

The London School of Economics and Political Science

Property, Unjust Enrichment and Restitution

Charlie Edward James Webb

**A thesis submitted to the Department of Law of the London
School of Economics for the degree of Doctor of Philosophy**

London, November 2007

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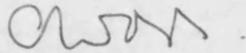
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Abstract

This thesis examines the law's response to defective transfers and other misapplications of assets and argues that the present variety of responses is unprincipled and fails to treat like cases alike.

Sometimes, when A mistakenly transfers property to B, the law says that, because of the mistake, A's legal title to that property never left him. At other times the law says that legal title did pass to the recipient but that the mistake leads to a new equitable title to the property arising in A's favour. And at other times, the law says that A relinquishes all title to the property but has instead a personal claim against the recipient for recovery of the value of the property mistakenly transferred. These differences matter because they affect issues such as the measure and form of recovery, the impact of B's insolvency, and the availability of defences. Yet in all such cases the claimant's complaint seems to be the same: the asset was mine to dispose of and I did not consent to its passing to the defendant.

If all these cases are concerned with the same question, they should all receive the same answer. Accordingly a new, uniform approach, consistent with the principles underlying such claims, will be put forward. This will then point the way to a clearer understanding of certain issues of a more fundamental nature, such as the organisation and structure of private law, the use of concepts in legal theory and reasoning, and the distinction between property and obligations.

Acknowledgments

Many people provided support and assistance in various forms over the past five years. First amongst these is my supervisor, Sarah Worthington. It was she who first encouraged me to start this project and throughout she gave me the space and freedom I wanted, while always being ready and willing to offer guidance and advice when needed. This has taken a lot longer than we both envisaged, and I am thankful for her patience and unstinting support.

Numerous teachers, students and friends have helped shape my views on law generally and the arguments made in this thesis in particular. Of these, particular thanks go to Tim Akkouch, who was on the receiving end of my first rants on unjust enrichment and restitution, and with whom I first wrote on the subject. More recently, my brother, Will, has provided the best and most testing (if, from his side, largely amoral) discussions I have had on private law. I should also mention James Penner and Hugh Collins, who both read and commented on earlier versions of chapter 2.

Finally, my greatest debt is owed to my parents. Their encouragement and support could not have been greater. In innumerable ways, but for them this thesis would not have been written.

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Chapter 1

An introduction

It has been said that, “[t]he relationship between the law of property and the law of unjust enrichment/restitution has long been regarded as fiendishly complex and problematic. Indeed one can regard it as the last great unsolved mystery for those working in the law of restitution.”¹ The parameters of property, restitution and unjust enrichment are themselves uncertain, and it is plain that they may interrelate, and have been regarded as interrelating in a number of different ways and in a variety of contexts. This thesis focuses on just one of these; the law’s handling of defective transfers and other misapplications of assets.

Sometimes we give away our assets by mistake. At other times, they are taken from us without our knowledge. Occasionally, we may be forced to part with them as a result of another’s illegitimate pressure. In all these cases, we can say that our consent to the asset leaving our hands was, at best, flawed, if not entirely absent. And in all these cases, the law gives us a claim against the person who received or took the asset from us. Why?

This thesis is, in the first instance, an examination of the principles which underlie and support claims in these instances. At present, the law offers an array of diverse responses. So, if I transfer an asset to you by mistake, the claims then available to me vary depending on the type of asset involved and the nature of my mistake. Sometimes I can recover the asset itself, at other times only its monetary value. Sometimes my claim will have priority in the event of your insolvency, but sometimes it will not. At times the fact that you were unaware that my consent to the transfer was flawed and that you either paid for it or have since changed your position in the belief that it is now yours provides you with a defence, but at other times it does not.

These differences in treatment can be supported only if they reflect genuine, material differences between the cases. Certainly this appears to be the view of the courts and the vast majority of academic writers. These various, alternative responses have been matched by a multiplicity of concepts and devices that have been employed to present and account for such claims, and which seek to validate their substantive differences. So, we see these claims allocated variously between the law of property, of torts, trusts, quasi-contract, restitution and unjust enrichment, though without any consensus as to which of these labels are appropriate and when they are to be applied.

¹ A. Burrows, “Proprietary Restitution: Unmasking Unjust Enrichment” (2001) 117 *L.Q.R.* 412, at p. 412. See too P. Millett, “Review of A. Burrows, *The Law of Restitution*” (1995) 111 *L.Q.R.* 517, at p. 518.

I shall argue that this approach is wrong. If we look to the facts of these cases, they can be seen to raise a common problem. And, since they all pose the same question, they should be given the same answer. At present, the law is failing to treat like cases alike, and failing to do justice. We need, therefore, to rethink how the law should respond to defective transfers and to devise a scheme which is coherent, principled and just. The main body of this thesis will be concerned with doing just this. Following an identification of the principles which are raised by these cases, we shall see how these can then be used to construct an alternative, uniform regime for their resolution.

First though, we need to show why a fresh approach is needed. It is easy to say that like cases should be treated alike, but how do we know when cases are, materially, alike and unlike? Without some basis or criterion for establishing likenesses, we cannot move beyond assertion. To answer this we must turn to an issue which become increasingly popular and prominent in private law scholarship over recent years – classification.

Questions of legal classification, or taxonomy, have been the focus of much recent writing on the law of restitution and unjust enrichment. The reasons for this are plain. The credentials of a subject long neglected fell to be established and its place within private law marked out. Unjust enrichment and restitution had to be defined and distinguished from the law's other organising concepts. This, in turn, required analysis of how and why we should classify and order legal rules and claims. As such, the claim that unjust enrichment be accepted as identifying a distinct and discrete branch of the law necessarily entailed a broader claim as to how the law should be arranged and presented.

The attention that unjust enrichment lawyers have given to classification has paid dividends. The claim that unjust enrichment ranks alongside contract and tort as one of the central organising ideas within private law is widely viewed as uncontroversial (though, perhaps paradoxically, what exactly unjust enrichment describes remains contested). Moreover, there is evidence that this renewed focus on classification is now making its mark in others parts of private law.² However, while the gains made by unjust enrichment scholarship are many, I shall suggest that the answers they have given to the central questions of classification are wrong, and threaten to encourage just the sort of arbitrary and unprincipled distinctions which unjust enrichment lawyers have fought so hard to excise from the law. Though this has consequences throughout private law, it has a particular bearing on our understanding of the claims that follow defective transfers, for, importantly, though unjust enrichment scholarship has gone a long way to breaking down some of the divisions that the law previously drew in its analysis of such claims, it has served to entrench others. As such, it stands as an impediment to a principled and just system of law.

² See, e.g., P. Birks, "The Concept of a Civil Wrong", ch. 1 of D. Owen (ed.), *The Philosophical Foundations of Tort Law* (Clarendon Press, 1996); P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia L.R.* 1; R. Chambers, "Constructive Trusts in Canada" (1999) 37 *Alberta L.R.* 173; J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002); A. Pretto-Sakmann, *The Boundaries of Personal Property: Shares and Sub-Shares* (Hart Publishing, 2005).

Only by making a fresh start and rejecting many of the assumptions on which much unjust enrichment scholarship is founded will we in fact succeed in treating like cases alike and doing justice. We shall now see why.

Chapter 2

A false start: the rise of unjust enrichment

Even before the recent growth in unjust enrichment scholarship, it had long been clear that the dominant and long-established legal categories of contract and tort failed to exhaust all instances of private law liability. Building on the work of Goff and Jones, Birks in *An Introduction to the Law of Restitution*¹ argued that out of this miscellany there could be identified a class of cases sharing such common features as to justify their recognition as forming a third basic category of private law claims. The common feature of these cases was that the defendant came under a liability to give up an enrichment he had received to the claimant. As a common term for liability to give up gains, Birks adopted the term “restitution”. Importantly, however, Birks saw a problem in slotting restitution into the existing classificatory scheme of English law.

On the basis that legal rights are all responses to certain events in the world, different rights reflect different responses to different events. Accordingly, rights can be classified by reference to either the nature of the response² or the event to which they respond. Restitution describes a response, and so aligns with other responses such as compensation and punishment. However, to Birks, the dominant classification within English law was one based not on response but on causative events, that is, the events from which rights arise. For instance, he viewed the established categories of contract and tort as being event-based, in that the formation of a contract or the commission of a tort was an event from which legal rights would arise. As such, there was a need to find a term to describe the causative event which gave rise to restitutionary claims, and which could then line up next to contract and tort in our classificatory scheme.

It is here that unjust enrichment came in. As restitution was the response consisting in causing a defendant to give up to the claimant an enrichment, it followed that, for there to be restitutionary liability, the defendant must have received an enrichment which, in the circumstances, the law requires to be given up to the claimant. Wherever an enrichment must be given up, it can be described as “unjust”. Wherever it is the claimant to whom the enrichment must be given up, we can say that the enrichment was “at the claimant’s expense”. As such, unjust enrichment, more fully unjust enrichment at the claimant’s expense, by a simple unpacking of the notion of

¹ P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989).

² Given Birks’ preference for event-based classification, I shall not examine classification by response, though here too I think there are serious problems, particularly in defining and grouping individual rights. These have been touched on by others: see, e.g., A. Tettenborn, “Misnomer – A Response to Professor Birks”, ch. 2 of W. Cornish, R. Nolan, J. O’Sullivan and G. Virgo (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998), at pp. 34-36.

restitution, became the generic conception of the event which triggers the right to restitution.³ Unjust enrichment was then, by definition, the event from which all instances of restitutionary liability arose.⁴ This then left a fourfold classification of the events from which rights arise: consent, wrongs, unjust enrichment and a residual miscellany.

This first conception of unjust enrichment was, however, soon revealed to be problematic, so much so that, despite widespread academic and judicial endorsement, it was subsequently rejected by Birks himself.

2.1 The problem of restitution for wrongs

For Birks, problems became apparent when one examined the cases conventionally grouped under the heading of restitution for wrongs.⁵ Such cases involve the defendant coming under an obligation to give up to the claimant a benefit he received. This being so, these are clearly cases of restitution and, applying the logic of the *Introduction*, also instances of unjust enrichment. However, the circumstances (events) in these cases which require the enrichment received by the defendant to be given up to the claimant amount to, or at least involve, the commission of a wrong by the defendant against the claimant. Moreover, the claimant relies on these facts as constituting a wrong in order to establish his entitlement to the defendant's gain.⁶ Because of this it can be said that the right to restitution arises from the wrong. This is problematic for Birks' taxonomy as it suggests that such cases straddle the categories of wrongs and unjust enrichment. As the four basic classes of event are intended to be mutually exclusive, and moreover because this is necessary for the taxonomy to fulfil its purpose, something had to give. Professor Birks' solution was to hold that cases of restitution for wrongs were not cases of unjust enrichment. This in turn entailed the admission that there was no perfect quadrature between restitution and unjust enrichment. The restitution for wrongs case law demonstrates that restitution is a response not only to the event unjust enrichment, as the *Introduction* had asserted, but to another class of events, namely wrongs. Indeed Professor Birks went on to assert that rights to restitution can and do arise from all four of the basic categories of event. Restitution is therefore multi-causal. However, while this may

³ Birks, *Introduction*, *supra*, n. 21, pp. 16-18

⁴ Accordingly, there was, in Birks' terminology, a perfect quadrature between restitution and unjust enrichment.

⁵ For the full version of this argument see P. Birks, "Misnomer", ch. 1 of W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds.) *Restitution: Past, Present and Future* (Hart Publishing, 1998) and P. Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79 *Texas L.R.* 1767.

⁶ This point is important in demonstrating that the existence of a wrong on the facts is not simply an example of alternative analysis, on which see Birks, "Misnomer", *supra* n. 5 at pp. 8-9, and P. Birks, "The Law of Unjust Enrichment: A Millennial Resolution" [1999] *Singapore Journal of Legal Studies* 318, at pp. 329-331.

achieve the immediate goal of avoiding intersecting categories, it creates more fundamental problems down the line.

2.2 The nature of unjust enrichment

What then of unjust enrichment? As we have seen, in the framework set down in the *Introduction*, unjust enrichment had a clear, if rather inert, role. It was simply the generic term for any event which gave rise to a right to restitution. However, the admission of the multi-causality of restitutionary rights entails that this understanding of the meaning of unjust enrichment can no longer hold. We might, therefore, expect Birks to have offered a refined definition of unjust enrichment; one that clearly distinguishes it from other restitution-yielding events. However, the definition provided in his latter work is in much the same terms as that in the *Introduction*. “Unjust enrichment is a causative event. It is the event that consists in the receipt of an enrichment at the expense of another in circumstances which call for that enrichment to be given up to that other.”⁷ Birks himself admitted that such a definition naturally covers all restitution-generating events. Therefore, and in order to avoid unjust enrichment overlapping with the other categories of event, Birks asserted that the ambit of this definition must be artificially restricted. This is to be done by cutting out those cases in which the circumstances which call for the enrichment to be given up - the “unjust” element - amount to (and are relied on in their character as) one of the three other basic classes of event; consent, wrongs or others.⁸ With this restriction in place we now have what Birks referred to as the narrow meaning of unjust enrichment.

However, this means that, in relation to rights to restitution, we are left with two residual categories, defined in each case to catch what is left by the other three. The fourth category, miscellaneous other events, comprises those right-creating events left once manifestations of consent, wrongs and unjust enrichment are removed. Therefore, it is necessary to know what falls within the first three categories before one can identify what makes up the fourth. When it comes to unjust enrichment, however, we are told that it consists in the event which generates rights to restitution and which is not a manifestation of consent, a wrong or some miscellaneous other event. So, to know what an unjust enrichment is, we must first know what falls within consent, wrongs and miscellaneous others. But as we have to be able to define unjust enrichment before we can say what falls within the category of miscellaneous others, it becomes impossible to identify which restitutionary rights arise from unjust enrichment. Once rights deriving from consent and wrongs are put to one side, we are left with a residual jumble of restitutionary claims which we know must

⁷ Birks, “A Millennial Resolution”, *supra* n. 5 at pp. 320.

⁸ *Ibid.*, p. 328.

be allotted either to the category of unjust enrichment or to miscellaneous others. However, we are not told how this is to be done. Without more, we cannot say what an unjust enrichment is.

We might then look to the detail of Birks' account to bring us nearer to understanding what this narrow conception of unjust enrichment comprises. As restitution means the giving up of a gain made at the claimant's expense, restitutionary rights arising under each of the four basic categories of event will differ from one another on two related grounds. Firstly, the circumstances which lead to the conclusion that the enrichment cannot be retained, and hence the reason(s) why it must be given up, (in the terms of the *Introduction*, what it is that makes the enrichment "unjust") will differ as we move from one category to another. Secondly, the categories will also differ from one another in respect of the way in which the claimant can mark himself out as having an entitlement to the gain in the defendant's hands; in other words the sense in which it can be said that the enrichment was made at the claimant's expense. It may therefore be thought that an insight into what distinguishes unjust enrichment from the other categories of events may be offered by the division drawn by Birks in the *Introduction* between unjust enrichment by wrongdoing and unjust enrichment by subtraction,⁹ as this impacts on both these issues. However, this fails to bring us any closer to an answer. For, while unjust enrichment by wrongdoing clearly maps onto the class of restitutionary rights arising from wrongs, it is not true to say that unjust enrichment by subtraction covers the same ground as that occupied by the narrow conception of unjust enrichment in Birks' modified framework. As Birks pointed out, restitutionary rights arising under any of the four categories of event can concern subtractive enrichments. In particular, restitutionary rights falling within the category of miscellaneous other events may involve enrichment by subtraction from the claimant.¹⁰ Moreover, Birks at one point suggested that the new definition of unjust enrichment may extend beyond subtractive unjust enrichments and hence is capable of encompassing instances of restitutionary liability which do not effect a return of the enrichment whence it came.¹¹ So, we cannot even say with certainty that rights to restitution falling within the category unjust enrichment share a common denominator in relation to the source of the enrichment.¹²

⁹ See Birks, *Introduction*, *supra* n. 1, pp. 23-25 and 40-44.

¹⁰ The clearest example of this is the right to the specific transfer of an asset following a successful *vindicatio*, on which see *infra*, text to nn. 14-15.

¹¹ Birks, "A Millennial Resolution", *supra* n. 6, p. 324.

¹² Birks, however, latterly maintained that the "at the expense of" element of unjust enrichment claims translates as "from", so that the enrichment is always, in some sense, subtractive, although "from" and "subtraction" are capable of being interpreted more or less broadly: see P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 74-98. This would mean that, while we would be no closer to being able to classify restitutionary claims arising from enrichments which *could* be said to be subtractive, we would know that, where the enrichment can in no sense be viewed as deriving from the claimant (for example, the receipt of income on which tax must be paid to the Inland Revenue), it must fall outside unjust enrichment. Birks comes to this conclusion by reasoning that, once enrichment by doing wrong to the claimant is excluded, the only remaining possible meaning of "at the expense of" is the subtractive sense: *ibid.* p. 74. This is not correct. The "at the expense of" element of the claim is designed to establish a sufficient

Birks provided a number of examples of restitutionary liability which he saw as falling within the class of miscellaneous other events.¹³ For the most part, however, Birks either simply asserted, without explanation, that the event in question is not an unjust enrichment or admitted the difficulty of determining whether a given right arises from an unjust enrichment or some other event, but without offering guidance as to how this determination could be made. This provides little assistance in locating the divide between such other restitution-yielding events and unjust enrichment for the very reason that it is possible to define *any* event which gives rise to a right to restitution as an unjust enrichment. Indeed, as we have seen, Birks himself took this approach in the *Introduction*. And, although we know that Birks went on to reject this conception of unjust enrichment, we still need some criterion by which we can separate those restitutionary rights which can properly be said to arise from unjust enrichment from those that do not. Without this, the bare assertion that a particular restitution-yielding event is not an unjust enrichment rather prompts the response, “Really? How do you know?”

The closest Professor Birks came to providing such a criterion comes in his analysis of the right to demand the specific transfer of an asset following a successful *vindicatio*.¹⁴ Having argued that such a right is restitutionary, he then discusses the event from which this right arose. Consent and wrongs are quickly discounted, leaving a choice between unjust enrichment and miscellaneous others. Of these, Birks preferred placing the right in the category other events, defining the causative event as receipt of an asset belonging (in equity) to another. This is on the basis that, were we to view the event as an unjust enrichment, it would entail that such a right, and hence the *vindicatio* which it underpins, would be subject to the defence of change of position. This was seen by Birks as entailing an undesirable weakening of property rights and to be avoided. From this, therefore, it could be suggested that the hallmark of restitutionary rights arising from unjust enrichment is that they are subject to the change of position defence. This would then provide a basis for distinguishing unjust enrichment from the miscellany of other events from which rights to restitution arise. But this is effectively to abandon, at this point, the taxonomic scheme whereby rights are classified by virtue of the events from which they arise. Rather than looking to the event itself, that is, the factual circumstances of the case, as providing the basis for distinguishing unjust enrichment from events in the miscellaneous class, we are looking to (one aspect of) the law’s

connection between the claimant and the gain received by the defendant (*ibid.* pp. 73-74). This connection is necessarily made out whenever a restitutionary claim exists. Hence, as restitutionary claims extend to some enrichments which are neither subtractive nor acquired through wrongdoing, the “at the expense of” requirement must also be capable of bearing meanings other than “by subtraction from” and “by doing wrong to”. If we are to limit it to the subtractive sense we need further justification.

¹³ See Birks, “A Millennial Resolution”, *supra* n. 6, pp. 326 and 328; Birks, “Unjust Enrichment and Wrongful Enrichment”, *supra* n. 5, pp. 1775-1776.

¹⁴ Birks, “Misnomer”, *supra* n. 5 at 21-26; P. Birks, “Property and Unjust Enrichment: Categorical Truths” [1997] *N.Z. Law Review* 623, at pp. 656-658.

response to make this distinction. So, as regards restitutionary rights, in place of the fourfold categorisation of consent, wrongs, unjust enrichment and others, we would in substance be left with consent, wrongs, other events creating rights to restitution which are subject to the change of position defence, and other events creating rights to restitution which are not subject to the change of position defence. There is no indication that Birks intended this. Indeed, it is the replacement of a response-based category, restitution, which has drove Birks' later work. But, if this too provides no basis for locating the divide between unjust enrichment and the miscellany of other events which can lead to restitution, we are still left none the wiser as to what unjust enrichment is.¹⁵

2.3 Restitution for wrongs and unjust enrichment by wrongdoing

Thus far, the focus has been the problems in drawing the boundary between unjust enrichment and the category of miscellaneous other events. However, difficulties in Professor Birks' taxonomic scheme also emerge in relation to the divide between unjust enrichment and wrongs. This involves returning to the area of law known as restitution for wrongs.

Birks' position has been summarised already.¹⁶ This must now be elaborated. Whereas Professor Birks originally saw these as instances of unjust enrichment, with the claimant satisfying the "at the expense of" requirement by demonstrating that the defendant acquired the gain by breaching a duty owed to the claimant, he latterly argued that in such cases the causative event is the wrong itself. For Birks the conclusive factor was that in such cases the claimant can only make out an entitlement to the defendant's gain by characterising the circumstances in which the gain was made as involving a breach of duty, or, in other words, the commission of a wrong. And if the

¹⁵ There are other problems with this analysis of the right to demand an asset's transfer following a *vindicatio*. As we have seen, Birks maintained that the causal event in such cases cannot be unjust enrichment as this would entail the availability of the change of position defence. This assumes that the all restitutionary rights arising from unjust enrichment are subject to the defence *and* that this is not true of restitutionary rights which fall within the miscellaneous others category. This is not verified by authority, as the courts have yet to accept the multi-causalist thesis that says unjust enrichment and restitution cover different ground, and Birks does not provide any arguments of principle or policy in support. Indeed, Birks had previously suggested that there may, albeit exceptionally, be rights arising from unjust enrichment which are not subject to the change of position defence: see P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 *University of Western Australia Law Review* 1, at p. 60. Latterly Birks offered a new argument in support of the view that the right to demand an asset's transfer pursuant to a *vindicatio* does not arise from unjust enrichment, see Birks, *Unjust Enrichment*, *supra* n. 12, pp. 27 and 64-65. Birks argued that, by relying on his subsisting title to the asset, the claimant cannot be alleging that the defendant has been enriched by receipt of the asset, and hence his claim cannot be viewed as one arising from unjust enrichment. This does not help to draw the line between unjust enrichment and miscellaneous other restitution-yielding events as denying enrichment must also involve denying that liability is restitutionary. Restitution is gain-based recovery. One cannot have gain-based recovery without the existence of any gain.

¹⁶ *Supra*, text to nn. 5-6.

claimant is relying on the facts as constituting a breach of duty in order to make his claim to the gain, it must be that the event from which the right arises is the wrong.

However, this conclusion does not follow from the premiss. The fact that the claimant relies on the facts as involving the commission of a wrong does not entail that the causative event from which the ensuing right to recover the defendant's gain arises must be viewed as the wrong. Birks' argument, as stated, relies on an assumption that, while a given set of facts may be capable of alternative analysis, that is, the facts can be conceived differently so as to reveal alternative claims arising from different causative events, any single conception of these events can reveal just one causative event. That is to say, where the claimant relies on the events as constituting a wrong, as in the restitution for wrongs cases, the causative event can only be the wrong, necessarily precluding the identification of some other causative event, such as an unjust enrichment. But this assumption is unfounded. Consider claims for breach of contract. These fall within the category of wrongs in Birks' taxonomy as they clearly arise from the commission of a breach of duty. And yet a breach of contract necessarily entails that a contract has been entered into by the parties, and contract formation is an example of an event falling within the consent category. Therefore, where a claimant seeks to bring a breach of contract claim he must not only assert that the facts reveal a wrong by the defendant but also that they reveal a manifestation of consent. Indeed it is only this prior manifestation of consent, entry into the contract, which allows us to characterise the facts as involving a wrong. The fact that the claimant in a breach of contract claim relies on the facts as revealing an example of the causative event of consent does not entail that his claim must be allotted to the consent category. Accordingly, it does not follow from the fact that restitution for wrongs cases involve the claimant asserting the commission of a wrong that his claim must arise from that wrong and not an unjust enrichment.

Indeed, restitution for wrongs is susceptible to a similar analysis to breach of contract. We could say that when a defendant makes a gain by committing a breach of duty, this gain can be viewed as an unjust enrichment while at the same time acknowledging that the claimant is relying on the facts as revealing a wrong. Moreover, just as it is the manifestation of consent which makes the defendant's conduct wrongful in the breach of contract example, so here it is the defendant's breach of duty which makes his receipt of the benefit "unjust", and hence an unjust enrichment. Such an analysis is possible because the facts necessary to establish the right to restitution extend beyond the mere commission of the wrong. In addition to proving the wrong, the claimant must also show that the defendant received a benefit through his breach of duty. This allows us to say

that the claimant is relying on the facts in their characterisation as a wrong and yet still maintain that the causative event is an unjust enrichment.¹⁷

I do not intend to take this competing analysis of the place of restitution for wrongs in the event-based taxonomic scheme any further. As I shall argue later, there are indeed good reasons for treating such cases differently from other instances of restitutionary liability. What I am questioning is whether an event-based taxonomy gets us there. Through this discussion of restitution for wrongs, I hope to show that, even where there is agreement as to the facts which must be proved to make out the claim, and as to how those facts are to be characterised, there may still be no clear answer to the question of how we should class the right. We *could* say, like Birks, that restitution for wrongs cases are instances of rights arising from, and to be placed in the category of, wrongs. But we could just as well say that these are instances of unjust enrichment, without leaving us with intersecting or overlapping categories. Where we draw the lines between the categories of events, and which of the multitude of facts or events, which must all be established to make out the claim, should be regarded as *the* causative event are matters of choice. Such choices have to be made before we can know into which category each right falls, and moreover these choices must be justified if the chosen classification is not to appear arbitrary. It is clear that in relation to restitution for wrongs, and elsewhere, that Birks made such choices. He clearly took the view that restitution for wrongs cases belong under the wrongs heading and that unjust enrichment is to be defined so as to exclude such cases. What is missing is any justification of why *this* version of an event-based taxonomy is preferable to any other which similarly avoids overlapping or intersecting categories and is not otherwise 'bent'.¹⁸

That Birks' taxonomy is dependant upon a series of choices, of value judgments, is obscured by his presentation of the scheme as being essentially neutral. Nowhere did Professor Birks suggest that the placement of given rights in the scheme, or indeed the catalogue of categories

¹⁷ Just as, in breach of contract claims, the claimant must establish both that he entered into a contract with the defendant and that the defendant breached his duty, thereby permitting us to say both that the breach of contract was a wrong *and* that the formation of the contract was an event falling within the consent class. The opposing analysis presented in the text would suggest additional changes to Birks' taxonomic scheme, beyond a realignment of the wrongs and unjust enrichment categories. In particular, seeing the gain made by the defendant as an event "beyond" the wrong, and which therefore takes the claim out of wrongs and into unjust enrichment, would also support the view that, in relation to claims for compensatory damages, the loss suffered by a claimant from a wrong should be seen as a separate and additional causative event beyond the wrong. This would involve the recognition of a new category of "compensable loss" or the like. This would leave wrongs to cover those cases where the wrong is actionable without an allegation of loss (or for that matter gain to the defendant) and no such allegation is made.

¹⁸ Though see Birks, "Unjust Enrichment and Wrongful Enrichment", *supra* n. 5, pp. 1783-1793, where Birks offers five "down-to-earth reasons" for separating wrongful enrichment (restitution for wrongs) from unjust enrichment. However, for the most part, these seem to be consequences which would follow from such a separation being made, without providing independent justifications for making the division in the first place. Conversely, see A. Burrows, "Quadrating Restitution and Unjust Enrichment: A Matter of Principle?" [2000] *R.L.R.* 257, especially at pp. 261-268, for a list of practical advantages gained by grouping together all restitutionary rights.

which form the basis of the taxonomy, are matters of choice. He acknowledged that choices can be made as to the basis of the taxonomy, hence one could choose to class rights by the goals they seek to achieve rather than the events from which they arise, but, once this is done, there was a tendency to present all further questions as answered by the initial choice of taxonomic basis. This was reinforced by Birks' frequent analogies to classification in the natural sciences. We are encouraged to believe that task of allotting legal rights to different categories of event is equivalent to that facing a scientist who is to classify animals by virtue of what they eat. But, while the latter appears to involve little more than careful observation of the natural world, the task of the legal categorist extends beyond mere observation of the legal world, that is, what is said and done by the courts and the legislature. This is because, once the combination of facts which must be ascertained to establish the existence of each individual legal right is identified,¹⁹ choices remain as to which of these multifarious combinations of facts should be regarded as analytically similar and hence suitable for collective categorisation, in other words we must decide which cases are to be grouped together. These are the choices which will determine the nature and scope of the categories which make up the classificatory scheme. However, once it is admitted that, to complete the taxonomic project, we must move beyond simple identification of the series of facts which lie behind individual legal rights and instead go on to ask which factual combinations should be grouped together, and so treated alike, and which should not, it becomes clear that the true basis of the resulting taxonomy is not the events from which rights may be said to arise but the criteria we use to answer the prior question as to the make up of the particular categories. These points will be expanded below.

2.4 The goal of legal taxonomy

To evaluate Birks' taxonomy we must first ask what the goal of legal taxonomy is. We cannot measure the success of a taxonomic scheme before we know what it is that it seeks to achieve. Professor Birks himself frequently made the case for the importance of taxonomy in the law, arguing that it promoted goods as diverse as allowing people to plan their affairs with confidence, impeding certain forms of oppression and the separation of powers.²⁰ However, I

¹⁹ By no means a simple task in itself. In relation to the law of restitution, there is considerable disagreement as to whether certain cases are instances of restitutionary liability at all, that is to say, whether the identification of a gain received by the defendant is necessary to make out the claim. Examples include the anticipated or incomplete contract cases, such as *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932, and the loss of opportunity to bargain or "use claim" cases, exemplified by *Wrotham Park Estate Co. v. Parkside Homes Ltd.* [1974] 1 W.L.R. 798.

²⁰ See P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1, especially at pp. 1-4 and 97-99, and P. Birks, "Definition and Division: A Meditation

suggest that the overriding goal of a taxonomy of legal rights is the promotion of justice. Justice can only be done if like cases are treated alike, and legal classification seeks to tell us when cases are materially alike and so call for like treatment. Justice demands that the law be rational, coherent and consistent. Taxonomy helps us to achieve this.²¹

Therefore, the key question to which one attempting to draw up a taxonomy of legal rights must offer an answer is how do we determine when rights are materially alike. Like cases must be treated alike, yet rights may be similar or differ in any number of ways. We need to know which similarities and differences matter. Only then can we say which cases should be treated alike and hence should be grouped together in the classificatory scheme.

Indications as to how this question should be answered can of course be obtained by looking at what the courts do and what they say they are doing, what cases they do treat alike, what cases they say are alike. Indeed, one could hardly produce any taxonomy of the law without paying the utmost attention to all the legal material. But it is clear too that the enquiry must extend beyond this. If the history of the law of restitution has told us anything, it has told us that we must be prepared on occasion to look beyond the wording of a judgment to understand what a case is about. Without this we would still be talking in terms of quasi-contract, waiver of tort and the like. Furthermore, one object of legal classification is to show where the law has fallen into incoherence and contradiction. This cannot be done if our classificatory scheme blindly accepts every judicial utterance. So, the legal categorist must ultimately answer the key question himself. Professor Birks, by choosing to classify legal rights by causative event, by the event from which the right arises, gave his answer. Cases are materially alike when the rights involved arise from materially similar events.²²

We are now in a position to assess Birks' taxonomy. This assessment will be in two stages. Firstly, we must examine the construction of the taxonomic scheme. Once the decision is taken to

on *Institutes* 3.13", ch. 1 of P. Birks (ed), *The Classification of Obligations* (Oxford University Press, 1997). Useful discussion of the goals of legal taxonomy can also be found in E. McKendrick, "Taxonomy: Does it Matter?", ch. 22 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002), especially at pp. 632-638, and S. Smith, "Taking Law Seriously" (2000) 50 *University of Toronto L.J.* 241.

²¹ That Professor Birks sees this as the principal purpose of legal taxonomy seems clear: see the references *supra* n. 20. It is arguable that the other goals of legal taxonomy referred to in the text only require that the law is clear and consistently applied, and not that the content of the law is free of inconsistency and arbitrariness, though it may very well be that clarity and consistency in the application of the law is facilitated by rationality and consistency in the law itself.

²² Though it must be noted that Birks never asked the question in those terms. Instead, he tended to discuss the issue of the basis of legal classification in the context of a competition between event-based and response-based categories. His reasons for preferring classification by causative event have varied. At one point Birks suggested that response-based classification was "less enlightening" as legal responses always have to be related back to the events from which they arise: see P. Birks, "Definition and Division", *supra* n. 20, pp. 27-32. Latterly, Birks' preference for an event-based taxonomy seemed to be grounded more in convention, the established categories of contract and tort being, in Birks' view, event-based: see Birks, "A Millennial Resolution", *supra* n. 6, pp. 320-322, and Birks, *Unjust Enrichment*, *supra* n. 12, pp. 20-28.

classify rights by causative event, how do we then go about filling in the gaps, arranging the legal material on the chosen basis? This involves asking how we identify the causative event of individual rights and, having answered this, how we then form the generic categories of causative event to complete the structure of the scheme. Secondly, with the taxonomic scheme in place, we must ask whether it achieves its purpose; does it treat like cases alike?

2.5 Determining the causative event

For a given legal claim or right to come into existence, a series of individual facts (or events) will have to occur. Each of these individual facts is necessary for the establishment of the right.²³ A taxonomy which classes right by causative event therefore presupposes that, from this series of necessary yet distinct facts, we can identify one which can be regarded as *the* causative event.²⁴ The other facts would accordingly be considered to be in some sense ancillary, or as merely forming part of the background, to the “true” causative event. The key question though is how this is to be done.

Take the right of a contracting party to compensatory damages from a defendant for losses caused by the latter’s breach of contract. This right may plausibly be said to depend on the following facts and circumstances having occurred or being present: each contracting party having achieved majority (hence acquiring the capacity to enter into the contract); contract formation, which itself can be broken down into offer, acceptance and the provision of consideration; satisfaction of any formality requirements; breach of contract; and loss to the claimant resulting from the breach.²⁵ Which of these is the causative event? The immediate problem is that they can *all* be said to be causative events, in that each one must be present if the claimant is to succeed in making out his claim. If any one is absent, then the claimant will have no such right, and, as such, each event is *a* cause of the right’s existence. Moreover, as each is a necessary, yet none a sufficient, condition for the existence of the right, it cannot be said that any one of these events is

²³ See too W. N. Hohfeld, *Fundamental Legal Conceptions* (W. W. Cook (ed.), Yale University Press, 1923), pp. 32-33.

²⁴ It may be that “event” is broader than “fact” in that an event may consist in more than one fact. This will depend in part on what can be said to constitute a single fact. If events are interpreted as being thus broader, then the causative event may be identified in the occurrence of more than one fact. The substance of the argument presented in the text does not turn on the answer to such questions.

²⁵ Indeed, this list of events may presuppose too much as it describes such events in legal terms. Contract formation, for example, is not an event in the world as much as the law’s reaction to or interpretation of an event (or series of events), the event being, in the case of a bilateral contract, an exchange of promises. It may well be that, if an event-based taxonomy is to fulfil its purpose of treating like cases alike, we should describe events in non-legal terms, so as not to beg the question of whether the law is correct so to analyse them, see *supra*, text to nn. 21-22.

more *causally* important than the others. So looking to causation alone will not tell us which event is *the* causative event for the purposes of the event-based taxonomy.

An alternative approach would be to say that the causative event is the final event in the series of necessary factual occurrences. This could be supported on the basis that the right can be said to come into existence only when this final piece of the jigsaw is in place, and hence that this is event which most immediately triggers the right. However, it is clear that this is not the criterion applied by Birks when identifying causative events. For example, Birks regards the making of a will as a causative event falling within the manifestations of consent category. Yet the intended legatee does not acquire a right to the bequeathed asset upon the execution of valid will. More needs to happen. The series of necessary events is still incomplete. The will itself will not take effect until the death of the testator, and even then property will not vest in the legatee until distributed by the executor. Taking the approach that it is the last in the series which constitutes the causative event, this would mean that it is the delivery of the asset to the legatee, rather than the making of the will, which is the causative event here. On this basis, the execution of a will cannot be viewed as a causative event. Similarly, this approach would entail that the causative event would often be the fulfilment of a formality or registration requirement.²⁶ Such results appear counter-intuitive and the utility of a taxonomy which leads to such consequences is highly questionable.²⁷ It would also look very different to the version of an event-based taxonomy proposed by Birks. Furthermore, the last in the series of events only has the effect of triggering the right because the other necessary factual elements are already in place. There is, accordingly, no reason for viewing the last event in the series as any more significant for the existence of the right than those occurring earlier in the chain. We simply cannot avoid the fact that each event in the series is necessary, and hence equally *causally* significant. If we are to pick out one from the series as constituting *the* causative event, we must resort to some external set of criteria; external, that is, to the task of ascertaining the necessary factual elements for a given right's existence, to provide us with a basis for making this identification. What the identification and application of such criteria means for a taxonomic scheme which seeks to classify by causative event will be discussed following the next section.

²⁶ At least where the formality requirement is fulfilled after all other elements of the relevant transaction have been completed, for example, where a transaction must be evidenced in writing and that written evidence can be provided at a later date, such as in relation to declarations of trust in respect of land in s. 53(1)(b) of the Law of Property Act 1925, or where a transfer of title is perfected only upon registration.

²⁷ The reasons for this will be examined below, *infra* text to n. 35.

2.6 Forming the categories

As we have seen, the construction of an events-based taxonomy, such as that proposed by Birks, requires more than the identification of the causative event from which each legal right arises. It also entails that, from the multiplicity of right-generating events, we can form groupings of such events on the basis that they are of the same kind, that they are all particularised examples of the same generic event. Only once this is done will the taxonomic scheme take shape. These groups give us the categories which provide the basic structure of the scheme. Thus Birks views all right-generating events as reducible to four basic categories, three nominate - consent, wrongs and unjust enrichment – and a residual miscellany. How then is this list of generic event descriptions, which is to form the basis for the taxonomy, decided upon?

The problem is that events in the world do not come neatly packaged into pre-established categories. We have to do this ourselves. But how do we know whether a mistaken payment is an event materially similar to the transfer of an asset made under compulsion or the payment of a tax not lawfully demanded? We can of course draw up a generic description of an event so as to cover them all, but the question is not whether we *could* do this but whether we *should*. To say that they are like events simply because the law treats them the same way, as each gives rise to restitutionary liability, is to replace our event-based taxonomy with one arranged by response, and begs the question whether this is the correct treatment of such cases in the first place. Is the voluntary but innocent receipt of another's goods, transferred without that person's authority, materially similar to a deliberate punch on the nose? It may well be that English law sees both cases as involving the commission of a breach of duty, but, again, to treat this as determinative looks like reverting to classification by (one aspect of) the law's response to the event. Is it right to treat them both as wrongs?²⁸

As with the decision as to the identification of a right's causative event, we can do this only by applying some external set of criteria which tell us which events should be treated as *materially* similar and hence suitable for grouping together. Does it matter that the benefit received by the defendant took the form of a service rather than a payment? We can look at the facts as long and hard as we like but this will not tell us whether this is a difference that matters.²⁹ Once again, the events-based taxonomy comes up short. It requires supplementation before it can tell us what we want to know. It is clear that Birks had an answer to the question what causative events are materially alike, since he gave us his four generic categories. But, as with the identification of

²⁸ On the nature of innocent conversion see *Kuwait Airways Corporation v. Iraqi Airways Co. (nos. 4 and 5)* [2002] 2 W.L.R. 1153, at pp. 1174-1176, *per* Lord Nicholls.

²⁹ This is demonstrated by the fact that other restitution scholars, who appear to share Birks' commitment to classification by causative event, have come up with different categories of causative event: see R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), pp. 43-50.

causative events, what is missing is any explanation or justification of this answer. There is no discussion of why Birks' view of materiality should be preferred to alternative conceptions. Indeed there is no explicit indication that there is a question to be answered here. The notion of materiality is treated as self-evident. We are left to second-guess what criteria Birks was applying to determine materiality from the answers he arrives at. Even then we would be left to look elsewhere for arguments in support of his position.

2.7 The deficiencies of an event-based taxonomy

The preceding two sections have shown how a taxonomy which aims to class legal rights by causative event requires answers to two fundamental and necessarily prior questions. Firstly, how do we identify the events which are properly regarded as causative of individual legal rights? Secondly, how do we determine which of these should be grouped together on the basis that they are simply particularised instances of a single, more general, causative event, so forming the categories within the classification? Without answers to these questions we cannot begin to construct the taxonomic scheme, and yet in Birks' analysis such questions are largely unanswered and their fundamentality unacknowledged. Our answers will determine the shape of the classificatory scheme. However, as we have seen, these questions can be, and have been, answered in different ways, and such differences will necessarily lead to differences in the arrangement of the resulting scheme. How then are we to proceed?

The key must be to return to the purpose of classification. If our concern is with treating like cases alike we need to answer these questions in such a way that like cases will be grouped together and unlike cases kept apart. All then turns on how we determine when cases are alike. This question will be examined in due course, but before then it should be noted that, however we answer it, we are now rejecting the premises of the event-based taxonomy. This purports to classify rights by causative event; that is to say, it is the notion of causative events which tells us how cases are properly categorised and so when they are materially alike or unlike. However, we have now seen that the structure of the scheme and the place of individual rights within it is dictated by the two fundamental preliminary questions of how to identify and classify such events, or, more precisely, the shape of the scheme is determined by the criteria, the considerations, we apply in coming to these answers. We are no longer looking to causative events to tell us when cases are materially alike. Rather we are asking if cases are materially alike in order to determine what the causative event is and what such events can be grouped together as individual instances of some broader generic causative event.

As causative events can be identified and categorised differently, we need some grounds, some set of criteria, to determine which method of identification and categorisation is preferable. Yet, once we do this it is these criteria which form the basis of our classificatory scheme. We may still choose to use the notion of causative events to mediate our presentation of what cases are materially alike, but this can only obscure the fact that it is not causative events that determine the structure of the scheme but a prior decision, founded on unspoken factors, as to which cases should be treated alike. So it may be that cases are materially alike when the rights concerned arise from events which are materially alike, but this is not because it *follows* from the similarity in causative event that the cases call for like treatment. Rather it follows from the prior conclusion that the cases should be treated alike that the relevant causative events are to be viewed as materially alike.

The conclusion then is that, if we want our taxonomic scheme to treat like cases alike, we must abandon the project of classifying legal rights by causative event. We simply cannot answer the questions that need to be answered in order to build an event-based taxonomy without first deciding which cases we want to treat as alike. And, once we have these answers, an event-based taxonomy serves no purpose. It serves only to obscure why it is that we view these cases as deserving like treatment. We would be better served bringing out into the open the criteria we apply in making these decisions in the first place and using these as the basis of our taxonomy. What these criteria may be and how a taxonomy based around them may look will be examined below.

Before then it is worthwhile to examine more closely the premiss of Birks' taxonomic scheme, that rights arise from, are caused by, events in the world. Here too I think the event-based taxonomy can be seen to be flawed, and, again, analysis of these shortcomings will show us the way to an improved method of classification and a better understanding of legal rights.

2.8 The relationship between rights and events

The preceding sections alone tell us that the project of classifying legal rights by causative event is destined for failure and so should be abandoned. It may also be, however, that the event-based taxonomy is premised on a misconception as to the nature of the relationship between legal rights and events.

Legal rules, norms, state the consequences in law of factual occurrences, or events. When things happen, when events occur, legal rules tell us what significance, if any, they have in law. Thus perhaps the key legal question, at least for judges, academics and students, is what legal consequences do and should flow from - and hence how the legal positions of the parties involved are and should be changed by - the occurrence of such factual events. It is this reality which may be

regarded as providing the foundation to the events-based taxonomic scheme constructed by Birks. He sought to classify legal rights, that is, rights arising from the application of legal rules, by reference to the factual situations which give rise to them. As such, it is clear that by “event”, Birks did indeed mean factual occurrence or event “in the world”. Grantham and Rickett have, however, argued that, while the notion of causative events provides the correct basis for the classification of private law, “events” should be understood not as factual occurrences but as legal constructs.³⁰

This, rather odd, claim is not always clearly spelt out. At times, Grantham and Rickett’s criticism of Birks’ use of “event” appears simply to be that Birks misdescribed the relevant factual occurrence(s) lying behind the recognition of particular legal rights. For example, they challenge Birks’ view that contractual rights arise from the event of agreement on the basis that contract law clearly tells us that agreement alone is not enough for contractual rights to arise; in addition there must, at the very least, be consideration and an intention to create legal relations.³¹ This is, of course, true, but it says nothing which requires a rejection of Birks’ understanding of events as factual occurrences.³² At other points, however, it is apparent that Grantham and Rickett see their argument as going further than this. They state that “[p]hysical events in and of themselves have no meaning”³³ and that “legal rights and duties do not arise from raw and unreconstructed happenings in the physical world, but from an interpretation of these physical happenings within the intellectual framework of the law.”³⁴ Now, of course, it is true that without legal rules, without law, the mere occurrence of a given combination of facts necessarily has no legal meaning or significance. But, once legal rules are in place, this no longer holds. Legal rules mean that the occurrence of certain physical events *does* change the legal relations of the parties involved, *does* alter the legal status quo. By virtue of legal rules, factual occurrences have normative, legal consequences. Grantham and Rickett maintain that, for factual events to give rise to legal rights, they must first be interpreted within the law’s intellectual framework. So, they state:³⁵

The notion of contract is thus both a factual and a legal one, dependant upon an interpretation of the physical occurrence of statements as amounting to an agreement as that latter concept is understood by the law, a task which is performed by interpretative constructs such as that of offer and acceptance, the doctrine

³⁰ R. Grantham and C. Rickett, “Property Rights as a Legally Significant Event” [2003] *C.L.J.* 717.

³¹ *Ibid.*, pp. 723-724.

