, Chap. 6.
[2] But there may be an action for mesne profits.
[3] See below, Chap. 8.
[4] See below, para. 6–015.
[5] See below, paras 6–009—6–014.
[6] See below, para. 36–011.
[7] See below, Chap. 34.
[8] See below, Chap. 33.
[9] See, *e.g.* below, para. 36–002.
[10] *e.g.* under a contract subsequently rescinded for misrepresentation, duress or undue influence: see below, Chap. 9.
[11] *cf. Nelson v. Rye* [1996] 2 All E.R. 186: below p. 860. By the middle of the 18th century the common law action of account had fallen into desuetude. Thereafter, account was always sought in equity: Story, *Equity Jurisprudence* (Boston 1836), Vol. I, pp. 427 *et seq.*
[12] *Seager v. Copydex Ltd* [1967] 1 W.L.R. 923: see below, para. 34–013.

to pay over a sum of money, namely, the profits which he made.[13] Thirdly, it is said that to order an account is to set in train a "complex and protracted" inquiry.[14] But that is not in itself a sufficient reason for denying an account in an appropriate case.[15] So, in the *Spycatcher* case, the House of Lords ordered what was in fact a "complex and protracted" inquiry when it required the *Sunday Times* to account for the profits made from the issue of the newspaper containing extracts from Mr. Peter Wright's memoirs.[16] We discuss later in this Chapter the extent to which a wrongdoer can claim an allowance for his skills and expenditure in earning the profits for which he must account.[17]

A claim that a defendant is a trustee of money for the plaintiff or that the plaintiff is entitled to a lien over a fund in his hands presents more complex questions which we discuss in the following Chapter of this book, entitled "Proprietary Claims and Proprietary Remedies."

Services rendered and goods supplied

1–034 **(1) Services and goods freely accepted** If a defendant has freely accepted services or goods, then the *general* rule is that he must pay their reasonable value at the date they were rendered or delivered respectively.[18] Reasonable value is normally market value, that is the sum which a willing supplier and buyer would have agreed upon; any sum awarded will generally include a figure which represents a profit element.[19]

However, the "special position" of the parties may, on occasions, be taken into account in determining what is the reasonable value of the services and goods.[20] A defendant may then be able to demonstrate that a "benefit may not be worth as much to [her] as to someone else."[21] In *Ministry of Defence v. Ashman*[22] the estranged wife of a serviceman, having been served with notice by the RAF to vacate subsidised accommodation, did not do so because the family had nowhere else to go. Not until 11 months later was she able to find appropriate local authority housing. The MOD claimed the market rent of the flat as damages. The County Court judge awarded damages on the basis of the adjusted local authority average rents. The Court of Appeal allowed the wife's appeal and returned the matter to the County Court for damages to be reassessed.

In Lloyd L.J.'s view, it has never been held that the landlord had the option of "waiving" the tort of trespass. The appropriate measure was the payment of

[13] *Attorney-General v. Blake* [2000] 2 W.L.R. 625, 642, *per* Lord Nicholls: below, paras 20–024 *et seq.*
[14] *Siddell v. Vickers* (1892) 9 R.P.C. 152, 162–163, *per* Lindley L.J.
[15] *My Kinda Town v. Soll* [1982] F.S.R. 147, 156, *per* Slade J.
[16] *Att.-Gen. v. Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109: see below, para. 34–010.
[17] See below, pp. 34–36.
[18] Exceptionally, the valuation may be at a later date: see *TSB Bank plc v. Camfield* [1995] 1 All E.R. 951, below, para. 11–011.
[19] *cf. Rover International Ltd v. Cannon Film Sales Ltd* [1989] 1 W.L.R. 912, 922, *per* Kerr L.J.
[20] As it was in *Seager v. Copydex Ltd (No. 2)* [1969] 2 All E.R. 718, CA.
[21] *Ministry of Defence v. Ashman* (1993) 2 E.G.L.R. 102, 105, *per* Hoffmann L.J. followed in *Lewisham LBC v. Masterson* (2000) 80 P. & C.R. 117 C.A., noted in [2000] R.L.R. § 129.
[22] [1993] 2 E.G.L.R. 102, CA, followed in *Ministry of Defence v. Thompson* [1993] 2 E.G.L.R. 107, CA, (decided two weeks later), but distinguished in *Inverugie Investments Ltd v. Hackett* [1995] 1 W.L.R. 713, PC: below, n. 23.

mesne profits.[23] But both Kennedy L.J. and Hoffmann L.J. considered that the MOD had elected to claim in restitution. In Hoffmann L.J.'s words:

> "It is true that in the earlier cases it has not been expressly stated that a claim for mesne profits for trespass can be a claim in restitution. Nowadays I do not see why we should not call a spade a spade."[24]

Her benefit gained at the MOD's expense would ordinarily be the rental value of the property in the open market. But the defendant was free to devalue subjectively[25] the benefit gained at the plaintiffs' expense for Mrs Ashman had no choice but to stay until rehoused by the local authority. Consequently, Hoffmann L.J. concluded that the benefit gained was no more than the higher of the former concessionary rent and what she would have had to pay for suitable local authority housing if she could have been rehoused at the date of the notice to quit.[26] Since MOD's claim was for the benefit conferred it was not relevant to consider what loss it had suffered.

1–035 The burden should be on the defendant to convince the court that the benefit to her is less than its market value.

If the plaintiff has suffered greater loss, it is always open to him to sue for damages in tort. But, on occasions, he may have no claim in damages and he may suffer hardship if the defendant is allowed subjectively to devalue, as the following example demonstrates. A rogue persuades D that P will render services for £100, and P that D will pay him £200. On these facts the Massachusetts court[27] held that P should recover the reasonable value of his services. Both were the innocent victims of the rogue. For that reason the court's decision is not unattractive. But it is doubtful whether an English court would reach a similar conclusion. Certainly, D has been incontrovertibly benefited. But the value of the benefit to him is what he thought he had to pay P.

1–036 If the defendant has freely accepted services or goods, which have been rendered or supplied under a contract which is or has become ineffective, it may be proper to look to the price which the parties have agreed should be paid in respect of the benefit so conferred. The contract price provides evidence of the reasonable value of services rendered in part performance of a contract which the defendant has wrongfully repudiated.[28] It is only evidence, and the sum awarded

[23] The Lord Justice relied, *inter alia* (at p. 106), on *Phillips v. Homfray* (1883) 24 Ch.D. 439, and the authorities cited below para. 36–004. (The MOD would have only let the premises to a member of the services.) In *Inverugie Investments Ltd v. Hackett* [1995] 1 W.L.R. 713, PC, Lord Lloyd (as he now was) distinguished *Ashman* on the ground that Kennedy and Hoffmann L.JJ. had invoked a cause of action separate from trespass: for a comment, see (1996) 112 L.Q.R. 39 [Watts].
[24] At p. 105. See Lord Nicholls in *Att-Gen v. Blake* [2000] 4 All E.R. 385, 392, below, paras 20–024 *et seq.*
[25] At p. 105, following Professor Birks, *Introduction*, p. 109 *et seq.* Birks develops his arguments in *Defence of Free Acceptance* in Burrows (ed.), *Essays on the Law of Restitution*, Chap. 5. See also (1989) 9 Legal Studies 121, 131–132 [Arrowsmith].
[26] *Ministry of Defence v. Thompson* [1993] 2 E.G.L.R. 107, 107–108, summarising the principles in *Ashman*. In her article "Trespass, Mesne Profits and Restitution" (1994) 110 L.Q.R. 420, Elizabeth Cooke discusses some of the difficulties which flow from Hoffmann L.J.'s reasoning, on which see the text above.
[27] *Vickery v. Ritchie*, 88 N.E. 835 (1909), below, para. 23–007.
[28] See below, pp. 531 *et seq.*

may exceed the contract price.[29] However, there is much to be said for the view that the contract price should be a ceiling of any award. Deane J., in the High Court of Australia[30] was prepared so to hold, although on the facts before him the contract which the defendant had wrongfully repudiated was unenforceable by action. The price agreed may also be held to provide the ceiling of an award if a contract is held to be void, for example, if the parties failed to agree on another essential term or if there was some unresolved ambiguity in some other fundamental contractual term.[31] It is not surprising that a court should look to the agreed price if the contract failed because some other essential term had not been agreed upon or was fatally equivocal. But in *Way v. Latilla*[32] the parties had not agreed on what the plaintiff's remuneration should be. Nonetheless, Lord Atkin was of the opinion that the

> "court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. If the discussion had ranged between three per cent. on the one side and five per cent. on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration on an entirely different basis, upon which, possibly, the services would never have been rendered at all."[33]

Again, in litigation arising out of a contract which had been frustrated,[34] Robert Goff J. held that the consideration agreed upon is relevant as providing some evidence of the "just" sum to be awarded and may "provide a limit to the sum to be awarded."[35] And, in *Guinness Mahon & Co. Ltd. v. Kensington and Chelsea RLBC*,[35a] where the contract was held to be void, being beyond the powers of the defendant borough, Robert Walker L.J. observed that,

> "Where a supposed contract is void *ab initio*, or an expected contract is never concluded . . . , no enforceable obligation is ever created, but the context of a supposed or expected contract is still relevant as explaining what the parties are about."