³² Moreover, Birks was no doubt fully aware that the bare fact of an agreement was insufficient for contract formation. That Birks did single out agreement as “the” causative event does, however, raise the question of the basis upon which these other elements of contract formation can be excluded from the definition of the causative event (or, alternatively, the basis on which certain aspects of contract formation, such as consideration, can be said simply to be elements of the event of agreement). This is an example of the problems inherent in Birks’ scheme discussed *supra*, text to nn. 23-26.

³³ Grantham and Rickett, *supra*, n. 29, at p. 722.

³⁴ *Ibid.*, p. 723.

³⁵ *Ibid.*, p. 724.

of consideration, the rules on contractual capacity and the notion of an intention, objectively determined, to create legal relations.

But this process of interpretation does not involve anything more than an examination of the facts in the context of the legal rules in order to determine what legal result is required by the application of those rules to the facts. It may be true to say that we conventionally approach the question whether a contract has been formed (and hence whether contractual rights have arisen) by asking a series of further questions, employing an array of additional legal concepts: was there an offer? Was that offer accepted? Was there consideration? But this does nothing more than to break up the larger question of contract formation into smaller, more manageable pieces. So, to answer the question whether there is an offer, we need to know what the law says amounts to an offer, that is, what facts constitute an offer, and whether such facts are present in the case at hand. At the end of the process, the application of the legal rules to the facts either leads to the finding of a contract or it does not. The fact that such conclusions are mediated through the language of offer, acceptance and consideration changes nothing. None of this challenges the truth underlying Birks' scheme, that, where there is law, factual occurrences have legal consequences. Of course, one can argue that it would be better to classify the law by some means other than events, but if one is to adopt an events-based taxonomic scheme, there seems to be no other option than to understand events as factual occurrences. To reject classification by the factual event which provides the basis for the legal right is to reject an event-based taxonomy.³⁶

So, when examining the events-based taxonomy, it is clear that "events" must be understood as factual occurrences. How then should we understand the relationship between events and legal rights? Certainly, as we have seen, events have legal consequences. The occurrence of a particular fact may give an individual a legal claim or subject him to a liability where none existed previously. Nonetheless, I believe that it is misleading to view such rights as arising from, or created by, such events, and that an analysis which seeks to do so is in danger of being drawn into making baseless distinctions. The point can best be made by an example.

Where two debtors are jointly and severally liable in respect of the same debt, the creditor can have recourse to either debtor to recover the full amount owed. However, as between the two debtors, the law may take the view that the burden of paying the due sum should not be borne

³⁶ Grantham and Rickett's proposed scheme fails as it seems to leave no room to question the conventional conceptual framework of the law. If we classify by *legal* event, that is, by reference to how the law understands, conceptualises the things that happen in the world, our taxonomy will necessarily follow the conceptual distinctions which the law draws. We are then unable to challenge the validity of such distinctions. As we have seen, *supra*, text to nn. 20-22, the principal goal of legal taxonomy is to help us to ensure that the law treats like cases alike. It cannot do this if we are compelled to view cases as alike wherever the law treats them as alike (see further, chapter 3, text to n. 4). A similar criticism can be made of Birks' scheme in relation to the class of "wrongs", which is defined simply by reference to, and hence blindly follows, the law's current classification of such cases as involving a breach of duty.

entirely by the party called upon to pay by the creditor. In such cases the debtor who makes the payment to the creditor is entitled to reimbursement or contribution from the other debtor. Many view this right as arising from an unjust enrichment, as the second debtor, the defendant, is enriched by the payment made by the first debtor, the claimant. This is enriching because the payment in satisfaction of the creditor's claim precludes him from claiming that sum from the defendant.³⁷ To the extent that the law takes the view that the burden of paying off the creditor should not be borne by the claimant, that enrichment can then be said to be "unjust" and should be given up to the claimant. This right, therefore, fits neatly into Birks' classification by causative event. When the claimant pays the creditor, this is an example of the event of unjust enrichment and the claimant's right arises from that unjust enrichment.

However, a claimant who *would be* entitled to reimbursement or contribution from the defendant in the event of being called upon to pay by the creditor may be able to bring a claim *before* paying. He can seek a *quia timet* order that the defendant pay his own share. This is problematic for a taxonomy based on causative events as, in this case, it seems impossible to argue that the right arises from an unjust enrichment. Until the claimant pays, there is no event which can be viewed as an unjust enrichment. The most we can say is that the right to such an order exists so as to ensure that the defendant *does not become* unjustly enriched. It is designed to see that he does not receive the benefit which he would receive if the claimant paid the creditor in full.³⁸ This being so, a taxonomy founded on the notion of causative events is compelled to see this right as falling within a category other than unjust enrichment. A right cannot arise in response to, be created by, the event of unjust enrichment if its effect is to preclude receipt of the benefit which would be unjustly enriching if received.³⁹ And yet, it is clear that the law is doing the same thing here and for the same reasons as where the claim follows payment. The only difference is one of timing.

The obvious problem here is that classification by causative event requires the separation of claims which are materially alike. The former claim would fall within unjust enrichment, whereas the latter would have to be categorised differently, presumably within the class of miscellaneous others. However, I think the objection can alternatively be expressed in terms which suggest that Birks' scheme misunderstands how rights and events connect. One can say that these two claims reflect not two distinct rights but one. Both the claim to reimbursement following payment to the

³⁷ Although it will not strictly be true to say in all cases that the debt is thereby discharged, as the debt may in law be held to subsist so that the claimant may be subrogated to the creditor's position in order to obtain reimbursement or contribution.

³⁸ See C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford University Press, 2003), at pp. 49-51.

³⁹ One cannot argue that the right to the *quia timet* order response to unjust enrichment without thereby collapsing the fundamental distinction Birks consistently drew between rights which *reverse* unjust enrichment and those which *prevent* unjust enrichment: see Birks, *Introduction, supra* n. 1, pp. 25-26; Birks, *Unjust Enrichment, supra* n. 12, pp. 36.

creditor and the right to a *quia timet* order to see that the defendant pay his fair share to the creditor stem from the same basic right. How we should express that right is a separate question, but, using Birks' preferred terminology, we could describe it as the right that, should the claimant pay off the creditor entirely, the defendant would be unjustly enriched. So, while both claims can be said to *relate to* or to be concerned with the same event, it is clear that an analysis which insists on treating rights as *created by* events is compelled to deny the common basis of the two claims.

This analysis is applicable to all legal claims. The fact that the claimant has the right to bring a claim on the occurrence of certain facts will mean that, prior to such facts occurring, he has a right that, *should those facts occur*, he has a claim.⁴⁰ So, a contracting party has a right to compensatory damages to recover losses caused by a breach of contract. But this necessarily entails that he has a right, existing before the event of breach, that, *should the defendant commit a breach of contract*, he is entitled to compensatory damages. Such statements hold true because this is the way rights work; this is what it means to have a right. The claimant's entitlement to compensatory damages does not lie at the discretion of the court. This is why we say he is entitled to this "as of right".⁴¹ The claimant is entitled to the award simply by establishing the incidence of the necessary facts. From this it follows that he has a right to the award should those facts occur. Again it can be said that both versions of the right relate to the same event, breach of contract, but it cannot be said that both rights *arise* from the event of breach as the second, more abstract version of the right is premised on the breach not having occurred. Birks' taxonomy manages largely to rid itself of the inconsistencies created by the notion of causative events by limiting itself to classing only those legal rights which are realisable in court.⁴² This means that the more abstract versions of the legal rights which underlie legal claims are more often than not excluded, because courts tend only to realise such rights in their specific form, once the relevant event has occurred. For instance, the courts are not asked to realise the more abstract right that, should a contract be breached, the claimant is entitled to compensatory damages. They only have to realise the specific conception of this right, when the claimant seeks damages following the event of breach. However, the example

⁴⁰ Broadly the same point is made in D. Friedmann, "The Protection of Entitlements via the Law of Restitution – Expectancies and Privacy" (2005) 121 *L.Q.R.* 400. For instance, Friedmann states, *ibid.*, p. 402, that "the entitlement precedes the event that gives rise to the cause of action".

⁴¹ The position in relation to rights which lie at the discretion of the court is more complex. Much depends on what we mean by discretion. If we mean that the claimant's entitlement depends on the interplay of a number of factors which must be balanced by the court, such that it will not be clear in advance whether the claimant can make out his claim, this is not inconsistent with the analysis presented in the text. The position is different if we take discretion to mean that, on a given set of facts, the court is free to choose whether the claimant has such an entitlement. It is not clear whether the latter sense of discretion has a place in English law as it entails judicial freedom not to treat like cases alike.

⁴² Birks, *Unjust Enrichment*, *supra* n. 12, p. 30. It is questionable whether Birks did in fact exclude all rights which are not realisable in court as this would involve excluding from the classificatory scheme legal property rights (excluding those relating to land), as Birks repeatedly asserted that the common law has no *vindicatio* in respect of such rights, and contractual rights to performance which the courts would not specifically enforce. Such rights are realisable only indirectly through ancillary claims.

cited above of *quia timet* orders between joint debtors shows that such more general rights are on occasion realisable, and so to persist in treating rights as created by events is to treat like cases differently and to misunderstand the way rights relate to events.

This, therefore, provides a further reason why a taxonomy which aims to class rights by causative event can not succeed. Its premiss, that rights *arise from* events, is not true.⁴³ We need a taxonomy which better understands the way that rights relate to events in the world, and which thereby ensures that we have a scheme which treats like cases alike.

2.9 Moving on

Categorising legal rights by causative event will not work. The notion of causative events cannot tell us what cases and claims should be regarded as alike. Indeed, on closer analysis, it is a misconception to regard rights as arising from events. However, through highlighting the failings of Professor Birks' model we can begin to see how we might develop a classificatory scheme which succeeds in treating grouping together materially alike cases and segregating those which are materially distinct. The key is to get to grips with what we mean when we say that like cases should be treated alike. A legal taxonomy will stand or fall by its ability to comply with this precept of justice, and, if we are to construct a scheme which achieves this purpose, we must confront this question directly.

⁴³ Or, perhaps more accurately, it is true only in the, analytically uninteresting, sense that legal rights will all stem from the act of some legal institution, whether the legislature or the courts.

Chapter 3

The Search for Principle

Treating like cases alike requires that we be able to identify like cases. What then does it mean to say that cases are alike? By cases we mean sets of facts (series of events, situations). The key question is when are such sets of facts alike. It is clear that likeness in this context does not mean factual identicalness. Cases can be alike in the relevant sense despite being, at least in part, factually dissimilar. Indeed, no two cases can be in all respects factually alike, if only because of differences in time, location or the identities of those involved. We may then say that what we are looking for is *material* likeness. But that still leaves us with the question of what is meant by material. How do we determine when cases which are factually dissimilar are nonetheless materially alike?

3.1 Determining the likeness of cases

Whether two cases are alike depends on the application of standards or criteria by which such likenesses are to be determined. However, cases can be alike or unlike in different ways reflecting different criteria of likeness which may be adopted. What we need to identify is the proper criterion of likeness in the present context. The key to this is to understand the purpose of the principle that like cases should be treated alike. This principle is a guide to deciding cases, to determining the correct legal consequences of particular combinations of facts. If legal response X follows from the occurrence of set of facts A, then X should likewise follow from set of facts B, where A and B are alike. We can say, therefore, that cases are materially alike when they require like treatment. Now this may not seem to take us much further; like cases are those which should be treated alike.¹ However, what it tells us is that whether cases are materially alike depends on whether the factual differences between them have a bearing on the way those cases should be decided; do their factual dissimilarities justify differing treatment?

Determining the likeness of cases therefore requires inquiry into the reasons for attaching particular legal consequences to given sets of facts. Cases A and B will accordingly be alike where

¹ Or more precisely, like cases are those which should be treated alike *for the same reasons*. Hence, not all cases which give rise to a restitutionary claim are alike if the reasons for restitution are different.

the reasons² for attaching legal response X to case A apply equally to case B. An alternative way to express this is in terms of principles. Our generic reason for assigning a particular legal response to a given set of facts is that the response reflects or gives effect to principles³ we believe should be embodied in or effectuated by the law. Cases are alike where they raise the same questions of principle, where the principles which we believe should be reflected in the law apply to them in the same way. Where cases raise the same questions they should receive the same answers. Disputes as to the likeness of cases are therefore disputes as to what are good reasons for legal decisions and/or their application to the facts at hand, or, in other words, as to the principles which do or should shape the law and/or as to what the application of those principles to the facts entails.

It is important to stress that we can, and often do, argue that cases are alike even though the law may not treat them alike. Indeed, the principle that like cases should be treated alike is most commonly invoked to test the legal rules we have. So, we can always ask whether the law is in fact succeeding in treating like cases alike. Necessarily, therefore, disputes as to whether cases *are* alike cannot be resolved by appeals to what cases the law *treats* as alike. Put another way, disputes as to what the law *should be* cannot be settled solely by reference to what the law *is*.⁴ What we are seeking to determine is whether the cases that the law treats as alike really are alike; whether the cases it treats differently really are different. Answering this question requires an inquiry into the principles which are or should be reflected in the law and what their application requires on the facts.

This is not to say that the data of court decisions, judicial dicta and legislation can have no part to play in making and resolving arguments as to what the law should be. In particular, different legal systems may choose differing combinations of principles on which to base their laws. Even those which choose to give effect to the same principles may find different ways of applying them and resolving conflicts between them. Because of this, there are different types of argument that can be made concerning the likeness of cases. Firstly, one may accept (or seek to identify and defend) the particular combination of principles adopted within the relevant system, and argue that, on that basis, given cases are or are not alike. Such an argument then turns in part on the correct

² This covers not just the positive reasons for that legal response but also the absence of reasons for rejecting that response. Two cases may both include facts which, taken in isolation, supply the same reason for a particular result. However, they will not be materially alike where the one case includes additional facts which provide a reason for rejecting that result. The clearest examples of this are where the facts of each case raise the same cause of action, but in one a defence is available (at least where the defence does not deny an element of the cause of action, such as the contributory negligence defence to tort claims).

³ Dworkin famously distinguished principles and policies (see R. Dworkin, *Taking Rights Seriously* (Duckworth, 1977), pp. 22-23, 90-100). The reference to principles in the text is intended to embrace both of these, though I also take the view that we can identify sub-divisions within this class of principles as broadly defined.

⁴ For present purposes, nothing turns on the answer to the question of where to locate the line between what the law is and what it should be. It is, I think, clear that such a line exists. One may prefer to express the same distinction in terms of what we do (or have been doing) and what we should do.

identification of the principles recognised in that system. Analysis of case law and legislation will then be central to this identification process. However, ascertainment of the principles which underlie the system's rules may also lead one to view some of this data as erroneous, unsupportable on the basis of any principle which the law does embody. As such, even in relation to this type of argument, one cannot determine the likeness of cases solely by reference to the distinctions currently drawn by the law. Secondly, and alternatively, one may argue that given cases are alike on the basis of a particular preferred combination of principles, without contending that those are the principles currently embodied within the system. Such an argument is, to this extent, an argument about what principles *should* be reflected in the law, and, in resolving such questions, case and statute law will carry little weight.

Clearly, if one's concern is with a particular type of claim or case, it will rarely be necessary to identify the full set of principles which do or should underlie the law. Instead it will be sufficient only to deal with those principles relevant to the sort of case under discussion. A common form of legal argument works in this way: seeing that we (or if we are to) respond to case A with legal response X, we should also provide response X in case B, which is materially identical. This form of argument may appear to obviate the need to locate the justification in principle of response X to cases A and B, focussing instead on the question of their likeness. However, as we have seen, the question of whether A and B are materially alike requires inquiry into the reasons for attributing the given legal response to them since, as we have seen, it is only on this basis that their material likeness can be determined.

This section thus far may appear to have done little more than state the obvious. It is, however, necessary at this early stage to make clear on what terms discussion of the likeness of cases, and hence of the relationship between the variety of claims being examined here, must be conducted. As we shall see, though many defend the law's divergent responses to misapplications of assets, few attempt, let alone manage, to identify any justificatory principle to support these differences of approach.

3.2 Reasons for restitution

If we are to treat like cases alike, we cannot avoid an inquiry into the principles embodied in and furthered by the law and their application to the facts; in short, the reasons for deciding cases. So, to understand unjust enrichment claims and their relationship to other types of claim we must inquire into the principles which underlie them.

If restitution is defined as the giving up of a received benefit, then the law of restitution comprises those cases to which the law responds by placing on the defendant a duty to give up a

benefit received by him.⁵ What we must ask is why the law requires that the defendant give up a benefit he has received, that is, what are the reasons for ordering restitution.

3.3 Unjust enrichment: the broad view⁶

We saw in the previous chapter that the event-based taxonomy of rights must be rejected, as must the understanding of unjust enrichment as a category of causative event to which it gives rise. However, there is also support amongst restitution scholars for an alternative understanding of unjust enrichment. This sees unjust enrichment not as an event but as the basis of a principle explaining some or all instances of restitutionary liability.⁷ Framed in terms of a reason for ordering restitution, this is an improvement on the event-based scheme and its conception of unjust enrichment, since it shows that we are at least asking the right question. So employed, “unjust enrichment” seeks to answer the call to identify a basis in principle for restitutionary claims, and hence, as we have seen, a basis for determining their material unity. However, the answer it provides is unsatisfactory.

Though it is common to find reference simply to “the unjust enrichment principle” or “the principle of reversing unjust enrichment”, it is clear that this is shorthand for a fuller expression of principle. This can and has been expressed variously; “a person has a right to have returned to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust”,⁸ “no-one ought to be unjustly enriched at the expense of another”, “the law does not permit

⁵ P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn. 2005), at p. 3; G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006), at p. 3. Not all would agree with this definition of restitution. It is used only as a convenient starting point and the subsequent argument certainly does not depend upon its validity. Firstly, some would not extend “restitution” to all instances of gain-based recovery: see, e.g., L. Smith, “The province of the law of restitution” (1992) 71 *Can. Bar. Rev.* 672 and J. Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) (both preferring the language of disgorgement in relation some gain-based claims pursuant to wrongs); A. Burrows, “Quadrating Restitution and Unjust Enrichment: A Matter of Principle” [2000] *R.L.R.* 257, at pp. 258-259 (not extending “restitution” to primary contractual obligations to confer benefits). Secondly, some do not see the law of restitution as focussed solely on gain-based claims: see, e.g., S. Hedley, *A Critical Introduction to Restitution* (Butterworths, 2001); P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000). I think there is also a problem identifying whether particular claims are truly gain-based: see in particular the claims concerned with anticipated contracts which never materialised, e.g., *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932, and the “user-principle” cases, such as *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246.

⁶ Hedley has previously referred to broad and narrow views of unjust enrichment: see S. Hedley, “Unjust Enrichment: A Middle Course?” (2002) 2 *O.U.C.L.J.* 181. His distinction, however, is not the same as that drawn in the text.

⁷ See, e.g., A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn. 2002), at pp. 1-2, 5-7; Virgo, *supra* n. 5, at pp. 6-9; G. Jones, *Goff and Jones: The Law of Restitution* (Sweet and Maxwell, 6th edn. 2002), at pp. 3, 13-17; R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), at pp. 3-4.

⁸ W. Seavey and A. Scott, “Restitution” (1938) 54 *L.Q.R.* 29, at p. 32.

one person to be unjustly enriched at the expense of another”.⁹ And, though there are differences of opinion as to the ambit of the principle, the idea is the same throughout: the defendant must give up to the claimant a benefit where its retention would leave him unjustly enriched at the claimant’s expense. Much then depends on what is meant by unjust enrichment at the claimant’s expense, as this will determine not only the scope of the principle but also whether it does indeed identify a unitary principle underlying a class of legal claim.

On one view¹⁰ the unjust enrichment principle explains all instances of restitutionary liability. This builds on Birks’ original quadrature thesis of the relationship between unjust enrichment and restitution, examined in the previous chapter. As we saw, under the perfect quadrature thesis unjust enrichment not only explains all restitutionary claims but is defined in such a way as to ensure this. To say that there had been an unjust enrichment is simply to say that the facts support a restitutionary claim. This conception of the unjust enrichment principle adds little to this. Where there is a restitutionary claim there must, by definition, have been an unjust enrichment, and unjust enrichments must be reversed. The definition of the event and of the principle follow from, and add nothing to, the initial definition of restitution and the identification of a case as one where restitutionary liability arises. We know there has been an unjust enrichment because the facts give rise to a right to restitution, we know unjust enrichments must be given because unjust enrichments are those enrichments which the law requires to be given up.

The logic of the process cannot be faulted, but its utility can. We know that the law responds to certain cases by requiring the defendant to make restitution. What we need to identify is why this is. A principle designed specifically to embrace all restitutionary claims and simply to reflect the fact that restitution must be made does not and cannot do this. And this is true whether one interprets the principle as downward-looking, tying it to the instances of restitutionary liability found in case and statute law, or whether one decouples it from the authorities, embracing the possibility of novel forms of restitutionary claim. The former version of the principle amounts to saying that restitution must be ordered where the authorities say it must, the latter that restitution must be ordered when there is good reason (in principle) to do so. In either case unjust enrichments are those enrichments which must be given up, those that require restitution, and the principle simply states that enrichments which must be given up must be given up. Unjust enrichment and the principle of reversing unjust enrichment, without further elaboration, neither help us to identify which enrichments must be given up nor provide a reason for requiring defendants to give up such enrichments.¹¹

⁹ Both taken from P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn. 1989), at p. 23. It should be noted that Birks did not favour using “unjust enrichment” in this form.

¹⁰ See, e.g., Burrows, *supra*, n. 5; Jones, *supra*, n. 7, at pp. 3, 13-14.

¹¹ The same is also true of “restorable enrichment”, the term preferred by Grantham and Rickett (see Grantham and Rickett, *supra*, n. 7, at pp. 18-20. Grantham and Rickett prefer “restorable” to “unjust” on the

This upshot of this is that the unjust enrichment principle fails to aid analysis of restitutionary claims. It does not answer any of the questions that need to be answered if we are to understand when and why restitutionary liability arises, and so to ensure that we treat like cases alike. Moreover, a second and more serious criticism can be made of this conception of the unjust enrichment principle. This version of the principle encourages us to believe that all cases to which the law responds by ordering restitution are founded on the same principle and hence are materially alike. This unity is misleading however. As we have seen, despite being framed as a principle, the unjust enrichment principle does not identify a reason for restitution. The principle states that unjust enrichments must be given up, but, since unjust enrichments are those which must be given up, the principle adds nothing. The only unity it identifies is one of response. This would not be so important if in fact all restitutionary claims did derive from a single principle, and so there was just the one reason for requiring restitution. The principle would still require identification, but at least the impression of material likeness created by talking of a single unjust enrichment principle would not be inaccurate. It seems clear, though, that there is no such unity in the law of restitution. There is not one reason for restitution but many. A number of distinct principles, each supporting instances of restitutionary liability, may be identified.

The aim here is not to draw up an exhaustive list of such principles. An example will suffice to demonstrate the disunity within the law of restitution. In the following chapters, I shall argue for a particular understanding of a class restitutionary claims exemplified by mistaken payments. However, even before I begin the analysis of such claims, it should be clear that these cases are materially different from at least a significant number of the cases which are standardly grouped together under the heading “restitution for wrongs”. They reflect different reasons for restitution. The considerations of principle¹² which led, for instance, the courts in *Attorney-General for Hong Kong v. Reid*¹³ and *Attorney-General v. Blake*¹⁴ to order the defendant to make restitution are distinct from those which support the reversal of a mistaken payment. And, though they may not express it in these terms, this explains why most restitution lawyers see an important analytical difference between restitution for wrongs and what Birks called “autonomous” unjust enrichment claims.

basis that “unjust” fails to capture the reason for restitution or the circumstances in which restitution will be ordered. However, at least on the downward-looking approach, “unjust” and “restorable” are synonymous. Certainly, “restorable” provides no better an explanation of why the law requires such gains to be given up.

¹² Primarily that it would be wrong to allow the defendant to be able to profit from his unlawful conduct, and perhaps also that others should be discouraged from acting similarly.

¹³ [1994] 1 A.C. 324.

¹⁴ [2001] 1 A.C. 268.

3.4 Unjust enrichment: the narrow view

There is a second conception of the unjust enrichment principle which may seem to avoid some of the failings of the broad view. This sees the principle as explaining some but not all instances of restitutionary liability, thus rejecting the perfect quadrature thesis.¹⁵ On this view, the unjust enrichment principle is just one of a number of principles and policies which support restitutionary claims. Therefore, this version of the unjust enrichment principle cannot be accused of presenting the false unity suggested by the broad view; indeed it openly acknowledges that there exists a multiplicity of reasons for restitution.

Nonetheless, this approach too must be rejected. The first reason for this is that, like the broad unjust enrichment principle, it does not identify a reason for restitution. We saw in the previous chapter that when Birks' refined his notion of unjust enrichment as an event, there was no corresponding change in the terms he used to express it.¹⁶ The same is true of the narrow version of the unjust enrichment principle. Though the scope of the principle has been reduced, the terms in which it is defined remain substantially the same.¹⁷ The difference between the broad and the narrow views is that proponents of the narrow view identify additional principles which explain certain instances of restitutionary liability. Such cases are then cleaved off from the body of law explained by the unjust enrichment principle. The refinement of the unjust enrichment principle is then solely in negative terms; we learn what it is only through being told what it not. Just as Birks' later definition of unjust enrichment could be reduced to "the event giving rise to restitutionary rights which does not fall within one of the other categories of causative event", so the unjust enrichment principle becomes "the principle underlying those instances of restitutionary liability left once those explicable on the basis of some other principle or policy are removed". In this sense it resembles a residual category, a collection of cases held together simply by the restitutionary response and that fact that no other identified principle explains them. One could say that the narrow view of the unjust enrichment principle reflects a state of work in progress. It is a product of an as yet uncompleted process of identifying the distinct reasons for restitution, the distinct principles which support restitutionary claims. As further reasons are identified, so the area covered by the unjust enrichment principle reduces. But, no matter how much material is excised from it, unjust enrichment does not itself provide a reason for restitution.¹⁸

¹⁵ See, e.g., Virgo, *supra*, n. 5, at pp. 6-18.

¹⁶ *Supra*, ch. 2, text to nn. 7-8.

¹⁷ See, e.g., Virgo, *supra*, n. 5, at p 51-52: "Whenever it can be shown that the defendant has been unjustly enriched at the expense of the claimant the defendant will be obliged, by operation of law, to restore to the claimant the value of the benefit which he or she has received."

¹⁸ In the first edition of his textbook, Virgo stated (G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 1st edn 1999), p. 10): "The justification for the award of restitutionary remedies where the defendant has been unjustly enriched at the plaintiff's expense is that, by virtue of the relevant ground of

There is a second reason for rejecting this narrow view of the unjust enrichment principle. Although the narrow view, unlike the broad version of the principle, acknowledges the variety and multiplicity of principles underlying restitutionary claims, it too suggests the unity, the material likeness, of those cases that *do* fall within it. And again this impression is likely¹⁹ to be false. For example, Virgo's conception²⁰ of the unjust enrichment principle covers *Woolwich Equitable Building Society v. I.R.C.*,²¹ where the restitutionary claim was explained on the basis of the constitutional principle that the Government should not be able to levy taxes without the authority of Parliament, and hence should not be entitled to retain tax money so levied. If we are to endorse, as Virgo does,²² this explanation of *Woolwich*, then it is clear that the reason for restitution is different from that supporting the restitutionary claim in the standard case of a mistaken payment; the cases are not materially alike. The same general point is evidenced by the terms in which Virgo introduces his account of the unjust factors, or what we may call reasons for restitution. When looking at what makes a particular enrichment unjust, he says, "this notion of injustice derives from three different principles, which can usefully be summarised as claimant-oriented, defendant-oriented and policy-oriented."²³ Again, if Virgo is right to say that within the unjust enrichment principle there are distinct principles providing distinct reasons for restitution, then the unjust enrichment principle groups together cases which are materially dissimilar.²⁴

The unjust enrichment principle then, in both its wide and narrow forms, not only fails to identify a reason for restitution - a principle explaining why particular gains must be given up - but also groups together cases which are not materially alike. The need to treat like cases alike requires that we look past unjust enrichment for an understanding of the bases of restitutionary liability.

restitution, the defendant cannot be considered to have any right to retain the value of the benefit." This says no more than that, where the facts of such cases reveal a ground, or reason, for restitution, the defendant must make restitution. Perhaps tellingly, this passage appears to have been removed from the second edition.

¹⁹ "Likely" rather than "certain" only because of the remote chance that a proponent of the narrow principle identifies, and hence removes from its scope, all but one of the other principles supporting restitutionary claims, thus leaving a unitary residual category for the unjust enrichment principle.

²⁰ Virgo's is not the only possible conception of the narrow unjust enrichment principle. The content of the narrow version of the principle will vary depending on which cases are seen as explicable on the basis of other principle. So the identification of a different set of (other) restitution-supporting principles would lead to differences in the scope of the unjust enrichment principle. Different conceptions of the narrow view would then provide different examples of disunity.

²¹ [1993] A.C. 70.

²² Virgo, *supra*, n. 5, at pp. 400-404, 408-416. The possibility exists, however, of justifying a restitutionary claim on the facts of *Woolwich* on the same basis as a claim in respect of a mistaken payment (*c.f.* Birks, *supra*, n. 5, at pp. 133-135). This does not entail that the reasoning of the House of Lords and the accounts which support it are defective. Rather it would mean that this would be an example of what Birks called alternative analysis; and, in so far as a claim could be supported on the basis of the constitutional principle, it would be materially dissimilar to mistaken payments.

²³ *Ibid.*, at p. 119.

²⁴ Though it should be stated that, like his unjust enrichment principle, none of Virgo's three sub-principles identifies a reason for restitution.

3.5 Non-voluntary benefits

Many restitution scholars have noted that in a number of instances of restitutionary liability a material factor is that the claimant benefited the defendant without a fully or properly formed intention to confer that benefit. Even amongst those who see a role for unjust enrichment in explaining restitutionary liability, there is recognition that often it is a defect in the claimant's intention to benefit the defendant that underlies the conclusion that the defendant's enrichment is unjust, and hence to be given up. Virgo, for instance, states, "[w]here the claimant's intention has been affected in some way he or she cannot be considered to have voluntarily transferred a benefit to the defendant and so the defendant can be considered to have been unjustly enriched."²⁵ Birks split the unjust factors into three families, each identifying a distinct reason for restitution. One of these was "non-voluntary transfer", where the facts entitle the claimant to assert "I did not mean him/her to have it".²⁶ What needs to be addressed is why and when the claimant's intention should determine the defendant's entitlement to retain benefits he has received.

Our general dissatisfaction with the distribution of wealth in society does not provide the basis of a legal claim. If the claimant is to make out a claim to wealth in the defendant's hands his argument must go further than asserting his preference for such a redistribution. So, it is clear that there must be a particular connection between the claimant and the benefit received by the defendant, which makes the claimant's intention in respect of the defendant's receipt and retention of that benefit a relevant consideration in determining the latter's entitlement to it. What sort of connection is needed? Orthodox accounts of the law of restitution connect the claimant and the enrichment claimed through the "at the expense of" requirement, and, in relation to the types of case regarded as instances of non-voluntary transfer, this requires that the defendant receive the enrichment "by subtraction from", or simply "from", the claimant.²⁷ However, the simplicity of the language conceals ambiguities. "From" is capable of encompassing a range of different types of connection between claimant, defendant and enrichment. The central case of enrichment received from the claimant would be the receipt of a benefit held by the claimant immediately prior to receipt. However, the terminology comfortably accommodates indirect enrichments, where the benefit passed from the claimant through the hands of third parties, before being received by the defendant. It can also cover instances where the defendant received a benefit which was on the way

²⁵ Virgo, *supra*, n. 5, at p. 120.

²⁶ See P. Birks, "The Law of Restitution at the End of an Epoch", (1999) 28 *U.W.A.L.R.* 13, at pp. 24-27; P. Birks and R. Chambers, *The Restitution Research Resource* (Mansfield Press, 2nd edn. 1997), at 2-3; *c.f.* Birks, *supra*, n. 5, at 104, 108 and 116, where he argued that, should all unjust enrichment claims be founded on an absence of basis for the transfer, all such claims would be examples of non-voluntary benefit.

²⁷ Birks, *supra*, n. 9, at pp. 23-25, 132-133; Birks, *supra*, n. 5 at pp. 73-75; Burrows, *supra*, n. 7, at pp. 25-26.

to the claimant and which, but for the defendant's intervention, would have been received by him. There are also cases where the benefit received by the defendant neither was held previously by the claimant nor would have come his way, but derived from the claimant's labour or skills or from some source of wealth held or previously held by the claimant.

Do all these senses of "from" count? If not, where do we draw the line? These questions can be answered only by inquiring into the principle underlying these claims, for this will determine their proper scope. As such, it is unsurprising that those wedded to the view that unjust enrichment provides the organising principle have come up with conflicting and usually unsatisfactory answers, seeing that "unjust enrichment" identifies no true principle, and that this simple verbal formulation is apt to cover any number of different positions. Accordingly, unjust enrichment theorists have had little choice but to fall back on the authorities and the intuition that liability has to stop somewhere.

What is clear is that there are situations where a benefit is received by the defendant which comes "from" the claimant in one of the aforementioned ways *and* where the claimant did not intend the defendant so to benefit and yet, even before we get to the question of defences, no claim is recognised. Many of these situations have received little attention by restitution scholars, yet seeing why claims for restitution do not succeed in such cases tells us something important about the basis of liability where they do.²⁸ The point can be made by examining three cases, two of which are not commonly regarded as bearing on the law of restitution, while the third receives at best passing reference in the leading English texts.

The first is *Bradford Corporation v. Pickles*.²⁹ There, a substantial part of the town's water supply derived from natural spring water which passed under the defendant's land. The defendant then made excavations into his land which had the desired effect of drawing off much of this water and consequently reducing the flow of water into the town. Though the defendant claimed that the water he was extracting was required for work on his land, the suspicion was that the defendant's motive was to induce the corporation to purchase his land or to pay him for refraining from interfering with the natural flow of the water. The corporation sought an injunction to restrain the defendant from continuing these activities, and the case turned on whether the defendant's motive could render unlawful what was otherwise a lawful use of his property. The House of Lords concluded that his motive did not affect the lawfulness of his conduct and the corporation's claim failed. The case is now seen as a leading authority in the law of torts. However, the case also important implications for the law of restitution.

²⁸ There appears to be greater recognition of this point in civil law jurisdictions: see, e.g., E. von Caemmerer, "Grundprobleme des Bereicherungsrechts" in H. Leser (ed.), *Gesammelte Schriften I* (Mohr, 1968), at pp. 374-375; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co., 1990), p. 889.

²⁹ *The Mayor, Aldermen and Burgesses of the Borough of Bradford v. Pickles* [1895] A.C. 587.

The defendant, by diverting and retaining for his own use the water which flowed through his land, was enriched. This enrichment came from the plaintiff corporation, in the sense that, barring the defendant's intervention, it would have made its way to the corporation instead. It therefore provides an instance of what Birks called "interceptive subtraction".³⁰ Moreover, this enrichment of the defendant was certainly not intended by the claimant. Would then a claim for restitution against the defendant have succeeded? The answer must be no. Though the issue of restitutionary liability was not raised, the judgments are incompatible with any such claim arising on the facts. Lord Halsbury L.C. held:³¹

... the interference ... is an interference with water, which, but for such interference, would undoubtedly reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of the water, and that the defendant has no right to what he is doing. ... The very question was then determined by this House,³² that the landowner had a right to do what he had done whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate.

The key point is that the corporation could not make out any entitlement to the flow of the water onto their land. They had no right that the defendant refrain from diverting and retaining the water. And clearly if the defendant was legally entitled to take the water for himself, he should come under no liability to give up this enrichment if he goes ahead and does this.

³⁰ See Birks, *supra*, n. 9, at pp. 133-138; Birks, *supra*, n. 5, at pp. 75-77. I refer to Birks' theory of interceptive subtraction not because I wish to endorse it, but because the language of unjust enrichment is naturally capable of extending to such cases, and yet it is clear that, at least on occasion, liability is nonetheless denied. The key question is why. Birks' theory has come in for criticism, notably in L. Smith, "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 *O.J.L.S.* 481. Smith's main argument is that Birks' theory is flawed in so far as it suggests that a single instance of unjust enrichment can be at the expense of more than one party – the person from whom it was received (A), and the person to whom, but for the defendant's intervention, it would have come (B). Smith then argues that to know at whose expense the enrichment was made we must inquire into the relationship between A and B to ask how the defendant's receipt impacted on their rights and liabilities *inter se*. So, if, for example, despite the defendant's intervention, A's transfer discharged a liability to B, the defendant's enrichment would be at B's expense, not A's. As such, unjust enrichment is a "zero-sum game" (*ibid.*, p. 483). I am largely in agreement with Smith on the fact that there will usually only be one proper claimant, but differ from him as to how he is to be identified. Moreover, given relativity of title and the fact that more than one person may be able to make out an exclusive (at least vis-à-vis the defendant) entitlement to an asset or benefit received by the defendant, it is not impossible that there may be, in an appropriate case, more than one potential claimant.

³¹ [1895] A.C. 587, at pp. 591-592. To similar effect is Lord Ashbourne, *ibid.*, at p. 598: "The plaintiffs have no case unless they can shew that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing."

³² In *Chasemore v. Richards* (1859) 7 H.L.C. 349.

The second case is *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor*.³³ The plaintiff company owned a racecourse on which they held horse races. It made money by charging spectators for admission. One of the defendants, the Commonwealth Broadcasting Corporation, viewing the races from a platform built on neighbouring land owned by another of the defendants, began live radio broadcasts of these races. This gave would-be racegoers an alternative way of following the races and attendance at the racecourse dropped off, causing the plaintiff a loss in revenue. The plaintiff sought an injunction to restrain these broadcasts on the ground that they constituted a nuisance or, alternatively, that the construction and use of the platform constituted an unreasonable user of the neighbouring land.

The claim failed. A bare majority of the High Court of Australia held that the facts disclosed no actionable wrong on the part of the defendants. The following passage from the judgment of Latham C.J. encapsulates the majority's reasoning:³⁴

I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. ... The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language etc., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects.

What does any of this have to do with the law of restitution? Certainly this case, like *Bradford Corporation v. Pickles*, is concerned primarily with answering a question of torts law, and the emphasis was on the loss caused to the plaintiff rather than any gains made by the defendants. However, the defendants were no doubt enriched through their enterprise. Moreover, this enrichment could be said to have come from the plaintiff, in that the value received by the defendants derived, in part, from the plaintiff's work and activities on, and the use to which it put, its own land.³⁵ Yet, despite the plaintiff clearly not intending the defendant to receive this enrichment, a restitutionary claim would have failed.

³³ (1937) 58 C.L.R. 479.

³⁴ *Ibid.*, at p. 494.

³⁵ Of course, the enrichment received by the defendants also derived from their own work in broadcasting the race reports, though this in itself would not be sufficient reason to deny a restitutionary claim. An analogy can be drawn with restitutionary claims where the asset received by the defendant has been profitably invested, repaired or improved by him while in his hands. The case would be clearer, but the result no doubt the same, if the neighbouring landowner had simply put up seating on the platform and charged admission for people to come and view the races. A clearer connection could then be identified between the loss suffered by the claimant and the gain made by the defendant.

The restitutionary consequences of the majority's reasoning are brought out most clearly in the judgment of Dixon J:³⁶

So far as freedom from view or inspection is a natural or acquired physical characteristic of the site, giving it value for the purpose of the business or pursuit which the plaintiff conducts, it is a characteristic which is not a legally protected interest. ... [C]ourts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in an organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour.

Referring to the dissenting judgment of Brandeis J., in *International News Service v. Associated Press*,³⁷ he continued:³⁸

His judgment appears to me to contain an adequate answer both upon principle and authority to the suggestion that the defendants are misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value. Briefly, the answer is that it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches. ... [T]he right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected at law or in equity.

Though the plaintiff's use of the land generated value, this does not mean that the plaintiff had an exclusive entitlement to that value. In respect of the value in the view of the plaintiff's land from neighbouring land, the law recognises no entitlement in the plaintiff. The plaintiff had no right that others not watch, commentate upon, and thereby profit from the activities carried out on its land. From this it follows that the plaintiff had no right to the value, the enrichment, received by the defendants in so doing.

Finally there is the Scottish case of *Edinburgh and District Tramways Company Ltd. v. Courtenay*.³⁹ The claimant company let the right to advertise on their tram cars to the defendant. The contract provided that the defendant was to supply the fittings needed to mount the advertisements. However, new cars put into service by the claimant had the necessary fittings already built onto them, enabling the defendant to mount the advertisements without itself providing fittings. The claimant sought recompense, what would be called restitution in English law, from the

³⁶ (1937) 58 C.L.R. 479, at pp. 508-509.

³⁷ (1918) 248 U.S. 215.

³⁸ (1937) 58 C.L.R. 479, at p. 509-510.

³⁹ 1908 S.C. 99.

defendant for its use of such fittings. This claim failed. Firstly, it was held that the contract between the parties imposed no obligation on the defendant to pay for such use. Nor was the claimant entitled to recovery on non-contractual grounds. In giving his judgment, the Lord President disapproved of the definition of principle underlying claims to recompense given in Bell's *Principles of the Law of Scotland*,⁴⁰ which stated, "where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain." To support his rejection of any such principle, the Lord President, Lord Dunedin, used the following example:

One man heats his house, and his neighbour gets a great deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say, "Give me so much for my coal bill, because you have been warmed by what I have done, and I did not intend to give you a present of it."

It was accordingly held that the claimant could not make out a claim in respect of the benefit received by the defendant simply by showing that this benefit had resulted from the claimant's actions and without any intention on the claimant's part that the defendant should receive such a gratuitous benefit. This then makes explicit what was implicit in *Bradford v. Pickles* and *Victoria Park Racing*. Though many restitutionary claims are founded on the receipt of a benefit deriving from the claimant and without the latter's consent, something more is needed if such a claim is to be recognised.⁴¹ Lord Dunedin considered that this additional element could be found in a requirement that the claimant have lost something.⁴² This, though, brings its own problems. For one thing, any claimant who is able to identify a benefit received by the defendant that has come from him can argue that this benefit is something he has, in some sense, lost, yet this, of course, is the very notion that Lord Dunedin was rejecting. *Bradford v. Pickles* and *Victoria Park Racing*

⁴⁰ G. Bell, *Principles of the Law of Scotland*, (W. Guthrie (ed.), T. & T. Clark, 10th edn, 1899), at sec. 538.

⁴¹ Birks, *supra* n. 5, at pp. 158-159, argued that the denial of a restitutionary claim in Lord Dunedin's example of the house being heated is best explained on the basis that the claimant does in fact intend to confer such a benefit on his neighbour. Clearly this was not Lord Dunedin's view of the case; his point in using it was to refute the argument that all non-intended benefits coming from the claimant would give rise to restitutionary liability. Moreover Birks' argument is flawed. Birks reasoned that, since the heating of the neighbour's home was an inevitable side-effect of the claimant's (intended) heating of his own home, the benefit to the neighbour must also be regarded as intended. This notion of oblique intention is philosophically suspect (see J. Finnis, "Intention and Side-effects", ch. 2 of R. Frey and C. Morris (eds), *Liability and Responsibility* (Cambridge University Press, 1991)), and it is not clear that consent to the one, intended, result involves or is only consistent with consent to the other. However, even if we take the two consequences as a package, such that consent must be to both or to neither, the claimant would still be entitled to argue that, had he known that the defendant would be benefited, he would have acted differently. Yet the claimant would surely not succeed even if he could persuade the court that he would not have heated his house had he realised that the defendant's house would also have been heated. Moreover, it certainly does not follow that the claimant's consent was to the defendant receiving that benefit *gratuitously* (c.f. Birks, *supra* n. 5, at p. 159).

⁴² "... there are certain marks or notes of the situation in which recompense is due, and I think that one mark or note is that the person who claims recompense must have lost something." 1908 S.C. 99, at p. 106.

point us in the right direction. The extra element in such claims is better expressed by saying that the benefit received by the defendant must be one to which the claimant was exclusively entitled, one which the law had reserved for him. If we wanted to rescue Lord Dunedin's requirement of loss, we could then say that the claimant has only really "lost" something where he can establish some exclusive entitlement to what the defendant received. But we would be better off if we avoided the confusion engendered by introducing such a conception of loss and instead talked simply in terms of entitlements.

3.6 The need for exclusivity

Bradford v. Pickles, *Victoria Park Racing* and *Edinburgh and District Tramways v. Courtenay* all provide instances where, despite the defendant receiving an enrichment which came, in one way or another, from the claimant and was not intended by him, no restitutionary claim was available.⁴³ The important point is why in each case such a claim (would have) failed. In none of these cases was the claimant able to establish an exclusive entitlement to the type of benefit received by the defendant. So in *Bradford*, the defendant was entitled to draw off as much of the water as he liked; in *Victoria Park Racing*, the defendants were at liberty to profit from the view they had of the plaintiff's land.

By contrast, where the claimant can show that, at the very least vis-à-vis the defendant, he was exclusively entitled to the benefit the defendant received, then this gives us a reason to recognise a claim for restitution of that benefit.⁴⁴ The law sets down individuals' entitlements to wealth and sources of wealth. Sometimes the law allocates wealth to one or more people, giving a right to the sole enjoyment of that wealth and with a right to exclude others from its enjoyment. At other times, the law makes no such allocation. Where no such exclusive entitlement is granted, any person is free to share in it, so far as he is able to, but without any right that others should not similarly benefit. What was at stake in *Bradford* and, more explicitly, in *Victoria Park Racing* was the nature of the claimant's entitlement to enjoy or share in a particular source of wealth: was it or was it not exclusive?

Where the law recognises a claimant as having an exclusive entitlement to a particular item of wealth certain consequences are likely to follow. Firstly, seeing that the law has allocated that

⁴³ These are not the only possible examples. Another, similar to the variant on the facts of *Victoria Park Racing* at n. 33, *supra*, would be the setting up of a rival business, whereby custom moves from the claimant's business to the defendant's. A further, hypothetical, example is discussed in J. Penner, "Basic obligations", ch. 5 of Birks (ed.), *The Classification of Obligations* (Clarendon Press, 1997), at pp. 111-113.

⁴⁴ See too J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006), pp. 424-426.

wealth exclusively to the claimant, it then has good reason to give protection to the claimant's interest by prohibiting interference with his enjoyment of it. This explains the relevance of determining the nature of the claimant's entitlement to the particular item of wealth to the tort claims brought in *Bradford Corporation v. Pickles* and *Victoria Park Racing*. Secondly, where there is an exclusive entitlement to an item or source of wealth, this will usually carry with it the power to determine who benefits from that wealth, one aspect of which will be the power to dispose of that exclusive entitlement. Where wealth to which the claimant is exclusively entitled is received by the defendant, and the claimant has not given his consent to his receipt of that benefit, then a claim to the recovery of that wealth can be justified on the basis that such wealth is reserved for the claimant until he has made an effective disposition of it, and that, given he gave at most defective consent to its receipt by the defendant, no such disposition was made. In other words, this gives us a reason for restitution. Effectively, the restitutionary claim follows from the fact that the relevant item of wealth has been reserved for the claimant, and hence our ultimate justification for the restitutionary claim in such cases is the same as our justification for allocating certain items of wealth to individuals in the first place.

This then explains the common features of a class of restitutionary claims. The reason the gain is normatively significant is because the law allocates certain items of wealth exclusively to individual members of society. If the claimant can say that an enrichment in the defendant's hands is one to which the law had given him an exclusive entitlement, then, unless he had effectively consented to the defendant being so benefited, he should continue to be able to assert his entitlement to it. Mistake, failure of basis, coercion and the like are accordingly material factors as they go to the question of whether the claimant effectively consented to the defendant's benefit.

We have so far avoided making reference to a concept which is usually central to issues of wealth allocation and entitlement. That concept is property. The relationship between property and restitutionary claims is one of the most controversial, and one of the least well understood, questions within the law of restitution. In the following chapter, we shall confront this question and we shall see how the notion of property should be understood as providing the basis of what may be regarded as the central cases of restitutionary liability.

Chapter 4

Property

Of the many valuable resources in the world, some¹ are allocated by law to particular individuals or groups. This allocation frequently takes the form of a protected and exclusive entitlement to use that resource in whatever way one chooses, subject to any specific limitations set down in law. In addition to the liberty so to use the resource, the entitled individual or group will generally have the power to allow others to use and so benefit from it. This often extends to a power to transfer to another the entirety of one's entitlement. Where the law recognises such an entitlement in an individual, it not only allocates such wealth to him but also confers on him powers of reallocation. The allocation of wealth through exclusive entitlements to use and to control others' use of resources is conventionally seen to be the role of the legal institution of property,² and such entitlements to resources can usefully be termed ownership interests.³

A central aspect of property institutions is, therefore, the power they give to owners to control the use others may make of and the benefits they may derive from particular items and sources of wealth. This control entitles the owner, so far as his exclusive interest extends, to exclude others from use and enjoyment of that resource.⁴ It also allows him to grant others some enjoyment of it, whether through outright transfer of his entitlement or some more limited grant of use privileges in relation to it. Such a grant may be gratuitous but it may also be made in exchange for the use of or an entitlement to some other valuable resource. An owner's interest in a resource therefore typically comprises an exclusive entitlement in relation to both its use and enjoyment *and* its potential as a means of acquiring other forms of wealth through exchange.

These two dimensions of ownership interests are reflected in the distinction sometimes drawn between "property as things" and "property as wealth".⁵ However, the property as wealth aspect of ownership can be regarded as secondary to and derivative of its use dimension. Firstly,

¹ Though not all: see K. Gray, "Property in Thin Air" [1991] *C.L.J.* 252.

² See, e.g., J. Harris, *Property and Justice* (Oxford University Press, 1996), pp. 3-4, 26-27; J. Penner, *The Idea of Property in Law* (Oxford University Press, 1997), pp. 68-75; Gray, *supra*, n. 1 at p. 294.

³ See Harris, *supra*, n. 2 at pp. 5, 28-32. We may put to one side the objection that, in the absence of any claim directly asserting or vindicating one's interest in an asset, there is no ownership of assets in English law: see W. Swadling, "Unjust Delivery", ch. 15 of A. Burrows and Lord Rodger, *Mapping the Law: Essays in Honour of Peter Birks* (Oxford University Press, 2006), at pp. 281-282. One may choose to define ownership so as to make it dependent on the availability of such a claim; many others, and I, choose not to.

⁴ See, e.g., *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.* (1987) 38 Building L.R. 82, at p. 102, *per* Scott J.

⁵ See, e.g., Harris, *supra*, n. 2, pp. 140-141; B. Rudden, "Things as Things and Things as Wealth" (1994) 14 *O.J.L.S.* 81.

resources have value, and hence the potential to be used to acquire new items of wealth, precisely because of the uses to which they can be put. We seek, and so are willing to pay for, resources because of what we can do with them. Even if something is acquired solely as an investment, the purpose is to put oneself in a position to acquire other useful assets in the future. Secondly, an owner's power to transfer or to grant use of that resource follows from the idea that, subject to legal limitations, he is free to do whatever he pleases with it. Grants of use privileges or transfers of entitlement are just one type of use. It is therefore incorrect to view the entitlement of an owner as being limited to, or even primarily concerned with, the resource's exchange value.

Legal protection and delineation of an owner's interest in a resource is provided by duties imposed on others in respect of their dealings with it.⁶ In so far as the owner is granted exclusive use privileges over the resource, there will be primary duties requiring others to act consistently with the owner's interest.⁷ This will include, for instance, obligations not to use the resource without the owner's consent and not to interfere with the owner's own use of it. These primary duties can be enforced through the provision of injunctive relief restraining imminent or continuing contraventions and through self-help remedies. They can also be given effect by duties requiring that other to act in a way which gives positive effect to the owner's interest. Respect for the owner's entitlement to the resource also provides the basis for the imposition of secondary duties on those who have dealt with the resource in a prohibited manner. The most common example of this is an obligation to make compensation for any losses the defendant has caused the owner in so acting. The breach of primary duties may also give rise to the imposition of penalties. In both cases, competing principles will generally restrict liability to those at fault.⁸ These rules are in the main part to be found in the criminal law and the law of torts. They are also, however, to be found within the law of restitution, and they includes the class of liability typified by cases of mistaken payments.

We have seen that ownership interests provide exclusive use privileges and control powers. The resource is the claimant's to use and enjoy so far as his interest in it extends. Within this sphere of exclusive entitlement, others may use and benefit from it only where and to the extent that the owner has given his consent. The relevance of this to the law of restitution should be clear. If, without the claimant's consent, a defendant receives or uses or in some other way benefits from a resource which the claimant owns, and such use or benefit is of a type which falls within the exclusive entitlement of the claimant, then that defendant obtains something to which he is not

⁶ Harris, *ibid.*, pp. 5, 24-26 termed the rules imposing such duties "trespassory rules".

⁷ For discussion of the terminology of primary and secondary duties see C. Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 *O.J.L.S.* 41, at pp. 42-49. See further J. Austin, *Lectures on Jurisprudence or the Philosophy of Law*, (R. Campbell (ed.), John Murray, 4th edn 1873), Lecture XLV.

⁸ See chapter 5, text to nn. 69-73 and chapter 6, n. 8 and accompanying text

entitled. Moreover, what he obtains is something to which the claimant *is* entitled. This justifies, where possible, the return of what the defendant has obtained.

All this suggests a rather straightforward explanation of the type of restitutionary liability arising in cases of mistaken payments and the like. It rests on and gives effect to the claimant's exclusive interest in what was obtained or received by the defendant. The claim that property or ownership offers an explanation of such cases has been made before.⁹ It has, however, tended to be given short shrift. It is important to examine the criticisms which have been made of this argument and why they miss their mark.

4.1 The law

Much of the criticism which a property based explanation of restitutionary liability has attracted is premised on a perceived lack of fit between the theory and the law. It is therefore useful as a starting point to set out how English law responds in such cases.

For ease, we shall initially look only at cases of receipt of tangible personal property to which the claimant was beneficially entitled¹⁰ immediately prior to its receipt by the defendant and where the claimant's consent to its receipt by the defendant is absent or defective. We shall also assume that the defendant gave nothing to the claimant in return for his acquisition of the asset and that no contractual relationship exists between the parties. At present, English law provides a variety of responses, the applicability of which depends variously on the type of asset involved, the nature of the claimant's entitlement to it and the nature of the defect in the claimant's consent.

If the claimant gives no consent¹¹ to its receipt by the defendant or if his consent to its transfer is caused by a mistake which the law classes as fundamental,¹² then the claimant will retain

⁹ See, e.g., S. Stoljar, *The Law of Quasi-Contract* (Law Book Company, 2nd edn. 1989), pp. 5-9; D. Stevens, "Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things" (1989) 39 *U. Toronto L.J.* 258 and 325; B. Fitzgerald, "Ownership as the Proximity or Privity Principle in Unjust Enrichment Law" (1995) 18 *U. Queensland L.J.* 166; P. Watts, "Restitution - A Property Principle and a Services Principle" [1995] *R.L.R.* 49, at pp. 49-70; J. Dietrich, *Restitution: A New Perspective* (The Federation Press, 1998), pp. 208-213; P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000), pp. 275-279. Links between "property" and "unjust enrichment" or "restitution" are also identified in S. Gardner, *An Introduction to the Law of Trusts* (Clarendon Press, 2nd edn 2003), pp. 132-137; Gray, *supra*, n. 1 at pp. 279-280; J. Harris, "Property - Rights in Rem or Wealth", ch. 4 of P. Birks and A. Pretto, *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University Press, 2002), at p. 59.

¹⁰ *I.e.* either the claimant held legal title and subject to no trust or the asset was held on trust for him absolutely. The question whether the receipt of trust property raises different issues, and hence calls for different treatment, from receipt of assets to which no trust was attached will be examined later: see, chapter 5, text to nn. 74-98.

¹¹ This covers situations where the claimant is ignorant of the asset coming into the defendant's hands but should also extend to cases of "powerlessness", where the claimant, though aware of the defendant receiving the asset, is unable to prevent it. See P. Birks and R. Chambers, *The Restitution Research Resource*

his title to the asset, despite the defendant now having physical possession. Where the claimant's consent is defective in some other way, for instance it is founded on a non-fundamental mistake, is given on the basis of some condition which fails, or is the product of compulsion, the claimant's title will pass to the defendant.

In those cases where the claimant retains his title to the asset he will then be entitled either to specific recovery of the asset or to a claim against the defendant for its value. Where the claimant has an equitable title, he can recover the asset itself from the defendant. There is no suggestion that change of position is a potential defence to such a claim¹³ and the claimant will have priority in the event of the defendant's insolvency. Where the claimant's title is legal, he will generally have a claim in the tort of conversion. This entitles the claimant to recover the monetary value of the asset received by the defendant, as well as compensation for further losses. Specific recovery is available only at the discretion of the court.¹⁴ Again the claimant is given priority in the defendant's insolvency. No change of position defence is available, though the suggestion that it should be has received some judicial support.¹⁵ In the case of receipt of money, the claimant may also have a claim for money had and received. This entitles the claimant to recovery of the equivalent sum from the defendant, but this time with no priority in insolvency and, it seems,¹⁶ the claim is subject to the change of position defence.

Where the defect in consent does not prevent title passing to the defendant, a claimant who previously held legal title can recover the value of the transferred asset by virtue of a *quantum valebat* claim or an action for money had and received. Change of position is a defence to such claims and they carry no priority in the event of the defendant's insolvency. It also appears that, in some cases, in place of the legal title which has passed to the defendant, the claimant will acquire a new equitable title to that asset.¹⁷ The exact circumstances in which this will occur are

(Mansfield Press, 2nd edn 1997), p. 3; G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006), p. 589.

¹² The clearest example is where the claimant's mistake is as to the identity of the transferee: see, e.g., *Cundy v. Lindsay* (1878) 3 App. Cas. 459. It seems that, at least some, mistakes as to the identity of the asset transferred may also be classed as fundamental: see Virgo, *supra* n. 11, pp. 586-588. Virgo also suggests that title will not pass in extreme cases of compulsion; *ibid.* pp. 589-590.

¹³ See *Foskett v. McKeown* [2001] 1 A.C. 102.

¹⁴ Under s 3(3) of the Torts (Interference with Goods) Act 1977.

¹⁵ See *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos 4 and 5)* [2002] 2 W.L.R. 1353, para. 79 *per* Lord Nicholls.

¹⁶ Birks argued that all claims for money had and received are unjust enrichment claims and that all unjust enrichment claims (and, it seems, only such claims) are subject to the defence of change of position. The first part of this argument has however been challenged: see R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), pp. 32-34, 277-279; Virgo, *supra* n. 11, pp. 575, 645-646. In the shadow of *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548, Grantham and Rickett and Virgo nonetheless accept that change of position should be available in respect of such claims; Grantham and Rickett, *ibid.*, pp. 360-361; Virgo, *supra*, n. 11, pp. 710-711.

¹⁷ E.g. *Re Trusts of the Abbott Fund* [1900] 2 Ch. 326; *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291; *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1981] Ch. 105. See more

controversial. Where it does, the claimant is entitled to specific recovery of the asset and has priority in insolvency. At present, change of position is no defence, though there is academic support for the view that it should be.¹⁸ The position is less clear with respect to claimants who held an equitable title. In most cases the defendant will have received the asset as the result of an improper transfer by the claimant's trustee, in which case the claimant will most likely have been ignorant of the transfer and hence his title will remain. Furthermore, as we are looking at cases of physical receipt of the asset, defective dispositions by the claimant of his equitable interest are not in point, since the asset will in such cases remain in the trustee's hands. The only cases in point then would seem to be where the claimant directs his trustee to transfer the asset to the defendant absolutely and where the claimant releases his equitable interest such that the defendant trustee becomes absolutely entitled to the asset.¹⁹ Should the claimant's consent to the transaction be defective, then the likely result is that the claimant could ask for the disposition to be rescinded.

So, there is no doubt that as the law stands, a variety of responses exist to defective or non-consensual transfers of property. The key question then is whether these different responses can be attributed to material differences between the cases. If not, we are failing to treat like cases alike.

4.2 The passing of title

Most restitution writers support the distinction between, and different treatment of, on the one hand, those cases where the claimant's absent or defective consent has the effect of precluding title passing to the defendant recipient and, on the other, those in which the claimant's title nonetheless does pass. If this distinction is to be justified it must be on the basis that it reflects and supports a material dissimilarity between the two classes of case. As we saw in the previous chapter, the material likeness of cases can only be determined by identifying those principles which we believe should be reflected in the law and examining their application to the facts.²⁰ What we should not do is to conclude that cases are materially alike simply because they are treated alike or that they are materially different because they are treated differently.²¹ Therefore, the clear fact that the law *does* draw a distinction between those cases where title does pass and those where it does not, does not in itself tell us whether it *should*.

generally R. Chambers, *Resulting Trusts* (Clarendon Press, 1997); *c.f.* *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 696.

¹⁸ See, e.g., P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] *N.Z. Law Review* 623, at pp. 632-635; Chambers, *supra*, n. 17, p. 237.

¹⁹ In both cases, the defendant would end up with legal beneficial title, the claimant's equitable title having been extinguished. They therefore differ in structure from those cases discussed previously where the claimant's is a legal title and it is this title which passes to the defendant.

²⁰ See chapter 3, *supra*, text to nn. 1-4.

Many of the arguments that have been made in support of this distinction can be rejected on this basis. For example, a number of writers seek to justify the distinction between claims where title has not passed and those where it has on the basis that the courts approach matters differently in each case, for example by not requiring the identification of an “unjust factor” in the former class of case.²² Even if this were true,²³ all this would show is that the courts currently *treat* these cases differently, not that they *are* different.

Similarly misconceived is the argument that only where the claimant’s title passes to the defendant recipient can it be said that he has been enriched or that his enrichment comes at the claimant’s expense, and hence that his liability is founded on his unjust enrichment.²⁴ From this it is thought to follow that liability in those cases where title does not pass must be explained on some other basis. The standard counter-argument is that, though the defendant may not as a matter of “technicality” be enriched, as a matter of “factual reality” he is, since, in spite of his lack of title to it, the asset is at his disposal.²⁵ A stronger point perhaps is that if we are to view enrichment as precluded by the claimant’s retention of title to the asset received by the defendant, then we should also say that the defendant is not enriched where he *does* acquire title but comes under an immediate obligation to give up its value. In both cases the law has provided a mechanism which prevents the defendant from benefiting from his receipt.²⁶ The more fundamental objection,

²¹ *Ibid.*

²² See, e.g., A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn 2002), pp. 61-62; Virgo, *supra*, n. 11, pp. 11-14, 570-574; L. Smith, “Unjust Enrichment, Property and the Structure of Trusts” (2000) 116 *L.Q.R.* 412, at p. 420.

²³ And, as regards the role of “unjust factors”, it may not be. Though the courts may not use this language in those cases where title does not pass, it is clear that the determination that title has not passed requires first identifying a relevant and sufficient defect in consent on the part of the claimant to the asset’s receipt by the defendant.

²⁴ See, e.g., W. Swadling, “A Claim in Restitution” [1996] *L.M.C.L.Q.* 63; A. Tettenborn, “Restitution of Property you do not Own Anyway”, ch. 11 of A. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2003). *C.f.* *Portman Building Society v. Hamlyn Taylor Neck* [1998] 4 All E.R. 202.

²⁵ See Birks, *supra*, n. 18 at pp. 654-656; *c.f.* R. Grantham and C. Rickett, “Restitution, Property and Ignorance – A Reply to Mr Swadling” [1996] *L.M.C.L.Q.* 463; Grantham and Rickett, *supra*, n. 16, pp. 34-35. It seems, however, that Birks subsequently changed his view on the factual enrichment point, see P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2004), pp. 27, 64-68, arguing that title does indeed preclude enrichment and so that, where title does not pass, the success of an unjust enrichment claim requires the claimant effectively to renounce his title. Grantham and Rickett’s line on the factual enrichment argument appears to fluctuate; compare the citations above with the following: R. Grantham and C. Rickett, “Trust Money as an Unjust Enrichment: A Misconception” [1998] *L.M.C.L.Q.* 514, at pp. 517-518; R. Grantham and C. Rickett, “Property Rights as a Legally Significant Event” [2003] *C.L.J.* 717, at pp. 738, 742-743.

²⁶ For instance, Grantham and Rickett, in R. Grantham and C. Rickett, “Property Rights as a Legally Significant Event” [2003] *C.L.J.* 717, at p. 742, deny the existence of enrichment where title does not pass on the basis that “[t]he defendant’s receipt was always encumbered with an obligation, arising from the claimant’s right *in rem*, to return the property”. But, if the defendant cannot be regarded as enriched where he is liable to give up the asset received or its value (and it is clear that Grantham and Rickett see their argument as applying as much to the latter type of claim as to the former), the same argument denies enrichment in respect of those claims where title does pass. Essentially the same point is made in P. Watts, “Property and ‘Unjust Enrichment’: Cognate Conservators” [1998] *N.Z. Law Review* 151, at p.161.

however, is that, irrespective of what the law may *treat* as an enrichment, the notion of enrichment cannot establish the material dissimilarity of the two types of case we are looking at. If, for example, we compare the cases of an asset transferred to the defendant on the basis of a mistake as to his identity and of the same asset transferred on the basis of the claimant's mistaken belief that he is under an obligation to do this, it is plain that they are not to be materially distinguished on the issue of the defendant's enrichment. In both cases the same asset comes into the defendant's hands. If asking whether the defendant is enriched is a relevant question, and this needs first to be established, then the answer must be the same in both cases, namely yes.

If the current division between claims where title subsists and those where it does not is to be justified, more must be done than simply to fall back on the reality that such a division is an established part of the law. What is needed is an explanation of why we should maintain this distinction.

One such argument is that while the property explanation can account for those cases where the claimant's title to the asset subsists after receipt by the defendant, it cannot explain those cases in which it passes since, by definition, the claimant's property, in the sense of title, in that asset has been lost. For example, Burrows, in rejecting Stoljar's version of the property explanation, writes:²⁷

... as an explanation of the usual case of restitution, where the claimant has itself paid its money to the defendant, the theory is seriously deficient for only in a limited number of cases does the property in the money not pass to the payee.

Now it would be astonishing if Stoljar and all those putting forward similar views had overlooked the passing of title in these cases. But of course they have not. They are not arguing that such restitutionary claims follow from the fact that, as a matter of law, the claimant retains title to the asset following its receipt by the defendant. Plainly in many cases it does not. Rather their, and my, argument is that it is only by reference to the interest, or property, that the claimant had in that asset at the outset that we can explain why it is that he is able to bring a claim when that asset then comes into the defendant's hands following a transfer to which the claimant's consent was either flawed or wholly absent. The defendant is liable precisely because this interest entitled the claimant alone to determine who should use and enjoy that asset, and his decision to allow the defendant to receive and benefit from it was, at best, defective.

It is, at the very least, misconceived to look simply at the rules on the passing of title and to conclude from these that property can have no role to play in justifying the claims that arise in these cases. For a start, this assumes the correctness of these rules, and yet the very question in issue is whether the law is right to respond the way it does in such cases. So, we know that title *does* pass

in many cases of defective transfers, but one of the questions we need to address is whether and why it *should*. More fundamentally, however, the Burrows argument reflects a common failing in unjust enrichment writing, namely to ignore the fact that the rules on the passing of title are themselves a part of, but crucially only one part of, the law's regime to deal with defective transfers. So, the Burrows argument would have us believe that in those cases where title passes, the transfer of the asset from claimant to defendant is itself perfect, that the claimant successfully and effectively disposed of his interest in the asset, notwithstanding any flaws in his decision-making faculties or process. It is because of this that so many commentators then feel driven to look elsewhere for an explanation for the claims that lie in such cases. Yet, if we really did believe that the transfer was entirely effective and beyond challenge, we would have no reason to give *any* claim to the claimant. The asset was the claimant's to dispose of, but he did so. That should be the end of the story. The fact that the law, even as it is, does not take this view but instead imposes a liability on the defendant to give up the asset's value tells us that it does not consider the claimant to have made a straightforward and effective disposition of his interest in the asset.²⁸

Now, it can certainly be argued, as I shall later, that the fact that, in many of these cases, the law treats title as having passed notwithstanding the claimant's flawed consent to the transfer means that the law's protection of the claimant's interest in his assets is sometimes incomplete or inadequate.²⁹ But, even as the law stands and even in those cases where title is, at present, held to pass to the defendant, we can justify the claims that arise following a defective transfer or misapplication of assets only by reference to the notion of property, to the fact that the law gives exclusive entitlements to determine who can use and enjoy assets, since only then can we account for why the law considers that *this* claimant consent is relevant to, and determines the existence of claims in respect of, *this* defendant's receipt of *this* asset or benefit.

²⁷ Burrows, *supra*, n. 22, p. 9.

²⁸ Conversely, there is a tendency to view recovery in those cases where title *does not* pass as resting simply on the claimant's subsisting title to the asset in the defendant's hands (see, e.g., Burrows, *supra*, n. 22, pp. 61-62; Virgo, *supra*, n. 11, pp. 11-17, 570-574; Grantham and Rickett, n. 16, pp. 30-41). However, holding the title is retained by the claimant despite the asset having physically changed hands is itself a legal response, a legal state of affairs, which requires justification.

²⁹ Moreover, the end result in such cases is not far different to the majority of cases where title *does not* pass, for here too the claimant can usually obtain no more than the monetary value of the asset, with the defendant retaining the asset and, ultimately, acquiring title to it. To similar effect, in Roman law, successful *vindicatio* claims, whereby the claimant asserted his entitlement to an asset held by the defendant, gave rise only to an obligation to pay over to the claimant a sum of money equal in value to that asset (see, e.g., B. Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1962), pp. 100-102). So, here too the law left the defendant free to keep the property. As such, we can see that typically, whether or not title is held to pass in the first instance, the claimant position in substance is much the same. And, just as the fact that the claimant does not ultimately recover the asset and indeed loses his title to it does not lead us to view *vindicatio* claims as anything other than assertions of the claimant's interest in his assets, nor should we reject the view that the claims available in respect of defective transfers where title is held to pass are to be explained by reference to the claimant's interest in the asset.

Accordingly, we can and should say that the reason that title does not pass, and that the defendant is then liable to the claimant, where the asset is received without the claimant's knowledge or by virtue of a fundamental mistake is the same as that underlying the defendant's liability in the more typical case where the claimant's flawed consent is not considered sufficient to prevent title passing. In both cases the same principle is being applied, the same interest protected.³⁰ And that interest is the one identified at the beginning of this chapter: the interest in exclusively determining the use, enjoyment and disposition of those resources which the law, through the institution of property, allocates to each of us.

Now, though the facts both of those cases where title passes and those where it does not call for the application of the same principle, and though the responses English law has adopted in these cases are best explained as applications of this common principle, it is nonetheless clear that English law does draw a distinction between these two classes of case, providing different responses in each. Two conclusions are possible. One is that, because of the factual differences between them, the application of the principle to them requires a different response in each class of case. The other is that the law has gone wrong and is failing to treat like cases alike.

4.3 The defect in the claimant's consent

The only factual differences between the two classes of case we have been discussing thus far lies in the nature of the defect of consent on the part of the claimant to the defendant's receipt of the asset. On the one hand we have instances of a complete absence of consent and consent brought about by a mistake of a type the law classes as fundamental; on the other we have all other defects sufficient in law to found a restitutionary claim.³¹ Two distinct arguments have been made which seek to justify the law's differing treatment of these cases on this basis.

The first argument maintains that the question whether the claimant intended title to pass is distinct from the question whether the claimant intended the defendant to be benefited. Virgo, for instance, writes:³²

...[t]itle will not pass to the defendant either where the claimant lacks an intention that title should pass or where the claimant's intention can be treated as vitiated. ... Analysis of the categories of cases in which the claimant's title is vitiated suggests that they mirror the recognised grounds of restitution within the action founded on the reversal of unjust enrichment. But it must be emphasised that these categories have a

³⁰ See too Watts, *supra*, nn. 26, pp. 152-153.

³¹ See *supra*, text to nn. 10-19.

³² Virgo, *supra*, n. 11, p. 583. See too Swadling, *supra*, n. 24 at pp. 64-65, G. Jones, *Goff and Jones: The Law of Restitution* (Sweet and Maxwell, 6th edn 2002), p. 243.

different function in the context of proprietary restitutionary claims and are consequently defined in a different way from the recognized grounds of restitution. For in this context we are not concerned with whether the claimant actually intended to benefit the defendant. Rather, we are concerned to determine whether the claimant actually intended that title in the property should pass to the defendant.

The suggestion then is that there is no inconsistency in the law in the law responding differently to different defects in consent because there is no inconsistency in our saying that the claimant *did* consent to his title passing to the defendant but that he *did not* effectively consent to the defendant being benefited through his receipt of the asset. This does not deny that we are in both cases concerned with the claimant's interest in determining the disposition of those assets allocated to him.³³ Rather, the differing treatment of such cases is attributable to the different types of disposition the claimant may make of his assets. The application of the principle, and hence the precise legal response, is accordingly dependent on the particular disposition of the asset to which the claimant's consent was defective.

That the intention to pass title is not the same as the intention to confer a benefit through one's asset is clear. Transfer of the entirety of one's entitlement is just one way of using that asset to benefit another. The grant of more limited or temporary use privileges is another possibility. However, what this tells us is that it is possible to intend to benefit another through one's property without having an intention to transfer title to that other. This does not aid the argument. What needs to be established is whether and how it is possible for the claimant to intend title to pass but not to intend the recipient to benefit.

Now the law does provide a mechanism which enables an owner to transfer title to another without conferring any corresponding benefit on him. That mechanism is the trust. This means that the combination of an intention to pass title and a lack of intention that the recipient should benefit is neither nonsensical nor a legal impossibility. But it is clearly not consistent with the intentions of the claimant in the cases we are looking at.

In those cases where English law holds that title passes but imposes on the defendant a liability to give up the asset's value, for instance where the transfer is caused by a non-fundamental mistake or is made under compulsion, it is a fiction to say that, though the claimant did not intend the defendant to benefit, he did intend title to pass. Save where an owner makes a transfer on trust, the intention to pass title *is* an intention to benefit. Where, for example, a claimant mistakenly pays the same debt twice, his purpose in making the second payment is to transfer title to, and thereby the benefit of, that money. Had he remembered the prior payment, he would have intended the

³³ Though Virgo does view the two types of case as involving distinct principles. His view that distinct principles are involved in essence rests on the different ways in which the law responds to these cases. As we have seen, chapter 3, text to nn. 1-4, the material likeness or dissimilarity of cases cannot be established this way.

defendant neither to obtain title to it nor to derive any benefit from it. The intent to pass title and the intent to benefit go hand in hand. It is unreal to insist that the claimant's consent to title passing is intact and it is only his intent to confer a benefit that is vitiated. Moreover, because of this, the basis of the restitutionary claim contradicts the reason for holding that title has passed. The law has a choice to make as to what defects of consent will prevent title passing and will give rise to restitutionary liability, but it cannot consistently conclude both that title passes because this is what the claimant intended and that the defendant must nonetheless give up the benefit he received because the claimant did not consent to this.³⁴ My point here is simply that such a response, and the distinction between these cases and those where title does not pass, cannot be supported on the basis that it reflects the claimant's intentions or the way in which his consent was defective.

The second argument does not draw any such distinction between the intention to pass title and the intention to benefit. Instead, it seeks to justify the law's different responses in such cases on the basis that they reflect the different degrees to which a claimant's consent to the defendant's receipt is absent or defective. The greater the defect in the claimant's consent the greater the level of protection he merits. Accordingly, the retention of title in cases of ignorance reflects the claimant's complete absence of consent to the defendant's receipt, whereas the passing of title where the claimant makes a non-fundamental mistake is said to mirror the fact that his consent, though defective, is not wholly absent. Another way of viewing this would be to say that where consent is absent or seriously defective the transfer has no legal effect whatsoever, whereas where the defect is more minor, the transfer is *prima facie* effective.

Two principal objections could be made. Firstly, one may question the premiss of the argument, that defects of consent differ not just in kind (for instance as between mistaken and compelled consent) but in degree. It is clear, for example, that there is a factual distinction between the state of mind of a claimant whose asset is taken without his knowledge and that of one who transfers it on the basis of a liability mistake. What is not so clear to me is whether the claimant's consent is any greater, any more real, in the latter case than in the former. It seems to me that in the case of mistake, as in the case of ignorance, *in the circumstances*, the claimant gives no consent to the defendant's receipt. Of course it is true that the claimant knows of the transfer and, on his understanding of the facts, intends it. But if this is our proper focus then there should be no recovery at all. Similarly, I am far from sure how we are to distinguish greater from more minor mistakes; in what way is a fundamental mistake (more) fundamental? When we distinguish "big" and "small" mistakes in everyday speech we are generally distinguishing the consequences of those mistakes, rather than the nature of the misapprehension or its effect on the individual's decision-

³⁴ This is not to say that holding title to have passed and limiting the claimant to recovery of the asset's value may not be justified. However, if we are to do so it can only be through the application of competing principles which counter the need to give full protection and effect to the claimant's interest in his assets.

making. Looking to the effect of mistake in the law of contract provides no assistance. The division between mistakes as to identity, which render a contract void, and mistakes as to “attributes”, which do not, is not drawn on the basis of the extent to which the claimant’s consent is defective,³⁵ nor do the courts resolve onto which side of the divide a particular case falls by looking at the size or significance of the mistake.³⁶ Other types of mistake which make a contract void similarly are not defined by reference to the degree to which they render the parties’ consent defective but are instead identified by their impact on the performance of the purported contractual obligations.³⁷

An alternative approach would be to look at causation, differentiating “significant” or “predominant” causes from those which are not. And yet, despite the frequent appearance of such notions in discussion of causation,³⁸ I am sceptical as to how we distinguish causes on the basis of significance, that is, on the basis of the size of their contribution to the result. Once we have a list of *causae sine qua non* for the claimant’s decision, it seems idle to inquire as to their relative significance since, *ex hypothesi*, the absence of any one of these would have resulted in a different outcome. We can ask which factors were at the forefront of the claimant’s mind when he made his decision, but it does not follow that these are any more important, or deserving of attention, than his background assumptions. Another approach would be to ask how great the claimant’s desire was that the defendant not benefit, as this more clearly *is* a question of degree. But this question looks unanswerable, certainly unquantifiable, and in any case would not lead to the neat distinctions currently drawn between mistakes as to different factors (identity, subject matter and so on).

I shall not, however, pursue this objection further, as it would take far more than the space available here to substantiate. There is a second objection though. As we have seen, not all factual differences between cases are material differences. Accordingly, even if it is true that there are degrees to which one’s consent can be defective, so that this provides a basis for factually distinguishing these cases, it does not necessarily follow that this also gives us a reason for

³⁵ See, e.g., *Shogun Finance Ltd. v. Hudson* [2004] 1 A.C. 919, at p. 948, *per* Lord Millett, “... it is difficult to see why a mistake induced by fraud should make a contract altogether void if it is a mistake as to the offeror’s identity (whatever that may mean) and not if it is a mistake as to some other attribute of his such as creditworthiness which may be equally or more material”.

³⁶ That is assuming that such a division can be supported. Criticism of the identity and attributes distinction is widespread: see, e.g., *Ingram v. Little* [1961] 1 Q.B. 31, at pp. 64-65, *per* Devlin L.J.; *Lewis v. Averay* [1972] 1 Q.B. 198, at p. 206, *per* Lord Denning M.R.; *Shogun Finance Ltd. v. Hudson* [2004] 1 A.C. 919, at pp. 931-932, *per* Lord Nicholls, and at p. 948, *per* Lord Millett.

³⁷ See, e.g., *Bell v. Lever Bros* [1932] A.C. 161, at p. 218 *per* Lord Atkin, “... a mistake [as to quality] will not affect assent unless it ... is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be”; *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.* [2003] Q.B. 679, at p. 703, *per* Lord Phillips M.R., “...if common mistake is to avoid a contract ... the non-existence of the state of affairs must render performance of the contract impossible”.

³⁸ See, e.g., *Barton v. Armstrong* [1976] A.C. 104, at p. 121; *R. v. Cheshire* [1991] 1 W.L.R. 844, at p. 851-852; *Huyton S.A. v. Peter Cremer GmbH & Co.* [1999] 1 Lloyd’s Rep. 620, at pp. 636. See too the reference

according them different treatment. It has never been suggested, nor is there any basis in principle, for limiting the claimant's recovery for the simple reason that his consent, though flawed, could have been even more defective. An owner's interest in those assets allocated to him justifies the defendant's liability wherever such an asset comes into his hands without the claimant's consent, and whatever the defect in that consent. If limitations are to be imposed on the claimant's recovery then these must come from the application of principles which compete with or qualify the protection of the claimant's ownership interest; principles which carry more weight (or are not so easily outweighed) where the flaw in the claimant's consent is more minor.

An analogy can be drawn with the law of torts. Where the claimant seeks compensation for the losses caused to him by the defendant, there is no suggestion that the claimant should have his damages reduced just because the defendant could have fallen even further below the standards expected of him. However, there are distinct principles which do justify limiting the amount recoverable, and these principles receive greater recognition where the defendant's wrongdoing is less serious. For instance, the rules of remoteness apply so as to limit the types of loss for which the claimant receives compensation, and these rules have greater scope where the defendant's wrongdoing is less serious.³⁹

The resolution of this question therefore depends on the identification and application of the principles which compete with the principle of protecting and effectuating the claimant's ownership interest in his assets. These will be examined in chapter 6. For now, it can be said that, even if we were to accept the argument that the extent of the claimant's recovery should depend on the degree to which his consent to the defendant's receipt is defective, this would not justify the law as it stands. Firstly, there is no reason to assume that mistakes as to identity are any more "fundamental", in the sense of being destructive of the claimant's consent, than mistakes as to other factors.⁴⁰ Secondly, it is not an accurate representation of the law to say that the claimant is better protected where title does not pass than where it does.⁴¹ Sometimes the claimant is indeed better off. The absence of a change of position defence to conversion claims is one example. However, there are also instances when a claimant is in a better position if title is held to pass, particularly in those cases where the claimant acquires a new equitable title in the asset.⁴² For instance, it is only in this latter case that the claimant is entitled to the specific recovery of the asset transferred. In addition, due to the more generous rules of tracing and claiming in equity, in such cases the

of to "causative potency" in *Brian Warwicker Partnership v. H.O.K. International Ltd.* [2005] E.W.C.A. Civ. 962, at para. 37.

³⁹ Compare, for instance, the test set down in *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd., The Wagon Mound* [1961] A.C. 388 with that in *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.* [1997] A.C. 254.

⁴⁰ Remembering that we cannot distinguish these cases on the basis that it is only in the former case that the claimant's intention to pass title is vitiated: see *supra*, text to nn. 32-34.

⁴¹ See S. Worthington, *Equity* (Clarendon Press, 2nd edn 2006), pp. 290, 294-303.

claimant is also in a stronger position should the defendant have exchanged the original asset or mixed it with other assets. The position presently taken by English law in these cases cannot, therefore, be regarded as carrying through a clear policy of providing better protection to a claimant whose consent is more seriously defective.

4.4 Terminology

We have seen that the law responds in a variety of ways to cases where an asset to which the claimant is exclusively entitled is received by the defendant, without the claimant's consent. However, all these cases raise the same question of principle and the varying responses of the law to such cases can all be seen to be applications of the same principle. However, the fact that there are differing responses shows that the law is effecting this principle in different ways at different times. Even if we can say that defects in consent vary in degree, and that this justifies varying degrees of protection, this cannot justify the current legal position. Like cases are not being treated alike. In the next chapter we shall examine what response principle requires in these cases.

Before this, it is helpful to recap and to make clear why I see little or no role in the analysis of the types of claim under discussion for two concepts or expressions, one or both of which are central to most analyses of the law of restitution: unjust enrichment and the vindication of property rights.

4.4.1 *Unjust enrichment*

As we saw in chapter 2, the notion of unjust enrichment as an event, and the event-based taxonomy into which it fits, must be rejected. Justice requires that we treat like cases alike, and the identification of like cases requires analysis of the principles to be embodied in and effectuated through our legal rules. The project of classifying rights by causative event, at best, distracts us from these tasks. At worst, it leads us in the wrong directions. The alternative conception of unjust enrichment, as a principle, is little better as, however broadly or narrowly it is defined, it fails to identify a reason for requiring the defendant to give up his gain. The analyses of those who employ unjust enrichment, whether as an event or as a principle, as a basis for the classification and differentiation of cases fail because they either do not ask what is it that makes cases materially

⁴² See *supra*, n. 13-14.

alike and unlike or their answer to this question is inadequate. The end result of this is the grouping together of cases which are materially dissimilar.⁴³

We can now see that unjust enrichment reasoning also leads to the segregation of cases which raise common questions of principle. Under Birks' event-based taxonomy, in those cases where title passes, the claimant's right of recovery arises from the unjust enrichment of the defendant. However, where title does not pass, the claimant's subsisting rights in the transferred asset are nothing to do with unjust enrichment⁴⁴ since they were held by the claimant before the asset ever came into the defendant's hands. But once we realise that this is not the correct question to ask, and once we ask why it is that the claimant does retain title in such cases, then it is clear that we are dealing with the same principle in each case. Birks came very close to admitting this, but his reliance on classification by causative event required firmly distinguishing the prevention and the reversal of unjust enrichment.⁴⁵ One might have thought that when unjust enrichment is used as the basis of a principle, so avoiding the distinctions entailed by the event-based taxonomy, there would be no such difficulty recognising the common principle underlying both types of case. However, for the most part,⁴⁶ those who have employed a version of the principle have supported a distinction between the cases where title passes and those where it does not, primarily on the grounds that the courts deal with these cases differently and that there is no enrichment where title does not pass. These arguments have been dealt with already.⁴⁷

⁴³ See chapter 3, *infra*, text to nn. 12-14 and 20-24.

⁴⁴ The only slight qualification is that, on Birks' analysis, there will be some cases where the claimant's subsisting title to the asset arose in the first place as a response to an earlier unjust enrichment. However, in such instances, although the claimant's rights arise from an unjust enrichment, this is not an unjust enrichment of the defendant recipient and indeed, at least where the claimant does not disclaim his title, there is no unjust enrichment when the defendant receives the asset.

⁴⁵ P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989), pp. 25-26. Aside from the fact that this distinction followed inevitably from the process of classifying by causative event, Birks also offered a practical reason for maintaining a distinction between cases where title passes and those where it does not, namely that law on the acquisition of property rights would become dragged into the law of restitution, leaving the subject which is too large to be manageable: see *ibid.*, p. 15. This can be criticised on two grounds. Firstly, there is no reason to assume that the rules on the acquisition of title would then have to be seen as part of the law of restitution. The fact that there exist tort claims in respect of damage to or interference with the claimant's property in no meaningful way entails that the rules as to acquiring title are subsumed within the law of torts. And, in any case, the claimant's title to the asset transferred is just as important to the success of those claims where that title passes. In either case, the claimant will not succeed unless he has title to the asset immediately prior to the defendant's receipt. Secondly, it does not follow from the fact that the size of a subject requires it to be divided for the purposes of exposition and learning that such divisions are to be respected when it comes to deciding cases. Classification for the purposes of exposition has a different function from and so need not mirror classification for the purposes of the analysis and resolution of cases.

⁴⁶ Though see A. Burrows, *The Law of Restitution* (Butterworths, 1st edn 1993), pp. 362-375, for an instance of the unjust enrichment principle being used to explain those cases where title does not pass. Burrows, however, changed his mind on this, supporting a distinction between the two types of case primarily on the issue of enrichment: see Burrows, *supra*, n. 22, pp. 61-62.

⁴⁷ See *supra*, text to nn. 20-26.

Could we rescue the terminology of unjust enrichment by using it to describe the principle underlying all these claims, the principle we have so far expressed in terms of the protection of the claimant's property or ownership interest? This would give it a material unity which other conceptions of unjust enrichment have lacked. This is, in essence, the position taken by Gordley.⁴⁸ Consistently with the analysis presented here, Gordley stresses the role of exclusivity in restitutionary claims. A claimant will be able to recover where the benefit received by the defendant derived from a resource to which the defendant had an exclusive right to benefit. It is not enough simply to show that the benefit came from the claimant without the latter's consent. Accordingly, as Gordley acknowledges, the conceptions of the unjust enrichment principle adopted by most commentators are on this basis defective. However, rather than rejecting the language of unjust enrichment, Gordley argues that we need simply to refine our understanding of it. Once we appreciate the requirement that the claimant has an exclusive right to benefits of the kind received by the defendant, we can continue to talk meaningfully of a principle against unjust enrichment. Indeed, Gordley contends that we cannot dispense with unjust enrichment since it is only by reference to the principle that we can explain when and why the law provides for the recovery of benefits.

As will be clear, I agree with much of Gordley's analysis. However, I find his use of unjust enrichment unpersuasive. In restitutionary claims of the kind under consideration, the key question, as Gordley notes, is whether the claimant has an exclusive interest in benefits of the kind received by the defendant. But "unjust enrichment" provides no assistance in determining the existence, nature or scope of such interests.⁴⁹ As a matter of authority, the resolution of such issues requires us to turn to the law of property. To answer these questions at the level of principle we must inquire into the reasons the law recognises such interests at all. However, once we identify and understand the nature of such interests, we already have our explanation of why such benefits are recoverable. "Unjust enrichment" tells us nothing we do not already know.

So, while it would be possible, instead of speaking in terms of the protection of property or ownership or exclusive interests in assets, to redeploy the language of unjust enrichment to explain these claims, this is dependent on a refinement of unjust enrichment which makes the concept superfluous. Indeed, continued reference to unjust enrichment is likely to be counter-productive. One problem is that, though "unjust enrichment" is a more convenient, and more familiar, expression, it is not as revealing. It tells us that the defendant has come under a liability by virtue of his receipt but it does not tell us why this is. The words "unjust enrichment", by themselves, give us a conclusion - that the defendant has something that he should not, that he must give it up - not a

⁴⁸ J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006), pp. 419-432.

reason. Now it is possible that we could all learn to understand unjust enrichment as referring to the principle of protecting and effectuating a claimant's ownership interest when, without his consent, an asset of his comes into the defendant's hands. But it would increase the risk of confusion. There are already established definitions of unjust enrichment which we would have to take care to excise, and the difficulty of this task would be compounded by the need to battle against the natural implications of the language of unjust enrichment, which embraces all benefit based claims. Elegance is not to be pursued at the risk of inaccuracy and injustice. And if constant reference to the protection of ownership interests in the event of unintended transfers is thought unwieldy or inelegant, we should look for terminology which does not carry with it preconceptions or implications at odds with the idea we are seeking to identify.

It may be argued that we should be wary of abandoning the language of unjust enrichment. Much progress has been made in recent years in judicial and academic understanding of the law of restitution, and this has been due in a large part to the acceptance of theoretical models which have unjust enrichment as their foundation. There is a fear that much of this good work will be lost by abandonment of traditional unjust enrichment analysis.⁵⁰ It is difficult to see why this would happen. Faced with competition between orthodox analyses of restitution and modern reinterpretations, judges are unlikely to pick neither, and run for the cover of quasi-contract and the like. In any case, when justice, the like treatment of like cases, is in issue, the comfort of sticking with what we have carries little weight. We should not be scared off debate about key theoretical issues simply because some find them bothersome or unpalatable. These things matter; they affect the outcome of cases and hence the rights and liabilities of litigants.

If it is to be used at all, the terminology of unjust enrichment should be reserved for those occasions when we need a common term for all cases where the defendant comes under a liability to give up a gain. Restitutionary liability means that there has been unjust enrichment and vice versa. This is essentially the sense in which unjust enrichment was first used by Birks. Moreover, it is consistent with the natural meaning of the words and so should not be a source of confusion. But it should also be clear that when unjust enrichment is used in this way it contributes nothing to our understanding of restitutionary liability. To say there is an unjust enrichment is to say that the defendant has received something which must be given up, but it says nothing as to when or why this is the case. This leaves unjust enrichment with the same role in the exposition of restitutionary liability as a notion of unjust or recoverable loss would have in describing claims for compensation. It is telling that accounts and analyses of compensatory claims get by and are intelligible without reference to any such notion.

⁴⁹ Indeed, Gordley acknowledges this; see *ibid.*, at p. 425: "... to apply the principle, one has to know whether the claimant has an exclusive right. The principle itself does not tell us what exclusive rights people have."

⁵⁰ See, e.g., Burrows, *supra*, n. 22, p. 6.