Only in exceptional circumstances should a court ignore the terms of the ineffective agreement.[36]

1–037 Services which are requested or freely accepted are valued at the date of the request or free acceptance respectively. But it is a distinct and undecided question whether as, a matter of law, it is open to the court to take into account, in assessing the *quantum meruit* award, the defendant's claim that he had been

[29] See *e.g.*, *Boomer v. Muir*, 24 P. 2d 570 (1933), below, para. 20–020 for a full discussion.
[30] *Pavey & Matthews Pty. Ltd v. Paul* (1987) 162 C.L.R. 221, 257. *cf. Scarisbrick. v. Parkinson* (1869) 20 L.T. 175.
[31] See below, Chap. 23.
[32] [1937] 3 All E.R. 759, followed in *Brenner v. First Artists' Management Pty. Ltd* [1993] 2 V.R. 221, 259.
[33] At p. 764.
[34] For example, *British Exploration Co. (Libya) Ltd v. Hunt (No. 2)* [1979] 1 W.L.R. 783, [1981] 1 W.L.R. 232, CA, [1983] 2 A.C. 352, HL. Hereafter referred to in the notes as *B.P. v. Hunt.*
[35] [1979] 1 W.L.R. 783, 805–806, *per* Robert Goff J.: see below, pp. 557 *et seq.*
[35a] [1998] 2 All E.R. 272, 294: see further below, para. 25–015.
[36] For such a case, see *Rover International Ltd v. Cannon Film Sales Ltd* [1989] 1 W.L.R. 912, 927–928, *per* Kerr L.J. ("All remedies must necessarily lie in the area of restitution".) See below, pp. 502, 661–662 for a critical discussion of the decision.

exposed to extra expense and claims by third parties because of the late or unsatisfactory performance of the plaintiff. The question had arisen in *British Steel Corporation v. Cleveland Bridge and Engineering Co.*[37] In that case the plaintiff sued for the price of cast-steel nodes delivered to the defendant, who counter-claimed for damages for late delivery. Robert Goff J. held that no contract had been concluded since the parties had failed to agree on the price, but held that the plaintiff was entitled to a *quantum meruit*. But, he did not reach the question whether the value of the plaintiff's *quantum meruit* award should be reduced because of the alleged breach. In *Crown House Engineering Ltd v. Amec Products Ltd*,[38] the Court of Appeal considered that there was no clear answer to this question. Consequently, it was inappropriate to seek an answer in Order 14 proceedings. In our view, the fact that the defendant may have suffered loss in consequence of the plaintiff's acts or inaction should not be taken into account in determining the *quantum meruit* award. The defendant should be left to pursue any independent claim which, if the contract is ineffective, may possibly lie in tort.[39]

(2) Services rendered and goods delivered which have incontrovertibly benefited the defendant 1–038 A defendant may be incontrovertibly benefited[40] even though he has not freely accepted the services or goods. It is not always easy to determine *when* the value of the plaintiff's incontrovertible benefit should be measured. Take the case of the good faith but mistaken improver of a car.[41] Is it the date when the improver has completed the improvement or is it the date of judgment in his favour?[42] In principle, it should normally be the former date.

There is a second question: what is the *value* of the incontrovertible benefit? This is a difficult question for a number of reasons, not the least of which is to balance the fact that the defendant has been incontrovertibly benefited against the fact that he neither requested nor freely accepted the services rendered.[43] The defendant may have been incontrovertibly benefited but may say that he would not have incurred the plaintiff's expenditure; that he does not have the means to satisfy any order to make restitution; or that to require him to sell an asset which has been incontrovertibly improved would be harsh or unreasonable.[44]

[37] [1984] 1 All E.R. 504; below para. 26–001.
[38] (1990) 48 B.L.R. 32. The point was also left open in *Serek Controls Ltd v. Drake & Skull Engineering Ltd* (2001) 73 Con.L.R. 100, where there were allegations of slow or unsatisfactory performance. Judge Hicks Q.C. held that the claimant was entitled to a quantum meruit on a reasonable remuneration basis. He was of the view that defects remaining at the completion of the work could be taken into account.
[39] Contrast (1983) 99 L.Q.R. 572 [S. N. Ball].
[40] For a definition of incontrovertible benefit, see above, para. 1–023 *et seq.*
[41] *cf. Greenwood v. Bennett* [1973] 1 Q.B. 195: below paras 6–009—6–014.
[42] Only Lord Denning M.R. thought that the improver had a direct restitutionary claim: below para. 6–010. But even if the owner sues in conversion, the improver may be indirectly compensated: *Munro v. Willmott* [1949] 1 K.B. 295: below para. 6–011.
[43] See the valuable discussion of the Reporter, Professor Kull, in his *Council Draft No. 2* of the *Restatement of Law: Restitution and Unjust Enrichment*, Section 9, pp. 77–93.
[44] To take one example, P mistakenly improves D's house. D neither knows nor acquiesces in the making of the improvements. It is clear that P will be denied any restitutionary claim: below, para. 6–002. However, an American scholar, Professor Dobbs, has suggested that he should be granted a "postponed lien" over the property, to be foreclosed only when the property is sold: see *Law of Remedies* (2d ed. 1993), vol. 1, §5.8(3) at 798. See also illustration 5 of Section 9 of *Council Draft No. 2 of the Restatement of the Law: Restitution and Unjust Enrichment.*

There is the further question whether a court should take into account what the defendant knew when the services were rendered; for example, he may have known that the claimant had mistakenly rendered the services and stood by and allowed him to continue doing so.[45]

The answers to these questions are not clear for only relatively recently have English courts recognised the principle of incontrovertible benefit. It may be helpful therefore to posit a number of hypothetical problems.

(1) Necessary services may be rendered under a contract which is void for want of authority; it is then proper to grant the plaintiff a reasonable sum which may be measured by the sum which the parties had agreed upon.[46]

(2) P thinks that he is the owner of a car and improves it without the true owner's, D's knowledge. P should recover from D the reasonable value of his services or the increased value of the car, whichever is the lower figure.[47] However, the improver, P, should give credit for the use of the car during the time it was in his possession.[48]

(3) P mistakenly delivers oil to D who consumes it, not knowing of P's mistake. P should have delivered it to T who has a standing contract with him. The value of D's incontrovertible benefit is the market value of the oil (including a profit element), the sum which D regularly pays his supplier, or possibly the sum which T had agreed to pay P,[49] whichever is the lowest figure.

(4) P wrongfully repudiates an entire contract before he has substantially performed his side of the bargain. He has, however, rendered valuable services which D had bargained for. As English law now stands, he is without a remedy.[50] But the Law Commission has proposed[51] that, as in some other common law jurisdictions,[52] P should be allowed to recover the value of the benefit conferred, subject to the innocent party's, D's counterclaim for loss suffered. In these circumstances D's incontrovertible benefit should be a sum which represents the reasonable value of P's services, the increased value of D's assets or a rateable proportion of the contract price, whichever is the lowest figure.