4.4.2 *The vindication of property rights*

“The vindication of property rights” may appear more in keeping with the analysis presented here. In this chapter we have used the notion of property to explain the basis of claims an individual has when, without his consent, an asset to which he is exclusively entitled then comes into the defendant’s hands. However, those theorists who use the vindication of property rights have in mind something different from the property explanation put forward here. Such analyses employ the vindication idea alongside unjust enrichment, with the former explaining those claims where title does not pass and the latter those where it does. The vindication of property rights accordingly describes the assertion of subsisting title in the received asset and claims pursuant to such an assertion. This division between vindication claims and unjust enrichment claims, founded as it is on the differences in the treatment given in each case, ignores the common principle underlying them both.⁵¹ If we were to adopt the terminology of the vindication of property rights we would accordingly risk confusion with this different notion of vindication used by other theorists. Moreover, the language of vindication of property is sufficiently broad to embrace claims to assets in the defendant’s hands founded on principles other than the protection of the claimant’s ownership prior to receipt, such as many of the claims traditionally discussed under the heading “restitution for wrongs”.

There is a further reason to be cautious about adopting the language of the vindication of property rights, and which also requires us to refine the property explanation developed thus far. We have seen already that property can be regarded as having a dual dimension, reflected in the terminology of property as things and property as wealth.⁵² We shall see in the coming chapter that these different aspects of ownership support distinct types of claim that can follow when an asset comes into the defendant’s hands without the owner’s consent.

⁵¹ See *supra*, text to nn. 27-30.

⁵² *Supra*, text to n. 5.

Chapter 5

Claims

In the preceding chapter we saw that the claims arising where an asset held by the claimant comes into the defendant's hands without the former's consent are best explained on the basis that they protect and give effect to the claimant's interest in that asset. We have also seen that, at present, English law does not provide a uniform response in such cases, and, in so doing, that it fails to treat like cases alike. If we are to avoid such injustice, we must develop a principled scheme of the claims available in such cases. Since such claims exist to give effect to the claimant's interest in the asset received by the defendant, the form these claims will take turns in the first instance on the nature and scope of this interest. We must therefore begin by examining the content of such interests and asking what form of recovery their protection requires. Secondly, the claims available in such cases will also be shaped by other principles whose application militates against an unqualified assertion of the claimant's interest. We must therefore ask what these principles are and inquire into the effect their recognition should have on what the claimant is entitled to recover.

We shall again start with a central case, namely, where the claimant, prior to the defendant's receipt, had possession of and held legal beneficial title to the asset. Where an asset to which the claimant has such title is received by the defendant without the former's effective consent, the claimant's interest in the asset can support distinct claims. These can be said to reflect, roughly, the distinction drawn between property as things and property as wealth.

5.1 Specific recovery: ownership as the right to a thing

Legal beneficial title is an example, indeed the paradigm instance in English law, of an ownership interest. As we have seen,¹ such interests, in so far as they extend, comprise not just an exclusive entitlement to the wealth the asset represents, to its potential as a means of acquiring new items of wealth, but also an exclusive entitlement to use and enjoy, and to determine others' use and enjoyment of, that asset. That legal beneficial title entails such a right to use the asset and is not restricted to a right to its value or the economic benefits to be derived from it is clear. The law of torts imposes on us a duty not to take or to interfere with assets to which another has title. The duty

¹ See chapter 4, text to nn. 1-5.

is not *either* to refrain from such interference *or* to account for the benefits so derived. If I take your sandwiches but leave you a sum of money to cover their value to you, I have committed both the tort of conversion and the criminal offence of theft. This can only be because an owner has an interest in the asset beyond its value. Accordingly, the claimant should in principle be entitled, where possible, to the specific recovery of the asset. This is the only response which gives full effect and protection to the claimant's interest. Any other form of recovery leaves the asset in the hands of the defendant, with him free to deal with it as he wishes. This is plainly inconsistent with the claimant being exclusively entitled to determine its use and enjoyment.

One objection would be that, while it may be conceded that the claimant had such an entitlement prior to the defendant's receipt, it does not follow that he has any such interest in the asset once it is in the defendant's hands. Certainly, in the majority of defective transfer cases English law holds title to the asset to have passed to the recipient despite the flaw in the claimant's consent.² But why is this? Why should the claimant's entitlement to the asset should be lost or otherwise affected by its physical transfer to or receipt by the defendant? The claimant is of course able to transfer his entitlement to the asset to another, but not every change in possession entails a transfer of ownership.³ Whether the claimant's interest in the asset passes with possession depends on the claimant's intention, on whether he has effectively exercised his power to dispose of his interest. In the cases we are looking at the claimant's consent to such a transfer of his interest, if not wholly absent, is in some way defective. And, even if we admit that it is not every defect in the claimant's consent which will render a purported disposition of his interest ineffective,⁴ we can say that, where the law provides a claim in respect of the defendant's receipt of the asset, this must be because the claimant did not properly exercise his power of disposition. By contrast, where the claimant has effectively exercised his power to transfer his interest, we have no reason to give him *any* claim, whether for specific recovery, the value of the asset, or of some other kind. After all, as we have seen,⁵ the intention to pass title and the intent to benefit the defendant through his receipt of the asset are, in such cases, indivisible. Either both must be regarded as defective or neither. As such, we cannot say that, while the claimant consented to the transfer of his interest in the asset, he did not consent to the defendant receiving any benefit. He no more intends the former than the latter.

² See chapter 4, text to nn. 11-12.

³ See J. Penner, *The Idea of Property in Law* (Oxford University Press, 1997), p. 146.

⁴ Which I think we must. Even if we allow recovery in all cases of mistaken transfers through a causative mistake test (as is the current position in English law: see *Barclays Bank Ltd. v. W. J. Simms, Son & Cooke (Southern) Ltd.* [1980] Q.B. 677), in relation to claims to transfers brought about by coercion or other forms of pressure, the law must decide what degree or type of pressure will give rise to a claim, since pressure of some form is almost inevitably present in any disposition.

⁵ See chapter 4, text to nn. 32-34.

So, any claim the claimant has in respect of the defendant's receipt of the asset depends upon, and can only be justified on the basis of, an ineffective exercise of his power to transfer his interest. And, where the claimant has not properly exercised his power to transfer his entitlement to the asset, in the absence of any principle applying which would justify its expropriation from him, that entitlement should remain the claimant's, irrespective of who currently has factual possession of the asset.⁶ Accordingly, the claimant should be able to call for the return of the asset, not simply on the basis that he did not properly consent to the defendant receiving it in the first place, a decision which was for the claimant alone to make, but on the basis that he should be regarded as having a continuing interest in the asset.⁷

The claim for specific recovery clearly provides for recovery of the asset originally held by the claimant so long as and to the extent that it remains in the defendant's hands.⁸ The claim should also extend, however, to certain other assets not previously being held by the claimant, but to which he can establish an entitlement through their connection with or derivation from the original asset.

5.1.1 Fruits

The first example of this is where the original asset produces what we may term fruits. Where an asset has the capacity for bearing fruit, that is, generating new, distinct assets, title to those fruits will commonly vest in the owner of that initial asset from the moment of the fruit's generation and without the need for any further act, such as seizure, on the part of the owner. In such cases, ownership of the fruit-bearing asset carries with it the exclusive entitlement to (ownership of) those fruits. As such, we can say that such an entitlement to the fruits is an incident

⁶ As such, the position English law takes in many such cases, namely that title to the asset passes but the claimant is entitled to recover its value, can only be justified on the basis of principles which require us to limit or deny a full assertion of the claimant's ownership interest, thus effectively justifying its expropriation. The question of what principles may limit or deny such an assertion of the claimant's interest in the asset shall be examined in chapter 6.

⁷ An analogy can, perhaps, be drawn with claims following a breach of contract. There, even where the court awards compensation, and hence does not give effect to his interest in performance, the claimant's right to performance necessarily underlies the claim. As Lord Clyde stated in *Panatown Ltd. v. Alfred McAlpine Construction Ltd*, [2000] 4 All E.R. 97 at 111, "a failure in the obligation to perform does not destroy the asset [the bargained for contractual rights]. On the contrary it remains the necessary legal basis for a remedy."

⁸ Difficult questions will arise where the claimant's asset is mixed with or joined to another asset, whether the defendant's or a third party's, when in the defendant's possession. Where, or in so far as, the claimant's asset can still be physically separated from the conglomeration, there is no barrier to its specific recovery. There is good sense in a similar approach being taken to mixtures of fungibles. However, where such separation is no longer possible, specific recovery of the conglomeration or any part of it can not be justified on the simple basis of the claimant's pre-existing and continuing entitlement to it, since *ex hypothesi*, the asset claimed is not the asset to which the claimant initially held title. If the claimant is to make out some entitlement to the conglomeration it would be by virtue of principles analogous to those supporting claims to substitute assets acquired in exchange for the original asset: on which see *infra*, text to nn. 11-16.

of title to the original asset. Where this is so, the claimant should be entitled to specific recovery of not just the original asset but also any fruit generated by it while it is in the defendant's hands.

What counts as a fruit in this sense will often not be straightforward. Fruit from a fruit-bearing tree may appear the most obvious example, such that ownership of an apple tree entails ownership of its apples. However, the law may take a different view where the apples fall onto a neighbour's land. Similarly a legal system may hold that ownership of a litter of piglets depends not (only) on ownership of the sow but (also) on ownership of the boar.⁹ For present purposes such questions need not be addressed more fully. Whether title to the fruit does indeed rest solely on title to the other asset is a question of the same order as what the conditions of title to that original asset are and whether the claimant has met them. While fundamental to the success of such a claim, they are logically prior to the question of what claims lie when an asset to which the claimant is exclusively entitled comes into the defendant's hands. So just as we can say that there should be specific recovery where the claimant has title to an asset which is then received by the defendant without the former's consent, we can simply say that, where (first) title to the fruit is dependent solely on title to the asset which produced it, the claimant should be entitled to specific recovery not only of the fruit-bearing asset first received by the defendant but also of any such fruits produced by it whilst in the defendant's possession.¹⁰

5.1.2 *Substitutes*

A second example is where the defendant exchanges the asset received from the claimant for another asset. In such cases, the law commonly extends to the new, substitute asset the claims which were available in respect of¹¹ the original asset. Where this is so, the claimant is said to be able to "trace (the value inherent in the original asset) into" the substitute acquired with it. However, the language of tracing sheds no light on why it is that, in certain situations, claims available in respect of the asset to which the claimant did originally hold title can also attach to the

⁹ For example, in English law, first ownership of the young of animals usually goes to the owner of the other; *partus sequitur ventrem*. There is an exception though in the case of cygnets, where ownership is divided between the owners of the cob and hen: see W. Swadling, "Property: General Principles", ch. 4 of P. Birks (ed.), *English Private Law: Volume 1* (Oxford University Press, 2000), p. 350; W. Blackstone, *Commentaries on the Law of England: Volume 2* (1766), pp. 390-391.

¹⁰ Similarly we can, and torts textbooks do, say that an owner has a claim for compensatory damages where the defendant intentionally or negligently damages his asset, without full explanation of when a claimant will be able to establish such an ownership interest.

¹¹ This formulation is used to accommodate not just claims to specific recovery but also claims against the defendant for his handling of the asset, claims for money had and received and knowing receipt.

substitute asset – an asset to which, prior to the exchange, the claimant had no entitlement.¹² A sustained argument has been made that the claimant’s ability to assert an interest in the substitute asset rests on the reversal of unjust enrichment. However, we have already seen that “unjust enrichment” has no explanatory force, failing to identify a principle or reason justifying the existence of rights and claims. These failings are clear enough when dealing with claims in respect of the defendant’s receipt of the original asset from the claimant. Once we come to claims to substitutes, these problems are compounded. An unjust enrichment analysis requires us to say not only that the defendant is (further) enriched each time he makes such an exchange, but that such enrichment comes each time at the claimant’s expense. It is unsurprising that some unjust enrichment adherents have found this a bridge too far.¹³ In any case, even if we could find a way of stretching these notions to accommodate such claims, the point is that this would nonetheless fail to provide an adequate account of *why* such claims exist. What we need to know, and what unjust enrichment fails to tell us, is why the claimant acquires some entitlement to the substitute asset. How do we get from his title to the original asset to an interest in the substitute for which it was exchanged?

Perhaps the best explanation is as follows. Ownership interests, so far as they extend, entail the exclusive entitlement to determine the use and enjoyment of the relevant asset. This will generally entitle the owner, *inter alia*, to permit others to use and enjoy that asset and even to transfer his interest in that asset to another outright. Moreover, the owner is free to set the terms of such a disposition.¹⁴ It may be gratuitous or he may make it conditional on the donee providing some asset or service in return. Because of this latter possibility, ownership gives one the power to use the asset to acquire other items of wealth through exchange.¹⁵ Therefore, so long as the asset has some value to others, ownership interests provide the owner with a potential for acquiring new assets and other forms of wealth. Moreover, this power falls within the exclusive province of the owner, such that he and he alone is entitled to take advantage of this potential.

Accordingly, where the defendant receives an asset to which the claimant is entitled without the latter’s effective consent, just as we should not view the claimant as having transferred or lost

¹² Indeed, the modern tendency is to say that tracing is simply the process of identifying the location of value, and so is “neutral” as to rights: see, *e.g.*, L. Smith, *The Law of Tracing* (Clarendon Press, 1997), pp. 6-18, 277-279; P. Birks, “The Necessity of a Unitary Law of Tracing”, ch. 9 of R. Cranston (ed.), *Making Commercial Law* (Clarendon Press, 1997), pp. 242-243; *Foskett v. McKeown* [2001] 1 A.C. 102, at p. 113, *per* Lord Steyn, and at p. 128, *per* Lord Millett. As such, it is not tracing itself which requires explanation but the claims that may be made pursuant to such an exercise. This view may be called into question seeing that the tracing “rules” vary depending on the positions, and in particular the culpability, of the parties involved. In any case, the key question remains, namely, on what basis the claimant is able to assert rights in the substitute.

¹³ See, *e.g.*, Swadling, *supra*, n. 9, p. 354.

¹⁴ See, *e.g.*, *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.* (1987) 38 Building L.R. 82, at p. 102, *per* Scott J.

¹⁵ See J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), p. 172.

his entitlement to the asset, we should not view him as having lost this exclusive power to take advantage of the potential to acquire new items of wealth that ownership entails. While the original asset remains in the defendant's hands, this aspect of the claimant's entitlement is protected, as are all aspects of his ownership interest, by allowing specific recovery of that asset. However, where that asset has, in whole or in part, been exchanged by the defendant for some other asset, specific recovery of the substitute can be justified on the basis that this gives effect to the claimant's ownership interest *in the original asset* in so far as that interest provides the owner with a means of, a capacity for, acquiring other items of wealth. Recognition of the claimant's entitlement to the substitute, and allowing him specific recovery of it, can be viewed as reflecting the fact that it is the claimant alone who is entitled to take advantage of the original asset's potential to be used to obtain new items of wealth.¹⁶

In summary, the claimant should be entitled to specific recovery not only of the original asset to which he held title prior to the defendant's receipt but also of any fruits of that asset and assets acquired by the defendant in exchange for that original asset.

5.2 Non-specific claims¹⁷

The claim for specific recovery gives fullest expression and protection to the claimant's interest in his asset. However, it will not be available in all cases. This will clearly be so where the defendant has retained neither the original asset nor any substitute asset acquired in exchange for it. In addition there may be cases where, though the asset remains in the defendant's hands, competing principles require us to reject a specific recovery claim. However, the unavailability of specific recovery does not mean that the claimant's ownership interest is no longer capable of protection. Whether or not we embrace the notion of proprietary interests as consisting in a bundle of rights, it

¹⁶ It would be possible to make essentially the same argument in terms of "value", the notion central to most modern accounts of tracing. On this basis, ownership of the asset could be said to carry with it the exclusive entitlement to the value inherent in it. When the asset is exchanged for another, that value can then be found in the substitute, and which in turn supports a claim to the substitute. However, I think the analysis presented in the text is preferable. Firstly, it provides a clearer explanation of how and why we can say that the entitlement to or value in the original asset is transferable to the substitute. Secondly, an analysis centred on value fails to account for why the claimant should have an interest not just in the value inherent in the substitute, which could accordingly be given effect by requiring the defendant to give up the equivalent monetary sum, but in the thing itself. Where one's interest is solely in value, its present form and location are irrelevant.

¹⁷ This expression, though inelegant and not particularly revealing, is preferred to "money claims" on the basis that money may be the object of a specific recovery claim and to "personal claims" on the basis that this may wrongly suggest that such claims do not give priority in insolvency; on which see Chapter 7, text to nn. 29-53.

is clear that we can identify and isolate distinct aspects or strands of an ownership interest.¹⁸ Consistently with this, in principle there may also exist claims which give partial, more limited effect to the claimant's entitlement, embodying and effectuating particular aspects of his interest.

5.3 Ownership as the potential to acquire new items of wealth

As we have just seen when examining claims for the specific recovery of substitute assets, among the uses an owner may make of his asset is to grant use privileges to others or to make an outright transfer of his entitlement. Since the owner can set the terms of such a grant or transfer, the asset, at least so long as it is valued by others, provides the owner with a means of, a capacity to, acquire other items of wealth. Accordingly, one aspect of an owner's interest is an exclusive entitlement to take advantage of the asset's potential as a means of acquiring other wealth.¹⁹ More simply, we can say that the owner is entitled to the asset as a source of wealth or as a store of exchange-value.

Where the defendant receives an asset to which the claimant is entitled and without the latter's effective consent, the defendant receives a source of wealth. Moreover, this source of wealth is one to which the claimant is exclusively entitled. This entitlement justifies a claim to the return of that source of wealth to the claimant. The source of wealth being the asset, this is most obviously achieved by specific recovery. However, when viewed as a source of wealth, an asset is significant not for its physical form and its inherent usability but for what can be acquired with it. Because of this, it is possible to protect this aspect of the claimant's interest other than through recovery of the specific asset. All that is needed is for some equivalent source of wealth to be given up to the claimant. Though the source of wealth returned is not the source of wealth to which the claimant is entitled, when assets are viewed as sources of wealth they are essentially fungible, differing only in the measure of exchange value they provide. As such, it is convenient and unobjectionable to allow the claimant to recover an alternative but equivalent source of wealth. The upshot of such a claim is that the defendant retains the asset²⁰ but the improvement to his capacity to acquire new wealth which he gains from the asset is offset by the award which entails an equivalent store of exchange value being given up to the claimant.

¹⁸ See, e.g., A. Honoré, "Ownership", ch. 5 of A. Guest (ed.), *Oxford Essays in Jurisprudence: 1st series* (Oxford University Press, 1961).

¹⁹ See too P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law", ch. 18 of D. Johnston and R. Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002), at pp. 509-510.

²⁰ Indeed the defendant acquires title to it. A claimant may not recover both the asset itself and a sum of money reflecting its wealth-acquiring potential since this would be a form of double recovery. Hence, where

This claim is justified only where and in so far as the defendant retains possession of an asset to which the claimant can establish an exclusive entitlement. Like specific recovery, the claim here is premised on the claimant being able to point to some asset in the defendant's hands and assert an exclusive entitlement to it. The only difference is that the claimant is not asserting his interest in the asset as a thing physically to be used and enjoyed in and for itself, rather he is asserting his interest in it solely as a means to obtain other items of wealth. Where the defendant no longer holds the asset or a substitute, the claimant cannot assert an exclusive interest in any source of wealth held by the defendant. This means that such a claim will be unavailable not only where the defendant has given away the asset gratuitously or where it has been destroyed but also where he has exchanged it for some benefit which does not leave him with any exchange product which can itself be turned to value.²¹ In the latter case, the defendant, though he no longer retains any relevant asset, may still be viewed as having been enriched by his receipt of and dealings with the asset, particularly where this has saved him some otherwise necessary expenditure. As we shall see,²² this enrichment or benefit may itself provide the basis of a claim. However, such a claim must rest on a distinct basis, a distinct aspect of the claimant's interest in his asset.

This aspect of the claimant's interest can most conveniently be effectuated by requiring the defendant to transfer to the claimant a sum of money sufficient to enable his acquisition of such items of wealth as he could have acquired through exchange of the asset. The principal question is how we quantify this sum. Where there is a market in assets of the type to which the claimant is entitled, his interest will be effectively protected by a monetary award equal to the market value of an asset of the same type and in the same condition. This is not (simply) because this is the sum the claimant could have obtained had he decided to sell the asset. Indeed, given the imperfections of markets, a particularly industrious or persuasive seller may be capable of obtaining over the odds for such an asset. Rather, such a sum enables the claimant to acquire for himself an equivalent substitute, which he can then exchange for new items of wealth as and when he chooses, just as he could when in possession of the original.

Where there is no market in such assets, quantification is less straightforward. Since there is no clear way to enable the claimant to obtain an equivalent substitute asset, we must ask how else the claimant's interest in using his asset to acquire new items of wealth can be protected. The starting point is that, without the asset, the claimant is prejudiced to the extent that there are items of wealth which are now beyond his reach, that is, items which he could have acquired in exchange for the asset and which he is now no longer in a position to acquire. In principle, therefore, and remembering that we are still to examine the principles which require such recovery to be limited,

the defendant recovers on the latter basis, he must thereby lose his entitlement to the asset, which passes to the defendant (at least in so far as the non-specific claim extends).

²¹ Such as where the asset is exchanged for a service which leaves no marketable residuum.

the claimant's interest is protected by an award which ensures that his ability to acquire new items of wealth is not diminished through loss of the asset. This requires us to ask what is the most the claimant could have obtained in exchange for the asset, and awarding him the sum it would take to allow him to acquire this. This is essentially to ask what is the highest price the claimant could have obtained for the asset. This question, while difficult, should be no more challenging than the task the courts face when putting a value on unique goods for compensation claims. Moreover, the courts elsewhere have confronted quantification questions of no lesser difficulty, relying where necessary on educated guesswork and common sense.²³ In any case, this question will rarely need to be answered since, as we shall see, competing principles will generally restrict recovery to a lesser sum.

5.4 Ownership as control over benefits

It is clear that ownership interests confer an exclusive right to determine how and by whom the asset is used. This entails that, in so far as use of the asset is something of value to the owner and others, the owner has control over access to the benefits to be obtained from use of that asset. Where the defendant receives an asset to which the claimant is entitled without the latter's effective consent, the defendant, to the extent that he values the use he then makes of that asset, receives a benefit which the claimant did not intend him to have. Does this justify a claim for the recovery or giving up of that benefit? Not in itself.

The claimant's interest in determining the use of the asset justifies preventing others making use of it without his consent. Where the asset is in the defendant's hands, this interest supports a claim for specific recovery of the asset, since this prevents future unauthorised uses.²⁴ However, it does not in itself provide a basis for a claim in respect of the use the defendant has already made of the asset and the benefit he has already derived from so doing. The claimant cannot prevent what has already happened and the use to which the asset was put cannot be undone or reversed. What *can* be reversed is the benefit the defendant received from so using the asset. To make out such a claim, however, the claimant must go further and establish that he has an interest

²² *Infra*, text to nn. 24-68.

²³ Particularly in relation to the issue of the consumer surplus in damages awards for breach of contract, on which see *infra*, text to nn. 65-66. Damages awards for pain and personal injury are another example of the courts not being deterred by difficult, if not impossible, questions of quantification.

²⁴ This interest also justifies injunctive relief to prevent the defendant interfering with the use of the asset by a claimant in possession of it.

not only in determining how and by whom the asset is to be used but also in any benefits which accrue from its use.²⁵

5.4.1 *Establishing an exclusive interest in benefits*

Do ownership interests extend this far? Like the questions of which resources can be owned and what uses of those resources are reserved for the owner, this is a question upon which legal systems may reasonably differ. Such questions of the scope of proprietary interests turn to a significant extent on our reasons for adopting the institution of property in the first place,²⁶ and accordingly the resolution of such issues will not be attempted here.²⁷ What we can examine is the stance taken in English law on this.

If an owner does have such an interest in the benefits derived from his asset, then we should expect this interest to be manifested in a claim to recover any benefits derived by the defendant from it when made without the claimant's consent. Does English law recognise such claims? The difficulty in answering this question is that, as we have just seen, we can justify non-specific claims following defective transfers and misapplications of assets on the basis of the claimant's interest in the asset as a source of wealth. Accordingly, what we need to look for is cases of beneficial receipt or use of another's assets where this alternative explanation for non-specific recovery is not available. The clearest example of this is where the defendant receives and/or makes beneficial use of the claimant's asset, but, at the time of the claim, the defendant retains neither the original asset nor any substitute acquired in exchange for it. In such cases the claimant's interest in his asset as a source of wealth cannot justify recovery since no relevant asset is in the defendant's hands. If ownership interests do, however, entail an exclusive entitlement to benefits derived from the asset's use, then we should nonetheless expect a claim to succeed here.

²⁵ A similar distinction is drawn in P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000), pp. 149-151. It is clear that the former does not entail the latter, in that there is no illogic in recognising a person as having an interest in determining the use of an asset without also giving him an interest in the benefits such use gives. Arguably this is the case in respect of benefits derived from a person exercising his capacity for action, on which see *infra*, text to nn. 106-117.

²⁶ *I.e.* understanding why we sometimes grant to individuals exclusive interests in items of wealth should help determine the extent of such interests.

²⁷ An interesting starting point to the examination of such questions is provided in K. Gray, "Property in Thin Air" [1991] *C.L.J.* 252.

5.4.2 Use claims

It is clear that English law does reveal examples of claims in such instances.²⁸ However, these cases are not conclusive on the point since they may be explicable on other bases. For instance, it has been argued that such claims should be viewed as applications of the principle that nobody should be allowed to profit from his own wrongdoing, an analysis reflected in the conventional categorisation of such claims as examples of restitution for wrongs.²⁹ On this basis, the justification for such claims lies not in the need to respect the claimant's ownership interest, which extends to an exclusive entitlement to any benefits derived from the asset's use, but rather in ensuring that those who have acted wrongfully do not gain through so doing. Alternatively it can be argued such claims are compensatory, designed to make good the loss caused to the claimant by the defendant's wrongful use of the asset.³⁰

In truth, all three are, in appropriate cases, defensible bases for a claim and it is likely that, to the extent that they have chosen between them, different judges at different times have had in mind differing rationales for such claims. Perhaps the strongest argument that these cases demonstrate an entitlement to benefits received from one's assets comes from the fact that liability is strict. This suggests that the reasons for holding the defendant liable do not lie in the quality of

²⁸ E.g. *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246; *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359; *Ministry of Defence v. Ashman* [1993] 2 E.G.L.R. 102.

²⁹ See, e.g., A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn, 2002), p. 455; G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006, pp. 11, 431. One weakness with this explanation of such claims is that they can arise even in the absence of fault on the defendant. Where this is so, the principle that no man should profit from a wrong, whether it is viewed as a moral principle or as an instrument to deter future wrongdoing, has, at most a much reduced application. The law's classification of such conduct by the defendant as a breach of duty does not change this. A second problem with interpreting these claims in this way is that it cannot explain the measure of recovery awarded, since this rarely extends to all the profits made by the defendant, on which see *infra*, nn. 33.

³⁰ See, e.g., *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246, at p. 256, *per Romer L.J.*; R. Sharpe and S. Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 *O.J.L.S.* 290; *c.f. Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] 1 W.L.R. 798. The standard objection to this analysis is that, where the claimant would not himself have used the asset for the period in which the defendant had possession of it, and the defendant's use of it did not decrease its value, the claimant suffers no loss, so any award cannot be compensatory. This criticism is misplaced though. There is no fiction in saying that the claimant suffers a loss where the defendant uses the claimant's asset without his consent, and the claimant would not have consented to the defendant so using the asset gratuitously. The only issue then is as to quantification of this loss. One possible way of measuring the loss is to ask what price the claimant would have charged the defendant in return for permitting such use of the asset. Since English law still for the most part measures loss on an objective, market value basis, we should not be surprised to see the courts approaching the issue through the language of reasonable sums and market price. It is true, of course, that the claimant may not have been willing to grant permission in return for such a sum. But it does not follow from this that he has suffered no loss (*c.f.* J. Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002), pp. 101-102; Burrows, *supra*, nn. 29, at p. 477). On the contrary, it shows that his "subjective" loss exceeds the objective, market-based measure; that is, it provides an example of a consumer surplus. The valid criticism of these cases then is that they under-compensate the claimant.

his conduct but in what he has obtained from it. In essence, the same point is made by those who argue that liability in the torts of conversion and trespass became strict in order to make up for the lack of a *vindicatio* claim at common law.³¹

However, it must also be acknowledged that there are features of these cases inconsistent with such an interpretation. Firstly, it is clear that, as things stand,³² the law responds in the same way to innocent interferences with the claimant's assets as it does where the defendant is at fault, in particular by holding him liable for certain consequential losses. Such a result cannot be justified on the basis that liability exists here only to ensure that the defendant gives up benefits to which the claimant is exclusively entitled. Secondly, the measure of recovery in such cases is difficult to square with *any* of the rationales put forward for such claims.³³ In particular, if the claimant has an exclusive interest in benefits derived from his asset, this justifies recovery of all such benefits received by the defendant. However, recovery in these cases is limited to the sum the claimant could reasonably have charged the defendant for the use he made of the asset. As such, the case law provides only equivocal support for the notion that ownership interests give the holder an exclusive right to benefits derived from the asset.³⁴

³¹ See, e.g., P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] *N.Z. Law Review* 623, at p. 646; J. Davies, "Tort", ch. 14 of P. Birks (ed.), *English Private Law: Volume II* (Oxford University Press, 2000), pp. 502-503; J. Baker, *An Introduction to English Legal History* (Butterworths, 4th edn 2002), p. 399.

³² Though see *Iraqi Airways Corporation v. Kuwait Airways Co. (Nos 4 and 5)* [2002] 2 A.C. 883, at p. 1093, *per* Lord Nicholls.

³³ As an application of the principle that no man should profit from his wrongdoing, such awards are inadequate since recovery generally does not extend to all the profits made by the defendant. If such awards are compensatory, we should expect the courts to pay greater attention to the valuation the claimant himself put on the avoidance of such infringements (see *infra*, n. 65-66). And, if such awards are designed to reverse benefits obtained from the use of the claimant's asset and to which the claimant is exclusively entitled, the courts should take more care to establish and to measure the benefit obtained by the defendant. There is no reason to assume that the defendant places the same value on such use as does the market. Indeed this would be as much of a fiction as the assumption that the market rate is the correct measure of the claimant's loss in such cases: see M. Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 *O.J.L.S.* 42, at pp. 50-52; *c.f.* Edelman, *supra*, n. 30, at pp. 70-71. However, see Jaffey, *supra*, n. 25, pp. 135-138, 146-151, for an attempt to justify both the existence of such claims and the measure of recovery granted on the basis of the claimant's exclusive entitlement to the value generated by his asset.

³⁴ Further judicial support, though only indirect, for the existence of such an interest in benefits derived from one's assets comes from the recent adoption of Birks' framework for identifying and analysing liability in unjust enrichment, which clearly suggests that claims to involuntarily conferred benefits are not dependent on the defendant retaining the asset from which they were derived: see *Banque Financière de la Cité v. Parc (Battersea) Ltd.* [1999] A.C. 221, at p. 227, *per* Lord Steyn. However, in so far as it suggests that all involuntarily conferred benefits are *prima facie* recoverable, this framework is defective: see chapter 3, text to nn. 25-44.

5.4.3 Academic opinion

Turning to the academic literature, there is a similar ambivalence. Among some restitution lawyers there is clearly an assumption that such an interest exists.³⁵ The orthodox framework for establishing a claim in unjust enrichment, whereby, subject to defences, an enrichment received by the defendant can be recovered by the claimant upon establishing that the enrichment came at his expense and the presence of an unjust factor,³⁶ suggests that a claimant has an interest in all benefits deriving from him. However, as we saw in chapter 3,³⁷ this assumption that all involuntarily conferred benefits are *prima facie* recoverable is incorrect, and so we should be wary of following blindly the implications of this conceptual structure. Rather, the recoverability of benefits will in the first instance turn on the claimant establishing some exclusive interest to them, and this is of course the question we are now addressing.

Moreover, other theorists have preferred an interpretation of enrichment which entails that there is no recovery in respect of, and hence the claimant has no interest in, the benefits derived from use of his asset. As will be seen, such arguments are best interpreted as denials of any exclusive interest in an owner in the benefits his asset brings.³⁸ Beatson, for instance, argues that a defendant is enriched, and so liability on the basis of unjust enrichment will lie, only where he has enjoyed an increase in wealth.³⁹ He then says that the hallmarks of wealth are exchange-value, transferability and/or the capacity to produce income. This leads him to conclude that unjust enrichment reasoning cannot justify recovery in respect of what he terms “pure” services, namely those actions of the claimant which neither leave the defendant with some marketable residuum, such as some new asset or an improvement to an existing asset, nor save him a necessary expense, since in such cases the defendant ends up with nothing he can exchange for value or which produces an income. However, this argument also requires the rejection of liability in respect of benefits derived from use of the claimant’s asset, where such use leaves neither a marketable residuum in the defendant’s hands nor saves him a necessary expense, as again in such cases the defendant does not, under Beatson’s definition, enjoy any increase in his private wealth.

³⁵ See, e.g., P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 83-86; D. Friedmann, “Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong” (1980) 80 *Columbia L.R.* 504.

³⁶ First developed in P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989), though later adopted by most of the texts.

³⁷ Text to nn. 25-44.

³⁸ In addition to the writers discussed in the text, such a position is taken in R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), p. 61; though for criticism of Grantham and Rickett’s argument see *infra*, n. 38 and accompanying text. See too J. Stevens, “Vindicating the Proprietary Nature of Tracing” [2001] *Conv.* 94, at p. 99: “It is submitted that value cannot subsist in the abstract, but only in respect of specific assets, whether tangible or intangible. In other words, value can only endure in the form of a property right.”

The standard response to Beatson's argument is to state that he is simply wrong to say that a defendant cannot be benefited without an increase in the assets at his disposal, and in particular to say that pure services cannot constitute a benefit.⁴⁰ This is, however, to misconstrue Beatson's point. He does not claim that pure services are not beneficial. Indeed he acknowledges that a money value can be put on them. Rather he is saying that it is not all unintended benefits which are capable of founding a claim in unjust enrichment, and that such claims should be limited to those instances where the defendant's benefit takes the form of an increase in his private wealth. The difficulty with his argument is that nowhere does he offer any clear reason for adopting this narrowed definition of enrichment and the consequent limitation on such claims. Having accepted Birks' equation of enrichment with wealth, he goes on to reject Birks' understanding of wealth on the basis that this is not the "ordinary sense of the word"⁴¹ and inconsistent with how it is used by economists. But there is little explanation of why the latter interpretation is preferable.⁴²

A similar argument, with similar implications for cases where the defendant benefits from use of an asset, is made by Muir.⁴³ He explicitly accepts that the concept of benefit extends beyond the receipt of assets. However, he argues that, within the law of unjust enrichment, benefit must be given a narrower meaning, or, in other words, that the law must provide for recovery only in respect of certain types of benefit. According to Muir, we should distinguish acts which "confer a benefit" on the defendant, which equate to transfers of wealth, and acts which are "of benefit" to the defendant, which, at most, merely create wealth.⁴⁴ His argument is that an unjust enrichment claim can only lie in the former case. As with Beatson, the difficulty comes in identifying Muir's reasons for rejecting liability where no wealth (as defined by Muir) is transferred to the defendant.⁴⁵ That

³⁹ J. Beatson, "Benefit, Reliance, and the Structure of Unjust Enrichment", ch. 2 of *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991), pp. 29-32.

⁴⁰ See, e.g., Birks, *supra* n. 36, pp. 449-451; Burrows, *supra*, n. 29, pp. 17-18.

⁴¹ Beatson, *supra*, n. 39, p. 24.

⁴² See Jaffey, *supra*, n. 25, pp. 90-91. One has to look elsewhere in Beatson's essay to piece together his reasons for taking this view. His principal concern is that Birks' understanding of enrichment threatens the homogeneity of that concept and hence also the homogeneity of the legal category of unjust enrichment. On Birks' approach, a finding of enrichment will sometimes require an inquiry into the defendant's choices and preferences (in order to establish whether the defendant can subjectively devalue his receipt). Beatson appears to believe that this compromises the clean division between unjust enrichment and other legal categories, such as contract: see *ibid.*, pp. 36-39. Beatson's fears are surely unfounded. Acknowledging that benefit is subjective, and so, in a sense, choice-dependent, does not entail that any liability in respect of the receipt of benefits is chosen, that is, voluntarily undertaken.

⁴³ G. Muir, "Unjust Sacrifice and the Officious Intervener", ch. 9 of P. Finn (ed.), *Essays on Restitution* (Law Book Company, 1990), pp. 297-305.

⁴⁴ Muir does not offer a clear definition of wealth, but it appears that he interprets it similarly to Beatson. Their analyses differ, however, in that Beatson would allow for claims where the claimant benefits the defendant by saving him a necessary expense. Muir, by contrast, requires some transfer from claimant to defendant and accordingly excludes such cases: *ibid.*, p. 302.

⁴⁵ Muir, *ibid.*, p. 299, talks of the need for a narrowed notion of benefit to preclude liability in instances of unintended benefit in which liability has not been recognised and would be undesirable. I agree that there should not be liability in all cases of unintended benefit, but the better way to achieve and to explain this is through examination of the interests we protect by, and the principles which support, such claims. Muir by

we can distinguish cases where the defendant is benefited through the receipt of assets from those where he is benefited by some other means is clear. But what we need to know is whether this factual distinction is also a material one, one which justifies according to these two classes of case different treatment.

If this limitation is to be anything other than arbitrary, it must be grounded in some feature unique to the receipt of assets. What distinguishes the receipt of assets from other situations in which the defendant is benefited is that the defendant acquires something which he can exchange for other items of wealth.⁴⁶ If recovery in respect of unintended benefits is to be limited to those cases where the defendant receives something which he can then use to acquire other items of wealth, this suggests that the only benefit the law is concerned with, the only benefit in respect of which liability will arise, is the benefit of receiving something which enables one to acquire further wealth. But then the interest in benefits we are recognising and effectuating through such claims is no more than the claimant's exclusive interest in the asset's potential as a means to acquire wealth through exchange. This interest was examined above, where we saw that it justifies a non-specific claim in its own right. If we interpret enrichment so as to apply only to the receipt of things which can be exchanged for value then we are effectively denying any legally recognised interest in benefits distinct from the interests we have already examined. Accordingly, if we take Beatson and Muir's view of enrichment, we are denying that an owner has an exclusive interest in the benefits his asset produces beyond its potential as a source of wealth, and, as such, we cannot justify any claims beyond those we have examined already.

One final point must be dealt with. Birks latterly made an argument which, if correct, would entail that there would be no liability in cases of beneficial receipt where the defendant does not retain the original asset or a substitute. As such, the argument is similar in its consequences to Beatson's and, as with Beatson, Birks' attention was focused on claims in respect of pure services.⁴⁷ Contrary to what he understood Beatson to be arguing, Birks acknowledged that pure services could be beneficial. However, he claimed that, nonetheless, no claim would lie in such cases since, in the absence of any marketable residuum or saving of expenditure, the defendant could not be said to have *retained* any benefit derived from the claimant's actions.⁴⁸ The same reasoning must also require us to deny restitutionary liability for the use of assets in the absence of their retention, at

contrast offers no analysis of why liability is desirable in cases where the claimant confers a benefit but not where his actions are merely of benefit. Muir's other concern is with the difficulties in quantifying certain benefits. Again, it is unclear why he thinks such difficulties are greater where there is no transfer of wealth.

⁴⁶ Here I am using the term "wealth", as in earlier chapters, and in contrast to Beatson and Muir, to encompass not just the receipt of assets but also other items of value.

⁴⁷ *Supra*, text to nn. 39-40.

⁴⁸ Birks, *supra*, n. 35, pp. 62-63; see also P. Birks and C. Mitchell, "Unjust Enrichment", ch. 15 of P. Birks (ed.), *English Private Law: Volume II* (Oxford University Press, 2000), p. 542. In Birks' terms the defendant is entitled in such cases to raise the defence of change of position, a defence which, in the absence of wrongdoing on the defendant's part, limits recovery to the value of the enrichment retained by him.

least where such use does not save the defendant any expenditure. As such, Birks' argument seems to be that, though a claimant has an interest in all benefits deriving from his assets or actions,⁴⁹ no claim will lie where the defendant is left with no marketable residuum nor saves any expenditure for the simple reason that, in such cases, there is no benefit retained for the claimant to recover.

The argument is open to objection however. Firstly, if we are to say that a defendant can only retain a benefit where there is a retention of, improvement to or preservation of assets, we are making the notion of benefit co-extensive with an increase in the assets at the one's disposal. But, on this basis, we should not regard pure services as beneficial. Where no asset is received and no saving made there is, on this view of benefit, no point in time when the defendant is benefited. Therefore, rather than viewing the receipt of pure services as an example of enrichment followed by instantaneous disenrichment, we should regard them as cases of no enrichment. This is, of course, contrary to what Birks long argued. The argument is also inconsistent with Birks' own view that a restitutionary claim can lie in cases where the defendant has used but not retained the claimant's asset, even without an assertion of wrongdoing on the part of the defendant.⁵⁰ More fundamentally, Birks' argument entails that all those who pay for services or the use of property are left worse off, and should consider themselves worse off, once the transaction is complete. Indeed, we should always regret having entered into such transactions. If no benefit is retained in such cases, we should all prefer to be in the position in which we started, with the money in our pockets, since we were better off then. But this is clearly not the case. An analogy can be drawn with the notion of loss. We do not say that there is no loss to be compensated in the absence of some diminution in the assets at the claimant's disposal.⁵¹ Loss can take other forms; we can be left worse off in other ways. The same goes for benefit. We can be benefited, left better off, other than through an increase in to our stock of assets. This is why we are happy to pay, and, after the event, remain happy to have paid, for pure services.

The question whether ownership interests carry an exclusive entitlement to benefits derived from the asset cannot, therefore, be regarded as fully settled. The case law is equivocal and the academic literature offers conflicting views, with little explicit discussion, or indeed awareness, of

⁴⁹ This is where his argument differs from Beatson's and Muir's.

⁵⁰ Birks, *supra*, n. 35, pp. 83-86. See in particular the discussion of *Edwards v. Lee's Administrator* (1936) 96 S.W. 2^d 1028, where he states (*ibid.* pp. 84-85), "The use of the land was taken directly from Lee. Despite Lee's having suffered no loss, he would clearly have had a claim in unjust enrichment for the reasonable rental, being the value of what Edwards had taken." The absence of wrongdoing is important since the claimant is then not disentitled from raising a change of position defence.

⁵¹ Similarly, we rightly say that there may still be a loss to be compensated when a specific harm has subsequently been rectified or has abated. For example, where the claimant suffers physical injuries which heal before the trial, we do not treat this as a reversal of that loss or as a reason for rejecting a compensatory claim. The fact that an injury is no longer a continuing *source of loss* does not mean that the losses it had previously caused have been extinguished. For the same reason, once a service is complete, it may no longer be a source of *further* benefit, but it does not follow that the benefit it did bring has been lost. Many of the points here are expanded upon in the following pages.

the issue at stake. What we can say with confidence is that if and where the law regards the claimant's interest in an asset as encompassing not just an exclusive entitlement to determine how that asset will be employed but also an entitlement to any benefits derived from its use,⁵² the claimant should be entitled to recover any benefit the defendant has derived from use of the asset to which the claimant has not effectively consented. Such a claim is explicable on the simple basis that, so long as the defendant retains that benefit, he has something to which he is not, and to which the claimant is, entitled. As such, the claim is in many ways similar to the claim for specific recovery. In both instances the claimant is asserting that the defendant has something which is rightfully his. The difference between them lies in what it is that the claimant is asserting an interest in. In the specific recovery claim he is pointing to the asset itself, the physical thing in the defendant's hands. Here, he is calling not for the return of this thing but of the benefits deriving from it. The defendant is better off, has been enriched by, his receipt of and dealings with the asset, and the point of the claim is to take this benefit from the defendant and transfer it to the claimant.

5.4.4 *The scope of an interest in benefits*

Before we look at how an interest in the benefits derived from an asset may be given effect, there is one other point to which attention should be drawn. We have seen that, although ownership interests can be viewed as granting an open-ended set of use-privileges to the asset, some uses will fall outside the exclusive domain of the owner. Cases like *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor*⁵³ concern the limits of an owner's exclusive interest. Similarly, if we do recognise that an owner has an exclusive interest in benefits derived from the use of his asset, it would not follow that all such benefits would be recoverable. Here too we would have to ask how far this interest extends, and so to what benefits the claimant is entitled.

As with the question of the extent of an owner's use privileges, we should not expect the scope of an interest in benefits to be capable of clear definition. The broadest approach would allow for the recovery all benefits from others' uses of an asset within the owner's exclusive domain without his consent. A narrower and more straightforward alternative would be to recognise the owner as having an interest in the benefits derived from a defendant's use of his asset

⁵² Or, rather, from such uses as fall within the claimant's exclusive interest. There will usually be some uses of the asset, and hence some benefits deriving from the asset's use, which the law does not reserve for the owner. The clearest example of this is the benefit to be derived from viewing the asset: see *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor* (1937) 58 C.L.R. 479.

⁵³ (1937) 58 C.L.R. 479.

only to the extent that such use results in an increase in the assets at the defendant's disposal, such as where it enables him to avoid incurring otherwise necessary expenditure.⁵⁴

5.4.5 *Recovery and quantification of benefits*

The final question is how the recovery of benefits is to be effectuated. We must begin by examining the notion of benefit more closely. Firstly, though our focus here is on cases where the defendant has received tangible property from the claimant, as we have just seen, it is clear that there can be benefit in circumstances other than the receipt of physical assets and we may be benefited even where we end up with a diminution in our assets. This is evident whenever we choose to make a disposition of a physical asset without obtaining another such asset in return, thus diminishing our pool of possessions. If we valued only such assets then we would never choose a course of action which would leave us with fewer of them. The fact that we do demonstrates that we also value other "things", such as experiences, knowledge and relationships.⁵⁵

Secondly, and more fundamentally, even in cases involving the receipt of physical assets, benefit is an abstract, intangible notion. The receipt of the benefit is something distinct from the receipt of the thing. As manifested in the language of deriving a benefit *from* an asset, the benefit is something consequential on, and so necessarily separable from, the asset's physical receipt. The benefits we derive from assets come from what we are able to do with them. The receipt and use of a particular asset will be beneficial to an individual when it facilitates or enables the pursuit of ends and experiences he desires and values, and the benefit is the contribution this makes to his ability to achieve these objectives, to satisfy these wants. And, of course, it is not just the possession and use of tangible assets which can make such a contribution. A benefit is in essence an improvement in a person's quality of life, and we are benefited every time we do or receive or experience something which we value, which we regard as making us better off.

⁵⁴ Essentially the same idea can be expressed by saying that a claimant will be liable for benefits derived from prohibited use of another's assets where and to the extent that it results in an increase to his patrimony. This end result is akin to the position taken by Beatson, on whose view liability should depend on the defendant being left with some marketable residuum: see, *supra*, nn. 39-42 and accompanying text. On this approach, claims for the recovery of benefits begin to resemble the first type of non-specific claim we examined above, where the claimant can recover in respect of the increased wealth-acquiring potential the asset receives provides. The difference, however, is that such claims are dependent on the claimant being able to establish an interest in an asset held by the defendant. By contrast, this version of a claim to recover benefits, and Beatson's preferred approach, are not so limited, requiring merely an increase in the assets at the defendant's disposal. The latter, but not the former, would justify recovery, for instance, where the misapplied asset is used to discharge a liability of the defendant's.

⁵⁵ A common criticism made of theorists such as Beatson and Muir is that they fail to see that a defendant can be benefited in the absence of the receipt of or an improvement to assets (*e.g.*, Birks, *supra* n. 36, pp. 449-451). As we have seen, such criticisms are founded on a misreading of their argument and so are misplaced: see *supra*, text to nn. 40-42.

Two points follow from, and reflect, this. Firstly, the receipt of an asset is not inherently or necessarily beneficial. Whether it is depends on what the defendant can then do with it and the value he places on such uses. We all differ in our goals and interests, our means and our capacities, and such differences lead to differences in both the uses to which we can put a given asset and the value we attach to those uses. Accordingly, what is beneficial to one person may not be to another, and, amongst those for whom receipt of the asset would be beneficial, some will benefit more than others. This brings out the second point, that benefit is, in this sense, a personal or subjective notion. The benefit each of us derives from the receipt of an asset is as personal to us as our tastes, priorities and capabilities, for the very reason that these are the factors which determine what we value.⁵⁶

Since benefit lies in the improvement to one's quality of life, the contribution made to one's ability to pursue one's objectives and satisfy one's wants, it means that while the source of a benefit may be capable of being physically held and given back, benefits themselves cannot. We can see this clearly even in the case of the receipt of physical assets. In such cases, and in contrast to those where the defendant is benefited by other means, continued possession of the asset enables the defendant to derive ongoing benefits through its continued use. Taking the asset away from him precludes his obtaining further benefits in the future, but it does nothing to remove those benefits he has already derived from his earlier use of it. Such benefits, once received, are unaffected by whether or not the defendant retains possession of the asset.⁵⁷ For this reason it is misconceived to argue that only benefits derived from the receipt of assets are reversible.⁵⁸ This confuses the benefit the defendant receives with its source, the asset. Benefits obtained from the receipt and use of physical assets are every bit as intangible, as abstract as those obtained from other sources. There is no greater difficulty or artificiality in reversing a benefit obtained from such other sources than there is in the reversal of the benefits derived from the receipt of assets. Either all such benefits are capable of reversal or none is.

It is worth stressing at this point that I do not think there is anything in this account of benefit which is out of keeping with how the word is applied in the cases and texts, though it is

⁵⁶ However, the benefit an individual derives from an asset may lie not in the value he places on its use and possession but in the fact that he can use it to obtain, by way of exchange, items of wealth which he does regard as valuable in their own right. To this extent, the (subjective) benefit the individual derives from the asset may be dependent upon others regarding that asset as beneficial, and hence being willing to enter into such an exchange with him.

⁵⁷ For the argument that benefit is not co-extensive with, and so can endure even in the absence of, some continued increase in the assets at the claimant's disposal, see *supra*, text to nn. 38-46.

⁵⁸ For instance, Grantham and Rickett, *supra*, n. 38, p. 61, argue that there can be no recovery of benefits conferred by pure services on the basis that, without the defendant having in his hands some new or improved asset, his enrichment is not capable of restoration (reversal).

usually not spelt out in quite such terms.⁵⁹ Indeed, if, instead of understanding benefit as an abstract notion, we were to treat the asset received by the defendant as the relevant benefit, successful restitutionary claims could only result in specific recovery, since the benefit, being the asset itself, could only be returned or given up by its delivery up to the claimant. That the courts allow, and the texts endorse, recovery of benefits to take the form of a non-specific, monetary award shows that they understand the benefit in such cases to be something distinct from the asset itself. Moreover, without such an understanding of benefit, it would be impossible to argue for benefit-based liability in the absence of the defendant's receipt of some physical asset, which could then be returned *in specie*, thus automatically ruling out such claims, *inter alia*, in cases of pure services and payment of another's debts.

Of course this still leaves the question of how such benefits can be reversed. If they are intangible and so cannot be returned *in specie*, then what form could such a claim take? A useful parallel can be found in compensatory claims.

The abstract nature of benefit is mirrored in the notion of loss. Where a claimant seeks compensation for a loss, the loss may take a variety of forms;⁶⁰ assets of his may be damaged, he may suffer physical or psychological injury, his reputation may be harmed. These all result in the claimant being left worse off, in an impairment of his quality of life. An allegation of loss is, therefore, an allegation that the defendant has reduced, if only in some small and temporary way, the claimant's quality of life. The aim of a compensatory award is to redress this, to ensure that the claimant is not left worse off by reason of the defendant's conduct. This is done by awarding him a sum of money which increases his quality of life by an amount equal in measure to the diminution brought about by the defendant. Compensatory damages are not, therefore, designed to put right the specific harms and injuries which the defendant caused and which were the source of the claimant's loss. Indeed often these cannot be reversed.⁶¹ Rather they seek to ensure that, when we combine these specific harms and the money awarded as damages, the claimant is in a position no worse than that which he would have occupied had these harms never occurred. It is for this reason that the

⁵⁹ Indeed, if it were, it would avoid some of the unnecessary difficulties and confusion occasionally found in the cases and texts in the application of the notion of benefit. Thus, for example, one finds uncertainty whether, in cases where the claimant's services result in an end-product received by the defendant, the relevant benefit is the service or its product (see, e.g., *Virgo, supra*, n. 29 at p. 71; *c.f. B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 W.L.R. 783, at pp. 801-802, *per* Robert Goff J.). Of course, both may, depending on the facts, be a source of benefits, and the concept of benefit does not require us to choose between them. (Though, see *infra*, text to nn. 106-117, for discussion of whether the law provides recovery in respect of benefits conferred by one's services.)

⁶⁰ Or rather loss can be suffered in a number of ways. The terminology of loss is used at times to describe the (abstract) worsening of the defendant's position and at others to describe the occurrences which lead to such a worsening. The same is true of "benefit".

⁶¹ Some harms, whether to the person, assets or reputation, are irremediable. However, even where a specific harm can be repaired, until it is repaired, the claimant will have been deprived of the full use and benefit of the damaged item. Though repair stops this deprivation continuing, it in no way corrects or undoes the period of deprivation that has already elapsed. History cannot be rewritten.

courts are correct to say that it is for the claimant alone to determine how he should spend his compensatory damages.⁶²

When it comes to removing a benefit from a defendant, the court is in essence faced with the opposite task. Instead of having a reduction in the quality of life which needs to be redressed, we have here an increase which needs to be offset. This can be done by requiring the defendant to give up something he values, and hence the loss of which reduces his quality of life, in equal measure to the benefit he received, such that, following and by virtue of the claim, the defendant can no longer be said to have been benefited by his receipt. The most obvious and most simple way of doing this is by requiring the defendant to pay the claimant a sum of money equal to the value he places on the benefits he has derived from the asset.⁶³ Money is not the same as benefit. Rather it provides a ready and universal unit of measuring benefit, and, in its physical form, it is a convenient repository of value. The difficulty comes in attaching a money value to the particular benefits received by the defendant. This is because, as we have seen, what is beneficial, and the extent to which it is beneficial, will vary from person to person. What we need to identify therefore is what value, if any, *the defendant* places on his receipt of the asset.⁶⁴

The cases we are considering involve receipt of tangible property. Where the defendant retains that asset or a substitute asset acquired in exchange for it, a non-specific claim of the type described here will be brought either where principle requires the rejection of a specific recovery claim or where the claimant chooses to bring the non-specific claim in preference to a specific recovery claim. In each case the defendant will get to keep the relevant asset. Where specific recovery is unavailable, the law is saying that it is the defendant rather than the claimant who is now entitled to the asset. Where the claimant prefers not to seek specific recovery, he is effectively waiving his entitlement to the asset. In both cases, the defendant acquires, and the claimant loses, not just factual possession of the asset but also the entitlement to it. Therefore, what we are seeking to put a value on is the benefit he receives by acquiring this entitlement to the asset, with the exclusive use privileges and control powers this brings. This equates to asking the question what sum of money would the defendant have been willing to pay to acquire the asset that he received.

⁶² See further C. Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 *O.J.L.S.* 41, at pp. 61-62.

⁶³ Where the defendant retains the asset and the court does not order specific recovery, the sum of money awarded must also take account of the benefits he will in the future derive from its use.

⁶⁴ The need to take into account the defendant's own sense of value is usually approached through the notion of "subjective devaluation": see, e.g., Birks, *supra*, n. 36, pp. 109-114; Burrows, *supra*, n. 29, p. 18. On this basis, the *prima facie* measure of benefit is by reference to market price, but the defendant can argue that he placed a lower value on what he received. The account here differs in that, firstly, market price is not relevant even as a starting point and, secondly, since a defendant's valuation will also on occasion exceed the market price, in principle we should not only be concerned with subjective *devaluation*. (Though the application of competing principles, notably that underlying the defence of change of position, will generally limit recovery in such cases to the market price: see chapter 6, text to n. 41).

In substance, this is no different a task to, and presents the same difficulties as, the assessment of compensatory damages where account is taken of the consumer surplus.⁶⁵ The principal problem is one of proof. How do we know what value the defendant put on having title to the asset? The obvious source of the necessary information is the defendant himself, but, in the context of litigation, we may not feel his evidence to be fully reliable. However, only rarely will there be any evidence to support or contradict that of the defendant. The market value of the asset, where there is one, offers no guidance, since an individual's tastes and circumstances, and so his ascription of value, will often differ from those of the reasonable or statistically average man. If the asset was provided pursuant to a contract which has been discharged, the contract price will be only a little more helpful, merely indicating that he valued performance at at least that sum. Moreover, the claimant, even in contractual cases, is unlikely himself ever to have considered what was the maximum price he would have been willing to pay for the asset. Nonetheless, as shown by their handling of the consumer surplus issue,⁶⁶ the courts are unlikely to yield in the face of such difficulties, relying where necessary on educated guesswork and common sense.

Where the defendant retains neither the asset he originally received nor any substitute asset acquired in exchange for it, the benefit he retains cannot be measured by the value he places on being entitled to such an asset since, *ex hypothesi*, he neither has nor will acquire such an entitlement. Rather, we must seek to identify and place a value on the particular benefits he derived from his dealings with the asset and any substitute. This requires us to inquire in the first instance into how the defendant used the asset whilst it remained in his possession. These uses then need to be valued. Secondly, we must inquire into the circumstances in which the defendant parted with the asset, since they may have brought further benefit. Where the asset was destroyed or stolen, then there is no further benefit to the defendant. However, where the defendant voluntarily transferred it to another, such a disposition will usually bring a benefit to the defendant. This is most obviously the case where the defendant disposes of the asset as part of an exchange. What he receives from his transferee in return will be provide a benefit.⁶⁷ This will also be true though where the defendant makes a gift of the asset. By choosing to part with the asset gratuitously, the defendant demonstrates that he values the donee's receipt of the asset, and the consequences of this, more than he does his own continued entitlement to it. Such benefits must also be valued.⁶⁸

⁶⁵ On which, see generally D. Harris, A. Ogus and J. Philips, "Contract Remedies and the Consumer Surplus" (1979) 95 *L.Q.R.* 581.

⁶⁶ See, e.g., *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] 1 A.C. 344, particularly the speech of Lord Mustill.

⁶⁷ As we are here dealing with the case where the defendant retains no substitute asset, the exchange will be for some service or performance by the transferee or a third party.

⁶⁸ As a final observation, it should be noted that one may benefit from another's assets without ever coming into physical receipt of them. This is the case where the defendant is benefited by work done with the claimant's tools. Another example may be where the claimant pays off a debt owed by the defendant. Provided the benefit derives from an application of the asset from which the claimant is exclusively entitled to

5.5 Further claims

The claims we have examined thus far are all justified on the basis that the defendant has something to which the claimant is entitled. If the defendant holds something to which the claimant is, at least vis-à-vis the defendant, exclusively entitled, giving effect to the claimant's interest requires that the relevant asset or benefit be given up to him. As such, the claimant's recovery simply reflects and follows from his entitlement to the asset and/or the benefits derived from it. Given their justification, such claims are, therefore, dependent on the defendant's continued retention of an asset or benefit to which can establish such an exclusive entitlement. Accordingly, if there is to be liability where the defendant no longer holds an asset or benefit to which the claimant is entitled, it must have some other basis, resting on some other principle or interest of the claimant's.

Though the defendant may no longer hold the asset he received from the claimant, while it was in his possession he will usually have made use of it. In so far as the claimant's interest in the asset empowers him exclusively to determine how the asset will be applied, such use is inconsistent with the claimant's interest. This, however, does not, in itself, justify the defendant's liability. Since the defendant no longer holds the asset, no claim can be justified on the basis of preventing further misuse, and, in respect of the use the defendant has already made of the asset, this is now a matter of history and cannot be reversed or undone. What can be reversed or undone are the consequences of the defendant's use of the asset. We have already dealt with the recovery of benefits derived from use of another's asset. The other possibility is for the claimant to recover compensation for the loss he has suffered through being deprived of the asset.

For such a claim to be justified, however, we must find a reason for requiring this loss to be borne by the defendant rather than the claimant. In the absence of an undertaking of responsibility, the principal justification for shifting onto the defendant a loss which would otherwise fall on the claimant is that the defendant was a cause of the loss and was at fault in doing so.⁶⁹ This will be the case either where the defendant was culpable in causing the initial misapplication or where, though innocent at that stage, he later became aware that the claimant's consent to the transfer was defective and went on knowingly to deal with the asset inconsistently with the claimant's interest.⁷⁰

profit (and many claims would fail at this stage, as with *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor* (1937) 58 C.L.R. 479), a claim may in principle be available on the basis of the claimant's interest in the asset, even where that asset is never received by the defendant.

⁶⁹ See further chapter 6, n. 8 and accompanying text.

⁷⁰ Accordingly, I agree with Jaffey that the liability of a recipient who disposed of the asset in the knowledge that he had received it without the claimant's proper consent is better viewed as founded on the defendant's

The resulting position largely mirrors the view of Aquinas that liability in respect of the receipt of another's asset can rest on one of two bases, namely, having what belongs to another and wrongfully taking what belongs to another.⁷¹ Furthermore, it shows that it is not correct to view the non-consensual receipt, as opposed to retention, of another's asset as raising even a *prima facie* liability.⁷² For this reason, some of the work currently done by the defence of change of position is better analysed as involving a denial of the basic cause of action.⁷³

5.6 Other interests

We have treated as our core case the receipt of assets to which the claimant holds legal beneficial title. When we move beyond this core case to situations where the claimant has some different interest in the asset received or where the defendant is enriched in some other way, the availability of claims and their scope will similarly turn on what interest the claimant can establish in that which the defendant received. In particular, in so far as the claimant's interest mirrors the interest of a holder of legal beneficial title, the same claims should in principle be available.

5.7 Trusts

In the simplest instance of the trust, assets are held by the trustee, who holds legal title to them and has the usual array of control powers and use privileges associated with legal beneficial title. However, in contrast to a holder of legal beneficial title, in exercising these powers, the trustee must act solely in the interests of another, his beneficiary. The beneficiary has a correlative right that the trustee deal with the assets for the former's exclusive benefit. Furthermore, where the beneficiary is of full age and sound mind, and his beneficial interest is absolute, he can call upon the trustee to transfer to him both possession of and legal title to the trust assets, bringing the trust to an

wrongdoing rather than the simple fact of non-consensual receipt: see Jaffey, *supra*, n. 25, pp. 234-235, 320-321.

⁷¹ Thomas Aquinas, *Summae Theologicae* (Burns Oates and Washbourne, 1929), II-II, q. 62, a. 6. See too J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006), pp. 424, 433-434.

⁷² See too the approach taken by Lord Templeman in *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548, at pp. 559-560: "... in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched *and remained unjustly enriched*" [my emphasis].

⁷³ See Jaffey, *supra*, n. 25, pp. 282-284. On change of position, see chapter 6, text to nn. 3-41.

end.⁷⁴ The question then is how should the law respond where an asset held on trust is received by the defendant in the absence of the effective consent of one or both of the trustee and beneficiary?

We shall start with the case where neither the trustee nor the beneficiary consent to the defendant's receipt of the asset. While the trust is up and running the trustee has an interest in the asset which entitles him to physical possession of it and to determine how it is to be employed. And, though the beneficiary's *Saunders v. Vautier* right means that this interest is defeasible and, arguably, that, even prior to the beneficiary's exercise of that right, the trustee has no such exclusive interest *vis-à-vis* the beneficiary, it is clear that the trustee's interest in the asset is an exclusive one with respect to strangers to the trust.⁷⁵ This interest justifies specific recovery of the asset by the trustee from a third party recipient. Furthermore, just as a legal, beneficial owner can also claim specific recovery of assets required in exchange for the asset he originally held, so too should a trustee be entitled to recover assets acquired by the defendant in exchange for the original trust assets. Though the trustee was not entitled to benefit personally from such exchanges, he nonetheless was exclusively entitled (at least *vis-à-vis* the defendant) to determine how to exploit the trust assets' potential for acquiring new items of wealth. Where the defendant has exchanged the original trust assets for a substitute, that potential is then located in the new asset. Specific recovery can therefore be justified on the basis that it puts the trustee back in the position of being able to determine how this potential is exploited. As this power is to be exercised for the benefit of the beneficiary, such recovered substitute assets should, of course, be held on trust for the beneficiary. The same reasoning justifies the trustee bringing a non-specific claim, entitling him to recover the value of what could be acquired in exchange for the asset held by the defendant.

More difficult to justify is a non-specific claim by the trustee to recover the benefits derived by the defendant from his use of the asset. Though the trustee controls access to the asset and the use of it, it is the beneficiary who is entitled exclusively to benefit from this.⁷⁶ As such, it is not the trustee who can establish an entitlement to the benefits received by the defendant. If we are to allow the trustee to sue in respect of the defendant's receipt of such benefits, it can only be on the basis that, just as the trustee has vested in him control powers and use privileges in respect of the asset, so too he holds the power to bring proceedings in respect of the benefits obtained by its unauthorised use. This power would though be held and exercisable solely for the benefit of the beneficiary, and the proceeds of such a claim would accordingly be held on trust for him.

The claims available to the beneficiary will likewise be determined by the nature of his interest in the trust assets. On one view, a beneficiary's only interest is in the trust *fund*, rather than

⁷⁴ *Saunders v. Vautier* (1841) Cr. & Ph. 240.

⁷⁵ See *infra*, n. 89 and accompanying text.

⁷⁶ In the absence of a disposition which overreaches the beneficiary's interest in the asset.

in the specific assets which are at various times held on trust by the trustee.⁷⁷ Quite what an interest in a fund *is*, on this view, is hard to pin down,⁷⁸ but what is clear is that it involves a denial of the beneficiary having specific and distinct interests in the various items which constitute the fund at a given point in time. The premiss of this argument is that there are features of trusts law which cannot be squared with the beneficiary having at all times an interest in the individual assets which form the subject matter of the trust. Penner, for instance, focuses in particular on the claims available to a beneficiary following a misapplication of trust assets. Subject to defences, the beneficiary can elect between asserting an interest in the misapplied asset and making a claim to any substitute assets acquired in exchange for it. Penner's argument is that it is only by understanding the beneficiary's interest as being in a fund of shifting assets, rather than in the individual assets which make up the fund for the time being, that we can explain the beneficiary's ability to assert an interest in the proceeds of both authorised and unauthorised dispositions of trust assets. But this is not true. As we have seen,⁷⁹ an entitlement to substitute assets is best explained as a corollary, and manifestation, of an interest in the original asset's potential as a means of acquiring new items of wealth through exchange. So, rather than being inconsistent with having an interest in the specific trust assets, a beneficiary's right to the proceeds of dispositions of such assets is in fact best explained by him having such an interest.⁸⁰ Indeed, if the beneficiary were not to

⁷⁷ See, e.g., J. Penner, "Duty and Liability in Respect of Funds", ch. 12 of J. Lowry and L. Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths, 2006).

⁷⁸ Though Penner asserts that a fund exists as a distinct proprietary interest (*ibid.* at p. 212), his analysis suggests that, until certain events, such as a breach of trust, occur which allow the beneficiary to claim an interest in specific assets, the beneficiary has no proprietary interest of any sort but simply personal rights against the trustee. Indeed, his statement (*ibid.*) that, "in terms of the fund beneficiary, the proprietary aspect comes out *only*, it is submitted, in the way in which the law deals with situations where things go awry" [his emphasis] comes close to acknowledging this.

⁷⁹ *Supra*, text to nn. 11-16.

⁸⁰ This is not to say that the interest of a beneficiary mirrors in all respects the interest of a holder of legal beneficial title. This is clearly not the case. Most importantly, a beneficiary's interest is subject to, or limited by, the trustee's power, in certain circumstances, to transfer to a third party possession of and legal title to the asset free of the beneficiary's interest (on which see *infra*, text to n. 92). In addition to the claims available following a misapplication of trust assets, Penner gives other examples of aspects of trusts law which he sees as inconsistent with the beneficiary having an interest in individual trust assets. However, these likewise give us no reason for rejecting the analysis of a beneficiary's rights put forward here. Firstly, the beneficiary can assign his entire interest under the trust without making separate assignments in respect of each asset. However, this need mean no more than that the courts have adopted a pragmatic and facilitative approach to such transactions. Secondly, we should not place too much significance on the fact that it is the trustee who holds the right to sue third party recipients of trust assets, since this is principally a matter of form rather than substance. This is made most clear by the ability of the beneficiary to bring such an action where the trustee is unable or unwilling, needing only to join the trustee in proceedings. This shows that the beneficiary is entitled unilaterally to decide whether to sue. Penner's analysis is itself difficult to square with certain features of the trust, in particular the beneficiary's *Saunders v. Vautier* right to require the trustee to transfer the trust assets to him absolutely and his related right to call on the trustee to transfer trust assets absolutely to a third party, as, e.g., in *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291.

have an interest of *any* sort in the individual trust assets, we would not expect him to have any claim other than against the trustee for breach of duty.⁸¹

A more radical analysis views a beneficiary as having no interest of any kind in the trust assets. A sophisticated argument to this effect has recently been put forward by Smith.⁸² Smith has suggested that a beneficiary has a right only to proper performance of the trust by the trustee, and that his rights against third parties are limited only to preventing their interference with the trustee's performance of his duties. Accordingly, the beneficiary has no interest as such in the trust assets, their use and the benefits derived from them, and so claims against third party recipients cannot be justified on the basis of such an interest.⁸³

Is it correct to understand a beneficiary's rights in this way? Smith notes that the rights a beneficiary can assert against third party recipients of trust assets differ from and are less extensive than those they can assert against the trustee.⁸⁴ However, this in itself does not tell us that, to the extent that claims may lie against recipients of trust assets, these do not derive from an interest in such assets. More in point is the observation that duties of care to avoid damage to or destruction of trust assets are owed only to trustees and not to beneficiaries.⁸⁵ This appears inconsistent with the beneficiary having an interest in the assets. By contrast, however, there are aspects of trust law which seem to be incompatible with Smith's view. One is the rule in *Saunders v. Vautier*, which suggests that a beneficiary's interest goes beyond a simple right to performance of the trust by the trustee.⁸⁶ Another is that trusts, and a beneficiary's rights under them, are not dependent on the identity of the trustee. So, the trustees of a trust will often change over time, with the beneficiary's

⁸¹ Similarly, the trustee's liability to restore the trust fund *in specie* appears inconsistent with the beneficiary having no interest in the specific trust assets.

⁸² L. Smith, "Unravelling Proprietary Restitution" (2004) 40 *Can. Bus. L.J.* 317, at pp. 317-322. Largely the same argument had earlier been made by Stone: see H. Stone, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 27 *Columbia L.R.* 467.

⁸³ In fact, it will make little practical difference whether we adopt Smith's analysis or the view that beneficiaries do indeed have an interest in trust the assets. In particular, on Smith's view, holders of misapplied trust assets will, subject to defences, be liable to give them up so as to prevent (further) interference with the trustee's performance of his duties. The principal situation where it may make an important difference (and this depends on a particular understanding of the nature of the trustee's duties) is where the defendant recipient no longer retains the asset, but has benefited from its use while it was in his possession. Here it may be argued that the defendant, since he no longer the holds the asset, is not in a position further to interfere with the trustee's performance of his trust obligations, and so no claim could be justified on that basis. By contrast, if the beneficiary is understood to have an interest in trust assets *and* that interest extends to benefits derived from its use, then liability may be justified.

⁸⁴ Smith, *supra*, n. 82, pp. 320-321. See too R. Nolan, "Equitable Property" (2006) 122 *L.Q.R.* 232.

⁸⁵ See, e.g., *Leigh and Sullivan Ltd. v. Aliakmon Shipping Co. Ltd.*; *The Aliakmon* [1986] A.C. 785, at p. 812, and see too *M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe)* [1998] 4 All E.R. 675. The significance of this rule is reduced, and possibly eliminated, however, once one notes that the beneficiary can compel the trustee to bring claims arising from a breach of the duty of care owed *to him*, with the proceeds of such claims then held on trust for the beneficiary.

⁸⁶ So, for instance, Matthews (P. Matthews, "The Comparative Importance of the Rule in *Saunders v. Vautier*" (2006) 122 *L.Q.R.* 266, at p. 273) writes that *Saunders v. Vautier* "illustrates and exemplifies the idea of beneficial (or 'equitable') ownership or property."

rights remaining unaffected. Indeed, a trust will not fail for want of a trustee, with the court appointing one if necessary. This again suggests that there is something more to the beneficiary's interest under a trust than a simple right against his trustee, that it subsists independently and irrespective of who happens for the time being to be trustee and indeed notwithstanding the temporary absence of a trustee. Similarly, it is clear that in the event of a trustee's insolvency, the trust assets are not made available to meet the claims of the trustee's creditors. This is hard to square with the beneficiary having merely a right to the trustee performing his trust obligations since, though denying creditors access to such access allows performance of the trustee's trust obligations, most other creditors can similarly argue that, without priority, the performance of the (non-trust) obligations they are owed would be interfered with were their claims not granted priority. Smith draws an analogy with the way that contract rights give rise to claims against third party to prevent their interference with performance of the contract,⁸⁷ but the preceding examples show that the rights of a beneficiary are accorded greater protection and are more enduring than contractual rights. What we need to explain is why this is.

The most plausible explanation for all these aspects of a beneficiary's rights is the now orthodox view that the beneficiary has an interest in the trust assets. This explains why the identity of the trustee has no impact on the subsistence or content of the beneficiary's rights and why a beneficiary's claim is accorded priority over the claims of other creditors in the event of the trustee's insolvency. The key question is what is the exact nature of this interest.

I believe there are two ways to conceive of a beneficiary's interest prior to the exercise of his *Saunders v. Vautier* right.⁸⁸ The first is to say that he has, at that time, no interest in the physical possession and determining the use of the asset, but that the *Saunders v. Vautier* right gives him, and indeed amounts to, a power unilaterally to acquire such an interest. The second is to say that he has such an interest even before he exercises that right, since the trustee is entitled to possess and to determine the use of the asset only so long as the beneficiary allows.⁸⁹ On either basis the beneficiary should be entitled to recovery of the asset, any fruits or substitutes from a third party in possession of them. On the first view, even though the asset is now in the defendant's hands, the beneficiary, having not disposed of his power to acquire an interest in possessing and using the

⁸⁷ Smith, *supra*, n. 82, p. 321.

⁸⁸ As will be seen, for present purposes it does not matter which of these conceptions of the beneficiary's rights one adopts. However, authorities such as *Re Brockbank* [1949] Ch. 206 suggest both why this distinction may matter and that the courts have favoured the first conception. For a general examination of the nature and purpose of the *Saunders v. Vautier* principle, see Matthews, *supra*, n. 86.

⁸⁹ On this basis one could argue that there is an analogy between the respective rights of the trustee and beneficiary to the trust assets and the position under the common law where the defendant takes adverse possession of land to which the claimant holds paper title. The adverse possessor acquires a legal title to the land which is "good against" (that is, he acquires an interest in the land which is exclusive in respect of) all but those, such as the claimant (until the expiration of the limitation period), with a better title: see *Asher v.*

asset, may exercise that power and call for the trustee to transfer legal title to him, which entitles him to recover possession from the defendant. On the second, the beneficiary already has such an interest and can simply assert it against the defendant. On either basis, since the beneficiary either has or can acquire such an interest in the asset, he also has available to him the non-specific claims which we have seen are available to the holder of such legal beneficial title. As we have noted,⁹⁰ it is not entirely clear whether legal beneficial title includes an exclusive interest in the benefits others derive from use of the asset. If it does a beneficiary should also be able to claim against those who no longer retain trust assets but who benefited from their use.⁹¹

The second situation to examine is where the trustee consents to the asset passing to the defendant but the beneficiary does not. In such a case the trustee clearly has no claim in respect of any interest of his own in the asset, since he has given his consent to its receipt by the defendant. If any claim is to lie it must be in respect of the beneficiary's interest. Importantly his interest will usually be limited by or subject to the trustee's power to transfer possession of and title to the trust assets free of the beneficiary's interest.⁹² If the trustee transfers a trust asset to the defendant in proper exercise of this power, the beneficiary's interest in the asset is extinguished, regardless of whether the beneficiary knew of or consented to this disposition, and therefore no claim will lie against the defendant. However, the trustee's power to dispose of the asset free of the beneficiary's interest will not be unlimited, and the position differs where the disposition in favour of the defendant exceeds this power of the trustee. In such a case, the beneficiary's interest will not be defeated simply by the trustee transferring the asset to the defendant.⁹³ Therefore, the beneficiary may rely on this subsisting interest to found a claim.

We have seen that one possible interpretation of a beneficiary's *Saunders v. Vautier* right is that, even prior to its exercise, it gives him an interest in the possession and use of the trust assets since he can call for their transfer to him at any time. On this view the beneficiary would be entitled to specific recovery from the defendant as a means of effectuating this interest. However, a specific recovery claim can be justified even if we do not regard the beneficiary as having any such subsisting interest. As we saw, should we not view the beneficiary as having a present interest in possessing and using the asset, his *Saunders v. Vautier* right means that he has a power to acquire such an interest. The key question then is against whom is this power effective. In particular, it does not follow from the fact that it can be exercised against the trustee that it is also exercisable

Whitlock (1865) 1 L.R. 1 Q.B. 1. A similar principle applies in relation to chattels: *Armory v. Delamirie* (1722) 1 Stra. 505.

⁹⁰ *Supra*, text to nn. 25-54.

⁹¹ Indeed, if the law does recognize exclusive interests in benefits derived from assets, it seems clear that, even before exercising, and indeed even in the absence of a *Saunders v. Vautier* right, it is the beneficiary rather than the trustee who has such an interest. Accordingly, on this view, we would not need to rely on *Saunders v. Vautier* to account for the possibility of such a claim.

⁹² See D. Fox, "Overreaching", ch. 4 of P. Birks and A. Pretto (eds), *Breach of Trust* (Hart Publishing, 2002).

against third party recipients of trust assets. It is, however, clear that the courts now regard that power as exigible also against such strangers to the trust. It is for this reason that a beneficiary is regarded as having his own, equitable, title to the trust assets.⁹⁴ That being so, the beneficiary has an interest in the trust assets which he can assert against the defendant recipient and, through an exercise of his *Saunders v. Vautier* right, require the defendant to transfer the asset to him. As before, this also entitles the beneficiary to bring the non-specific claims set out above.

The final situation to examine is where the beneficiary consents to the defendant's receipt but the trustee does not. Since it is the trustee who will, in the usual case, have possession of the asset, such cases will be rare. We can, however, say that the beneficiary, having his own distinct interest in the asset, is free to dispose of this as he chooses, the trustee's consent being irrelevant. In such a case the trustee retains his own interest, though it remains defeasible by an exercise of the *Saunders v. Vautier* right, now held by the defendant. This interest of the trustee, so long as it subsists, supports the various claims described above. Additionally, the beneficiary can call on the trustee to transfer the asset absolutely to the defendant, that is, the trustee transfers possession of, and legal title to, the asset to the defendant, extinguishing the beneficiary's interest in it and leaving the defendant as holder of legal, beneficial title.⁹⁵ That being so, there should be no claim by the trustee where the beneficiary consented to the defendant receiving the asset beneficially and, prior to such receipt, the beneficiary could have required the trustee to transfer the asset to the defendant absolutely.

Not all trusts are alike and, where the rights of the parties differ from those in the simple case we have just been examining, so too may the claims they can bring. For instance, not every beneficiary will have a *Saunders v. Vautier* right to call on the trustee to transfer the trust assets to him absolutely. In the absence of this, the beneficiary will not be able to establish an interest in the trust assets sufficient to justify a specific recovery claim. Where there is no single beneficiary with such a right, the beneficiaries as a group, if all *sui juris*, together can require the transfer of the trust assets to them.⁹⁶ On this basis, they, as a group, can bring the same claims as an absolutely entitled single beneficiary. A beneficiary with no *Saunders v. Vautier* right may still be able to establish an interest in benefits received by the defendant, for instance where the beneficiary has a beneficial life interest in the assets.⁹⁷ On other occasions, though, the beneficiary will have no interest in the trust assets sufficient to found a claim of any kind.⁹⁸ Again though, the beneficiaries as a whole, whether or not all *sui juris*, will be exclusively entitled to the benefits derived from the trust assets.

⁹³ *Ibid.*, p. 105.

⁹⁴ See A. Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 27 *Columbia L.R.* 269.

⁹⁵ *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291.

⁹⁶ *Re Smith* [1928] Ch. 915.

⁹⁷ *C.f. Baker v. Archer-Shee* [1927] A.C. 844.

Accordingly they can claim in respect of any benefits received by the defendant to which they did not consent and which were not the result of an overreaching disposition by the trustee.

5.8 Intellectual property

The institution of property is commonly understood to embrace not simply entitlements to tangible, physical things but also entitlements to certain abstract, incorporeal notions and entities. Intellectual property is one example of this, through which are granted exclusive entitlements to particular ideas, information and motifs. As before, the claims available to the holder of such a right should be determined by the nature and scope of his interest, and, to the extent that his interest mirrors the interest of a holder of legal, beneficial title to tangible assets, the same claims should in principle be available to him.

It is clear that intellectual property rights give an exclusive entitlement to determine who may utilise and take advantage of the information or ideas over which the right extends. This in itself justifies injunctive relief to prevent such use by others without the claimant's consent. The claimant's interest may also extend to an exclusive entitlement to any physical assets acquired or created through application of the idea or information. This would then justify the delivery up of such assets to the claimant.⁹⁹ If his interest comprises not just the power to determine who may use the information or ideas but also an exclusive entitlement to any benefit derived from them then, subject to the application of competing principles, the claimant should have a claim for the recovery of any benefit obtained by others where they have made such use without the claimant's effective consent.

As the law stands, the claims available following infringements of intellectual property rights vary depending on the nature of the idea, information or other abstract entity in which the claimant has an interest. In some instances recovery of all profits derived from prohibited use is unavailable where the defendant acted innocently.¹⁰⁰ The absence of such of a claim strongly suggests that such entitlements do not presently extend to an exclusive entitlement to the benefits generated from use of the idea. In other cases, however, recovery of such benefits seems to be

⁹⁸ This will, for instance, be the position of a beneficiary of a discretionary trust. See *Gartside v. Inland Revenue Commissioners* [1968] A.C. 553.

⁹⁹ *C.f.* Patents Act 1977, s 61(1)(b), Trade Marks Act 1994, ss 15 and 16; A. Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 2nd edn 2004), pp. 583-586. This is not dissimilar to the way an interest in a tangible asset commonly extends to other assets generated from or acquired in exchange for that asset: see *supra*, text to nn. 9-16.

¹⁰⁰ This is clearest in relation to patents: see the Patents Act 1977, s 62(1). The question is less certain in respect of trade mark infringements: see Edelman, *supra*, n. 30, pp. 236-241.

available even in the absence of wrongdoing.¹⁰¹ This is consistent with the claimant having an exclusive interest in such benefits, and indeed it would be difficult to justify such claims on any other basis.¹⁰²

Aside from recovery of profits, a claimant may be entitled to a monetary award measured by reference either to the profits he has lost through the defendant's actions or, where no such profits would have been made, to the sum the claimant could reasonably have charged the defendant for his use. As with the analogous awards made in cases of interference with tangible assets, the latter type of award has been argued to be an example of restitutionary liability.¹⁰³ As we have seen though,¹⁰⁴ the validity of this argument is far from clear. Indeed one may say that, in the absence of some explanation of the basis in principle of such liability, it is idle to debate whether such claims are restitutionary. Certainly limiting recovery to a reasonable sum appears inconsistent with the claimant having an exclusive interest in *all* benefits derived from the idea or information.¹⁰⁵

5.9 Services

It is not only through the receipt and use of our assets that we can confer benefits on others. We can also pass benefits through our actions, by providing services which are of value to them. The question is whether a claimant who does not consent to the defendant benefiting from his actions has a claim in respect of such benefits.

Though the issue of restitution for services has generated its fair share of debate, academic attention has almost exclusively focussed on identifying the circumstances in which services may be regarded as enriching.¹⁰⁶ The implication is that the identification of a benefit received by the defendant is the only obstacle to recovery in such cases. This in turn rests on the widespread,

¹⁰¹ This was clearly the case in relation to copyright infringements under the Copyright Act 1956, s 17(2). Things are less clear now by virtue of s 97(1) of the Copyrights, Designs and Patents Act 1988, though *Wienerworld Ltd. v. Vision Video Ltd.* [1998] F.S.R. 832 suggests that the position remains the same.

¹⁰² The significance of such claims lying in cases of innocent infringement is of course that they cannot be explained as applications of the principle that no man should profit from his wrongdoing. Whether such claims do in fact demonstrate acceptance that the claimant has an exclusive interest in benefits derived from the idea or information is questionable, however, when one looks at the reasons given for such awards. For instance, it is often said that, because the claimant could have obtained an injunction to prevent the defendant's use of the idea or information, profits generated from such use should be recoverable. However, as we have seen (*supra*, text to nn. 24-25), this does not follow. There is no illogic in the law granting the claimant an interest in exclusively determining the use of, and hence who may benefit from, an asset without also recognising an interest in such benefits.

¹⁰³ See, e.g., Edelman, *supra*, n. 30, pp. 224-231.

¹⁰⁴ *Supra*, text to nn. 29-34.

¹⁰⁵ As is the fact that such claims are often unavailable where the defendant acted innocently; see, e.g., Patents Act 1977, s 62(1); Copyright Act 1988, s 97(1).

¹⁰⁶ Hence textbook discussion centres on "pure" services (*supra*, text to nn. 39-42); see, e.g., Birks, *supra* n. 36, pp. 449-451; Burrows, *supra*, n. 29, pp. 17-18; Virgo, *supra*, n. 29, pp. 70-72.

though generally tacit, assumption that a restitutionary claim will *prima facie* lie wherever the defendant receives a benefit from the claimant without the latter's effective consent. As we have seen though,¹⁰⁷ such an assumption is incorrect. It is not every involuntarily conferral of a benefit which is capable of founding a claim, and if a claimant wishes to recover a benefit received by the defendant he must do more than simply show that the benefit came from him and that he did not consent to this. The key question is whether the law recognises individuals as having an exclusive interest in (at least some of) the benefits they create through their actions. To the extent that such an interest is recognised, this justifies the claimant's recovery of benefits derived by a defendant from the claimant's actions without his effective consent.

Is there such an interest? It is clear that the law does recognise our interest in, and so protects, our capacity for action, our freedom to choose how and when we act.¹⁰⁸ And in allowing us to choose how we act, the law allows us to choose who we shall benefit through our actions. But, as we saw in relation to benefits derived from the use of assets,¹⁰⁹ it does not follow that the law recognises any interest in those benefits once created. Much the same point is made by Penner in his rejection of restitutionary liability in cases of pure services.¹¹⁰

Penner's argument has two steps. The first is to demonstrate that the receipt of assets and the receipt of services are conceptually distinct, and so we should reject the orthodox equation of benefits derived from receiving assets and those derived from another's actions. The second is to show that this conceptual distinction is indeed reflected in the law's response to the involuntary conferral of benefits through services. Penner's first step involves distinguishing our interest in property, defined as our interest in things external to ourselves, from our interest in exercising our capacity for action, a capacity which is inherently and necessarily ours. Hence, we have property in, title to, assets, whereas we do not have, and do not speak of having, property in or title to our actions. But, while we can rightly distinguish our interest in assets from our interest in our capacity for action, this does not in itself prove that there should be no claim in respect of benefits conferred by our actions, a claim analogous to that which is, or may be, available in respect of benefits derived from our assets. Put simply, the fact that we *can* distinguish benefits derived from assets and those derived from actions does not tell us that we *should*. So, even if we accept Penner's

¹⁰⁷ Chapter 3, text to nn. 25-44.

¹⁰⁸ This is done principally through the criminal law and the torts of battery and false imprisonment.

¹⁰⁹ *Supra*, text to nn. 24-25.

¹¹⁰ J. Penner, "Basic Obligations", ch. 5 of P. Birks (ed.), *The Classification of Obligations* (Clarendon Press, 1997), at pp. 102-119. Though Penner confines his attention to pure services, his argument arguably suggests that we should also deny recovery in respect of *benefits* derived from the receipt of assets (in contrast to claims dependent on and to give effect to the claimant's interest in *assets* in the defendant's hands). Throughout, the principal distinction he draws is between the receipt of and one's entitlement to assets and receipt of and claims to benefits derived from services, not between *benefits derived from* assets and those from services. For instance, Penner stresses the role of title in identifying rights to assets, noting that no such

definition of property, it does not follow that we cannot or should not have an interest in the benefits created by our actions.¹¹¹ To deny recovery of such benefits on the basis that our capacity for action is not a proprietary interest, without more, is assertion and not reason, depending as it does on an implicit assumption, itself requiring justification, that it is only through the concept of property that the law gives entitlements to benefits. In the absence of such reasoned support, resort to the language of property tells us nothing. As such, Penner's argument does not so much give us a reason to reject recovery in respect of pure services as refute one argument frequently made in support of such claims, namely that there must be symmetry in the law's response to the receipt of benefits from assets and from actions.

What does appear to be true though is that English law does not presently recognise individuals as having an interest in the benefits deriving from or created by their actions. If there were such an interest we should expect benefits involuntarily conferred on others by our actions to be recoverable. The cases, however, do not support this, appearing to require that, before a claim will lie, some additional factor, such as the defendant having encouraged the claimant to act as he did or the defendant allowing the claimant so to act, in the knowledge that he expected payment, must be present.¹¹² Even then the sum of money awarded does not appear to be assessed on the basis that this is the value of the benefit received by the defendant.¹¹³

There is one qualification. Though a number of commentators have challenged the view that there is and should be recovery in respect of pure services, that is services which create or leave no new or improved asset in the defendant's hands, there is close to a consensus that a claim will lie where the claimant's actions do leave such a residuum.

Why should this make a difference? As we have seen, the receipt of assets justifies claims for the recovery of such assets and, possibly, for recovery of benefits derived from them where and on the basis that the claimant has an exclusive interest in those assets. But in the cases we are examining now there is no receipt of assets to which the claimant had any pre-existing entitlement, nor are there assets in the defendant's possession which derive from an asset of the claimant's and

notion is employed in relation to services. But the same point can be made in relation to benefits, whether they derive from assets or other sources.

¹¹¹ Indeed, on Penner's definition, there would be nothing to stop us classing such an interest as an interest in property, since the benefits created by our actions, in contrast to the actions themselves, *are* external to and separable from us.

¹¹² Analyses of the cases along such lines are found in Beatson, *supra*, n. 39, pp. 31-39, Muir, *supra*, n. 43 and in P. Watts, "Restitution – A Property Principle and a Services Principle" [1995] *R.L.R.* 49, at pp. 70-80; *c.f.* the famous quote of Pollock C.B. in *Taylor v. Laird* (1856) 25 L.J. Ex. 329, at p. 332: "One cleans another's shoes; what can the other do but put them on?". The question of what principle, what interest of the claimant, *can* adequately explain recovery in such cases is, however, far from clear; *c.f.* Penner, *supra*, n. 110, pp. 116-119.

¹¹³ That such awards are not quantified by reference to the benefit received by the defendant, and hence that such claims do not reflect an interest in the claimant in such benefits, is reinforced by the fact that a claim may lie even where the claimant's actions do not benefit the defendant; see, *e.g.*, *Planché v. Colburn* (1831) 8 Bing. 14.

so could justify a claim on that basis. The only connection between the claimant and the new or improved asset in the defendant's hands is that the asset or the improvement to it is a product of the claimant's labour or actions. But, in the absence of some interest in the claimant to the products of his actions, this cannot justify such a claim. Because of this, we can justify the denial of recovery in cases of pure services, while at the same time allowing claims where the service gives rise to some new or improved asset, only if we say that a claimant, while having no interest in the *benefits* created by his actions, nonetheless does have an interest in *assets* which his actions create or, possibly, improve or maintain. Is such a position defensible?