[45] See below, paras 6–002 *et seq.*

[46] *cf. Craven-Ellis v. Canons Ltd* [1936] 2 K.B. 403: see below, para. 22–004.

[47] Or possibly the sum adjusted for inflation, which D had agreed, in the past, to pay a third party for a similar improvement.

In *Greenwood v. Bennett* [1973] 1 Q.B. 195, the Court of Appeal awarded the reasonable value of the services rendered, without any consideration of alternative awards: see below, paras 6–009—6–011 *et seq.*

[48] If D has sold the car, it will still be necessary to calculate the extent to which its value has been increased by P's improvements. This is no easy task. The burden should be on P to prove this fact.

[49] This award may ensure that P does not profit from his mistake. D is not a wrongdoer, but an innocent defendant.

[50] See below, para. 20–037 for a full discussion.

[51] Report, No. 121, Law of Contract, *Pecuniary Restitution on Breach of Contract*: see below, paras 20–046 and 20–047 *et seq.* for a full discussion.

[52] *e.g.* in some States of the USA.

(3) Services rendered in an emergency There is very little, if any, English authority to support a restitutionary claim. The case law of other common law jurisdictions suggest that the intervener may recover reasonable expenses and, if a professional, (for example, a doctor), reasonable remuneration.[53] 1–039

The valuation of the benefit gained by a wrongdoer who has been unjustly enriched[53a]

An accounting of profits There is some English authority,[54] as there is in the United States,[55] that a defendant who has consciously exploited another's trade mark or trade secret must account for the profits which he thereby made,[56] as must a conscious infringer of another's patent or copyright.[57] But it is not every conscious wrongdoer who must account for profits. As will be seen, some torts cannot form the basis of a restitutionary claim,[58] and only exceptionally will a defendant who wrongfully repudiates a contract be liable to account for profits made from the breach.[59] 1–040

In contrast, the honest defendant may be required to make restitution, but not necessarily to account for profits. The defendant who honestly but unwittingly betrayed another's confidence had only to pay "damages" which were measured by the reasonable value of the confidential information which he had used.[60] Similarly, the Copyright, Designs and Patents Act 1988[61] treats more harshly the conscious infringer than the infringer who did not know and had no reason to believe that he was infringing copyright; it is a defence to an action for damages, but not to a claim for any other remedy, that he did not know and had no reason to believe that he was infringing copyright. If these common law and statutory analogies are followed, then the extent of the wrongdoers' liability, and in particular that of tortfeasors, may depend on the court's characterisation of the conduct of the wrongdoer.

[53] See below, Chap. 17.

[53a] See, generally, Daniel Friedmann, "Restitution for Wrongs: The Measure of Recovery", in Symposium: Restitution and Unjust Enrichment (2001) 79 Texas Law Rev., 1763, 1879. Professor Friedmann distinguishes normal (objective) gain from attributed (punitive) gain, citing *Inverugie Investments Ltd v. Hackett* [1995] 3 All E.R. 841 (P.C.), above, para. 1–034, and argues that the courts should, on occasions, take into account a wrongdoer's bargaining skills when apportioning profits. Moreover, whether profits are the product of the wrongful act should be determined, not only by a "but for test", but by a proximate cause test. *cf.* Daniel Visser, "Searches for silver bullets: enrichment in three party situations" in *Unjustified Enrichment* p. 526.

[54] *Seager v. Copydex Ltd (No. 2)* [1969] 1 W.L.R. 809, CA (innocent exploitation, no account), with which contrast *Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd* [1963] R.P.C 45, 45 (conscious exploitation, account ordered): see below, pp. 759 *et seq.*, 788–789.

[55] *Olwell & Nye v. Nye & Nissen Co.* 173 P. 2d 652, especially at 654, following *Restatement of Restitution*, pp. 595–596.

[56] *Edelsten v. Edelsten* (1863) 1 De G. J. & Sm. 185, 189, *per* Lord Westbury.

[57] Patents Act 1977, ss.61–62; Copyright, Designs and Patents Act 1988, ss.96 and 97.

[58] See below, para. 36–002 *et seq.*

[59] Below paras 20–024 *et seq.* But the fact that the breach is "cynical and deliberate" is not by itself sufficient to depart from the normal basis on which damages are awarded: *Attorney-General v. Blake* [2000] 3 W.L.R. 625, 640, *per* Lord Nicholls: below, para. 20–024.

[60] See above, n. 54.

[61] ss.96 and 97, on which see *Redrow Homes Ltd v. Bett Bros plc* [1998] 1 All E.R. 385, HL.

If it is the general rule that the innocent wrongdoer will not be obliged to account for profits, then there are important exceptions to it. First, if the defendant is a fiduciary and is said to have breached his fiduciary duty of loyalty, then not only is he personally liable to account for any profit but he is a constructive trustee of any identifiable benefit. It matters not that he acted honestly and in his principal's best interests, that his principal also benefited from what he did, and that his principal would not have been in a position to acquire the benefit which he gained.[62] This equitable principle is well established. The class of fiduciary relationships is never closed; exceptionally even a person who wrongfully repudiates his contractual obligations may be said to owe a fiduciary duty to the innocent party.[63]

1–041 Secondly, the plaintiff may have interests which the courts wish to protect. These include such economic interests as title to property and, in other common law jurisdictions, the right to exploit one's own personality.[64] A court may then deprive even an innocent wrongdoer of his profits.

In determining the *quantum* of profits for which the wrongdoer must account, a court may have to consider whether a wrongdoer should be granted an allowance for his skills in earning that profit and whether he should be reimbursed his necessary expenses. It has been said that only in "exceptional circumstances"[65] should a court remunerate, or grant an equitable allowance to, a fiduciary. The claim must be "overwhelming" and "not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interest."[66] In *Boardman v. Phipps*,[67] if Mr. Boardman, the fiduciary, had not done what he did, "the beneficiaries would have had to employ (and would, had they been well advised, have employed) an expert to do it for them . . . It seems . . . inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it."[68] Mr. Boardman was as honest as the day is long. In *Guinness plc. v. Saunders*, Mr. Ward was assumed to be just as honest,[69] but he was granted neither remuneration nor an equitable allowance. The House of Lords proceeded on the basis that, in the context of Guinness's successful application for summary judgment, £5.2 million was a proper reward for Mr. Ward's services, rendered during Guinness' successful take-over of Distillers, that he "acted in good faith, believing that his services were rendered under a contract binding on the company", and that in that mistaken belief, he "may have rendered services to Guinness of great value and contributed substantially to the enrichment of the shareholders of Guinness."[70] Nevertheless, that mistake, in particular, his failure to realise that he

[62] See below, Chap. 33.
[63] *cf. LAC Minerals Ltd v. International Corona Resources* (1989) 61 D.L.R. (4th) 14: see below, para. 33–010.
[64] See below, para. 36–006.
[65] *Guinness plc. v. Saunders* [1990] 2 A.C. 663, 694, *per* Lord Templeman, said in the context of Mr. Ward's claim for an equitable allowance.
[66] *op. cit.* at p. 701, *per* Lord Goff.
[67] [1967] 2 A.C. 46: see below, para. 33–017.
[68] *Phipps v. Boardman* [1964] 1 W.L.R. 993, 1018, *per* Wilberforce J., cited in *Guinness plc. v. Saunders* [1990] 2 A.C. 663, 700–701, *per* Lord Goff.
[69] [1990] 2 A.C. 663 see below, para. 33–018.
[70] At p. 695, *per* Lord Templeman; *cf.* Lord Goff at p. 696.

could not use his position as a director to obtain a contingent fee of £5.2 million, authorised by a sub-committee of Guinness directors (which included Mr. Ward), but not disclosed to the full Guinness board, did not "excuse him or enable him to defeat the rules of equity which prohibit a trustee from putting himself in a position in which his interests and duty conflict and which insist that a trustee or any other fiduciary shall not make a profit out of his trust."[71] The House of Lords held that Guinness was entitled to recover the fee. Mr. Ward was not entitled to reasonable remuneration, and the House declined to exercise its equitable jurisdiction to grant him an equitable allowance. It would not in the circumstances be "inequitable . . . for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it."[72] Given the assumptions made in Mr. Ward's favour, this case provides another illustration of the strict application of equity's Draconian rules.[73]