Where a service results in the creation of some new asset, not only may the service itself be beneficial to the recipient, but the resulting asset will also usually provide, through its use, a source of further, future benefits. And, as with all assets, if valuable and scarce, it can also be used to acquire new items of wealth through exchange. As such, services which leave a marketable residuum create a capacity to derive ongoing benefits and to acquire other items of wealth. The asset, and with it the power to exercise this capacity and to determine who should benefit from it, requires allocation. By contrast, pure services create or contribute to no asset and hence no such capacity, and so do not raise the same questions of allocation.

There are reasons for resolving these questions of allocation in favour of the claimant. Firstly, one can make what Harris has called a creator-incentive argument.¹¹⁴ Those who, through their labour, create new assets, in so far as these can be put to valued use, thereby create a source of wealth from which any number of people may benefit. To the extent that this is socially desirable, as it usually will be, there is a public interest in encouraging such conduct. This can be done by granting the creator an entitlement to determine the disposition of the asset and the benefits it brings. A second argument builds on the fact that, through protecting our interest in exercising our capacity for action, the law allows us to determine who will benefit from our actions, even if it does not then give us an interest in such benefits once received so as to found a claim for their recovery. It would be consistent with this to allow recovery where the service results in some new or improved asset, since in such cases, in contrast to cases of pure services, the claimant's actions put the defendant in a position to derive ongoing benefits.

Each argument provides both a ground for distinguishing cases of pure services from those where the service leaves some marketable residuum and support for the recognition of an exclusive entitlement to a newly created asset in the claimant. Such an entitlement in turn justifies the same claims as are available where the defendant receives an asset to which the claimant had such an entitlement prior to receipt.¹¹⁵

¹¹⁴ J. Harris, *Property and Justice* (Oxford University Press, 1996), pp. 293-299.

¹¹⁵ The position is less straightforward where the claimant's actions improve an existing asset of the defendant's, rather than create an entirely new asset. To the extent that the same principles apply (and here,

Is this distinction between pure services and those resulting in some end-product reflected in the law? Certainly there are examples of the law granting entitlements to those who have through their industry and/or ideas created new assets. This can be seen in the law of intellectual property and in the rules of *specificatio*. However, where the claimant's actions merely result in an improvement of an existing asset, the position is less clear. Despite the occasional suggestion that a claim will lie in such cases¹¹⁶ there are a number of such situations where no claim is available. For instance, much of the law of tracing is inconsistent with the proposition that a claimant is entitled to recovery where his actions improve or enhance the value of the defendant's asset. As the law stands, it is only contributions in the form of an exchange of assets, and not through the provision of labour or the application of one's skills, which can give rise to an interest in the resulting product.¹¹⁷

5.10 Overview

In summary, the claims available following the defendant's receipt of assets or benefits provided by the claimant will depend, in the first instance, on what interest the claimant has in the asset and/or benefits presently held by the defendant. If the claimant can make out an exclusive entitlement to an asset in the defendant's hands, this should entitle him to its specific recovery or to a monetary award measured by the increase to the defendant's wealth-acquiring potential the asset provides. Such an exclusive entitlement can most easily be established by the claimant

for instance, the creator-incentive argument may have less weight), they would in the usual case justify recovery only to the extent of the increased wealth-acquiring potential that the claimant's contribution brought about.

¹¹⁶ See, e.g., *Greenwood v. Bennett* [1973] Q.B. 195, at p. 202, per Lord Denning M.R. There, Bennett's car was stolen and eventually came into the hands of Harper, who, mistakenly believing the car to be his, repaired and improved it. The car was subsequently seized by the police and the court was required to determine to whom it should be returned. It was held that Bennett was entitled to the car but that he must reimburse Harper for the money he had spent on it. This is an example of what the texts, somewhat misleadingly, call a "passive claim", in that it places a condition on owner's recovery of the car, rather than "actively" entitling the mistaken improver to sue for payment. While Lord Denning M.R. was of the view that an active claim would lie in such cases, this was not endorsed by the other members of the court and was expressly rejected by Cairns L.J. (*ibid.* at p. 203). The distinction between active and passive claims (or, more accurately, between claims brought by the improver and defences or conditions applicable to claims brought against him) is also reflected in s 6(1) of the Torts (Interference with Goods) Act 1977. Though this distinction has been criticized as illogical (see, e.g., Burrows, *supra*, n. 29, p. 164; Virgo, *supra*, n. 29, p. 80), it can be defended and suggests that one whose actions improve another's asset acquires no interest in, and has no claim in respect of, that asset or the benefits derived from it: see Jaffey, *supra*, n. 25, p. 92.

¹¹⁷ See, e.g., *F.C. Jones and Sons v. Jones* [1997] Ch. 159, where there was no suggestion that Mrs Jones had any claim to money which derived, in part, from her investment decisions. *C.f.* Smith, *supra*, n. 12, pp. 239-242, 367-368; T. Akkouch and S. Worthington, "Re *Diplock* (1948)", ch. 11 of C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006), at pp. 304-315. Indeed, even where the claimant contributes to the defendant's asset through his own assets, rather than his actions, it is unclear that a claim lies: see *Borden (U.K.) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch. 25; *c.f.* Akkouch and Worthington, *ibid.*; Smith, *supra*, n. 12, p. 242.

demonstrating that he had such an entitlement to the asset immediately prior to its receipt by the defendant and that he did not properly consent to its transfer to the defendant. It may also be possible to establish such an entitlement in other ways however, notably if the asset in the defendant's hands is a product of or substitute for an asset to which the claimant was exclusively entitled, and, possibly, if the asset was created or improved by the claimant's actions.

The claimant should have a claim to the monetary value of a benefit received by the defendant where he has an exclusive entitlement to benefits deriving from the source from which the defendant was benefited. It is unclear whether and when such entitlements are recognised in the law, though arguably an exclusive entitlement to assets carries with it a similar entitlement to the benefits it brings.

Without identifying such an entitlement, the simple facts that the defendant received an asset from, or has been enriched by, the claimant without his consent provide no justification for any claim by him.

We have now seen what claims are justified by virtue of the claimant's interest in his assets. However, the protection of such interests will often be opposed, and so qualified, by the application of other principles, and it is to these that we now turn.

Chapter 6

Defences

We have now seen what claims are supported by a claimant's interest in his assets when, without his consent, such assets come into the defendant's hands. Of course, such claims will fail if one or more of the facts on which they are founded is absent. For instance, no claim will lie where the claimant's consent to the transfer was in no way defective. This is for the simple reason that, in such cases, the principle that we should protect and give effect to the claimant's interest in exclusively determining the disposition of his assets is not called into play on the facts and so provides no basis for recovery. More importantly, however, such claims will also fail where all the elements of the claim as set out in the previous chapter are present and yet the application of other principles nonetheless require us to deny or to restrict recovery. Where this is so, though the claimant can rightly say that the claim is necessary to protect his interests, there are other considerations which have a stronger, or at least as strong a, claim for recognition in the law and which militate against recovery.¹ What follows is an examination of some of these principles.²

6.1 Change of position and the limits of strict liability

The preceding analysis of the interests which underlie claims in respect of misapplied assets shows why liability in such cases is presumptively strict. In the first place, the entitlement the claimant is asserting is neither premised nor dependent upon any wrongdoing or fault on the defendant's part. Rather, he is simply alleging that by law he has been allocated an interest, exclusive of the defendant, in some thing in the defendant's hands. The defendant is required to do no more than give up something to which he had no prior entitlement and to which no entitlement

¹ It has been said, surprisingly frequently, that defences must logically amount to a denial of some element of the cause of action; see, e.g., P. Birks, *Restitution – The Future* (The Federation Press, 1992), pp. 125-126; R. Nolan, "Change of Position", ch. 6 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995), at p. 136; R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), p. 334, *c.f.*, *ibid.*, p. 314. This is plainly untrue, unless we always include "absence of defences" in the formula for a cause of action, in which case the statement becomes tautologous. Indeed, for this reason, the logical consequence of this view of defences is that reference to "defences" is superfluous. If we are meaningfully to talk of defences, they must be distinct from elements of the cause of action and one basis for dividing the two is that presented in the text. In any case, it is clear that our reasons for rejecting a claim may be unconnected to, and so involve no denial of the applicability of, the principle or interest on which the claimant is relying. Clear examples of this elsewhere in the law of torts include limitation and contributory negligence.

² This is not intended as an exhaustive analysis of such principles. Rather it will focus on some of those most common and most closely connected to cases of misapplied assets.

was properly granted by the person exclusively entitled to do so. Secondly, and crucially, in the simple case with which we began the previous chapter, this does no injustice to the defendant, since the claim will leave him no worse off than if he had never received the asset. If he is required to hand back the asset, he simply ends up in the same position as that which he would have occupied had the asset not been misapplied.³ In short, he gains nothing but loses nothing.⁴

However, the position is no longer so straightforward where allowing a claim on one or more of the bases set out in the previous chapter *would* leave the defendant worse off than if he had not received the asset. The most common situation where this would result is where the defendant has made a disposition of his assets on the assumption that he is entitled to the asset received from the claimant, and he would not have made such a disposition had he known that he had no such entitlement. The question then is whether we should allow recovery (in full) where this would cause such a loss to the defendant.

The position of English law here is equivocal. Where it is held that the defect in the claimant's consent prevents his title passing to the defendant, a claim will not fail simply because this would leave the defendant worse off than if he had not received the asset. The furthest the law goes is, on occasion, to provide a defence where the defendant has, in good faith and without notice of the defect in the claimant's consent, given something of value in return for his receipt of the asset.⁵ By contrast, where title is held to pass despite the claimant's defective consent, claims will not succeed against the defendant, provided he has not committed any wrong, to the extent that this would put him in a worse position than that which he would have occupied had he not received the asset. This is by virtue of the defence known as change of position.⁶

³ Some refinement is needed when we move to the non-specific claims outlined in the previous chapter. Necessarily, in such cases, the defendant is required to give up something (a sum of money) different from that which he received from the claimant. In relation to claims for the recovery of benefits, there can be no danger of the claimant being left worse off as a result of the claim since recovery extends, and is justified, only to the extent that the defendant would otherwise be better off as by virtue of the receipt. In relation to non-specific claims assessed by reference to the wealth-acquiring potential the asset provides, the situation is not so straightforward, and there may be a risk that, even in the simple case, full recovery might leave the defendant worse off: see *infra*, text to nn. 37-41.

⁴ It is important to note, however, that it is not *because* the defendant is not left worse off by the claim that the claim is, in the first instance, justified. Rather, this fact helps us to see why the defendant's innocence does not provide a reason for rejecting such a claim.

⁵ Though this will sometimes have the effect that no loss will be borne by the defendant, it is unclear whether this is the rationale of the defence. Certainly it does not do the job very well. Not only is the defence unavailable in many instances in which full recovery would leave the defendant worse off, but, where the defence does apply, it provides a complete bar to any claim and so goes beyond the mere prevention of such losses to the defendant. See further *infra*, text to nn. 31-36.

⁶ In fact, the position of English law may well be more complex than this brief outline suggests. For instance, at least on one view, where title does not pass, the claimant may nonetheless choose not to rely on, and so effectively denounce, his title and claim instead in unjust enrichment, in which case the change of position defence can be raised: see P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 66-68. Moreover, where the claimant asserts title to a substitute asset in the defendant's hands, it has also been argued that change of position applies: see P. Birks, "Change of Position and Surviving Enrichment", ch. 2 of W. Swadling (ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* (British Institute of

This divergence of approach is usually explained on the basis that change of position is a defence unique to unjust enrichment claims and that, where the claimant is relying on his pre-existing and subsisting title to the misapplied asset, the claim is not in unjust enrichment. But as we have seen already,⁷ such explanations are inadequate since, whether or not title passes, the claimant is asserting the same interest and the law is giving effect to the same principle. As before, if this difference in treatment is to be justified, we must look beyond the plain fact that there *is* such different treatment and ask whether it can be supported on the basis that such cases raise different questions, and so call for different applications, of principle.

6.2 The basis of the defence

We can begin by asking why we should be concerned by the possibility of a claim causing a loss to the defendant. If we allow the claimant in such a case to assert his interest in full, so as to recover the asset *in specie* or to claim a sum of money equal to the asset's wealth-acquiring potential, the law would effectively be shifting a loss from the claimant onto the defendant. That is, in the absence of legal intervention, the defendant would remain in possession of, and free to deal with, the asset and it would be the claimant left disadvantaged. Of course, the claimant has an interest deserving of protection, but the question is whether that interest is sufficient to justify imposing this loss on the defendant.

If we look elsewhere, we can see that the law is generally reluctant to allow claims where this would leave the defendant worse off in the absence of fault or an undertaking of responsibility in respect of the relevant loss on the defendant's part. For instance, there is a tendency in the law of torts that liability for losses caused by one's actions should be dependent on fault.⁸ That the law

International and Comparative Law, 1997), at pp. 42-46; *c.f. Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548.

⁷ Chapter 4, text to nn. 20-30.

⁸ This is not to deny the significant role strict liability plays in the law of torts, nor that genuine fault is sometimes absent in some torts which are supposedly fault-based. A number of observations, however, can be made to defend the proposition in the text. Firstly, I think it is fair to say that, whether or not as a matter of statistical frequency fault-based claims are more common than strict liability claims, most view fault-based liability as the central case of tort, with strict liability the exception and calling for special justification. This is reflected in the focus in the texts and tort courses on the tort of negligence. It is also evident in the way the courts have allowed negligence to occupy ground hitherto regarded as the exclusive province of another tort while at the same time preventing other torts taking ground from the tort of negligence: see, respectively, *Spring v. Guardian Assurance Plc* [1995] 2 A.C. 296 and *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655. Similarly there is a trend for torts traditionally considered to be examples of strict liability to develop in ways which mitigate the strictness of liability: see, *e.g.*, *Cambridge Water Co. v. Eastern Counties Leather Plc* [1994] 2 A.C. 264 (*c.f. Transco Plc v. Stockport Metropolitan Borough Council* [2004] 2 A.C. 1, at p. 15, *per* Lord Hoffmann); Defamation Act 1996, ss 1-4. Secondly, in so far as the law of torts is concerned with prescribing what is acceptable conduct and upholding such standards (for instance, through declaratory and injunctive relief), there can be no complaints about strict liability, since in such cases the defendant is not

recognises and protects a claimant's interest in the avoidance of certain losses is plain from the fact that law provides claims for the recovery of such losses. However, a requirement of fault limits the law's protection of such interests. This, therefore, provides an instance of the law rejecting assertions of the claimant's interest where this would leave an innocent defendant worse off. Moreover, in such cases, it may be thought that the argument for shifting the loss onto the defendant is stronger since it is he who, albeit innocently, caused the claimant to suffer the loss. Here, by contrast, where the defendant receives the claimant's asset with no knowledge that the claimant's consent to the transfer was defective, the defendant cannot even be said to have caused this loss to the claimant. As such, we appear to have greater reason to refuse to impose liability on, and so to shift the loss onto, the defendant.

One way to express this concern is to say that there is a principle that the law should not inflict a loss on an innocent claimant in the absence of some relevant undertaking of responsibility.⁹ However, it may be possible to find a more revealing rationale by reference to the interests we examined in the previous chapter. In such cases, we may be able to say that the claimant's interest in exclusively determining the disposition of his assets comes into conflict with the same interest of the defendant in relation to his own assets.

Certainly, this seems to be the case where the claimant seeks or the court orders non-specific recovery, since here the effect of such a claim is to require the defendant to hand over assets - a sum of money - to which the claimant was not, and the defendant was, previously entitled. As such, the defendant can argue that this would infringe his own interest in exclusively determining the disposition of his assets.¹⁰ Clearly the same argument is not available where the

being required to bear a loss but simply to refrain from certain conduct. It can be argued that much of the strict liability in tort can be explained on that basis: see T. Weir, *Tort Law* (Clarendon Press, 2002), p. 85. Other instances of strict liability may be explicable so as likewise not to conflict with the proposition in the text. For instance, there is the argument, referred to *supra*, chapter 5, n. 31 and accompanying text, that conversion became a tort of strict liability to make up for the lack of a common law *vindicatio*, a position which would be reinforced were we to adopt the suggestion that innocent converters should be able to raise the defence of change of position.

⁹ The defence of change of position is often explained as protecting the defendant's interest in the security of his receipts: see, e.g., Birks, "Change of Position and Surviving Enrichment", *supra*, n. 6, pp. 39-41; M. Jewell, "Change of Position", ch. 10 of P. Birks and F. Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 1999), at p. 273. This recognises that those who receive assets on the basis that they are theirs to use as they wish are necessarily concerned to ensure such assets are indeed at their free disposal. Since our decisions as to how to apply individual assets of ours is affected by the total sum of assets available to us, we may be prejudiced if required to give up assets or enrichments which we believed to be free from such claims and on the basis of which belief we disposed of other assets. Nonetheless, such reliance is only one way, though perhaps the most common, in which a defendant may be left worse off by such a claim. Attempts to squeeze all such instances within the notion of reliance are artificial: see, e.g., Birks, *ibid.*, pp. 50-51. It is better to acknowledge that cases of reliance expenditure are one application of a broader principle and interest. This also allows us to see the parallels between such cases and other areas of the law, such as the tendency against strict liability for losses in the law of torts, where no question of the security of receipts arises.

¹⁰ Of course, a defendant can raise this argument against *all* non-specific claims, not just claims following the receipt of misapplied assets, for instance where the claimant seeks damages for a tort of breach of contract.

claimant seeks specific recovery of an asset on the basis of his exclusive entitlement to it, since, if his assertion is correct, it is he and not the defendant who is entitled to it. In such cases, the defendant may, however, be able to argue that to allow the claimant to recover the misapplied asset would defeat the basis of an earlier disposition of the defendant's own assets. That it, where the defendant made a disposition of his assets in reliance on his (perceived) entitlement to the asset received from the claimant, at least in so far as he would not have made such a disposition had he known he was not so entitled, he can say that his consent to that disposition was conditional upon his having such an entitlement. So, if the claim is allowed it will render an earlier application of the defendant's assets a misapplication. As such, it can be said that such cases also raise a conflict between the claimant's interest in the disposition of his assets and the defendant's interest in the disposition of his own assets.¹¹

We are, therefore, faced with a conflict of principle, a clash between opposing interests of the parties. How should this be resolved? Where two principles or interests conflict, the starting point should be to see if either has primacy over or greater weight than the other. If so, we should give effect to the stronger or more important principle. However, this presents a problem here since neither principle, neither party's interest, is obviously stronger than the other. Indeed, if we take the view argued for above, both parties are asserting the *same* interest and so there can be no suggestion that one is deserving of greater protection.

In the event of such a deadlock there are two ways the law can go. The first is simply not to intervene, providing no redress to the claimant (to the extent that the parties' interests clash). The argument would run as follows. Where a claimant seeks legal redress, he must provide a reason supporting the relief claimed. This will usually require him to show not just that he has some interest deserving of legal protection and which is being threatened but also that it is appropriate for the law to protect this interest through the use of its coercive power *as against the defendant*. So, for instance, when looking at the recovery of losses, it is not enough for the claimant to show that

However, this argument will be outweighed by the need to protect the claimant's interests so far as the defendant will not be left worse off by the claim or where, though it would leave him worse off, he has undertaken responsibility for that loss or his culpability in bringing it about justifies its imposition upon him.

¹¹ Since the scope of a defence will be determined by its rationale, that is, the principle which underlies it, the correct identification of the principle has practical importance. For instance, if the change of position defence exists to ensure that the defendant is not left worse off than he would have been had he not received the asset, it is difficult to justify the availability of the defence where the relevant diminution in the defendant's assets occurs prior to receipt of the claimant's assets, so called anticipatory change of position: see T. Akkouch and C. Webb, "Mistake, Misprediction and Change of Position" [2002] *R.L.R.* 107, at pp. 110-111. However, if we regard the defence as protecting the defendant's own interest in determining the disposition of his assets, we can accommodate anticipatory change of position, for, where the defendant makes a disposition of his assets in anticipation of the receipt from the claimant, should the claim succeed, the basis of that earlier disposition would fail. The only difference between such cases and those where the defendant makes the relevant disposition following receipt is that the basis of the disposition is a future occurrence (the receipt of an asset which would be at one's free disposal) rather than an existing state of affairs (the possession of such an asset).

he has suffered a type of loss in respect of which the law offers protection, he must also provide a reason why it is the defendant who should bear it. He cannot do this if his claim would infringe an interest of the defendant's as deserving of protection as that which the claimant is asserting.¹² In such cases, we can therefore say that the claimant cannot provide sufficient justification for the law's intervention on his behalf. Applied in this context, the result would then be equivalent to that produced by change of position; a claim will not succeed against an innocent defendant to the extent that it would leave him worse off than he would have been had he not received the asset.

There is a second possibility. Since we have here conflicting and equally weighted interests and principles, an alternative is to reflect this in the law's response. In such cases, full protection of the claimant's interest would be incompatible with and at the expense of full protection of the defendant's interests. As it is impossible to give effect to both parties' interests, and as we have no basis for prioritising one over the other, the law should favour neither, choosing instead to provide partial protection to both. Expressed slightly differently, the impossibility of giving full effect to both parties' interests means that someone will necessarily be disadvantaged. There is an inevitable loss which must fall somewhere and it is the job of the law to determine where it will fall. Since we have no reason for imposing the loss on one party rather than the other, it is fair to split it between the two of them. The result would be tantamount to a partial change of position defence.¹³

The usual backdrop for discussion of the possibility of splitting the loss between the parties has been the suggestion that the extent to which the defendant has a defence of change of position should be dependent on how his fault in respect of his receipt and retention of the asset compares with that of the claimant in its initial misapplication. The relevance to the application of the defence of the fault of either party will be discussed shortly. However, the criticism made of loss splitting in that context is the difficulty and uncertainty it would bring. Here though, such criticisms carry little weight since we are looking at a simple equal division of the loss. Indeed, it may be thought surprising that English law has been more ready to split losses between two blameworthy parties on the basis of their comparative fault, so giving rise to such uncertainties, than between innocent parties where the simpler option of equal division would often be appropriate.¹⁴

¹² Again, provided the defendant is not at fault in relation to, and has not assumed responsibility for the consequences of, the infringement of the claimant's interest, and provided the claimant cannot call on any additional principle in support of his claim. This is accordingly the position taken in much of the law of torts. Where the defendant causes a loss to the claimant, there will be recovery where the defendant was at fault but no, rather than partial, recovery where he acted blamelessly.

¹³ How this could be done will be examined later: see *infra*, text to nn. 23-30.

¹⁴ Examples of the former are the contributory negligence defence and the rules on contribution and reimbursement between wrongdoers. There are occasional examples of the law splitting losses between innocent parties, for example the rule of general average contribution in relation to the loss of cargo at sea. Elsewhere, the law has refrained from such an approach where it might be considered appropriate. For instance, unlike in other jurisdictions, English law's response to the frustration of contracts is not (primarily) concerned with ensuring a fair distribution of losses: see E. McKendrick, "Frustration, Restitution, and Loss Apportionment", ch. 6 of A. Burrows, *Essays on the Law of Restitution* (Oxford University Press, 1991).

One further point. We have noted that in some instances the law does not provide a change of position defence to claims following the misapplication of assets. Thus is the case where the defect in the claimant's consent is held to preclude title passing to the defendant. The standard justifications for this are twofold. Firstly, it is said that change of position is a defence unique to unjust enrichment claims and that, where a claimant relies on his subsisting title, the claim is not in unjust enrichment.¹⁵ Secondly, the defence should not be extended to claims founded on the claimant's subsisting title since this would unduly weaken the legal protection given to, and so the status of, property rights.¹⁶

This is unpersuasive. As we have seen,¹⁷ whether or not title passes, where the law provides for claims following the misapplication of assets, it is recognising the same principle, the same interest in the claimant. In both cases, the claimant was exclusively entitled to the asset prior to its receipt by the defendant and his consent to its receipt and retention by the defendant was either absent or impaired. Holding that title does not pass and holding that it does but imposing some separate liability on the recipient are two solutions to the same problem, two ways of effectuating the same principle, rather than different responses to different questions. As such, we cannot defend the current position simply by asserting that one case concerns unjust enrichment, and so is governed by one set of rules, while the other does not, and so other rules and considerations apply. Rather, the key question is whether we can support this difference in treatment on the basis that, though the same principles fall to be applied in each case, the factual differences between them justify different responses.

The factual difference between the two classes of case lies in the nature of the defect in the claimant's consent. I have argued already that, at least in relation to mistakes and ignorance, we cannot distinguish cases on the basis of the significance and seriousness of the defect.¹⁸ However, even if we did accept that defects in consent can be greater or lesser, can this support the present legal position whereby there is no change of position defence to claims where the defect in the claimant's consent was most serious?¹⁹ I do not think it can. The defendant will be left in a worse position than that he would have occupied had he not received the asset if the claimant can recover in full. No matter how defective the claimant's consent was, it is difficult to see how this can

Note too the cool reception to Devlin L.J.'s suggestion of loss-splitting in cases where, as a result of fraud as to the purchaser's identity, an unpaid vendor parts with goods which are subsequently sold on to a third party: *Ingram v. Little* [1961] 1 Q.B. 31, at pp. 73-74.

¹⁵ See, e.g., *Grantham and Rickett*, *supra*, n. 1, p. 361.

¹⁶ See, e.g., P. Birks, "Misnomer", ch. 1 of W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998), at p. 24; D. Fox, "Legal Title as a Ground of Restitutionary Liability" [2000] *R.L.R.* 465, at pp. 488-489; G. Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006), pp. 708-710.

¹⁷ Chapter 4, text to nn. 20-30.

¹⁸ Chapter 4, text to nn. 35-38.

¹⁹ Though see chapter 4, text to n. 40, for the argument that the defects in consent which preclude title passing often do not appear to be any more serious than those which do not preclude the passing of title.

justify shifting the loss onto the defendant. Of course, a claimant whose asset, for instance, was taken from him without his knowledge may be particularly deserving, but this cannot support requiring instead that the loss be borne by another party who bears no responsibility for the misapplication, who is no less innocent and who may be just as deserving.²⁰

As an aside, we may note that those who maintain that it would unduly weaken property rights if change of position were allowed as a defence to claims based on subsisting title are remarkably accepting of the weakening of property rights entailed by the law's willingness to say that title *does* pass even where the claimant's consent to the transfer is defective. In such cases, the claimant loses his title to the asset despite not having properly consented to its transfer. It may also be pointed out to those concerned about the weakening of property rights which acceptance of the defence would entail that, as things stand, even where title does not pass, the claimant will not usually be entitled to recovery of the very asset he lost, and so the protection of his property rights is, at best, partial and indirect.

6.3 Fault

This also provides one explanation of why a defendant who is at fault in relation to his receipt, retention or dealings with the claimant's asset has no defence.²¹ Even if he can argue that the claim will leave him worse off and contravene his interest in the disposition of his assets,²² his culpability provides a reason for placing the loss on him rather than on the claimant. The defendant's fault tips the scales, which would otherwise be evenly balanced, in favour of the claimant. But this also suggests that the claimant's own fault or responsibility in relation to the misapplication of his assets should likewise be relevant. Just as the defendant's fault tips the scales in the claimant's favour, the claimant's fault should tip the scales in favour of the defendant. The

²⁰ Moreover, especially if the change of position defence is explained along the lines presented in the text (*supra*, text to nn. 10-11), if we take the view that the seriousness of the defect in the claimant's consent is relevant to the availability of the defence, then we should make a similar inquiry with respect to the circumstances of the defendant's potential change of position. The defence will often be founded on the fact that, were the claim to succeed in full, the defendant's consent to some earlier disposition will be negated. If so, we should also ask how serious this defect is; the greater it is, the more deserving he is of protection. We would end up with the availability of the defence determined by a comparison of the extent to which each party's consent was defective. This would raise difficulties similar to those which have, for the most part, led courts and commentators to deny that the parties' comparative fault should be relevant to the application of the defence (*infra*, text to nn. 23-30).

²¹ *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548, at p. 580. A question remains, which I shall not attempt to resolve here, as to what degree of fault suffices in this context, though it is clear that innocent "wrongdoers" should not have the defence denied to them on this basis.

²² And he may not be able to argue that his interests are infringed where he made the relevant disposition of his assets in the knowledge that he was *not* entitled to asset he received from the claimant. In such a case he will, usually, not be able to say that his consent to that disposition would be rendered defective by the claimant's recovery.

parties' interests are no longer equally matched. The claimant's culpability provides a reason for requiring the claimant, rather than the defendant, to bear the loss.

Some have strongly rejected the suggestion that the claimant's fault should be relevant to the claims he can bring and to the application of the change of position defence.²³ The principal argument employed is that, since the claimant's fault is no bar to establishing a restitutionary claim,²⁴ it would be inconsistent for his fault then to be relevant in the application of the change of position defence.²⁵ But this does not follow. The fact that the claimant's negligence in misapplying his assets does not preclude recovery where this *would not* prejudice the defendant does not entail that his culpability should likewise be disregarded where recovery *would* leave the defendant worse off. These are different issues and raise different questions of principle.²⁶ As we have seen, in the latter case, unlike the former, we cannot give effect to both parties' interests in full. Someone must be disadvantaged, and fault provides a sensible basis for determining who this should be.

Aside from this, the argument against taking into account any fault on the claimant's part is that this would introduce too much uncertainty and complexity into the law.²⁷ This may be the case were we to adopt the approach taken, for instance, in New Zealand, where the parties' respective comparative levels of fault are used as the basis for splitting the loss between them.²⁸ However, we can accept the relevance of the claimant's fault to the availability of the defence without also accepting that the quantum or terms of recovery should be tailored to reflect the extent to which each party was responsible for the losses involved. The simplest solution would be that the defence is unavailable, and so the defendant bears the loss, where he is more at fault, while the claimant bears the loss where his fault is greater. Where the parties are equally blameworthy or blameless we face the same choice as outlined above, between leaving the claimant to bear the loss and splitting it equally between the parties.²⁹ Such an approach should be manageable. It is true that the levels of fault of the two parties are not readily commensurable, since the claimant's fault will

²³ See, e.g., *Dextra Bank and Trust Co. Ltd. v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193, at para. 45; *c.f. ibid.* at para. 42; R. Grantham and C. Rickett, *supra*, n. 1, pp. 357-360; Birks, "Change of Position and Surviving Enrichment", *supra*, n. 3, p. 41; J. Dawson, "Restitution without Enrichment" (1981) 61 *Boston University L.R.* 563, at pp. 571-573. Others, however, have been more receptive to the idea: see Nolan, *supra*, n. 1, pp. 156-158; A. Burrows, *The Law of Restitution* (Butterworths, 1st edn 1993), pp. 429-431; *c.f.* A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn 2002), pp. 523-524.

²⁴ *Kelly v. Solari* (1841) 9 M. & W. 54.

²⁵ See, e.g., *Dextra Bank and Trust Co. Ltd. v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193, at para. 45; Grantham and Rickett, *supra*, n. 1, p. 358. I endorsed this view too readily in *Akkouh and Webb*, *supra*, n. 11, p. 111.

²⁶ See Burrows, *The Law of Restitution* (2nd edn), *supra*, n. 23, p. 524.

²⁷ See, e.g., Birks, *Unjust Enrichment*, *supra*, n. 6, p. 219; Grantham and Rickett, *supra*, n. 1, pp. 359-360.

²⁸ See *National Bank of New Zealand Ltd. v. Waitaki International Processing (N.I.) Ltd.* [1999] 2 N.Z.L.R. 211; *Judicature Act 1908*, s. 94B.

²⁹ Beatson and Bishop have called this a *relative* fault approach, in contrast to one based on *comparative* fault (see J. Beatson and W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 *University of Toronto L.J.* 149, at pp. 154-155), though it should be noted that this terminology is not used consistently elsewhere.

relate to what he could have done to prevent the misapplication while the defendant's will usually lie in what he knew or should have known about the asset's provenance. But similar problems have not inhibited such developments elsewhere,³⁰ and, if need be, we can simplify matters further by treating the fault of neither party as greater, unless there is clear evidence to the contrary.

6.4 A broader principle?

It has been suggested that there is a further, broader principle which is relevant to such cases and which may provide a defence even where the defendant would not be left worse off by the claim. Barker, for instance, has argued for the continued co-existence and distinctiveness of the defences of change of position and bona fide purchase on the basis that, while the former is concerned with protecting the defendant from unjust losses, the latter has the wider, instrumentalist focus of the facilitation of trade.³¹ Trade is inhibited and the market suffers if the acquisition of assets involves risks to purchasers. This will be the case if there is the possibility that the purchaser may come under an unexpected liability by virtue of his receipt or possession of the asset or that he takes it subject to another person's interest of which he had no warning. Since people want to avoid this happening, such risks provide a disincentive to the acquisition of property.

We can accept that the law should be concerned with the facilitation of trade. What is less clear is whether this requires a broader defence than that outlined already.³² The risks identified above inhibit trade because they carry with them potential losses to the purchaser, either through his having to meet a liability or in his not being free to deal with the asset as he wishes. But the avoidance of such losses is the function of, and is achieved by, the defence we have already outlined under the heading of change of position. So long as this defence does its job properly, innocent purchasers will not be left worse off by virtue of their receipts.³³ As such, the risks that would otherwise arise in the acquisition of assets are removed, as are the barriers to trade to which

³⁰ For instance under the Law Reform (Contributory Negligence) Act 1945.

³¹ K. Barker, "After Change of Position: Good Faith Exchange in the Law of Restitution", ch. 7 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995), at pp. 195-198. See too K. Barker, "Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement" [1999] *R.L.R.* 75, at pp. 76-78, 86-87; Birks, "Change of Position and Surviving Enrichment" *supra*, n. 6, pp. 56-57.

³² It is also unclear to what extent such instrumentalist concerns should be allowed to trump the protection of individuals' rights and interests. As will be seen though, this question does not call for resolution here.

³³ The one qualification to this is that an innocent defendant could suffer such a loss if we were to adopt the solution of loss-splitting where the parties are equally blameless: see *supra*, text to nn. 13-14. Were we to adopt that as a general solution in cases where the parties are equally blameless, the facilitation of trade may, accordingly, provide a reason for creating an exception, and placing the entirety of the loss on the claimant, where the asset was received as part of an exchange.

they would lead.³⁴ Providing effective protection of the interests of those entering the market will also ensure the effective protection of the market.

Is there any reason to think that change of position cannot offer adequate protection to individual recipients and so, by extension, the market? That the law is just in principle is little comfort if it does not work justice in practice. What is important is that the defence, when applied by the courts, does catch all those defendants who would be left worse off by full recovery. Much turns on the location and weight of the burden of proof. It makes sense to put the onus on the defendant, since he is better positioned to adduce evidence of the circumstances which would cause him loss were the claim allowed in full. Provided courts remain mindful of the fact that many people gear their expenditure around the total sum of assets they believe to be at their disposal, such that increased income will often be followed by increased expenditure, and recognise that it will usually be difficult for a defendant to prove that a particular disposition was made in reliance on his belief that he was entitled to the asset received from the claimant,³⁵ the defence should be able to fulfil its purpose.³⁶ For these reasons, we should doubt whether protection of the market and the facilitation of trade supports a broader or an additional defence.

6.5 Application

It only remains to examine how the application of the principle outlined above affects the claims set out in the previous chapter.

³⁴ The possibility that adequate protection of individual recipients will entail adequate protection of the market is acknowledged by Barker: see Barker, "After Change of Position", *supra*, n. 31, p. 198. Moreover, the qualms he has as to the capacity of change of position to meet these concerns can be dealt with if the defence is developed and understood along the lines argued for here.

³⁵ That the courts are sensitive to such considerations is clear from the cases: see, *e.g.*, *Philip Collins Ltd. v. Davis* [2000] 3 All E.R. 808 and *Scottish Equitable Plc v. Derby* [2001] 3 All E.R. 818.

³⁶ Even if it is thought that the change of position defence offers inadequate protection to recipients due to the difficulty defendants face in proving that the claim would leave them worse off, it is hard to see what approach would be preferable. One option is to restrict the types of defect of consent which will ground a claim. But this just leads to haphazard and unprincipled results. Though greater protection is given to certain recipients (those whose receipt follows a defect of consent not within the class of defects which ground a claim), others are provided none (unless we were to maintain the change of position defence for these recipients, in which case one may ask why, if the change of position defence is sufficiently workable and reliable for them, it is not for the others).

6.5.1 *Specific recovery*

We have seen that, where the claimant is exclusively entitled to an asset in the defendant's hands, his interest supports a claim for that asset's recovery. However, in light of the preceding analysis, specific recovery should not be available as against an innocent defendant where this would leave him in a worse position than which he would have occupied had he not received the asset. This does not mean that on such facts a specific recovery claim must fail. The claimant should still be entitled to succeed on such a claim provided he ensures that the defendant is not thereby left worse off. The clearest way of doing this is for him to pay the defendant a sum of money to offset or make good any such loss. In effect, the claimant is then entitled to specific recovery on terms, namely, that he compensates the defendant for the loss caused to him by receiving and then having to give up the asset.³⁷

To calculate this loss we need to ask what dispositions the defendant made of his own assets and what valuable opportunities he passed by in reliance on his belief that he was entitled to the asset received, as well as any other losses causally connected to the receipt. However, we need also to take account of any benefits the defendant obtained by virtue of his receipt. Monetary values then need to be attached to all of these. The amount by which the claimant would be left worse off if required to hand over the asset, and so the sum payable by the claimant, is that arrived at if we offset the value of the benefits received from the losses suffered.

So, if the defendant received £1,000 and, believing he was entitled to this money, spent money of his own, say £500, on a holiday which he would not have taken had he known he was not so entitled, the relevant loss in the first instance is the £500 he spent on the holiday. However, in return for that money he received the benefit of the holiday, and, unless we offset the value of this benefit from the money spent, the result would be that the claimant would get the benefit of the holiday for free; that is, the claimant would be entitled to specific recovery only if he reimbursed the defendant for the money spent on the holiday. The question then is how to put a value on the benefit received by the defendant. This is in essence the same task, and involves the same inquiries, as those examined in the previous chapter in the context of claims for the recovery of benefits.³⁸ One particular point must be borne in mind however. It may be thought that the value of the holiday to the defendant, at least in the usual case, must be at least the sum he paid for it, since his decision to exchange the money for the holiday demonstrates that he places a higher value on the former than the latter. However, the value in money terms which one attaches to an item will vary depending on one's total wealth. The more we have, the more we are prepared to pay for a given

³⁷ See too Birks, *Unjust Enrichment*, *supra*, n. 6, p. 210; Burrows, *The Law of Restitution* (2nd edn), *supra*, n. 23, p. 528.

³⁸ Chapter 5, text to nn. 55-66.

item. When the defendant chose to spend £500 on the holiday, he did so on the assumption that his total wealth included the £1,000 received from the claimant. But this assumption turned out to be incorrect. This is why it matters that he would not have spent £500 on the holiday had he known he was not entitled to the £1,000 received from the claimant. It shows that, without that £1,000 added to his total wealth, he would not have placed the same value on the holiday. In these circumstances the holiday is worth less to him than the £500 he spent on it. So, if the claimant was to recover the full £1,000 from the defendant, the defendant would be left worse off since, *given the total wealth in fact at his disposal*, the benefit he obtained from the holiday is less than that of the £1,000 he must hand over. So what is the correct figure?

The question we must try to answer is, given the total wealth in fact at the defendant's disposal, what price would he have been willing to pay for the holiday. This gives us the value he places on the holiday in these circumstances. So, if we find that the defendant would have been prepared to spend £300 for the holiday, his net loss is £200 (the £500 he spent on the holiday offset by the £300 benefit from the holiday). No injustice is done to the defendant if the claimant recovers the asset in return for paying him £300 as this does not leave him worse off. He gets the holiday for the price which, in the circumstances, he would have agreed to pay for it.³⁹

If it is objected that this approach, depending as it does on such hypotheticals, involves too much uncertainty and allows too much room for error, the answer, once again,⁴⁰ is that similar concerns have not deterred the courts elsewhere and, more importantly, an approach which, though difficult, strives for a just result is surely preferable to one which makes no such attempt.

6.5.2 *Non-specific claims*

When we come to the non-specific claims, we are faced with the same basic question, to determine the amount by which the defendant would be left worse off in the event of full recovery. Here though, once we arrive at the correct figure, we need simply deduct it from the sum payable by the defendant.

The first type of non-specific claim we examined looks to the wealth-acquiring potential the asset provides. Here, when calculating the appropriate deduction, in addition to the factors already discussed we must also take into account, on the one hand, that the defendant will get to keep, and indeed become entitled to, the asset and, on the other, that, as a result of the claim, he is being required to pay for it. Where there is a market in such assets these two factors will cancel each other out. This is because, even if the defendant values the asset at less than the market rate, he can

³⁹ It should be clear that it does not matter that such a holiday would not have been available at that price.

⁴⁰ See chapter 5, text to nn. 23, 65-66.

then sell the asset, and thereby recover a sum equal to that which he must pay to the claimant.⁴¹ The difficulty comes if, for any reason, the defendant should be unable to sell the asset. In such a case, he will have no choice but to retain it and so we must ask what value he places on the asset. This figure should then be the maximum sum recoverable from him; anything more would leave him with something he values less than the money he paid to the claimant and hence worse off. To the extent that we are unsure whether and for how much the asset can be sold, we must, as when faced with uncertainties in quantification in other claims, fall back on educated guesswork and probabilistic reasoning.

In relation to the second type of non-specific claim, for the recovery of benefits derived from the claimant's asset, much of the work of the defence is pre-empted by the requirements of the cause of action. Since the claim is dependent on the defendant being, and remaining, benefited and extends only so far as the removal of that benefit, this will usually preclude any chance of the claim leaving the defendant in a worse position than had he not received the asset. One situation in which the defence may be needed is if the defendant does not have the funds to meet the liability without selling other assets of his. If he is required to sell such items for a price lower than the value he attaches to them, the claim would leave him worse off. Another is where the defendant places a higher value on the asset and the benefits he has derived from it than the market. In such cases, he should nonetheless be able to limit recovery to the market value on the basis that he could otherwise have obtained the same benefits from the market, and so compelling him to give up the full value he places on the asset and its benefits would be to require him to pay over the odds for something he could have acquired at a lower price elsewhere.

6.6 Contractual performance

No claim will lie in respect of assets transferred in fulfilment of a valid contractual obligation. This is so even where the claimant's consent to the contract, and hence to the transfer of assets under it, is defective, since many such defects do not prevent the contractual obligation arising.⁴² This is sometimes explained on the basis that the law of unjust enrichment is subsidiary to the law of contract.⁴³ However, the more revealing explanation is to say that, where the law recognises an obligation on the claimant to transfer an asset to the defendant, it necessarily admits a

⁴¹ Of course, if the defendant has to incur costs in selling the asset, these should be deducted from the sum recoverable by the claimant.

⁴² See, e.g., *Smith v. Hughes* (1871) L.R. 6 Q.B. 597; *Bell v. Lever Brothers Ltd.* [1932] A.C. 161.

⁴³ See, e.g., R. Grantham and C. Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 *L.Q.R.* 273; S. Hedley, "Unjust Enrichment: A Middle Course?" (2002) 2 *O.U.C.L.J.* 181, at p. 190.

limitation to the claimant's interest in exclusively determining the disposition of his assets.⁴⁴ In other words, where the law imposes or recognises an obligation on the claimant to transfer an asset, regardless of to whom that obligation is owed, it is necessarily, to that extent, denying or overriding his freedom exclusively to determine the disposition of his assets. The obligation means that he has no choice but to make the transfer.

It should not matter whether that contractual obligation is owed to the defendant or to a third party. Though in the latter case, before the transfer, the defendant may not have any claim-right against the claimant that the asset be transferred to him,⁴⁵ to allow the claimant to recover once the transfer has been made would contradict the obligation owed by the claimant. And though that obligation is owed to and exists to protect the interests of the third party, not the defendant, rather than requiring that the third party be joined to proceedings, it is simpler to allow the defendant to raise that contract as a defence.⁴⁶

6.6.1 Voidable contracts

This argument stands only in so far as the obligation to transfer the asset remains valid. Two situations require examination here. Firstly, we have voidable contracts. On occasion, the law allows a party whose consent to a contract is defective to have that contract set aside. Where he does so, the parties' mutual undertakings are no longer legally binding. This has two aspects. Firstly, in so far as the contract is still unperformed, the parties are released from the obligation to render such performance. Secondly, where the parties have already taken steps in performance of the contract, such actions are no longer to be considered as required by law, as the fulfilment of a legal obligation. This, therefore, removes the obstacle the contract would otherwise provide to the recovery of assets the claimant transferred to the defendant. Indeed the avoidance of the contract itself provides the basis for such a claim, since the claimant's consent to the transfer was given,

⁴⁴ Accordingly there will be no claim wherever an asset is transferred in fulfilment of a valid legal obligation, whatever the source of that obligation: see D. Friedmann, "Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution", ch. 10 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995), at pp. 247-248. The principle justifying such a limitation on the claimant's freedom to choose who will receive and benefit from his assets will be whichever principle underlies the obligation to transfer the asset, since any such obligation entails such a limitation. It is, of course, always open to one to argue that a given principle is not sufficiently strong to justify so limiting the claimant's interest in the disposition of his assets, which amounts to an argument that there should be no such obligation to transfer.

⁴⁵ Though such a claim is now more likely by virtue of the Contracts (Rights of Third Parties) Act 1999.

⁴⁶ This is the soundest explanation for the result in *Pan Ocean Shipping Co. Ltd. v. Creditcorp Ltd., The Trident Beauty* [1994] 1 W.L.R. 161. Note the analogous situation in the law of torts where a claim against the defendant would contradict a contractual obligation owed by the claimant to a third party: see *Norwich City Council v. Harvey* [1989] 1 W.L.R. 828.

inter alia, on the basis that he was under an obligation to make such a transfer. Once that obligation is removed, so is the claimant's consent to the asset's receipt and retention by the defendant.⁴⁷ Accordingly, a voidable contract, once avoided, far from providing a barrier to claims in respect of assets transferred under it, in fact supports such claims.