This decision is to be contrasted with that of the Court of Appeal in *O'Sullivan* **1–042** *v. Management Agency and Music Ltd.*[74] In *O'Sullivan* the Court of Appeal set aside a publishing contract on the ground of undue influence. The publisher was in a fiduciary relationship to the composer so that there arose a presumption of undue influence which the publisher failed to rebut. Both Dunn and Fox L.JJ. concluded, however, that the Court should exercise its discretion to grant the publisher an allowance for his skill and labour, an allowance which:

> "could include a profit element in the way that solicitors' costs do . . . [T]his would achieve substantial justice between the parties because it would take account of the contribution made by the defendants to [the plaintiff's] success. It would not take full account of it in that the allowance would not be at all as much as the defendants might have obtained if the contracts had been properly negotiated between fully advised parties."[75]

Neither Lord Templeman nor Lord Goff discussed *O'Sullivan* in *Guinness plc v. Saunders,* although the decision was cited by counsel. *Guinness plc v. Saunders* has not deterred later judges from granting an equitable allowance even to fiduciaries whose conduct has been less than exemplary. They have been prepared to hold that, although the existence or absence of conflict of interest is a very important consideration which may, in certain cases, be determinative, it is not the only factor to be taken into account.[76] Consequently, they have been ready to find, on the particular facts, that remuneration or an equitable allowance

[71] At p. 695, *per* Lord Templeman.
[72] At p. 701, *per* Lord Goff.
[73] See below, pp. 736–737 for a further discussion.
[74] [1985] Q.B. 428.
[75] At p. 469, *per* Fox L.J. See also dicta in such cases as *Redwood Music Ltd v. Chappell Co. Ltd* [1982] R.P.C. 109, 132, *per* Robert Goff J. and *My Kinda Town v. Soll* [1982] F.S.R. 147, 156–158, *per* Slade J.; but *cf.* Templeman L.J.'s dicta, in *Queen Productions v. Music Sales* (1981), unrep., that a court should not allow "any deduction from those profits as reward to defendants for their own efforts which they should never have employed," cited by Lionel Bently in [1991] E.I.P.R. 5.
[76] *Badfinger Music v. Evans* [2002] E.M.L.R. 2, § 46, *per* Lord Goldsmith Q.C., sitting as a Deputy Judge of the High Court: see further below, n. 78a

should be granted. One such case is *Nottingham University v. Fishel.*[77] Dr Fishel, an employee of the University of Nottingham, was a distinguished embryologist who specialised in the IVF treatment of infertile couples. Some of his research work was done outside the U.K. When he worked abroad, he took with him younger embryologists, also employees of the University, and from whose work he directly benefited both academically and financially. Elias J. held that there was a potential conflict between his specific duty to the University to direct the work of his younger colleagues in the interests of the University and his own financial interest in directing them abroad. The University was entitled to an account of profits, which were the sums received by Dr Fishel from fees paid by patients who had been treated by his younger colleagues, less payments made to them by him. Elias J. then went on to consider whether Dr Fishel should be granted an equitable allowance. In the Judge's view, *Guinness plc v. Saunders* was clearly distinguishable, for the arrangement made by the Guinness director for his own benefit was "so obviously inimical to the director's duty [of loyalty]." However, although he conceded that the "profit element" should be excluded from any calculation, *Guinness plc v. Saunders* did not, in his view,

> "preclude some reward for services rendered, albeit not compensation representing the full value of those services. This would hardly encourage breaches of duty in the normal case."[78]

Elias J.'s readiness to grant an allowance, even to fiduciaries such as Dr Fishel, who acted less scrupulously than Mr Boardman, is to be welcomed.[78a]

No doubt, the exercise of the discretion to grant an allowance depends upon the circumstances of the particular case. Although it appears, as *University of Nottingham v. Fishel* demonstrates, that *Guinness plc v. Saunders* does not preclude the possibility of the grant of an equitable allowance in an appropriate case, the speeches in *Guinness* evince a continuing anxiety that the exercise of the jurisdiction should not be allowed to undermine the principle that a fiduciary must not place himself in a position in which there is a possibility that his duty and self-interest may conflict. In contrast, in *Warman International Limited v. Dwyer*[78b] the High Court of Australia recognised that:

[77] [2000] I.R.L.R. 471.

[78] At p. 486. *cf. O'Sullivan v. Management Agency and Music Ltd* [1985] Q.B. 428, 469, *per* Dunn L.J. and Fox L.J., not cited by Elias J. but cited in text above.

[78a] See also *Badfinger Music v. Evans* [2002] E.M.L.R. 2, §§ 46–48, *per* Lord Goldsmith Q.C., sitting as a Deputy High Court Judge, where the claimant received an even more generous allowance. In that case the claimant, a former member of a rock group, now disbanded, had cleaned up, repaired and marketed tapes of a live concert given by the group. The Deputy Judge held that he was not dishonest, that the potential conflict of interest did not preclude payments for his "special and considerable efforts" (his work was of an "exceptional and substantial character"), and that the net recording royalties should be divided equally amongst the five members of the defunct group. Furthermore, the claimant was entitled to be reimbursed payments to third parties and studio fees, and should also receive a producer's fee. But it would not be right for him to receive the same amount as he would have received if he had reached an agreement with other members of the group: *O'Sullivan v. Management Agency and Music Ltd.* applied.

[78b] (1995) 128 A.L.R. 201, 212, following *Chan v. Zacharia* (1984) 154 C.L.R. 178.

> "[equity's] stringent rule requiring a fiduciary to account for profits can be carried to extremes and . . . in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff."[79]

The High Court was ready, as was the Court of Appeal in *O'Sullivan*,[80] to make an allowance for the fiduciary's "skill, expertise and [his] other expenses"[81]; but profits should be apportioned only if there was an antecedent agreement for profit-sharing.[82]

It is another question whether a fiduciary should be reimbursed for what he spent in earning any profits. If a trustee acquires an asset, using his own as well as the trust's money, then both he and the trust will enjoy a proportionate interest in the asset so acquired, although the burden is on him to demonstrate that he used his money in its acquisition.[83] Again, in patent and copyright law, the court frequently directs an apportionment of profits, in order to reflect the contribution, ideas and financial input of the infringer. As Lord Atkinson once said: "it would be unreasonable to give the patentee profits which were not earned by the use of his invention".[84] His Lordship accepted that, in many cases, "[t]his is obviously a matter which cannot be determined by mathematical calculation or with absolute accuracy. At best, the result can only be an approximation."[85] But the line between the fiduciary's "ideas", for which he is granted an allowance, and his "skill and labour," for which he is not, may be a thin one.

1–043

The wrongdoer should normally be reimbursed any expenditure incurred in making his profits. Exceptionally, however, it appears that a court may be prepared to reject his claim for reimbursement. Both Lord Keith and Lord Jauncey refused to allow the *Sunday Times* to deduct the payments made to Peter Wright for the right to reproduce extracts from *Spycatcher*, on the ground that the newspaper could have resisted Wright's claim to those payments.[86] But the payments had been made. Consequently, they were items which should arguably have been deductible in assessing the newspaper's profits.[87]

[79] At pp. 211–212, *per* Mason C.J., Brennan, Deane, Dawson and Gaudron JJ. But the burden is on the errant fiduciary to demonstrate that it is inequitable to order an account of the entire profits.

[80] Above para. 1–042 and below para. 33–003. *cf. Foster v. Spencer* [1996] 2 All E.R. 672 (remuneration granted, otherwise the beneficiaries would be unjustly enriched at the expense of the trustees.)

[81] (1995) 128 A.L.R. at 212.

[82] This is a puzzling observation, for rarely can there be such an agreement if the fiduciary is in breach of trust.

[83] *cf. Re Tilley's Will Trusts* [1967] Ch. 1179, 1188–1189, *per* Ungoed-Thomas J.: see below, para. 2–037, n. 16.

[84] *The United Horse Shoe and Nail Co. Ltd v. Stewart & Co.* (1888) 5 R.P.C. 260, 266–267, *per* Lord Watson.

[85] *Watson, Laidlaw & Co. Ltd v. Pott, Cassels and Williamson* (1914) 31 R.P.C. 104, 114: see below, para. 36–011. Lionel Bently discusses, in [1991] E.I.P.R. 5, 11–12 *et seq.*, in the context of claims for breach of copyright, some of the difficulties which arise in determining what is the appropriate contribution of the wrongdoer.

[86] *Att.-Gen. v. Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109, 262, *per* Lord Keith, 293–294, *per* Lord Jauncey. No other member of the House of Lords discussed this point.

[87] For this reason Lord Donaldson M.R. would have allowed the deduction: [1990] 1 A.C. at 198; see also Dillon L.J. at 211.

(B) *The Benefit must be Gained at the Plaintiff's Expense*[88]

1–044 The second subordinate principle of the general principle of unjust enrichment is that the benefit, the enrichment, must be gained *at the plaintiff's expense*.[89]

In many cases it will not be difficult to discharge the burden of demonstrating that it has been so gained; it will be evident that the plaintiff has paid money, rendered services or delivered goods to the defendant. But on occasions it may. For example, the plaintiff makes a payment, under mistake or under protest in pursuance of the defendant's demand which is subsequently held to be *ultra vires*. He sues to recover his payments, to be met by the defence that he has "passed-on" the tax to his customers; consequently, it has been argued, he suffered no loss and the defendant's enrichment was not gained at his expense. In England this question has arisen in the context of a restitutionary claim to recover an *ultra vires* payment, made under a "swap" contract.[90] The defendants claimed that the plaintiffs had not suffered a loss, equivalent to the defendants' gain, because it had entered into a profitable hedging contract with another bank. The Court of Appeal held that this was no defence to the restitutionary claim.[91] Other common law jurisdictions, as well as the European Court of Justice, have reached a different conclusion.[92]

Similarly, a defendant may submit that the benefit is the product, wholly or in part, of his own ideas and financial input. As has been seen, the burden is then on him to substantiate that submission.[93]

1–045 D may benefit at P's expense even though P does not directly benefit D. It is settled law that if P discharges a debt owed by D to T under compulsion of law, then P has a right to look to D for reimbursement[94]; and if P discharges more than a proportionate share of a common obligation which he and D owed T, he can seek contribution from D.[95] Indeed, P may obtain restitution if he mistakenly renders services to T and, in doing so, discharges D's statutory or contractual duty so to do.[96]

However, in two situations, the inquiry whether the benefit has been gained at the plaintiff's expense is more complex. These are (i) where the benefit was gained from a third party; and (ii) where the benefit was gained from the defendant's wrongful act.

[88] The phrase "at the expense of", in the context of the law of restitution, first appears in an article by J. B. Ames on the "*History of Assumpsit*" (1988) 2 Harv. L.R. 1, 52 and was adopted by Keener in his *Treatise on the Law of Quasi-Contracts*, p. 19. But the phrase is not found in Woodward's *The Law of Quasi Contracts*. See counsel's historical research in *Kleinwort Benson Ltd v. Birmingham City Council* [1996] 4 All E.R. at 750: below para. 25–017.

[89] See, generally, Birks and Mitchell, §§ 15.11—15.35.

[90] Below para. 25–014 for a description of a "swap" contract.

[91] *Kleinwort Benson Ltd v. Birmingham City Council* [1996] 4 All E.R. 733: below para. 27–005 for a full discussion.

[92] For a discussion of the case law in these jurisdictions, where the legal and economic arguments are explored, see Jones, *Restitution in Public and Private Law* (1991), pp. 28–40; and below para. 25–017.

[93] See above, para. 1–043.

[94] See below, Chap. 15.

[95] See below, Chap. 14.

[96] See below, para. 6–015.

Where the benefit was gained from a third party

1–046 If the defendant's benefit has been gained from a third party, and not from the plaintiff, the plaintiff's claim will normally fail.[97] For example, T pays money to D, a stranger, intending thereby to discharge a debt which he owes P. D makes no payment to P. T's debt remains undischarged and T can normally recover his payment from D, the consideration for the payment having wholly failed.[98] It must follow that P never had any claim against D. D has not gained his benefit at P's expense; the benefit has been gained at T's expense. It is T, not P, who has suffered the loss. The conclusion that P has no claim against D is, as a general rule, a wise one. At one time it was held that P's claim failed because there was no "privity" between P and D. As Professor Dawson said, the invocation of the fiction of privity reflected a "dimly felt situation that it was a mistake to become involved in these multi-party confusions when quasi-contract would short circuit a series of interconnected transactions, without joinder of the parties at intermediate stages."[99] For example, take the case where T mistakenly gives £300 to D, intending to give P that sum. If T demands the money from D before he has paid it to P, D cannot resist that demand. T is allowed to change his mind. The gift to P is still imperfect and, for that reason, P has no claim against either T or D. Again, T mistakenly pays D, thinking that he is his creditor or his creditor's agent; his creditor is in fact P. D becomes insolvent before T and P discover the true facts. If it were held that T's payment had the effect of discharging the debt owed to P, P would have to look to an insolvent D, not to a solvent T, for reimbursement. P would have good reason to feel aggrieved if that were the case.[1]

However, there are situations where P has successfully recovered from D the sum which T paid D and where D's gain was commensurate with P's loss.[1a]

[97] For an unusual illustration of this general rule, see *Hill v. Van Erp* (1997) 188 C.L.R. 159 (High Ct. of Aust.), noted in [1998] R.L.R. 184.

The defendant solicitor was held liable in negligence to the intended beneficiary, whose husband had attested the will. In Gummow J.'s opinion had taken the failed legacy, but who at pp. 225–227), the intended beneficiary had no claim against the next of kin, who were not responsible for the solicitor's negligent act. The next of kin's gain was not at the expense of the intended beneficiary. "Nor is it clear that the wealth in question would 'certainly' have vested in [the intended beneficiary] had it not been 'intercepted' by [the negligent solicitor] whilst 'en route' from the testatrix."

[98] See above, para. 1–018, n. 17.

[99] *Unjust Enrichment*, p. 126.

[1] Admittedly, P would argue differently if D was solvent and T insolvent. *cf.* (1991) 11 Oxford Jo. of L.S. 481 [Lionel Smith]. It appears that some American jurisdictions are now prepared, in some circumstances, to "short-circuit" the interconnected transactions: see Palmer, *op. cit.*, Vol. IV, pp. 300–301.

[1a] *cf.*, Birks, "At the expense of the claimant: direct and indirect enrichment in English law", in *Unjustified Enrichment*, p. 493, arguing that a personal restitutionary claim may lie against a remote (as distinct from an immediate) volunteer-recipient who would not have been enriched but for the enrichment by subtraction of the primary recipient, citing *Bannatyne v. D & C McIver* [1906] 1 K.B. 103, below, para. 30–051, *B. Liggett (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 K.B. 48, below, para. 2–025 and *Agip Africa Ltd v. Jackson* [1990] Ch. 265, [1991] Ch. 547 (C.A.) below, para. 33–031. *Cf.* the *Re Diplock* line of cases, discussed below, Chap 30. But the restitutionary claim will fail if the recipient incidentally benefits from the claimant's performance of his contract with a third party: above, paras 1–074 *et seq.*

There is no doubt that a proprietary claim will succeed, subject to defences, if the property is identifiable: see below, Chap. 2.

1–047 First, there are a number of old cases where D had usurped P's office and where he was obliged to make restitution of the sums which he had received from T "in the way of profits."[2] There are other examples in the reports where D has been held to be accountable because he held himself out to act with P's authority, for example, purporting to be his agent or his executor.[3] It is not clear what is the basis of these decisions. The fact that D was liable to make restitution to P suggests T's obligation to P was thereby discharged. Any other result would be bizarre. If T's debt to P was not discharged, T would be able to recover his payment from D, on the ground of mistake or total failure of consideration, and D would remain liable to P.[4]

1–048 Secondly, there are the cases on attornment. If T transferred a "fund" to D to hold to the use of P, and D assented so to hold it, then it is well established that D must hold the fund to P's use if he has by some act attorned to P. In the nineteenth century unconvincing attempts were made to rationalise the case law by finding a contract between P and D. Today these cases are of very limited importance. It may well be that they find their way into the modern law of restitution simply because, in the seventeenth century, *indebitatus assumpsit* superseded account which had formerly been P's appropriate writ. The happiest explanation of this body of law is that the act of attornment is effective to vest the equitable title in the fund in the plaintiff.[5]

Thirdly, there is an isolated English dictum which suggests that, if T dies, intending to bequeath P £300, but, by mistake, bequeathed £300 to D, then P is entitled to restitution from D.[6] This is fragile authority. The bequest is imperfect; and, unless the will can be rectified,[7] to perfect it would frustrate the policy embodied in the Wills Act 1837.