6.6.2 Termination for breach of contract

The second situation to be examined is where a contract is terminated following breach. Some breaches of contract entitle the innocent party to terminate the contract. The conventional understanding of termination is that it frees both parties from having to perform those obligations which have not yet fallen due, while those obligations, both primary and secondary, which have already accrued remain on foot. Both parts of this statement require qualification however. Firstly, though the party whose breach led to the contract being terminated is no longer required to perform those obligations which have not yet fallen due, he may be liable to compensate the other party for the losses caused by their non-performance.⁴⁸ Secondly, and more importantly for present purposes, each party may have a claim in respect of assets transferred in performance of the contract.⁴⁹

When viewed from the perspective of principle, the law is puzzling. Unless we take the view that termination, like rescission of a voidable contract, extinguishes *all* contractual obligations, both those as yet unperformed and those already performed, it is difficult to see on what basis either party can recover assets transferred in the performance of the contract, even where nothing is received in return. Without this, the recipient should be able to respond to any such claim simply by saying that the transfer was made in performance, and was required for the fulfilment, of a valid

⁴⁷ This is important as it means that it is both parties, and not just the party whose defective consent rendered the contract voidable in the first place, who can claim in respect of assets transferred under the contract. Despite this, I do not think it is entirely satisfactory to state that the avoidance of the obligation is itself the basis for such claims (*c.f.* Friedmann, *supra*, n. 44, p. 263). The avoidance of the obligation matters because it removes the basis of the transferor's consent to the transfer, and it is this lack of consent which supports the claim. Moreover, such formulations wrongly suggest recovery necessarily follows the avoidance of an obligation in performance of which an asset is transferred.

⁴⁸ See *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, at pp. 848-850, *per* Lord Diplock; G. Treitel, *The Law of Contract* (Sweet and Maxwell, 11th edn 2003), pp. 851-855.

⁴⁹ Such a claim will certainly lie where the asset transferred is money and there has been a total failure of consideration, that is, the recipient has not performed any of the contractual obligations in respect of which the money was paid: see *Giles v. Edwards* (1797) 7 Term Rep. 181; *Dies v. British and International Mining and Finance Corp'n Ltd.* [1939] 1 K.B. 724; *Stocznia Gdanska S.A. v. Latvian Shipping Co.* [1998] 1 W.L.R. 574. Beyond this the position is less clear. There is some suggestion now that the failure of consideration need not be total: see *Goss v. Chilcott* [1996] A.C. 788. It is widely argued that analogous claims should lie in respect of assets other than money (see, *e.g.*, P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989), pp. 226-234, 238-242; Burrows, *The Law of Restitution* (2nd edn), *supra*, n. 23, pp. 343-347, 354-359; Virgo, *supra*, n. 16, pp. 332, 337-339), though the authorities provide scant support.

contractual obligation, notwithstanding that he may himself have been in breach. And yet the authorities and texts stress that this is not how termination works and that the effects of termination for breach differ from those of rescission of a voidable contract.⁵⁰ This is clear from the possibility of claiming compensatory damages for breach following termination. One solution would be to refine our understanding of termination such that we view the right to terminate as giving a contracting party a choice not simply between continuing with performance as before and prospective termination, but also enables him effectively to rescind the contract *ab initio*, so entitling him to recover assets transferred in the course of performance. However, while this would provide a principled basis for such claims, such a view is incompatible with the explanations of termination found in the cases and texts. Moreover, it is inconsistent with the fact that the law allows one party to recover pre-payments while at the same time allowing the other to claim compensatory damages for breach.⁵¹

Perhaps the account of termination which most accords with principle is to view the consequences of termination, like the availability of the right to terminate itself, as stemming from and to be determined by the contract itself. That is to say, the question whether a contract can be terminated and, if so, what claims are then to be available to each party are to be resolved by reference to the terms of the contract, both express and implied. So, where the parties have expressly provided for recovery in such cases, the courts will give effect to their agreement. Where there is no such express provision, the question is whether terms may be implied. This in turn raises the question of the basis of the implication of such terms, an issue which is far from clear. What we can say, though, is that, since it is now well established that a claim to recover payments lies where the contract has been terminated and there has been a total failure of consideration, when parties, at least in commercial settings, provide in their contract for the right to terminate, they do so in the knowledge, and so on the basis, that such claims are available (at least in the absence of an express term to the contrary). Though this is not quite how termination is analysed in the cases, it is largely consistent with how the courts approach questions of termination and its consequences.⁵² Moreover, it provides a principled justification for the law in this area.

⁵⁰ See, e.g., *Johnson v. Agnew* [1980] A.C. 367, at pp. 392-393, *per* Lord Wilberforce; *Hurst v. Bryk* [2002] 1 A.C. 185, at pp. 193-194, *per* Lord Millett; Treitel, *supra*, n. 48, pp. 370, 852-853.

⁵¹ *Dies v. British and International Mining and Finance Corp'n Ltd.* [1939] 1 K.B. 724; *Rover International Ltd. v. Cannon Film Sales Ltd. (No. 3)* [1989] 1 W.L.R. 912. Such an understanding of termination would also be inconsistent with the rule that a party cannot, by termination, escape from an arbitration clause in the contract (see *Heyman v. Darwins Ltd.* [1942] A.C. 356) and with the decision in *Hurst v. Bryk* [2002] 1 A.C. 185.

⁵² For instance, there is now growing acceptance that what constitutes a total failure of consideration is a matter of contractual interpretation (see, e.g., *Stocznia Gdanska S.A. v. Latvian Shipping Co.* [1998] 1 W.L.R. 574, at p. 588, *per* Lord Goff; Virgo, *supra*, n. 16, pp. 315-318), which allows us to explain the seemingly irreconcilable authorities on this point: see, e.g., *Giles v. Edwards* (1797) 7 Term Rep. 181; *Rowland v. Dival* [1923] 2 K.B. 500; *Fibrosa Spolka Ackyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32. The distinction between part-payments, which can be recovered, and deposits, which usually cannot, also

However, if we take this view, it means that claims to recover assets transferred under terminated contracts are not in fact instances of the claims we have been examining up to now. Thus far we have been looking at claims founded on the claimant's interest in exclusively determining the disposition of his assets. Here, however, the claims lie not because the claimant did not consent to the transfer⁵³ but because this is what the parties provided for in their contract. They are claims deriving from the contract, giving effect to the claimant's interest in having the contract performed and justified by whichever principle we view as underlying the recognition of all contractual obligations.⁵⁴

6.7 Responses to the failure of contracts

Once a purported or apparent contractual obligation falls away, the obstacle it would otherwise provide to recovery in respect of assets transferred in fulfilment of that obligation is removed. So, as a general rule, a party who has transferred an asset to another in performance of a contract which was void from the outset or has been rescinded *ab initio* should have available to him the claims set out in the previous chapter. Where two parties have exchanged assets in such circumstances, this would entitle each to claim, subject to the limitation that neither party should thereby be left worse off than if he had not entered into the exchange.⁵⁵

turns on the construction of the contract: see Treitel, *supra*, n. 47, pp. 1007-1012. A broadly similar account of the availability and basis of claims following termination is contained in J. Beatson, "Discharge for Breach: Instalments, Deposits, and Other Payments due Before Completion", ch. 3 of *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991).

⁵³ His consent may be defective, but, as we have seen, the existence of a valid contractual obligation to make such a transfer precludes him claiming on that basis.

⁵⁴ I should make clear that I am not arguing that, because such cases concern contracts, any resulting claims should be classed as "contractual" (*c.f.* S. Hedley, "Implied Contract" [2004] *C.L.J.* 435, at p. 451). Such an argument, though recognising a contextual truth, is in itself analytically uninteresting as it says nothing as to the justificatory basis of such claims. The analysis presented here seeks to provide such a principled justification by viewing such claims as arising where and because this is what the contract provides, such that they are supported by the same principle as support the recognition of contractual obligation more generally. The identity of this principle is, of course, a matter of controversy. The orthodox view is that contractual obligations are voluntarily undertaken and arise in order to give effect to the intentions of the parties, with the existence and scope of such obligations determined by those intentions. On this basis, claims for the recovery of assets transferred in performance of a terminated contract would arise where, and on the basis that, this is what the parties intended. The same approach should also be taken to other types of claim which may lie after termination, such as for payment for work done: *c.f.*, *Planché v. Colburn* (1831) 8 Bing. 14; *Sumpter v. Hedges* [1898] 1 Q.B. 673. I should stress, however, that I am not contending that the approach put forward in the text justifies all the case law on termination. I am merely saying that we can justify claims for the recovery of assets where this is what the contract provides. Where we cannot so interpret the contract, a principled explanation, if one is to be found, must be sought elsewhere.

⁵⁵ As such, it is arguable that the current law on rescission is both too narrow and too wide. Too narrow in that it pays insufficient attention to losses which should limit recovery. Too wide as it treats the benefits derived from the other party's actions in the same way as it does receipt of assets and the benefits thereof,

However, we should not assume that, once any contract is removed or negated, recovery of assets transferred under it follows as a matter of course. As before, the availability of such claims may be limited by the application of competing principles and in the context of failed contracts this is particularly likely.

Firstly, the principle which dictates the invalidity of the contract will often also be relevant in determining what claims, if any, should be available following its failure. So, for instance, where the law holds a contract void on the basis that its performance would involve or lead to conduct which we prohibit or want to discourage, similar reasoning may support the law denying assistance to those involved and instead leave any losses resulting from the contract's invalidity to lie where they fall.⁵⁶ At other times, the relevant principle will not require the contract's complete subversion. This is the case with contracts with minors and the mentally incapable, where the law's concern is that those incapable of protecting themselves are not exploited. As such, and once we bear in mind that it would not be desirable to disable such parties from entry into all commercial transactions, there will often be good reason for the law to adjust the terms of such contracts to ensure their fairness, rather than requiring that they be unwound completely.⁵⁷

In other cases, however, a contract fails simply because of a defect in consent of one or both of the parties to it. Where this is so, the same respect for the parties' autonomy and freedom of choice as underlies the contract's invalidity would also appear to support the recovery of assets transferred in its performance. It may, however, be that, even in these cases, there exists an additional principle which provides an independent basis for claims following failure and limits the availability of the claims we have been examining thus far.

The starting point is that, where an apparent or assumed contract turns out not to be valid, there is the risk that those who have acted on the assumption of its validity will be prejudiced. Some protection is provided by allowing recovery of assets transferred on the basis of that false assumption. But often this will be of little or no assistance. For instance, such claims offer no protection where a party has incurred expenditure or otherwise depleted his resources in performance or in preparing for performance. Though such expenditure is capable of providing a change of position defence where the other party has transferred to him assets in performance and now seeks recovery, the protection this offers is dependent on there having been such a transfer and is insufficient where the expenditure incurred exceeds the value of the asset received. Alternatively, one party may have done work, which, when carried out, both parties understood was to be paid for. This work may or may not have been of benefit to the other party. Accordingly, even if we allow

requiring the giving up of both, notwithstanding that, as we saw in the previous chapter (text to nn. 24-52), it is at least strongly arguable that we have no exclusive interest in the benefits of our actions.

⁵⁶ See, e.g., *Berg v. Sadler and Moore* [1937] 2 K.B. 158; *Awwad v. Geraghty & Co.* [2000] 1 All E.R. 608.

⁵⁷ See, e.g., Sale of Goods Act 1979, s 3(2). An analogous approach can be seen in cases such as *Earl of Aylesford v. Morris* (1873) 8 Ch. App. 484 and *The Port Caledonia and The Anna* [1903] P. 184.

parties to recover in respect of assets transferred in performance and make such claims subject to the defence of change of position, the failure of a contract will often lead to an unequal distribution of losses and gains between the parties.

Now this in itself does not justify any additional claim. The law does not seek to redress all inequalities. It needs a reason for shifting a loss or a gain from one party to another. As we have seen already,⁵⁸ fault is one such reason, so where one of the parties is to blame for the other's defective consent, this justifies the former bearing the losses involved in the contract's failure. Beyond this it has been suggested that loss and gains should be readjusted so that they are borne equally in certain cases where the contract fails through the fault of neither party. One argument is that where parties choose to enter into a contractual relationship, they become, and choose to become, mutually reliant, and share a common interest in the success of their arrangement. As such, if it becomes impossible to carry this arrangement through, it is consistent with the basis of their relationship that the parties are treated as equals and that the losses and gains of their failed endeavour are split between them.⁵⁹ It may even be argued that entering into such a relationship puts each party under an obligation to look after the interests of the other, and that this may provide an alternative basis for requiring each party to bear their fair share of the losses involved in the contract failing.⁶⁰ Although I doubt whether it is in fact appropriate to view contracting parties as joined in some common venture, the mutual reliance inherent in such situations may justify splitting losses between the parties. Each party incurs the costs of performing and preparing to perform in reliance on the performance of the other, and does so with the knowledge and encouragement of the other. Therefore, where performance is not forthcoming, the loss each party suffers is a loss suffered as a result of placing reliance on, and with the encouragement of, the other. Save where the parties have allocated the risks of non-performance, and unless caused by the fault of the other, a contracting party bears some responsibility for the loss suffered by the other in the event of his performance not being forthcoming. This may accordingly justify the splitting of losses, that is, reimbursement for costs incurred and payment for work done, where a contract fails, for example, due to frustration or common mistake, innocent misrepresentation, or lack of formality. Where this is so, the recovery of assets transferred in performance should be possible to the extent that it does not infringe this principle.

⁵⁸ *Supra*, text to nn. 8-9.

⁵⁹ See J. Dietrich, *Restitution: A New Perspective* (Federation Press, 1998), pp. 151-156, 167-176. See too C. Fried, *Contract as Promise* (Harvard University Press, 1981), pp. 69-73.

⁶⁰ A similar argument is put forward in J. Penner, "Basic Obligations", ch. 5 of P. Birks (ed.), *The Classification of Obligations* (Clarendon Press, 1997), pp. 117-119.

6.8 Loss to the claimant

In the simplest case, a misapplication of assets will lead to the defendant holding something previously held by the claimant, and the resulting claim will require the defendant to hand back what the claimant lost. The claimant accordingly ends up back where he started and no better or worse off than he would have been had there been no misapplication. However, sometimes recovery on the bases set out in the previous chapter would give the claimant not just something different but something more than he lost. This may be the result in a variety of situations. For instance, the original asset held by the claimant may have been exchanged by the defendant for an asset of greater value, and the claimant would have made no such exchange had he retained the asset. Alternatively, in so far as claims may lie for the recovery of benefits others derive from use of the one's asset, it may be that the defendant's use of the asset did not prevent the claimant from using, and so benefiting from, his asset. Or the claimant may have received benefits as a result of the initial loss of the asset, such as an insurance payout.⁶¹ Can we justify claims where and to the extent that this would leave the claimant better off than he would have been without the misapplication? Put another way, should recovery be limited to the extent of the claimant's loss?

Opinions are split. Those who maintain that recovery should not exceed the claimant's loss have largely supported this limitation by reference to the notion of corrective justice, arguing that, in the absence of wrongdoing, corrective justice only justifies recovery to the extent that the claimant's loss and the defendant's gain correlate.⁶² My own view is that invocations of corrective justice, now becoming increasingly common, are unnecessary and unhelpful, so I shall first say a little about the use of corrective justice more generally before coming back to the specific question of the claimant's loss.

6.9 Corrective justice

In his account of justice, Aristotle noted that the range of issues to which justice pertains can be divided into two, so that justice has two basic aspects or forms.⁶³ The first is distributive

⁶¹ I do not mean to suggest all such cases fall to be treated in the same way. In particular, one may wish to argue that the claimant's recovery should be capped by his initial loss, but that it should not be further reduced if his loss is subsequently made good in whole or in part.

⁶² See, e.g., M. McInnes, "At the Claimant's Expense": Quantifying Restitutionary Relief" [1998] *C.L.J.* 472, at pp. 474-475; L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 71 *Texas L.R.* 2115, at pp. 2146-2148; C. Mitchell in "The New Birksian Approach to Unjust Enrichment" [2004] *R.L.R.* 260, at pp. 266-267; Virgo, *supra*, n. 16, pp. 112-115..

⁶³ Aristotle, *Nicomachean Ethics* (J. Thompson (trans.), H. Tredennick (rev.), Penguin, 1976), 1130b30-1132b20.

justice and concerns the allocation of resources, privileges, responsibilities between the members of a community. Justice here requires that each person has a share which is in proportion to his merit in reference to the criterion of distribution being applied. Secondly, there is corrective justice. This concerns questions relating to or arising from interactions or dealings between members of the community.⁶⁴ To explain the workings of corrective justice, Aristotle adopted the language of gain and loss. Interactions between individuals involve or give rise to injustice where they result in one party gaining and the other suffering a corresponding loss. Corrective justice requires the parties' equality to be restored by the gain being given up to the other party, thereby making good his loss.

It has been remarked that this analysis of corrective justice appears to mirror the straightforward case of a misapplication of assets.⁶⁵ There one's gain is another's loss and the law responds by requiring the gain to be returned. It would also suggest that corrective justice only requires gains to be given up where there is such a corresponding loss. However, it is clear that Aristotle used the language of gain and loss very differently from the way these terms are conventionally used in law. We must first examine what Aristotle meant by such terminology before we can use it in support of arguments as to the proper content of the law.

That "loss" and "gain" in Aristotle's account of corrective justice is neither the same as nor co-extensive with factual losses and gains is clear from his discussion of assaults.

Even where one party has received and the other given a blow, or one has killed and the other been killed, the active and passive aspects of the affair exhibit an unequal division; but the judge tries to equalize them with the help of the penalty, by reducing the gain. The term "gain" is used generally in such cases, even though it is not the appropriate word for some offences, *e.g.*, in the case of assault; ... at any rate when the damage has been estimated the effects are called loss and gain respectively.⁶⁶

Were this not so, Aristotle's account would fail to explain most instances of private law liability. But then if the losses and gains entailed by an unjust interaction are not factual losses and gains, what are they? There are, I think, two possible answers. One is that the language of loss and gain is simply designed to reflect the two sides of the interaction, what Aristotle called the "active

⁶⁴ It is clear that Aristotle intended "dealings" to be understood broadly so as to encompass not just voluntary transactions but also, for instance, assaults and defamation. Even so, it seems that his account does not cover the whole range of human interactions to which justice pertains. It focuses on the correction or rectification of unjust interactions, but there is a necessarily prior question of what interactions are lawful or just. As such, Aristotle's conception of corrective justice accounts for secondary rights and obligations but not primary rights and obligations (on which distinction see C. Webb, "Performance and Compensation: An Analysis of Contractual Obligation and Contract Damages" (2006) 26 *O.J.L.S.* 41, at pp. 42-45). It has been suggested that it was to make up for this deficiency that Aquinas chose instead to use the term commutative justice. See generally, J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), pp. 177-179.

⁶⁵ Smith, *supra*, n. 62, p. 2119.

⁶⁶ Aristotle, *supra*, n. 63, at 1132a.

and passive aspects” of the dealings between the parties⁶⁷. Here, gain and loss amount to the commission and the suffering of an injustice, or simply “doing” and “being done to”. This explains both why there is a gain and loss in all unjust dealings and why the gain and loss in each case necessarily correlate. The principal difficulty with this interpretation is that losses and gains, so understood, seem incapable of being reversed or undone. We can give up factual gains and compensate factual losses, but we cannot undo actions, “doings”.

The second interpretation is that put forward by Weinrib.⁶⁸ His suggestion is that we should understand Aristotle’s reference to gains and losses as *normative* gains and losses. Whereas factual gains and losses concern how the position or condition of the parties has changed as a result of their interaction, normative gains and losses are identified by asking whether, by reason of what happened between them, there is justification for requiring something to be taken from one party and given to the other. A party has a normative gain when justice so requires him to give something up and a normative loss where justice requires something to be given to him.⁶⁹ Translating this into legal terms, wherever there is liability,⁷⁰ there is a normative gain to the defendant and a normative loss to the claimant. These necessarily correlate since what justice requires the defendant to give up, and so what constitutes his gain while he still holds it, is what the claimant is required to be given, and the absence of which is his loss. Moreover, on this interpretation we have no difficulty seeing how gains can be given up and losses made good.⁷¹ I think, however, that Weinrib’s approach takes us some way from what Aristotle had in mind when employing the terminology of losses and gains. In Aristotle’s account, the parties’ loss and gain provide the basis of, or indeed represent, the injustice in the parties’ dealings. By contrast, following Weinrib, we must first ask what justice requires of the parties, then, *only having determined this*, we can say that a party required to give something up has a gain and one to whom justice requires something be given is suffering a loss. So understood, the notions of loss and gain no longer drive nor even contribute to the explanation of the nature of the injustice.

For present purposes, however, it is unnecessary to seek a resolution to these problems. This is because, however we interpret the references to gain and loss in Aristotle’s account, it is

⁶⁷ *Ibid.*

⁶⁸ E. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995), pp. 115-120.

⁶⁹ In Weinrib’s terms (*ibid.* at p. 116), “... a person enjoys a normative gain when there is justification for the law’s diminishing his or her holdings, and ... a person endures a normative a normative loss when there is justification for the law’s augmenting his or her holdings.” Weinrib goes on to argue that such justification is to be found in the notion of Kantian right (*ibid.* at pp. 120-129).

⁷⁰ Or at least wherever one party is liable to transfer some asset to another.

⁷¹ Indeed the defining feature of a normative gain is that it is something which must be given up and of a normative loss that it must be made good.

plain that these do not refer to factual gains and losses.⁷² Accordingly, we cannot find support for the view that recovery in respect of misapplied assets should be limited to the extent of the claimant's losses in Aristotle's reference to the correlativity of loss and gain in instances of corrective injustice.⁷³ Indeed, Aristotle's account of corrective justice tells us very little about its content, about when interactions between parties are just or unjust. Rather, as Weinrib notes⁷⁴, Aristotle's account of justice is formal, providing a structure, a framework for the application of justice arguments in resolving problems of social ordering. So, Aristotle tells us that one aspect of justice concerns relations and dealings between individuals, but does not tell us what justice requires here. For an answer to this question we must look elsewhere.⁷⁵

6.10 Establishing the irrelevance of loss

Accordingly, to say that recovery in respect of misapplied assets is an example of the law effecting corrective justice may be true, but tells us very little about the proper form and scope of such claims.⁷⁶ We are simply back where we started, asking what principle supports such claims, what principles may limit the availability of such claims and what the application of such principles requires on a given set of facts.

The question then is whether principle requires us to limit liability to the extent of the claimant's loss. Lionel Smith, working from the framework of corrective as elaborated by Weinrib, has argued that liability in unjust enrichment should be so limited to recovery of the claimant's initial loss.⁷⁷ Smith's reasoning is that the law of unjust enrichment is about defective transfers, and that it is the flaw in the transfer that provides the normative basis for recovery.⁷⁸ More simply, the

⁷² This, of course, does not mean that factual losses and gains may not be relevant to the establishment of an Aristotelian or normative loss or gain. This is clearly the case in law and morality. *Cf.* M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" [2001] *R.L.R.* 29, at pp. 45-47.

⁷³ Similarly, it is inaccurate to say that corrective justice is concerned with reinstating parties to their pre-transactional positions (*c.f.*, K. Barker, "Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons", ch. 5 of J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004), at p. 97), unless it is meant simply that pre-transactional *justice* is restored.

⁷⁴ Weinrib, *supra*, n. 68, pp. 66-75.

⁷⁵ For instance, it is here that Weinrib turns to Kant, though I am doubtful as to how much assistance the notion of Kantian right provides in fleshing out the requirements of corrective justice or the content of private law.

⁷⁶ All it tells us is that the justification for liability is to be found in the relationship of and what occurred between the parties.

⁷⁷ Smith, *supra*, n. 62, pp. 2146-2148. Smith, however, goes on to argue that subsequent reductions of the claimant's loss should not likewise reduce recovery, that is, there should be no defence of passing on: *ibid.*, pp. 2152-2155

⁷⁸ Adopting Weinrib's terminology, Smith writes (*ibid.*, p. 2147), "[t]he transfer, not just the loss or the gain, is crucial to the foundation of this strict liability. It unites the parties and, because of the flaw, turns a material

claim arises from and seeks to reverse a defective transfer, and so it follows that the claimant is entitled to what was transferred from him to the defendant and nothing more.

I agree with this up to a point. Smith is correct to stress that it is not enough to look at the gain made by the defendant; we must also ask where it came from. Central to the justification of claims following transfers to which the claimant's consent was defective is the fact that, in addition to the claimant not having consented to the defendant's receipt of the assets, those assets came from him. But I do not think that it follows from this that recovery exceeding the claimant's initial loss cannot be justified, and justified by the same principle. If we ask why a defective transfer generates liability, the answer we come to is that, as a result of it, the defendant now holds something to which the claimant is exclusively entitled. Before the transfer the claimant had in his possession an asset to which he was exclusively entitled and he has not effectively consented to this entitlement being transferred to the defendant. The elements of the defective transfer, namely the claimant's lack of consent and the fact that the asset came to the defendant from him, matter because they establish the claimant's entitlement to the asset the defendant received and so provide the basis of a claim against the defendant.

But this is just one way, though the simplest and most common way, for the claimant to establish an exclusive entitlement to an asset in the defendant's hands. We have seen already that a claimant may be able to establish an exclusive interest in, and so claim in respect of, an asset in the defendant's hands despite the claimant having had neither possession of nor any such interest in that asset prior to its receipt by the defendant, as is the case with fruits and substitute assets.⁷⁹ Of course, we need always to be able to connect the claimant and the asset or benefit he is claiming, we need to be able to justify why this person should be able to recover this asset. But this can be done other than by establishing a prior entitlement to and possession of the asset followed by a defective transfer. Gains, transfers, even non-consensual transfers, are not legally significant in and of themselves. They become significant where and in so far as they enable a claimant to establish an entitlement to something in the defendant's hands. Claims of entitlement to assets held by the defendant need not depend on, nor indeed arise from, a loss to the claimant or some diminution in

loss into a normative loss and a material gain into a normative gain. It follows that the measure of the transfer is the measure of the claim."

⁷⁹ See chapter 5, text to nn. 9-16.

his stock of assets.⁸⁰ As such, there is no basis for limiting claims to the extent of any loss suffered by the claimant.⁸¹

6.11 Passing on

The preceding analysis has focussed largely on the question of the claimant's initial loss, but the position is the same where the claimant's loss is subsequently reduced, for instance by the receipt of assets from a third party which would not have been transferred to him had the initial misapplication not occurred. Accordingly, there is no justification for a general defence of passing on.

In line with the analysis thus far, the third party, however, may have a claim to recover assets so transferred to the claimant if his consent to that transfer is defective. This will be the case, for instance, if the transfer was conditional on the claimant having suffered a loss and the claimant has made good that loss as a result of a successful claim against the defendant.

⁸⁰ This is reinforced by the fact that not all defective transfers generate liability, particularly if, as Smith does, we include within this transfers of wealth or abstract value. See chapter 3, text to nn. 25-44 and chapter 5, text to nn 24-54, 106-117. My view, however, is that the language of transfers is inapposite where claims are made in respect of the receipt of benefits or abstract value, since the defendant receives something the claimant did not previously hold. In which case, in so far as such claims are available, these provide a further example of liability which is not arise out of, and so does not seek to reverse, a transfer.

⁸¹ Moreover, because of the justification of such claims, it is inappropriate to speak of the claimant receiving a "windfall" in such cases; *c.f. Air Canada v. British Columbia* (1989) 59 D.L.R. (4th) 161, at p. 193-194, *per La Forest J*; *McInnes, supra*, n. 62, p. 474.

Chapter 7

Indirect receipt and insolvency

We began our examination of the claims available following a defective transfer or misapplication of the claimant's assets with a central case. One feature of this was that the defendant received the asset directly from the claimant. However, the misapplied asset may be received by the defendant only after having passed through the hands of a third party. The question to be considered here is whether such cases of indirect receipt fall to be treated any differently from the cases of direct receipt on which we have focussed thus far.

This issue has divided the commentators. However, there is increasing support for the view that claims against indirect recipients rest on a different set of principles and so are materially distinct from instances of direct receipt.¹ Moreover, the case law, though not unequivocal, seems to back this up. Since the only factual distinction between the two classes of case lies in the route the asset took to reach the defendant, their differing treatment can only be justified on the basis that this can be identified as a material difference. Accordingly, we must ask whether the fact that the asset passed through the hands of a third party before reaching the defendant raises different questions of principle from the cases examined thus far.

First, though, it is useful to take a closer look at the notion of indirect receipt. Direct receipt can be understood to cover those cases where the defendant receives an asset previously held by the claimant, and without it first having passed through the hands of a third party.² Indirect receipt, by contrast, covers all instances of, and claims pertaining to, the receipt of assets where there is no such direct connection between claimant and defendant. This covers a lot of ground and, importantly, the indirect link between claimant and defendant can be established in different ways. Since different issues are raised in each case, it is useful to divide cases of indirect receipt into two basic categories. The simpler case arises where the defendant receives from a third party an asset which was either previously held by the claimant or is the fruit or substitute of an asset that had

¹ Indeed it has recently been argued, in S. Hedley, "Unjust Enrichment: A Middle Course?" (2002) 2 *O.U.C.L.J.* 181, that, amongst unjust enrichment theorists, it is now a majority view that cases of indirect receipt are to be treated differently from those of direct receipt.

² Accordingly, the notion of direct receipt employed here extends beyond those cases where the asset passes from the claimant's physical possession immediately into the defendant's hands to cases where the receipt is not immediate, provided no third party handles the asset in the intervening period. This accommodates cases such as *Holiday v. Sigil* (1826) 2 C. & P. 176, where the claimant dropped a bank note which was subsequently picked up by the defendant. It should be stressed though that this definition of direct receipt is intended only as a starting point for discussion, and I do not intend to argue against those who have applied such terms differently. As will become clear, I think very little turns on the directness or indirectness of the defendant's receipt.

been held by the claimant.³ In the less straightforward example of indirect receipt, the defendant receives from a third party an asset which, although not previously held by the claimant nor is a fruit or substitute of such an asset, he would not have received had the misapplication of the claimant's asset not occurred.⁴ In the former case, the claimant and defendant are connected through a series of transactional links, that is, by following the asset initially misapplied and its substitutes. By contrast, in the latter case, the links are solely causal, in that the defendant would not have received the relevant asset but for the misapplication of the claimant's assets. For convenience then we will call the former category *transactional indirect receipt* and the latter *causal indirect receipt*. This distinction will prove important as the two categories reflect different bases upon which a claim may be founded, and so involve different considerations.

How then might one argue that the indirectness of receipt marks a material difference from the cases we have examined till now, and so justifies their different treatment? A variety of responses have been offered.

7.1 Enrichment at the claimant's expense

Much of the discussion of indirect receipt has as its starting point that liability in respect of misapplied assets is a matter of the law of unjust enrichment. The question then becomes whether the enrichment of a defendant whose receipt is indirect can be said to be "at the claimant's expense".⁵ It is not surprising that this has failed to produce any consensus. Even if it were correct to view liability in such cases as founded on the defendant's unjust enrichment,⁶ we cannot hope to provide a defensible answer to this question without an account of the interests and principles such claims seek to advance. Without this we are simply left with a verbal formulation capable of numerous, mutually incompatible interpretations and no basis upon which to choose between them. Simply demonstrating that the words "at the claimant's expense" are apt to extend to a given receipt by a given defendant gets us no nearer to determining whether that defendant's liability is justified. Moreover, looking down to the cases for answers will tell what the courts have said and done but not whether they were right to do so. Similarly unhelpful are attempts to flesh out the "at the

³ In the conventional terminology, the claimant can follow his asset into, or trace its value into an asset in, the defendant's hands.

⁴ E.g., the claimant, labouring under a mistake, pays £1,000 to X, which leads X to make a gift of his car to the defendant, a gift he would not have made had he not received the money from the claimant.

⁵ See, e.g., A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn 2002), pp. 31-34; P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law", ch. 18 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002).

⁶ On which see chapter 3, text to nn. 6-24.

expense of” requirement through a notion of privity.⁷ Without explanation of what exactly privity entails and, more importantly, why it does so, this leaves us without any justification for the denial of liability in such cases. Here, as before, the language of unjust enrichment offers no assistance in determining the scope or identifying the basis of liability in cases of misapplied assets.

7.2 Title

A more promising starting point is to note that there is agreement on all sides that a claim will lie against an indirect recipient where the claimant is able to establish a title, whether legal or equitable, to an asset in the defendant’s hands.⁸ However, as we have seen,⁹ the law often holds that the claimant’s title to a misapplied asset passes despite the defect in his consent. Accordingly, in many cases the initial recipient obtains not just possession of but also title to the asset from the claimant. Therefore, the claimant’s title is lost well before the asset reaches subsequent (indirect) recipients. Because of this, as the law stands, it will only be occasionally that the claimant will be entitled to recover on the basis of his subsisting title to the asset.¹⁰

However, it is clear that the passing of title does not, in itself, preclude a claim against a recipient. This is clear from cases of direct receipt, where a transfer can be found to have been defective, and so form the basis of a claim, despite title having passed. It is here, however, that it has been argued that difficulties arise in holding indirect recipients liable. Where there has been a misapplication of the claimant’s asset, the defective transfer from the claimant to the initial recipient justifies the latter’s liability. However, where that initial defective transfer did not prevent title passing, each subsequent transfer of the asset appears to be a valid exercise of a title holder’s power to dispose of his asset. Therefore, in the usual case, not only will an indirect recipient not

⁷ See, e.g., G. Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006), pp. 105-107; A. Burrows, *The Law of Restitution* (Butterworths, 1st edn 1993), pp. 45-54; c.f. Burrows, *supra*, n. 5, p. 31.

⁸ See, e.g., Burrows, *supra*, n. 5, pp. 34-35; Virgo, *supra*, n. 7, pp. 107, 636. There is, however, no such consensus as to how such a title may be established, the basis of the claims that are available in such instances, or indeed what may be recovered. It is clear, however, that a claimant may be able to establish title to an asset in the defendant’s hands even though that asset had not previously been in the claimant’s possession, such as where a claim is made in respect of substitute assets.

⁹ Chapter 4, text to nn. 11-12.

¹⁰ There is an argument that, at least in some cases, though the claimant’s title passes to the initial recipient, a new, equitable, title will arise in response to his defective consent: see, e.g., R. Chambers, *Resulting Trusts* (Clarendon Press, 1997); P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 180-198. This has been keenly disputed (see, e.g., W. Swadling, “A New Role for Resulting Trusts?” (1996) 16 *L.S.* 110; reprinted as Appendix 2 of P. Birks and F. Rose (eds), *Restitution and Equity: Volume 1 – Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000)) and support in the case law is patchy: contrast, e.g., *Chase Manhattan Bank v. Israel-British Bank (London) Ltd.* [1981] Ch. 105 with *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669. However, if accepted, the argument would entail that claims would lie more frequently against indirect recipients.

hold anything to which the claimant has title but he also will not have acquired the asset through a defective transfer.¹¹ In short, neither of the supposed bases of liability for the receipt of misapplied assets seem to apply to many indirect recipients, and therefore, so the argument goes, their liability cannot be justified.

In response to this, it has been contended that liability is not dependent on some nexus of transfer between claimant and defendant but simply on the fact that, as a matter of causation, the defendant has received a benefit from the defendant which the claimant did not intend him to have.¹² As such, though indirect receipt may make the establishment of such a causal connection more difficult, indirect recipients in principle fall to be treated in the same way as direct recipients.

My view is that, while neither approach is entirely misconceived - indeed there are important truths in each - each leads us, ultimately, in the wrong direction and fails adequately to explain when and why recipients, both direct and indirect, may be liable. To understand this, it is necessary to return once more to the basis of claims following the misapplication of assets.

7.3 The basis of liability

Where an asset to which the claimant is exclusively entitled is, without his consent, transferred to another party, the claimant's interest in the asset, which, *inter alia*, entitles him and him alone to determine who shall receive, use and benefit from the asset, justifies the recipient's liability to him. And though the law does not provide a uniform response to such cases, sometimes holding that the claimant's title does not pass, sometimes holding that it does but with the recipient then subject to a liability to give up its value, it is this interest, and its supporting principle, which explains the claims that lie against direct recipients.¹³ When we come to subsequent recipients, to ensure that we treat like cases alike, we must ask whether the indirectness of receipt is a material difference so as to justify different treatment. Once we understand the principle underlying claims against direct recipients, the answer can only be that it is not. The claimant no more consents to the indirect recipient's possession of the asset than he does to the direct recipient's.¹⁴ In both cases, the

¹¹ See, e.g., L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 *Texas L.R.* 2115, at pp. 2155-2174; A. Tettenborn, "Lawful Receipt - A Justifying Factor?" [1997] *R.L.R.* 1.

¹² See, e.g., Birks, *supra*, n. 5; S. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469.

¹³ For the full version of this argument, see chapter 4, text to nn. 20-30.

¹⁴ For similar reasons I disagree with Watts' suggestion that the denial of recovery against indirect recipients in those cases where title does not pass may be justified on the basis that, in such cases, the defect in the claimant's consent is more minor than in those cases where title is retained; see P. Watts, "Property and 'Unjust Enrichment': Cognate Conservators" [1998] *N.Z. Law Review* 151, at p. 154. Even if it is true that such defects can be greater or lesser and that this is reflected in the distinctions the law draws (on which see chapter 4, text to nn. 35-38), it is hard to see how this can justify a distinction between direct and indirect

claimant can say that, at the outset, he was exclusively entitled to the asset and at no point consented to a disposition of the asset or his interest in it in favour of the defendant recipient.¹⁵

That one's entitlement to one's assets is capable of justifying claims against both direct and indirect recipients should not be viewed as controversial. After all, as noted at the outset, all agree that a claim lies where the claimant has title to an asset in the defendant's hands, irrespective of whether the defendant received the asset directly from the claimant or otherwise. The position taken here runs counter to orthodoxy only in that, as we have seen, the rules on the passing of title mean that the claimant is often unable to establish title to any asset held by the defendant.

Acknowledging that, as the law stands, title can rarely be asserted against indirect recipients should not distract us. What we are asking is whether a claim is justified on a given set of facts, whether we should view the claimant as having a continuing interest in the asset, in short, what the law *should* be. It is plain that we cannot answer these questions by taking as a given (some part of) what the law *is*.¹⁶ In any case, that the law's protection of a claimant's interest in his assets does not stand and fall with the subsistence of his title to it is plain from the cases on direct receipt. There, the claimant is entitled to recover even where title passes and, as we saw earlier,¹⁷ these claims are explicable only by reference to the claimant's interest in the asset. So, not only should we not assume the correctness of the present rules on the passing of title where a claimant's consent to a transfer is defective, we can also see that the law does now, on occasion, protect a claimant's interest in his assets where, as part of its response, title is held to pass. Therefore, both as a matter of principle, and as a matter of law, the present rules on the passing of title give us no reason to reject the liability of indirect recipients.

At root, the argument for liability in such cases, and indeed for their parallel treatment with cases of direct receipt, is a simple one. Through the institution of property, the law grants individuals exclusive interests in certain assets. These interests, which we have referred to as ownership interests, entitle the holder to determine who may use and benefit from the asset, and, in the absence of the owner's consent, nobody else has any right to hold, use or enjoy it. Now, there is a decision to be made as to what, in law, is to amount to proper consent, what mistakes and false assumptions, what degree of compulsion will negate a choice to make a disposition of the asset. But, wherever that line is drawn, there can only be two potential outcomes. Either the owner has made an effective disposition of his asset, in which case, even if his consent was imperfect in some

recipients. It is arbitrary to make a defendant's liability turn on the route the asset took to reach him. Indeed, one could argue that the case against the indirect recipient will often be stronger since, in many cases, while the claimant's consent to the initial transfer is defective, rather than wholly absent, when it comes to subsequent transfers to later (indirect) recipients, his consent will be wholly absent.

¹⁵ Or to any such disposition in favour of some other earlier recipient, through whom the defendant could then claim an entitlement.

¹⁶ See more generally, chapter 3, text to nn. 1-4.

¹⁷ Chapter 4, text to nn. 20-30.

way, no liability whatsoever should arise, or the disposition was rendered ineffective by the claimant's defective consent, in which case neither the immediate recipient nor those who receive subsequently should be regarded as entitled to retain or benefit from the asset. This then justifies its recovery by the claimant.

This then allows us to deal with the arguments that have been employed for and against claims in these cases. Firstly, the distinction between title-based claims and those founded on defective transfers is an unsafe foundation for discussion of the appropriate response to the misapplication of assets. Though a fair representation of the law as it stands, it is misleading in so far as it suggests that we have here two materially distinct classes of case, rather than alternative and competing responses to one common set of facts. Secondly, claims against indirect recipients, and the justification for such claims, are founded on the claimant's lack of consent to the indirect recipient receiving and retaining the asset. For this reason it is irrelevant that the transfer through which the defendant received the asset was not, as between transferor and transferee, defective. This is again clear from those cases where title does not pass as a result of the initial misapplication. If A's asset is stolen by B, who then transfers it to C, it is simply irrelevant that B's consent to the transfer to C was in no way defective. A's consent is all that matters, since it is his consent alone which is necessary for a valid disposition of the asset. Thirdly, the basis of the defendant's liability is that he holds either the original asset held by the claimant or a substitute thereof. In the terms set out above, this provides a justification for claims in cases of transactional indirect receipt. It does not, however, support liability where the defendant does not hold any such asset, and so does not justify claims against causal indirect recipients. If there is to be liability in such cases, it must have some other basis. It is to this which we now turn.

7.4 Causation

Causal indirect receipt differs from transactional indirect receipt in that the defendant holds neither the asset initially misapplied nor any fruit or substitute of that asset. Instead, the claimant and defendant are connected only by the fact that the receipt of some other asset or benefit by the defendant was caused by the misapplication, in the sense that the asset or benefit would not have been received had the misapplication not occurred. Should such facts generate liability?

The suggestion has been that it is arbitrary to make recovery dependent on a chain of transfers and exchanges since this would provide a claim only in some of the instances where the defendant is enriched as a result of a misapplication of the claimant's assets. The causation approach is put forward to redress this. There are two underlying assumptions here. The first is that there should be liability wherever another benefits from a claimant's asset, or indeed simply

from the claimant, without his effective consent. The second is that the law's focus on transactional links, and the claims dependent on establishing such links, are concerned only with the identification and recovery of such benefits. Both assumptions are questionable.

The connection between claimant and defendant determines what liability, if any, arises as between them. The liability of transactional indirect recipients is built on the fact that an owner's interest extends beyond the original asset to other assets acquired in exchange for it. Transactional links, that is, transfers and substitutions, are significant because they enable claimants to identify assets in the defendant's hands as assets in which they have an exclusive interest. This in turn puts such a claimant in a position to bring either of the first two types of claim examined in chapter 5. However, since these claims are dependant on the defendant holding an asset to which the claimant is exclusively entitled, in the absence of such transactional links, such claims must fail. As such, there is nothing arbitrary in the law's focus on transactional links.

However, in chapter 5 we also examined the possibility of a claim not dependent on, and so arising independently of, the claimant establishing an exclusive interest in an asset in the defendant's hands. In so far as an owner has not just a right to control who uses and so benefits from his asset but also an interest in the benefits so derived, we can justify a defendant's liability even where no relevant asset is retained, provided the defendant was and remains benefited by an asset to which the claimant was, at the time, exclusively entitled. This may then enable us to justify the liability of an indirect recipient who does not retain and indeed may never have received an asset in which the claimant has an exclusive interest. Once again, the key question concerns the nature and extent of the claimant's interest in his assets.

The law here provides little guidance. As we saw in chapter 5, even in the more straightforward two party cases, it is unclear whether the law recognises an owner as being exclusively entitled to benefits derived from his asset.¹⁸ Such case law as there is is equivocal. Turning to indirect receipt, the emphasis in the case law that on the claimant being able to trace into an asset received by the defendant suggests that mere causal connections are insufficient to found liability.¹⁹ This, in turn, suggests that there is no such interest in benefits derived from one's asset, since the receipt of benefits, as opposed to the receipt of one's assets, does not depend on such transactional links, or at least that such an interest does not extend to the benefits received by this

¹⁸ Chapter 5, text to nn. 24-52.

¹⁹ See, e.g., *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265; *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548. Conversely, it could be argued that the fact the courts have in such cases been rather indulgent in their application of the tracing rules suggests an enthusiasm to break free from the need for such transactional links. Indeed, Birks went so far as to suggest that *Lipkin Gorman* could be viewed as authority supporting a causation approach: see Birks, *supra*, n. 5, p. 519.

class of indirect recipient.²⁰ However, there are occasional instances where indirect recipients have been held liable in the absence of transactional links.

The leading modern example, although it has received little attention in discussions of indirect receipt, is *Banque Financière de la Cité v. Parc (Battersea) Ltd.*²¹ The case arose from a loan made by the claimant to P. The loan was made on the condition that it be repaid ahead of any loans P had taken from companies within the group of which it was a part. This included the defendant. The money loaned by the claimant was then used by P to reduce its indebtedness to another of its creditors, R, which held a charge over land owned by P. Since the defendant held a second charge over that land, the reduction of the debt owed to R was also (potentially) beneficial to the defendant since it now stood to recover more in the event of P failing to repay the loan and the defendant then having to enforce its security over the land. P then became insolvent. The defendant, by virtue of its charge, would ordinarily be entitled to recover the money it was owed from the proceeds of the sale of the land and in priority to the claimant. However, the claimant argued that it should be subrogated to the rights previously held by R, so as to entitle it to be repaid ahead of the defendant. The House of Lords agreed.

The case was argued and decided through the framework of unjust enrichment. Given that the claimant only loaned P the money on the basis that it would be repaid before, *inter alia*, the defendant, the defendant would be unjustly enriched were it entitled to enforce its charge and secure repayment in priority to the claimant, on the basis that, to the extent that the defendant stood now to recover more from enforcing its charge, this was a benefit derived from the claimant's payment to P (since this then caused P to pay off the debt due to R, which strengthened the security provided by the defendant's charge) and this was a benefit which P did not intend the defendant to take. Stripped of unjust enrichment terminology, allowing the defendant to enforce its security interest without qualification would mean that it would benefit from an application of the claimant's assets, to which, in the circumstances, it did not consent.

The case is significant because the claimant succeeded despite the absence of a transactional link between itself and the defendant. There was no suggestion that the increased payout the defendant would otherwise have received would have been the traceable product of the money the claimant initially paid over. There was, however, a causal connection. By virtue of the claimant's payment to P, the defendant stood to receive more when P's assets were distributed among its creditors. The only relevant difference between this case and a standard instance of causal indirect receipt is that the claim was brought before, and so to prevent, the defendant's receipt of the benefit. Given that this receipt would not have amounted to a wrong committed by the defendant against the claimant, it seems that the claim can be supported only on the basis that

²⁰ See further, *infra*, text to nn. 22-24.