1–049 Fourthly, there is the law of secret trusts. Its origin lies in the principle that no statute, in particular, the Wills Act 1837,[8] can be invoked as a cloak for fraud.[9] The possibility of fraud in equity, D's breach of his undertaking to hold property for the benefit of another, P, "converts the party who has committed it into a trustee for the party who is injured by that fraud."[10] The law of secret trusts is not wholly reconcilable with the policy underlying the Wills Act. It is one thing to prevent D benefiting from his own fraud. It is another to enforce the trust in favour of P. If, historically, English lawyers enforced the trust on the ground that

[2] Below para. 29–001 *et seq.*

[3] See below, 29–002.

[4] *King v. Alston* (1848) 17 L.J.Q.B. 59; Smith, *"Three Party Restitution: A Critique of Birks' Theory of Interceptive Subtraction"* (1991) 11 O.J.L.S. 481. Assume that D has usurped P's office but has made restitution to P of the sums received from his usurpation to P. T, P's debtor, then recovered his payment from D on the ground that the debt had not been discharged and that, therefore, there had been a total failure of consideration. Can D recover the sums he had paid P? Seemingly, the answer is yes; the consideration for the payment has totally failed.

To avoid circuity of action, a court may conclude that T's claim against D should fail for his debt has been discharged. But if T is insolvent, a court may reach a different conclusion: above, n. 1.

[5] See below, Chap. 28.

[6] *Lister v. Hodgson* (1867) L.R. 4 Eq. 30, 34–35, *per* Romilly M.R. See also *M'Mechan v. Warburton* [1896] 1 I.R. 435, 439, *per* Chatterton V.-C; below, para. 31–001.

[7] Administration of Justice Act 1982, s.20: below, para. 31–001, n. 2.

[8] See also Law of Property Act 1925, s.53: below, para. 21–002.

[9] *cf. Bannister v. Bannister* [1948] 2 All E.R. 133, CA, following *Rochefoucauld v. Boustead* [1897] 1 Ch. 196, CA: see below, para. 21–002.

[10] *McCormick v. Grogan* (1869) L.R. 4 HL 82, 97, *per* Lord Westbury.

there was a possibility that D might repudiate his undertaking to the testator and thereby benefit from his own (equitable) fraud, today fraud may no longer be "an essential ingredient" of the law of secret trusts.[11] D holds on trust for P from the moment of the testator's death or possibly even earlier, from the date when he gave his undertaking.[12]

Finally, a fiduciary may receive a bribe from a third party, or he may divert an opportunity from a third party to himself which equity decrees should have been acquired for his principal. He holds any asset gained thereby as a constructive trustee. Equity deems the opportunity to belong to the principal from the moment of its acquisition. It does so, not only to prevent the fiduciary's unjust enrichment, but to deter all fiduciaries from the temptation of using their fiduciary office for their own profit.[13]

Benefits gained from wrongdoing

1–050 In the situations hitherto discussed,[14] the benefit gained by the defendant is the loss suffered by the plaintiff, for he has paid money, rendered services or delivered goods which the defendant has indubitably received from the plaintiff. In contrast, if the plaintiff's claim is based upon the defendant's wrongful act, there may or may not be an equation between what the plaintiff has lost and what the defendant wrongdoer has gained.[15] Nonetheless, the gain is said to be made at the plaintiff's expense.

There is an equation between loss suffered and benefit gained if, for example, the defendant converts and sells the plaintiff's chattel, or if the defendant, in breach of his fiduciary duty, buys trust property at an under-value. But there may be no such equation if a fiduciary exploits his position of trust to acquire an asset which his principal could not have acquired. An action equitable compensation may not be an attractive remedy in these circumstances. Instead, the fiduciary's principal will seek to recover the benefit gained, arguing that the fiduciary has been unjustly enriched at his expense.[16]

But not all wrongdoers are required to disgorge gains where the injured party has suffered no or little loss. For example, not all torts ground a restitutionary claim. Existing authority suggests[17] that only tortious acts which infringe the claimant's proprietary or possessory title can ground a restitutionary claim. The Court of Appeal has been reluctant to extend the class of restitutionary claims. For example, in *Stoke-on-Trent City Council v. W.& J. Wass Ltd*[18] the Court held that damages, and not an account, was the appropriate remedy even though the

[11] *Re Snowden (deceased)* [1979] Ch. 528, 536, *per* Sir Robert Megarry V.-C.

[12] *Re Gardner (No. 2)* [1923] 2 Ch. 230, a much criticised decision.

[13] See below, Chap. 33. Query if the *Diplock* personal claim (below Chap. 30) is an illustration of a benefit conferred by a third party: *cf.* Smith, *op. cit.* above, n. 4; p. 39. *cf.* Burrows' *The Law of Restitution*, pp. 51–53.

[14] See above, para. 1–044 *et seq.*

[15] *cf. Mason v. The State of New South Wales* (1959) 182 C.L.R. 108, 146, *per* Windeyer J. *cf. Roxborough v. Rothmans of Pall Mall Australia Ltd* (2001) 185 A.L.R. 335, 353, § 68, *per* Gummow J.

[16] Below, Chapter 33.

[17] But see below, para. 36–006, for a proposal that the law should be extended.

[18] [1988] 3 All E.R. 394: below, para. 36–006.

defendant company had consciously and consistently infringed the plaintiff's exclusive proprietary right to hold a retail market.

Until recently the common law held firmly to the principle that the injured party could never claim the profits made by the other party from his breach of contract. But the House of Lords has now held in *Attorney-General v. Blake*[19] that, exceptionally, a court may order an account of profits made from the breach if it is proper to do so, even though the plaintiff has suffered no comparable loss.[20]

1–051 Similarly, the honest fiduciary who is nonetheless for his profit found to have breached his duty of loyalty to his principal is not only liable to account for his profit but is a constructive trustee of those profits even though his principal could have acquired those gains.[21]

Public policy demands that criminals shall not benefit from their crimes.[22] For this reason they cannot succeed under the will of a person whom they murdered.[23] But it is uncertain whether they must disgorge an 'incidental' enrichment, for example, profits, made from the sale of the story of their criminal activities to a tabloid newspaper.[23a]

(C) *Unjust Retention of the Benefit*

1–052 It is not in every case where a defendant has gained a benefit at the plaintiff's expense that restitution will be granted. It is only when a court concludes it would be unjust for him to retain the benefit that he must make restitution to the plaintiff. It is necessary, therefore, to give content to the concept of *unjust* enrichment. The grounds and boundaries of restitutionary claims were originally formed by the old forms of action.[23b] For that reason money claims have hitherto been treated differently from claims based on services rendered and goods supplied.[23c] Nowadays it is possible to identify substantive categories which form the basis of the restitutionary claim that the defendant has received a benefit which it is *unjust* for him to retain.

The Grounds which Found the Basis of the Restitutionary Claim

Benefits which have been involuntarily conferred

1–053 A benefit may be conferred on another under mistake, compulsion or necessity.[23d] The transfer[23e] of the benefit is then non-voluntary, in the sense that the benefit would not have been conferred but for the mistake, the compulsion of the

[19] [2000] 3 W.L.R. 625.
[20] See further below, para. 20–024.
[21] See below, Chap. 33.
[22] Below.
[23] Below.
[23a] Below.
[23b] Above.
[23c] But see (1989) 99 L.Q.R. 217 [Burrows].
[23d] Below Section Two.
[23e] *Birks, Introduction*, Chap. 6.

necessity for the intervention.[24] In these cases, the other's enrichment is prima facie an unjust enrichment. We say *prima facie* because, as will be seen,[25] there are limits and defences to a restitutionary claim. For example, a claim will fail if the plaintiff has entered into a compromise,[26] if public policy precludes restitution,[27] if the defendant cannot be restored to his original position,[28] if he has changed his position or if he has given good consideration.[29]

Benefits which have been voluntarily conferred

Money A benefit may be voluntarily conferred, but the defendant may nonetheless be held to have received an enrichment which is an *unjust* enrichment. Commonly, but not exclusively, such claims arise out of contracts which are or become ineffective. At common law the plaintiff's ground of recovery is determined by the nature of the benefit conferred. **1–054**

If money has been voluntarily paid to another, a restitutionary claim will nonetheless succeed if the consideration for the payment has totally failed.[30] The defendant's performance of his promise is the consideration which the payer expects in return.[31] In the past, the courts have applied the principle stringently so as to deny recovery by the plaintiff if he has received from the defendant a benefit, no matter how small, which he can no longer restore and which forms part of the defendant's promised performance under the contract.[32] Conversely, if the benefit received does not form part of the promised performance, there is a total failure of consideration.[33] There are now welcome indications that English courts are prepared to interpret the doctrine of *total* failure of consideration more sympathetically and to allow a restitutionary claim even though the plaintiff had received a monetary benefit from the defendant. So, if a debtor defaults, the balance of a loan outstanding may be recoverable on the ground of failure of consideration; "for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground".[34] It is to be hoped that English courts will go further, will follow the analogy of the decisions on equitable rescission,[35] and will accept that if the consideration for a payment has partially failed, the plaintiff should recover his payment, but should

[24] *cf. Woolwich Equitable Building Society v. Commissioners of Inland Revenue* [1993] A.C. 70, 179 *et seq.*, *per* Lord Jauncey.
[25] See below, para. 1–061 and Part III.
[26] Below, para. 1–079.
[27] Below, para. 1–078.
[28] Below, para. 1–078.
[29] Below, para. 1–078.
[30] In *Westdeutsche Landesbank Girozentrale v. Islington London BC* [1994] 4 All E.R. 890 Hobhouse J., at first instance, and Leggatt L.J., in the Court of Appeal, held that the concept of *absence of consideration* was also an appropriate ground of restitution. *Cf. Guinness Mahon & Co. Ltd v. Kensington and Chelsea Royal London BC* [1998] 2 All E.R. 272, CA, below, para. 25–015. For a critical discussion, see below, paras 19–002—19–006.
[31] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32, 48, *per* Viscount Simon: see below, p. 511; *Baltic Shipping Co. v. Dillon* (1993) 176 C.L.R. 344, 376, *per* Deane J.
[32] For example, the services contracted for may have been rendered and cannot be returned: *cf. The Salvage Association v. Cap Financial Services Limited* [1995] FSR 654, 682, *per* Judge Forbes.
[33] For such a case, see *Rover International Ltd v. Cannon Film Sales Ltd* [1989] 1 W.L.R. 912: see below, para. 25–020.
[34] For example, *Goss v. Chilcott* [1996] A.C. 788, 798, *per* Lord Goff (PC): below, para. 19–008.
[35] Below, para. 9–023 *et seq.*

be required to make *restitutio* for any benefit received, whether or not it can be returned in specie. Statutory provisions apart, therefore, a payer cannot recover in restitution money paid if the consideration for the payment has only partially failed. This regrettable limitation is the product of the common law's reluctance to make any allowance, and to give credit to the defendant, for benefits which the plaintiff can no longer restore to him.[36]

1–055 Historically, these principles were formulated in the context of claims for money had and received between contracting parties. But there is no reason why claims should be so limited, and they are not.[37] There is a total failure of consideration when money has been paid on the basis of any assumption which is or becomes falsified. In *Martin v. Andrews*[38] money tendered with a subpoena *ad test* was recovered when the case was settled before trial. Similarly, money may be paid in anticipation of the parties entering into a contract which in fact never materialises[39]; under an arrangement which was never intended to create legal relations and where the payer did not get his expected returns[40]; or on the footing that there is a legal demand but where it transpires that the legal demand is a nullity.[41] The payment may then be recoverable, the consideration for that payment having failed.[42]

There is an analogous principle in equity, which finds its expression in the law of resulting trusts. For example, a testator bequeaths property on trusts which do not exhaust the beneficial interests, or on trusts which fail for one reason or another.[43] It is debatable whether the resulting trust for the benefit of the testator's estate arises, not because it is presumed that the testator intended it to arise, but because it is imposed by law; or whether the resulting trust is the automatic consequence of the testator's failure to dispose of what is vested in him and arises because the testator did not anticipate the event which caused the declared trusts to fail.[44]

1–056 **Services** In contrast, different principles determine whether it would be unjust to deny a plaintiff's restitutionary claim based on services rendered or goods delivered. Under the old *quantum meruit* and *quantum valebat* counts,[45] a

[36] See below, paras 19–007 and 19–008.
[37] *cf. Roxborough v. Rothmans of Pall Mall Ltd* (2001) 185 A.L.R. 335, 364 *et seq*, *per* Gummow J. Contrast *Westdeutsche Landesbank Girozentrale v. Islington London BC* [1994] 2 All E.R. 890, 923, *per* Hobouse J., criticised below, para. 19–003.
[38] (1856) 7 El. & Bl. 1, 4, *per* Lord Campbell C.J. cited in *Roxborough v. Rothmans of Pall Mall Australia Ltd* (2001) 185 A.L.R. 335, 364, § 102, *per* Gummow J.
[39] See below, Chap. 26.
[40] *Rose & Frank Co. v. J. R. Compton & Bros. Ltd* [1925] A.C. 445; *semble*; *Jones v. Vernon's Pools* [1938] 2 All E.R. 126.
[41] *Woolwich Equitable Building Society v. Commissioners of Inland Revenue* [1993] A.C. 70, 197, *per* Lord Browne-Wilkinson (a payment "without consideration"); see below, para. 19–002.
[42] *cf. Roxborough v. Rothmans of Pall Mall Australia Limited* (2001) 185 A.L.R. 335. (A retailer successfully reclaimed an *ultra vires* tax which had been contractually paid in advance to a wholesaler. There was a total failure of consideration since the wholesaler was not liable to pay it over to the government. That concept was not confined to a "contractual regime".)
[43] See below, para. 19–013.
[44] *Re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 289–290, *per* Megarry J. But see now the dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London BC* [1996] A.C. 669, 707–709: discussed below para. 19–013.
[45] See above, paras 1–001—1–003.

plaintiff had to plead and prove a request by the defendant. The notion of request has now been extended. It is now enough to demonstrate that the defendant has freely accepted the benefit conferred.[46] Not only is he then enriched,[47] but his enrichment is in law an *unjust* enrichment.[48] For if he ought to have known that the plaintiff expected to be paid and if he had a reasonable opportunity to reject the goods or services and did not do so, the plaintiff may legitimately say that his failure to do so is the ground of the plaintiff's restitutionary claim. Of course, the claim may fail for other reasons; for example, the plaintiff may have acted officiously,[49] he may have taken the risk that the defendant would not pay him,[50] or his claim, if admitted, would frustrate the policy of the statutory or common law rule which rendered the contract ineffective.[51]

In recent years it has been suggested by both Professor Burrows and Professor Birks that the language of the forms of action conceals the true ground of the restitutionary claim of the plaintiff who has rendered services or delivered goods, namely, failure of consideration.[52] The "argument for symmetry is irresistible"; it is not justifiable that the ground of recovery (the unjust factor) should depend on the nature of the benefit conferred.[53] Few jurists would deny this. But, as yet, the courts have not been prepared to accept failure of consideration as the ground of the restitutionary claim.[54]

Benefits gained from wrongdoing

1–057 As has been seen,[55] at common law not every wrongdoer must account for gains made from a wrongful act. Some tortfeasors must do so,[56] and, exceptionally, the defendant who wrongfully repudiates his contractual obligations must also account for profits gained from the breach.[57] Account is a personal remedy and does not confer on the successful claimant any proprietary interest in the profits gained from the wrongful act. "The purpose of ordering an account of profits . . . is", as Slade J. said in *My Kinda Town v. Soll*,[58] "to prevent unjust enrichment of the defendant by compelling him to surrender those profits, or those parts of the profits, actually made by him which were improperly made . . . "

[46] See above, para. 1–019 *et seq*.
[47] See above, para. 1–019.
[48] See Birks, *Introduction*, Chap. 8.
[49] See below, para. 1–077.
[50] *ibid*.
[51] See below, para. 1–079.
[52] Burrows, *op. cit.* pp. 299–304, and "*Free Acceptance and the Law of Restitution*" (1988) 104 L.Q.R. 576; Birks, "*In Defence of Free Acceptance*" in Burrows (ed.), *Essays on the Law of Restitution*, Chap. 5.
[53] Birks, "Failure of Consideration, in" Rose (ed.), *Consensus Ad Idem*, p. 186; Birks and Mitchell, §§ 15.39–15.41, 15.107.
[54] Possibly, they may be moving to do so; *cf.* (1988) 104 L.Q.R. 576 [Burrows].
[55] Above, para. 1–050—1–051. Critics of the Birksian division into "autonomous unjust enrichment" and "restitution for wrongs" include: Beatson, *The Use and Abuse of Unjust Enrichment*, pp. 206–243 and Cane in (ed. Birks) *Wrongs and Remedies in the Twenty First Century*, pp. 313–323.
[56] Below, Chap. 36.
[57] Below, para. 20–024.
[58] [1982] F.S.R. 147, 156. This was a passing-off case.

In equity the class of wrongdoers is wider. Fiduciaries who allow their self interest to conflict with their duty of loyalty are its most prominent members.[59] In equity, they may not only be made to account for profits thereby gained but declared to be constructive trustees of an identifiable fund. Equity orders the account and imposes the trust not only to reverse their unjust enrichment but also to guard against the mere possibility of a breach of fiduciary duty.[60]

Is unconscionable conduct a ground of an unjust enrichment claim?

1–058 English law does not recognise any "general principle of relief against inequality of bargaining power."[61–64] As yet, unconscionability is not a "distinct vitiating factor".[65] But in a few situations the courts have intervened to grant restitution because the defendant had behaved unconscionably. Prominent among these is equity's long established jurisdiction to set aside a bargain if there is "some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself . . . which in the traditional phrase 'shocks the conscience of the court', and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained."[66] In such a case the "stronger party" must make restitution of benefits which he has unconscionably gained.

It may well be that English courts are also ready to accept that unconscionability is the basis of the equitable doctrines of possessory and proprietary estoppel.[67] While "a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed."[68]

1–059 There are other decisions of the English courts where a defendant has received a benefit at the plaintiff's expense and which today can be best explained on the ground that it would be unconscionable for the defendant, having received an incontrovertible benefit at the plaintiff's expense, to reject a claim that he should make restitution of his unjust enrichment. For example, a ship deviates but makes a timely delivery of the cargo at the agreed port of discharge; dicta suggest that the ship is entitled to the agreed freight.[69] A lender of money to a minor, the loan being void under the Infants Relief Act 1874, may nonetheless be subrogated to the vendor's lien for unpaid purchase money.[70] And in *Lord Napier and Ettrick*

[59] Below, Chapter 33.
[60] As has been seen, para. 1–011, it has been argued that both at law and in equity the basis of the restitutionary claim is the wrongful act and not unjust enrichment. The case law suggests otherwise: see above, p. 12, n. 68.
[61–64] *National Provincial Bank Ltd v. Morgan* [1985] A.C. 686, 708, *per* Lord Scarman.
[65] But see Bamforth, "*Unconscionability as a vitiating factor*", [1995] L.M.C.L.Q. 538.
[66] *Alec Lobb Ltd v. Total Oil GB Ltd* [1983] 1 W.L.R. 87, 94–95, *per* Millett J. Q.C.: below Chap. 12.
[67] See below Chap. 37.
[68] *Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd* [1982] Q.B. 84, 131–132, *per* Brandon L.J. And see Bamforth, *op. cit.*, n. 65, pp. 539–542.
[69] *Hain Steamship Co. Ltd v. Tate & Lyle Ltd* (1936) 41 Com.Cas. 350, 358, 363, 373: below para. 20–043.
[70] *Nottingham Permanent Benefit Building Society v. Thurston* [1903] A.C. 6: below para. 1–079.

v. R. F. Kershaw Ltd,[71] Lord Templeman concluded that it would be "unconscionable for the names to take their share of the damages without providing for the sums due to stop-loss insurers to be paid out of the damages."

It is not inconceivable that English courts will accept unconscionability as a recognised ground of a restitutionary claim. As Sir Donald Nicholls V.-C. said in *CTN Cash and Carry Ltd v. Gallaher Ltd*, " . . . the categories of unjust enrichment are not closed."[72]

Unjust Enrichment Claims grounded on Public Policy

1–060 Public policy may ground a claim based on the defendant's unjust enrichment. For example, it is in the public interest to encourage, even by offering the carrot of a reward, maritime salvors to intervene in an emergency.[73] It is also one explanation why, in *Woolwich Equitable Building Society v. Commissioners of Inland Revenue*,[74] the taxpayer recovered payments, with interest, made pursuant to an *ultra vires* demand; why honest fiduciaries are stripped of their gains because there is a mere possibility that they may have allowed their duty and self-interest to conflict[75]; why *ultra vires* payments made by or to local authorities are recoverable[76]; and why neither common law nor equity will allow criminals to benefit from their crime.[77]

3. THE LIMITS TO A RESTITUTIONARY CLAIM BASED ON ANOTHER'S UNJUST ENRICHMENT[78]

1–061 We have now identified the principal grounds of claims based on another's unjust enrichment. A plaintiff who can establish one such ground is prima facie entitled

[71] [1993] A.C. 713, 736–737: below para. 3–043 *cf.* his observations in *Att.-Gen. for Hong Kong v. Reid* [1994] 1 A.C. 324: below para. 33–025.
[72] [1994] 4 All E.R. 714, 720. See also the observations of Lord Woolf in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, 723. ("Restitution is an area of the law which is still in the process of being evolved by the courts. In relation to restitution there are still questions remaining to be authoritatively decided."). *cf. R. v. Barnet Magistrates' Court ex p. Cantor* [1998] 2 All E.R. 333, 342, *per* Garland J.
[73] See below, Chap. 18; Birks, *op. cit.*, Chap. 9. Conversely, it may defeat a restitutionary claim: see below, para. 24–001.
[74] [1993], A.C. 70: below, para. 27–001.
[75] Below, Chap. 33.
[76] Below, para 25–013 *et seq.*
[77] Below, Chap. 38.
[78] From time to time this text will address the question whether a restitutionary claim will lie if the same facts give rise to some other claim, for example, in contract or tort. Some civilian jurisdictions accept a doctrine of *subsidiarity*, namely, that "the enrichment claim must give way if there is any other legal basis on which the plaintiff can ground his claim" : Zweigert and Kotz, *An Introduction to Comparative Law* (trans. Weir, 3rd. ed.), 550. For example, in Germany the unjust enrichment claim is subordinate to the *rei vindicatio* claim (so-called "weak" subsidiarity); in contrast, other civilian jurisdictions, including France, Italy and Quebec, reject an unjust enrichment claim if some other claim is available in principle, even though on the particular facts such a claim would necessarily fail: see Nicholas, "*Unjust Enrichment and Subsidiarity*" in (eds.) Passarelli and Lupoi, "*Scintillae Juris: Studi in Memoria di Gino Gloria*" (1994) Vol. III, 2037; Lionel Smith, "*Property, Subsidiarity and Unjust Enrichment*", in *Unjustified Enrichment*, 588. (Subsidiarity is embedded in our law, but not by name. Unjust enrichment has a corrective and subsidiary role to contract and "it is excluded by an operative distribution of risks and benefits.").
English law does not know the doctrine of subsidiarity by name. Its work is done through different