²¹ [1999] 1 A.C. 221.

the claimant was entitled to the benefit which the defendant would have received, since it derived from an application of its own assets.

Approaching the question from the perspective of principle, the scope and nature of any claims in such instances fall to be determined, just as they do in cases of direct receipt, by examining the nature and scope of the owner's interest in the benefits derived from his asset. Liability here is dependent on the defendant receiving a benefit to which the claimant is exclusively entitled, and we must ask in each case whether the claimant has an exclusive interest in benefits of the kind received by the defendant.²² Significant in this respect is that, in most cases of causal indirect receipt, the benefit derived by the defendant comes not from use he has himself made of that asset but from the fact that another's receipt of that asset prompted a transfer of some separate asset to the defendant. As such, though such benefits are causally connected to the claimant's asset and its misapplication, it is only in a loose sense that the benefit comes *from* that asset.²³ Now this, in itself, does not amount to a reason to reject claims in such cases. However, it may be thought that, if, as seems likely, we are to limit an owner's interest in and recovery of benefits derived, in some sense, from his asset, it is probable that those benefits which are only remotely connected to the asset and its use will be among those excluded.²⁴

7.5 Defences

Accordingly, the same principles support claims against indirect recipients as against direct recipients. And, as with direct recipients, such claims will be limited by the application of other, competing principles.

The principles which we examined in chapter 6 also apply in cases of indirect receipt. This means then that such claims should be limited where and to the extent that full recovery would leave the defendant worse off than had the misapplication not occurred. In conventional terminology, such claims should be subject to the defence of change of position. Furthermore, as we saw in the previous chapter, there is no basis for the view that there is a distinct and broader principle of promoting the facilitation of trade and security of transactions, such as would justify a

²² See chapter 5, text to nn. 53-54.

²³ This also shows that benefits may – and indeed often will – come, in the sense of causally derive, “from” more than one party, and indeed from the application of more than one asset. This in itself gives us reason to question whether it is plausible to say that ownership of an asset gives one an exclusive interest in the benefits derived (causally) from it, since this would often lead to a number of claimants being able to claim such an interest.

²⁴ An analogy may be drawn with the notion of relational losses, that is, losses suffered as a consequence of a loss suffered by another party, for which compensation traditionally has not been awarded through the law of torts: see J. Fleming, *The Law of Torts* (Law Book Company, 9th edn 1998), pp. 196-200.

distinct and broader defence to such claims. This is particularly significant in respect of cases of indirect receipt, since it means there is no justification for a defence of *bona fide* purchase as an alternative or in addition to that of change of position.²⁵

Claims should also be denied where recovery would be inconsistent with a legal obligation owed by the claimant, the most common example being where the claimant was under a contractual obligation to transfer the asset to the direct recipient in the first instance.²⁶ In most cases of indirect receipt, the obligation will be owed to someone other than the defendant, but, as we have seen,²⁷ there is sense in the defendant nonetheless being able to raise the existence of this obligation as a defence to claims against him.

7.6 Summary

One justification for imposing legal liability on a person is that he has something to which the claimant is, at least as between the two of them, exclusively entitled. And if the defendant does have something, an asset or an enrichment, to which the claimant is exclusively entitled, it should not matter how he came to have it. The route the asset or benefit took to reach the defendant simply has no bearing on the justification for the claim. Therefore, indirect receipt should not be viewed as raising any different considerations or questions of principle from cases of direct receipt.

The preceding analysis also shows that there are distinct bases for claims against indirect recipients. Liability may derive from the defendant holding an asset to which the claimant is exclusively entitled or it may derive from the defendant being benefited as a result of some use or application of an asset to which the claimant is exclusively entitled. Because of this, the opposition that is sometimes raised between basing (indirect) recipient liability on transactional links and basing it on causation is a false one.²⁸ Though the approaches differ, they are not mutually exclusive. This is because they answer different questions. So long as we recognise that ownership

²⁵ See chapter 6, text to nn. 31-36.

²⁶ This also shows that the key question is not whether the claimant was under an obligation to benefit or to transfer the asset to the defendant, but whether he was under an obligation which is inconsistent with a claim.

²⁷ See chapter 6, text to nn. 45-46.

²⁸ See, e.g., Evans, *supra*, n. 12. For this reason, while I agree with Evans that, in so far as the law is concerned with the receipt of benefits, it should be looking for causal rather than transactional connections, his argument, *ibid.*, p. 504, that looking for transactional links is “arbitrary and anomalous” and “has no normative support” is misplaced. It might also be pointed out that the suggestion that the tracing rules require normative support appears at odds with the modern orthodoxy, to which Evans appears to commit, that tracing is simply a process which is neutral as to rights. Neither the process of locating benefits nor that of locating things and their substitutes has any normative aspect and so neither requires justification (though the way we resolve uncertainties encountered in undertaking these processes when deciding cases does). It does not, however, follow from this that the identification of a benefit or a thing held by a defendant may not be central to the justification of his liability.

interests entail both an interest in the relevant asset, its fruits and substitutes *and* an interest in benefits deriving from such assets, we will have reason to be concerned with both the location of assets *and* the location of benefits.

7.7 Insolvency

This brings us to the final issue, namely the effect of a recipient's insolvency on the claims we have been examining thus far. This question is usually addressed by asking whether the claimant has priority in insolvency, which in turn is conventionally regarded as turning on whether the claimant has a proprietary right in an asset held by the defendant or merely a personal claim. The focus of discussion has then been on the circumstances in which a claimant may be able to establish such a proprietary right.

I shall take a different route. The starting point is to see that the issue raised by the defendant's insolvency is one of indirect receipt. Where a defendant is insolvent, there is necessarily competition between his creditors as to the extent to which their claims will be met from the defendant's limited resources. The defendant having insufficient assets to meet all his liabilities, there is a shortfall to be borne by some or all of his creditors. The key issue is how this loss is to be distributed between them. In relation to claims following the misapplication of assets, we have seen that liability, in the first instance, depends on and derives from the defendant's retention of an asset to which the claimant can assert an exclusive entitlement. In such cases, the question is whether the relevant asset or its proceeds are to be made available to other creditors in full or partial satisfaction of their claims. To the extent that they are, such creditors become (transactional) indirect recipients from the claimant. That is, they will receive, via the insolvent, and without the claimant's consent, an asset to which, by virtue of it being the asset initially misapplied or a fruit or substitute of it, the claimant can assert an exclusive entitlement.

As we have just seen, all other things being equal, cases of indirect receipt falls to be treated in the same way as those of direct receipt. And, just as the claimant's interest in an asset justifies the liability of a defendant who receives it without the claimant's consent, it likewise justifies the law acting at the outset to prevent it coming into another's hands in similar circumstances. Accordingly, protection of the claimant's interest in the asset requires that it should not be made available to satisfy the claims of other creditors, and hence that the claimant is able to recover in full. As such, we can only justify denying the claimant full recovery, and so making such assets available, at least in part, for the satisfaction of other creditors' claims, if the circumstances of insolvency call for the application of competing principles, sufficiently strong as to outweigh the principle of protecting the claimant's interest in those assets.

7.8 *Pari passu* and the impact on other creditors

Of course, such priority means that the defendant's other creditors are in a worse position than they would have been had the asset been made available for the satisfaction of their claims. But this tells us nothing, and certainly does not in itself reveal any injustice. After all, the same observation can be made wherever the law imposes liability.²⁹ The reason this appears to work injustice here is that it means that those making claims in respect of misapplied assets are given an advantage over other creditors of the defendant, which seems at odds with the basic principle of insolvency law of *pari passu* distribution, that all creditors should bear a proportionate share of the losses resulting from the defendant's insolvency.

Those who have argued for priority to be accorded to claims in respect of misapplied assets have, therefore, sought to show how such claimants may be distinguished from other creditors, so as to justify their exemption from the *pari passu* regime. These attempts have often fallen short. For instance, it has been argued that such claimants deserve priority on the basis that they have not chosen to take the risk of the defendant's insolvency.³⁰ However, even where true,³¹ this can be countered by showing that there are other creditors who likewise cannot be said to have accepted this risk, but who nonetheless fall within the application of the *pari passu* principle.³² A second argument is that, without such priority, the defendant's other creditors would receive a windfall.³³ This is closer to the mark, but to be convincing requires some explanation as to why the gain which would be made by the other creditors is better viewed as an undeserved windfall than a legitimate and fair reduction of the losses which they would otherwise suffer as a result of the defendant's insolvency.³⁴ This requires us to return to the basis of such claims.

As between creditors who, for instance, are claiming to recover losses caused to them by a breach of duty by the defendant, the *pari passu* principle reflects the fact that none has any greater claim to the assets held by the defendant than the others.³⁵ None can provide a reason why a

²⁹ That is, any defendant, and anyone who claims through such a defendant, can say that, liability would leave them worse off than they would have been in the absence of liability.

³⁰ See, e.g., G. Jones, Note [1980] *C.L.J.* 275, at p. 276; D. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 *Can. Bar. Rev.* 315.

³¹ The meaning and significance of the claimant accepting the risk of the defendant's insolvency will be examined *infra*, text to nn. 44-48.

³² See W. Swadling, "Property and Unjust Enrichment", ch. 11 of J. Harris (ed.), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997), at pp. 142-143.

³³ See W. Goodhart and G. Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 *M.L.R.* 489, at p. 500.

³⁴ *Cf.* Swadling, *supra*, n. 32, at p. 143.

³⁵ The same is also true in respect of other claims which are similarly "asset-unspecific", such as for the payment of contractually agreed sums and unpaid tax.

particular asset should be made available to him, in satisfaction of his claim, in preference to other creditors. The position is, however, different when we come to claims in respect of misapplied assets, for such claimants *can* offer a reason why their claim to a particular asset is stronger than those of other creditors. The claimant can say that the relevant asset is or derives from one to which he had a prior exclusive entitlement, and that he never properly consented to its disposition, whether to the defendant or to his creditors. Hence, just as the defendant's liability is justified by the need to give effect to the claimant's interest in the asset as between the two of them, so is the claimant's priority in the event of the defendant's insolvency necessary in order to prevent the other creditors receiving and benefiting from that asset without the claimant's consent.

That claims which amount to an assertion of one's ownership interest in an asset in the defendant's hands fall outside the principle of *pari passu* distribution is indeed orthodox. This is clear from the law's response in cases where title to the misapplied asset is held not to pass to the recipient. The argument put forward here differs solely in that it is not only in cases where, as the law stands, such title is retained that the law does and should give effect to the claimant's interest in the asset, and that, subject to defences, priority should be accorded in all cases where the defendant retains misapplied assets.

Indeed, the same point can be made using this as an alternative starting point. Most, if not all, would agree that a claimant whose asset has been stolen or who has transferred it on the basis of a "fundamental" mistake, such as to the defendant recipient's identity, and so who retains title to the asset, should have priority in the event of the defendant's insolvency. The claimant's asset should not be available to meet the defendant's liabilities. The approach here would extend that priority to all misapplications, not just to those where, at present, the law holds that title has not passed. If we are to maintain this distinction or one similar, we must be able to explain why differences in the source or nature of the defect in the claimant's consent should lead to differences in the law's response in the event of insolvency. Why should the creditors of a defendant who receives an asset as a result of the claimant's mistake as to his liability to make that transfer have access to the asset to satisfy their claims, whereas those of a defendant whose receipt stems from a mistake of identity do not? We have seen already that the standard defences of the law here are either unreal or beg the question.³⁶ So, for instance, it is not enough simply to say that the claimant retains title in the one case but not the other, since this may well be how the law presently responds in such cases, but offers no attempt to explain why it is correct to do so. Similarly, it is plainly inaccurate to say that, in the former case, it is only the claimant's intention to benefit the defendant which is vitiated, with his intent to pass title remaining uncompromised. This may be how the law presently *treats* such cases, but it in no way reflects the actual state of mind of the claimant when making the transfer.

³⁶ See chapter 4, text to nn. 20-26.

The most that can be said, and I am doubtful even of this,³⁷ is that the defect in the claimant's consent is greater in the latter case than in the former. But this still leaves us in need of an explanation as to why the gravity of the mistake should bear on the claims available to the claimant and, in particular, why, in the case of lesser impairments, the defendant's creditors should be entitled to receive and benefit from the asset or its proceeds. After all, such "lesser" defects are nonetheless considered sufficient to justify the liability of the defendant, and the claimant no more consented to its receipt by the defendant's creditors than he did to its receipt by the defendant.

7.9 Contractual non-performance

Others who have argued for priority to be accorded more often to claims following a defective transfer or misapplication of assets have stopped short of saying that there should, *prima facie*, be priority in all such cases. Chambers and Birks, for instance, have both argued that, through the resulting trust, proprietary claims, and so priority in insolvency, should be granted to a wider class of unjust enrichment claimant than at present. They have nonetheless suggested that there should be no such priority where the claimant's consent to defendant's receipt of the asset did not fail until after it was received by the defendant,³⁸ unless the asset was received on terms which throughout restricted the defendant's use of it.³⁹

Their basis for this limitation is not entirely clear. Where the claimant's consent fails only after the asset comes into the defendant's hands, there will necessarily be a period, prior to its failure, during which no claim lies in respect of the defendant's receipt and retention of the asset, and it is instead at his free disposal. Chambers and Birks both presuppose that, once an asset is received by the defendant with no liability and no restrictions on its use, the claimant is thenceforth unable to assert any proprietary right in it such as would entitle him to priority in insolvency, even if the basis on which his consent was given then fails. It is, however, unclear whether this conclusion is based on the perception that such a reversioning of title is a conceptual impossibility or merely undesirable as a matter of principle.⁴⁰

³⁷ See chapter 4, text to nn. 35-38.

³⁸ This will be the case where a condition of the claimant's consent to the transfer fails only after the transfer has been made.

³⁹ Chambers, *supra*, n. 10, pp. 144-153; Birks, *supra*, n. 10, pp. 194-198.

⁴⁰ Indeed, elsewhere Chambers appears to have accepted that, where an asset is transferred subject to a condition subsequent but with no restrictions on how the recipient may use it, the claimant may reclaim the asset and, presumably, be granted priority in the event of the recipient's insolvency, where the condition then fails: see R. Chambers, "Conditional Gifts", ch. 14 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn, 1998), pp. 430-431, 458-460. Chambers may respond that, in such cases, the claimant retains some reversionary interest in the transferred asset, but, subject perhaps to the case where the claimant expressly reserves such an interest, this reversionary interest is nothing more than an expression of the

Whatever the explanation, Chambers and Birks' position is problematic. Firstly, there is an inconsistency in denying that the claimant can make out a title to the misapplied asset where consent fails only subsequent to its receipt by the defendant, while still allowing him a personal, *i.e.* non-prioritised claim, in such circumstances. As we have seen, any claim made in respect of the receipt and retention of misapplied assets is justified only on the basis of the claimant's interest in the relevant asset. If we are to say that, once an asset is at the defendant's free disposal, any claim to it is lost, then there is no scope for imposing liability on the defendant *in any form*.⁴¹

Moreover, remembering that, in insolvency, the competition is between the claimant and the defendant's other creditors, Chambers and Birks' position amounts to saying that that, where the claimant's consent to the transfer fails subsequent to the defendant's receipt of the asset, the claimant's defective consent is sufficient to justify the liability of the defendant but not that of his creditors. However, given that the claimant no more consented to the creditors receiving and benefiting from the asset than he did to the defendant, it is hard to see how this difference in treatment can be justified. Even if we view the defendant as having an unrestricted power to dispose of the asset in the period prior to the claimant's consent failing, such that any disposition made by the defendant during this period cannot be challenged by the claimant, this would not justify making the asset available to the defendant's other creditors in whose favour no such disposition has been made.

It is likely that underlying this restriction on priority is a desire not to upset the existing law whereby the claims of contracting parties who have paid money or transferred goods without receiving the performance due to them in return have no priority in the event of the defendant's insolvency, unless they have contracted for such protection through the grant of security or reservation of title. Though such claimants have transferred assets on a condition - the defendant's performance of his contractual obligations - which fails, such as would appear to justify allowing them the same claims as generally available to those whose consent to a transfer of assets is defective, it is thought that this would be an illegitimate circumvention or contravention of the *pari passu* principle.⁴²

conclusion that the claimant should be able to recover the asset in the event of the condition failing. As such it is a reflection of, rather than a justification for, such recovery and priority.

⁴¹ Presumably, Birks and Chambers see no inconsistency here because, as a result of adherence to conventional unjust enrichment theory, they fail to see the role property or ownership interests play in justifying such claims.

⁴² Birks originally took the position that a resulting trust, and so priority in insolvency, was the principled response to all cases of unjust enrichment, but that the policy of *pari passu* distribution in insolvency required an "arbitrary" limitation in respect of claimants who transferred assets under a contract which the defendant failed to perform; see P. Birks, "Restitution and Resulting Trusts", in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University, 1992); reprinted as Appendix 1 of P. Birks and F. Rose (eds), *Restitution and Equity: Volume 1 – Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000). It was in part this admission of arbitrariness which led the House of Lords to reject this argument of Birks in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996]

Now, there is no doubt that if such claimants could, provided the defendant retained the asset transferred or a fruit or substitute of it, recover such assets or their value in priority to other creditors where the defendant was insolvent, the change would be dramatic. Far more creditors would escape the application of the *pari passu* principle, with many contractual creditors being accorded priority where at present they are not, which would result in fewer assets being made available to those creditors with no priority, and greater inequality amongst creditors generally.⁴³ However, if we are to justify this exclusion of contractual transferors, we must be able to show why the principles which justify the priority given to other claims in respect of misapplied assets do not apply here, or why such cases uniquely raise competing principles whose application requires that priority not be granted.

7.10 Acceptance of risk

One common argument that has been deployed to explain the denial of priority to contractual transferors is that they have voluntarily accepted the risk of the defendant's insolvency, and so should be left to bear their share of the losses resulting from it.⁴⁴ I find this idea of acceptance of risk a difficult one, however. If the claimant, in his contract with the defendant, has agreed that, in the event of insolvency, he is to have no priority over other creditors, such that the transfer is effectively made on terms that, should the defendant become insolvent, the asset will be made available to satisfy the claims of other creditors, I can well see that no such priority should be accorded. However, short of this, I am unsure as to what is meant by acceptance of risk and why it should limit a claimant's rights. Certainly the mere fact that the claimant was aware of the possibility of the defendant's insolvency should not limit the claims available to him. An awareness that the basis of one's consent to a transfer may fail does not render that consent any less

A.C. 669, at p. 709, *per* Lord Browne-Wilkinson. In fact, there is nothing arbitrary in one principle (or policy) limiting the application of another. Rather the arbitrariness in Birks' argument is in saying that the policy underlying *pari passu* distribution trumps the full protection of the claimant's interest in some cases where a recipient of misapplied assets is insolvent, but not in others.

⁴³ It has been argued, see, e.g., A. Burrows, "Unravelling Proprietary Restitution: A Response to Professor Lionel Smith" (2005) 41 *Can. Bus. L.J.* 424, at p. 428 that if claimants who transferred assets under a contract which the defendant then failed to perform could bring proprietary claims, and so obtain priority in insolvency, this would eliminate the distinction between secured and unsecured creditors. This is plainly false. There would be many classes of creditor who would have no such priority, including all those claiming compensation for losses (whether for torts, breach of contract or other legal wrongs). Nor should it be thought that all contract claimants would then have the option to bring prioritised claims. Those who have not yet performed, or whose performance has not involved a transfer of assets to the defendant, would have no such claim; and those who have transferred assets would only have priority so long as the defendant retained that asset, a fruit or substitute.

⁴⁴ See, e.g., *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, at p. 684, *per* Lord Goff; Paciocco, *supra*, n. 30, pp. 340-345; E. Sherwin, "Constructive Trusts in Bankruptcy", [1989] *U. Illinois L.R.* 297, at pp. 335-337; Burrows, *supra*, n. 43, p. 428.

conditional,⁴⁵ and so the fact that the claimant appreciated both that the defendant may breach his contract and that he may become insolvent in no way entails that he consented to the asset being made available to the defendant's creditors.⁴⁶

What appears to underlie the acceptance of risk argument is not only that most contracting parties who pay in advance or transfer goods on credit are aware of the risk of the defendant's breach and insolvency, but also that they will often have the possibility of taking precautions against such eventualities by bargaining for some form of security. From this it is thought to follow that those who do not take advantage of this opportunity should be left to bear their share of the losses from the insolvency as determined by the *pari passu* principle. However, such reasoning is flawed, since it rests on an assumption that a claimant should, at least where possible, have to bargain for such protection. The key is to recognise that the contract is not, or at least need not be, the exclusive source of the rights and obligations between the two parties. Contract is just one source of legal rights and duties, and contracting parties do not lose their non-contractual rights simply by virtue of entering into a contract which makes no express provision for them.⁴⁷ So, while it is true to say that, where a contracting party does not bargain for security, and so for the priority in insolvency it brings, no justification can be found *in the contract* for according such priority, there is still the possibility that priority may be justified on some other basis. And, as we have seen, a non-contractual justification for priority can be located in the principle of protecting an owner's interest in exclusively determining the disposition of his assets.⁴⁸ This interest and the rights flowing from it, though they may be modified or waived by contract, are not sourced in the contract,

⁴⁵ For this reason, the popular view, endorsed in *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193, that a claimant who transfers an asset subject to a condition subsequent without communicating that condition to the defendant recipient is a "risk taker", and so should be denied recovery where that condition fails, is misconceived: see generally T. Akkouch and C. Webb, "Mistake, Misprediction and Change of Position" [2002] *R.L.R.* 107, at pp. 108-110.

⁴⁶ Furthermore, as Rotherham notes (C. Rotherham, "Tracing and Justice in Bankruptcy", ch. 6 of F. Rose (ed.), *Restitution and Insolvency* (Mansfield Press, 2000), at p. 127), the assumption of risk argument is incomplete, since at most it says that, *given that such creditors' claims abate in insolvency*, a creditor who fails to take the chance to bargain for security has accepted the risk of his claim abating as a result of the application of the *pari passu* principle. But it leaves unanswered the prior question of why we should treat such claims as subject to *pari passu* in the first place.

⁴⁷ An analogy can be drawn with the law of torts, where contracting parties may, for instance, owe duties of care to one another despite the fact that they have not been bargained for: see *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145, at p. 193, *per* Lord Goff. Similarly, it is not suggested that a contracting party's claim to recover an overpayment depends on the contract so providing. Of course, overpayments, unlike breach and insolvency, are usually not anticipated, but, as we have seen, the claimant's awareness of such risks, in itself, provides no reason to limit his recovery when those risks materialise.

⁴⁸ The point is, perhaps, made even clearer when it is recognised that the priority which would be accorded by the grant of security will usually be different to the priority conferred on the basis of the defective transfer, since the latter gives priority only in relation to the asset transferred, its fruits and substitutes, and so is dependent on their existence in the claimant's hands, and the claimant will usually be free to dispose of these as he sees fit, at least prior to breach. One far-reaching consequence of this analysis is that reservation of title clauses are strictly unnecessary, since a claimant would have by default a right to recover assets transferred under a contract in the event of the defendant's breach and insolvency.

and hence whether or not the contract itself provides for such rights and the protection of such interests is by the by. Accordingly, if the principles we have examined thus far do indeed apply in the case of contractual transfers, we can justify such claimants having priority in insolvency even where the contract does not so provide.

7.11 The significance of contractual obligation

I think, nonetheless, that a principled argument can be made to deny contractual transferors priority in insolvency. This is that the existence of the contractual obligation on the claimant to transfer the asset to the defendant precludes the claimant from bringing claims asserting his interest in exclusively determining its disposition, and so from taking advantage of the priority that such a claim would provide. This argument has already been set down in chapter 6.⁴⁹ In summary, the existence of the obligation to transfer the asset is incompatible with any claim to recover it, even where the claimant's consent to the transfer is in some way defective, since the recognition of such an obligation necessarily involves a limitation on his freedom to dispose of his assets to whomsoever he chooses. Given this, before a claim of the type we have been examining here may lie in respect of contractual transfers, the obligation to make such a transfer must be set aside. Moreover, even where a contract is "terminated" for breach, this does not extinguish the obligation in fulfilment of which the asset was transferred.

As such, to the extent that, upon termination, the law justifiably allows recovery of the value of assets transferred in performing the contract, the better view may be that such claims are contractual, in the sense of deriving from the express or (genuinely) implied terms of the contract, rather than resting on the extra-contractual principles we are examining here. That being so, the availability and extent of such claims, including how they are affected by the defendant's insolvency, are to be determined by the contract. An express term granting such priority is what we recognise as a reservation of title clause or an agreed *Quistclose* trust arrangement. In the absence of such a provision, the courts have reasonably been slow to regard such terms as arising by implication.⁵⁰

⁴⁹ Chapter 6, text to nn. 42-60.

⁵⁰ The one area where the courts may be viewed as having done this is where *Quistclose* trusts have been recognised despite the parties not having spelt out that the claimant is to be accorded priority in the event of the defendant's insolvency. The implication of such a term may be legitimated on the basis that, though the express terms may no provision for it, nor do they exclude it, and it is consistent with the parties' intentions and the nature of their arrangement more generally for such a term to be inserted.

7.12 Change of position and “off-balance sheet liabilities”

According priority to claims in respect of misapplied assets entails taking away from the defendant’s estate assets which would otherwise have been available for the satisfaction of the claims of other creditors, and so leaves them in a worse position than if no such priority was accorded. However, as we have seen, this in itself involves no injustice to such creditors and provides no reason for denying priority to misapplication claims. In the ordinary case, this will leave the defendant’s other creditors in the same position as they would have occupied had the asset not been misapplied.⁵¹ However, different considerations apply where one or more of the defendant’s creditors *can* say that the allowing the claimant to recover in full and in priority to other claims would leave his worse off than had there been no misapplication.

In chapter 6, in our examination of some of the principles which may justify the denial or restriction of claims in respect of misapplied assets, we identified one such principle as forming the basis of the defence of change of position. As we saw then, the defence functions so as to ensure that claims are denied to the extent to which they would leave innocent defendants worse off, and that this in turn may best be explained as necessary to protect the defendant’s own interest in exclusively determining the disposition of his assets. As insolvency most clearly demonstrates, it is not only the defendant who may be adversely affected by claims of the type we are discussing. So, just as the principle operates to deny recovery where and to the extent that this would leave the defendant recipient worse off, so too it requires that such claims, and the priority they usually carry, be limited or qualified where one or more of the defendant’s creditors would otherwise be left in a worse position than that which they would have occupied had the asset not been misapplied.

This possibility arises because prioritised claims in respect of misapplied assets would constitute “off-balance sheet liabilities”⁵² and so are potentially deceptive to other creditors. A prospective creditor’s decision to advance credit to an individual will usually be affected by his perception of that individual’s creditworthiness. This will be based in part on the resources that the prospective debtor appears to have available to him. As such, where assets in the debtor’s possession and which appear to be at his free disposal turn out to be subject to unknown and undiscoverable claims, there is a risk that creditors may be misled. In relation to misapplied assets, the problem arises where a creditor provides credit to the defendant only on the basis of the defendant’s entitlement to the misapplied asset, such that he would not have advanced credit, at least on such terms, had he known or believed the defendant not to be so entitled. He can say that

⁵¹ See, e.g., Sherwin, *supra*, n. 44, at pp. 332-333; V. Finch and S. Worthington, “The *Pari Passu* Principle and Ranking Restitutionary Rights”, ch. 1 of F. Rose (ed.), *Restitution and Insolvency* (Mansfield Press, 2000), at pp. 10-11, 16.

⁵² See, e.g., *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, at p. 705, *per* Lord Browne-Wilkinson.

to allow the claimant to recover that asset in priority to his and other claims would leave him worse off than he would have been had the asset not been misapplied, since, has there been no misapplication, he would not have been misled into believing the defendant was creditworthy and hence would not have advanced him credit, which in turn would mean that he would not have been exposed to the losses resulting from the defendant's insolvency.

What is to be done in such cases? Simply denying the claimant priority may seem the obvious solution. However, this is imperfect for two reasons. The first is that it enables other creditors of the defendant who *did not* advance credit in the belief that the misapplied asset was the defendant's to have their claims satisfied, in part, from the claimant's asset. Since such other creditors can identify no principle which would justify *their* being entitled so to benefit from the asset, this would amount to an unjustified infringement of the claimant's interest in that asset. The optimal solution would be to protect those creditors who had relied on the defendant's apparent entitlement to the misapplied asset without conferring any underserved advantage on those who had not. Secondly, even if the claimant were relegated to the ranks of unsecured creditor, and his claim made subject to the *pari passu* principle, an injustice is arguably still done to those creditors who had relied on the defendant's apparent ownership of the misapplied asset when giving credit. This is because ranking the claimant alongside such creditors allows him to recover a share of the insolvent's estate which otherwise would have been available to them and other creditors. As such, and to this extent, reliant creditors can still say that such a claim would leave them worse off than they would have been had the asset not been misapplied.

The ideal solution would be to allow the claimant to recover in priority to the defendant's other creditors, but without doing injustice to those creditors who relied on the defendant's apparent ownership. One means of avoiding such injustice would be to allow a prioritised claim but also to require the claimant to make good the claims of such creditors, or at least the losses they would otherwise suffer as a result of the defendant's insolvency. This would ensure that such creditors are not left worse off than they would have been had there been no misapplication while still preventing the other, non-reliant, creditors from receiving some part of the misapplied asset or its proceeds in satisfaction of their claims. The problem with this approach comes where the losses to be made good to reliant creditors exceed the value of the asset which the claimant is seeking to recover. In such cases, the claimant will have little interest in seeking to recover the asset if such recovery is made conditional upon that his paying to those creditors a sum in excess of its value. We then face a dilemma, since if we allow the claimant to recover without first compensating those creditors who did rely on the defendant's apparent ownership of the asset, an injustice is done to them, yet if we do not, all the other non-reliant creditors will have the benefit of the asset being made available for the satisfaction of their claims. An alternative solution, which avoids this problem, may be to allow the claimant to recover in priority to other creditors provided he pays to

reliant creditors a sum equal to the share they would have taken of the proceeds of the sale of the asset had it been made available to creditors generally. This effectively perfects their expectations, since they gave credit on the basis that the asset was the defendant's and so would be made available for the satisfaction of their claims in the event of his insolvency.

The difficulty of establishing whether a creditor has given credit on the basis of the defendant's entitlement to a particular asset, and the relative complexity of the possible solutions to this problem may encourage the view that we would be better served by taking the simpler and more certain approach of denying priority in all such cases. I think, however, we should hesitate long before making such concessions. Firstly, while it may readily be conceded that the pursuit of justice is not the sole concern of the law, and that we must on occasion make concessions on the grounds of pragmatism, certainty and simplicity, we should nonetheless be slow to conclude that injustice should be tolerated on the grounds that this makes the law simpler or easier to apply. Secondly, if a simpler solution is to be favoured, it would be more just to give the claimant priority in all such cases, rather than impose a blanket denial. Though priority may work injustice to some creditors,⁵³ the denial of priority necessarily involves an injustice to the claimant, since it strips him of an asset to which he can claim to be exclusively entitled.

⁵³ In this context, it is worth noting that it has been suggested that it is rare for creditors to base their decision to give credit on the debtor's entitlement to particular assets in his possession, and are instead more likely to rely on the debtor's general ability to generate income: see, *e.g.*, Sherwin, *supra*, n. 44, pp. 323-324, 360.

Chapter 8

Rights and interests, property and obligation

The analysis of the claims available following a defective transfer or misapplication of assets that has been presented in the previous chapters has proceeded largely without reference to a distinction which is pivotal in most accounts of the law in this area; namely that between proprietary and personal rights. However, the conclusion that, subject to defences, a claimant whose assets have been misapplied should be entitled to their specific recovery, whether the defendant is a direct or an indirect recipient, and in priority to the claims of other creditors, may be thought to amount to, and indeed be more simply expressed by, saying that the claimant retains¹ a title to or proprietary interest in such assets. So, for instance, the approach advanced here leads to many of the same results as would adoption of the view that recipients of misapplied assets are to hold them on trust for the claimant.² What purpose, therefore, has been served by excluding such terminology from our account of the law here?

It would be unrealistic to imagine that the language of personal and proprietary rights could now be abandoned, and I do not propose this. However, without a clear and settled understanding of the location, basis and significance of a distinction between proprietary and personal rights, and I think it is plain that there is no such understanding at present, there are a number of dangers in its application. If we are to continue to employ these terms, we need to be aware of these dangers and to develop a clearer sense of the place of and the limited role played by these concepts in legal analysis. Without this, we risk being drawn us into identifying false oppositions and unities, thus derailing our attempts to develop the law in line with principle.

¹ I acknowledge the argument that the language of retention is strictly appropriate only where the interest or title vested in the claimant is the same interest or title which he held at the outset: see, e.g., *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, at p. 706, *per* Lord Browne-Wilkinson. For present purposes, however, I am not seeking to distinguish such cases of “genuine” retention and those where, though the claimant’s original title passes to the recipient, he acquires a new title in its place.

² A view most famously advanced by Birks and Chambers: see P. Birks, “Restitution and Resulting Trusts” in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University, 1992), reprinted as Appendix 1 of P. Birks and F. Rose (eds), *Restitution and Equity: Volume 1 – Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000); R. Chambers, *Resulting Trusts* (Clarendon Press, 1997); P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 185-198. As is plain from the previous chapters, there are also important differences in substance between the approach taken here and that of Birks and Chambers.

8.1 The utility of the language of proprietary and personal rights

The description of certain claims and rights as personal or proprietary is unobjectionable so long as it is always borne in mind that the application of these labels follows from and is, at best, only a (rough) shorthand for a detailed set of conclusions as to the various claims available to the claimant such as set out previously. In other words, it is *because* the claimant can claim against indirect recipients and has priority in the event of the defendant's insolvency that it becomes possible to speak of him having a proprietary claim or interest in the relevant asset. However, as the preceding chapters have shown, it should also be clear that the form and scope of the claims available following a defective transfer or misapplication of assets can be expressed without resort to the distinction between personal and proprietary rights and without any reference to the location of title to the misapplied asset.

Following on from this, it is crucial to note that the language of and distinction between personal and proprietary rights contribute nothing to the determination of what claims *should* lie where assets have been misapplied. If, for instance, we are interested to know whether, in such cases, claims should have priority in the event of the defendant's insolvency, this requires us to inquire into the principles that apply in such cases, the reasons for supporting or denying such priority. This involves consideration of factors such as the interest or policy supporting a claim in the first instance and the interests of, and the impact of such a claim on, the defendant and other affected parties, such as creditors of the defendant. This is how we approached this question in chapter 7. The proprietary-personal distinction cannot help us resolve these considerations. Very simply, even if it is correct to say that rights and claims are to be divided into personal and proprietary,³ we need some logically prior basis for determining into which category a particular claim falls.

This is, superficially at least, different to the way most commentators approach such questions.⁴ Here, the standard approach is to view, for example, priority in insolvency as dependent on and a consequence of the claimant having a proprietary interest in an asset held by the defendant. So, on this basis, to determine whether the claimant is to be accorded priority, we must first ask whether the claimant can establish such a proprietary interest, and the key question becomes how we are to identify proprietary rights. But, to explain and to justify the incidence of such interests, we must examine the principles supporting their recognition. And since, at least in such cases, the significance of proprietary interests is the priority they bring, this takes us back to an inquiry into

³ On which see *infra*, text to nn. 24-72.

⁴ See, e.g., A. Burrows, "The English Law of Restitution: A Ten-Year Review", ch. 2 of J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004), at p. 24; G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006), p. 576; R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000), pp. 403-404.

the reasons for according priority to certain claims.⁵ As such, the reference to proprietary rights in such accounts is something of a red herring. We are told that priority depends on the existence of a proprietary right, but then the existence of a proprietary right depends on their being good reasons for giving the claimant priority in insolvency. The proprietary-personal terminology simply mediates, while contributing nothing to, the inquiry into the justification of according certain claims priority in insolvency.

For this reason, I take a similar view of the terminology of personal and proprietary rights as I do of references to unjust enrichment.⁶ In each case, once we have come to the conclusion as to the existence and scope of a particular claim, we can attach the relevant label to it. But, in each case, in coming to that conclusion, these labels provide no assistance. The language of unjust enrichment tells us nothing about when and why the receipt of a benefit should generate liability, and the language of proprietary claims and interests tells us nothing about when and why a claim should have priority where the defendant is insolvent. And once we identify the factors which *are* relevant to answering these questions, it is doubtful what additional clarity or information is provided by the subsequent introduction of such terminology.⁷

Indeed, the danger here is that the terminology we use to analyse such claims can not only obscure but also distract us from those factors which are relevant to their justification. By regarding questions such as the claimant's position in the event of the defendant's insolvency as turning on whether his rights are proprietary or merely personal, we risk losing sight of the real reasons for according priority to certain claims. We have seen an example of this already in the use of "unjust enrichment", where the framework and conceptual apparatus developed to analyse claims has become detached from the normative foundations for imposing liability in such cases, which has in turn resulted in an (occasionally) unprincipled body of law and a failure to treat like cases alike.⁸ Similarly, we need to be careful in employing the language of personal and proprietary rights, since it is apt not only to hide the factors which *are* relevant to existence and scope of such claims but also to lead us into consideration of factors which *are not*.

⁵ Which is exactly the approach taken by those commentators who view priority as dependent on the claimant's having a proprietary interest when confronting the question of when such interests are justified; see, e.g., Burrows, *supra*, n. 4, pp. 27-29; Virgo, *supra*, n. 4, pp. 598-599; Grantham and Rickett, *supra*, n. 4, pp. 414-419.

⁶ See Chapter 4, text to nn. 42-50.

⁷ In relation to the recognition of proprietary rights, the same point is revealed by looking at those cases in which certain types of proprietary rights were first recognised. So, for example, when the court in *Tulk v. Moxhay* (1848) 2 Ph. 774 decided that a restrictive covenant would bind a purchaser of the covenantor's land who had notice of the covenant, it did not do so by first asking whether such a covenant created a proprietary interest. Rather the language of proprietary rights was applied to restrictive covenants *because* they were capable of binding purchasers.

⁸ See chapter 4, text to nn. 42-50.

8.2 The incidents of proprietary rights

Employing the terminology of proprietary and personal rights carries particular risks given the way the concept of a proprietary right is typically understood and applied. The conventional view of proprietary rights regards them as possessing a number of features or incidents. On this basis, to say that someone has a proprietary right in an asset involves a number of different claims; for instance, that he has an interest enforceable against third parties, that his claim has priority in the event of a defendant recipient's insolvency, that his interest is transmissible, that it provides the possibility of specific recovery of the asset.⁹ On the most extreme version of this view, not only are such incidents necessary features of proprietary rights but their availability also depends on a right's proprietary status. On this basis, these incidents come as a package. Each is an inherent and exclusive feature of a right being proprietary, with the result that one necessarily implies the others. Even where this extreme account of the features of proprietary rights is not adopted, it is conventional to treat at least some combination of these incidents as a necessary consequence of a right being proprietary.¹⁰

This view that proprietary rights entail a package of incidents encourages us to connect issues which may otherwise be regarded as distinct. This then has consequences for our analysis of the claimant's position and the claims available to him. So, if, as commonly assumed, a claimant will only be entitled to the specific recovery of misapplied assets only if he retains a proprietary right in them, *and*, again as commonly assumed, proprietary rights give the claimant priority in the event of the defendant's insolvency, then we can infer from the fact that the claimant is entitled to specific recovery that his right is proprietary and hence that his claim would be prioritised were the defendant insolvent. By contrast, if we know that the claimant has no such priority in insolvency, it must follow that he has no proprietary right and, therefore, that specific recovery is ruled out. Similarly, when determining whether the claimant *should* be entitled to specific recovery, we must,

⁹ See, e.g., F. Lawson and B. Rudden, *The Law of Property* (Clarendon Press, 3rd edn 2002), p. 14; W. Swadling, "Property: General Principles", ch. 4 of P. Birks (ed.), *English Private Law: Volume I* (Oxford University Press, 2000), pp. 204-206; S. Worthington, *Equity* (Clarendon Press, 2nd edn 2006), pp. 51-55.

¹⁰ For instance, Virgo (*supra*, n. 4, pp. 569-577) is of the view that proprietary rights entail and are necessary for priority in insolvency, claims against indirect recipients, the recovery of any increase in the asset's value and the possibility of specific recovery. Grantham and Rickett (*supra*, n. 4, pp. 401-404) treat proprietary rights as entailing and necessary for priority in insolvency, claims to any increase in the asset's value and the possibility of specific recovery, though not, it seems, for claims against indirect recipients (*ibid.*, pp. 63-65). Burrows (A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn 2002), p. 52) takes the view that proprietary rights entail and are necessary for the priority of claims in insolvency and, it seems, the possibility of specific recovery, and that they enable claims to be brought against indirect recipients, though such claims may at least on occasion lie in the absence of such a right (*ibid.*, pp. 31-41). Birks (P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005), pp. 78-98), by contrast, appeared to regard claims against indirect recipients and for recovery of an increase in the asset's value as possible even in the absence of some proprietary right, though such a right was necessary for priority in insolvency. He also took the view that specific recovery need not be limited to cases where the claimant held a proprietary right (*ibid.*, pp. 169-171).

on this basis, inquire not only into the reasons for and against allowing the claimant to recover the asset itself but also into the reasons for and against prioritising his claim over those of other creditors, since the one entails the other. In this way, by employing the notion of proprietary rights in the analysis of such claims, the answer to one question – the possibility of specific recovery – becomes conditional on or at least connected to the answer we give to another question – the appropriateness of giving such claims priority.

Such reasoning is unproblematic provided the initial assumption – that specific recovery and priority in insolvency are both necessary and exclusive features of proprietary rights – is correct.¹¹ But why should we assume this? The language of proprietary rights, at least as conventionally used, encourages us to connect various distinct types of claim, but without offering any explanation as to why we should treat such claims as connected. Without an account of *why* we should treat such standard incidents of proprietary rights as necessarily co-incident, employing the language of proprietary rights threatens the development of a principled response to such cases by introducing irrelevant considerations.

An example of this and of the dangers of treating the incidents of proprietary status as an indivisible package can be found in the law's handling of specifically enforceable obligations to transfer identified assets. Here, the defendant obligor is routinely regarded as holding the relevant assets on constructive trust, pending the actual transfer of title. The foundation of this trust seems to be an assumption that, since the court would allow the claimant obligee to recover the asset *in specie*, he must be taken to have a proprietary interest in the asset. This then gives him priority in the event of the defendant's insolvency. However, if we ask why the claimant should be accorded such priority, what principle supports this, we are left struggling for answers.¹²

Moreover, *if* it is correct to view the various incidents of proprietary rights as coterminous, it will be because the same factors are relevant to each; that the reasons for according a claim priority are also reasons for allowing specific recovery. And *if* this is true, then we have a good reason for employing the terminology of proprietary rights to mark out those cases where all these

¹¹ Of course, this is just an example and I acknowledge that few, if any, judges or commentators who employ the personal-proprietary rights terminology would suggest that all the incidents mentioned here are features which are both inherent to and exclusive of proprietary rights. Nonetheless, there is a clear tendency to see a right's proprietary status as determinative of a number of separate issues, and the challenge is as to the validity of this assumption: see *supra*, n. 10.

¹² See, e.g., W. Swadling, "The Vendor-Purchaser Constructive Trust", ch. 18 of S. Degeling and J. Edelman, *Equity in Commercial Law* (Law Book Company, 2005). In other contexts, despite occasional lapses, the courts and commentators have stressed that the availability of specific relief is not determinative of a right's proprietary nature, and hence its ability to bind third parties: see, e.g., *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175, at p. 1253, *per* Lord Wilberforce; W. Swadling, "The Proprietary Effect of a Hire of Goods", ch. 20 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn 1998), at pp. 504-508; B. McFarlane, "Identifying Property Rights: A Reply to Mr Watt" [2003] *Conv.* 473, at pp. 474-476. Examples of such lapses can be found in *Errington v. Errington* [1952] 1 K.B. 290, at pp. 298-299, *per* Denning L.J. and G. Watt, "The Proprietary Effect of a Chattel Lease" [2003] *Conv.* 61.

incidents arise. But this needs first to be demonstrated. The only way to do this is to look at each question – the availability of specific recovery, the issue of indirect receipt, the impact of a defendant’s insolvency – separately and solely on its own terms, examining the principles relevant to each, without assuming any connection between them. Such an examination may then reveal such a connection, and, importantly, its basis and scope. But it may be that no such connection is revealed. Certainly, before we have a clear and convincing basis for connecting these various incidents, relying on such an assumption means that our analysis of such claims proceeds on the basis of assertion, hunch and received wisdom rather than the examination and application of principle. These dangers are further compounded since, as has been noted,¹³ opinions differ as to which of these incidents are necessary and which exclusive features of proprietary rights.¹⁴ As such, we risk not only begging important questions but also talking at cross-purposes.

A useful analogy can be taken from the law of trusts. In the typical or paradigm trust, one party, the trustee, with his own, usually legal, title to an asset holds that asset for, and in so doing owes fiduciary duties to, another, the beneficiary, who has a separate, equitable title to the asset. Thus the typical trust possess two distinctive features or elements, this separation of legal and equitable title and the existence of fiduciary duties owed by the trustee to the beneficiary. As has been noted already,¹⁵ the suggestion has recently been made that trusts should be recognised in many cases where assets have been misapplied, such as would allow the claimant, on the back of his equitable title, to recover the asset in priority to the claims of other creditors of the defendant. A number of counter-arguments have been made in response to this proposal, one of which is that it would be unfair to innocent recipients of misapplied assets to impose on them the fiduciary duties typically owed by trustees.¹⁶ In turn, those proposing the recognition of trusts in such cases have

¹³ *Supra*, n. 10.

¹⁴ The uncertainty here extends well beyond the particular problem of misapplied assets. So, in relation to enforceability against third parties, while there is unanimity that proprietary rights necessarily bind an open-ended class of third parties, it is also accepted that some proprietary rights are enforceable against a wider class of third parties than others. Moreover, even where no proprietary right is found, similar, if not identical, results can be achieved through the imposition of “new” personal rights against such third parties: see, *e.g.*, S. Bright, “The Third Party’s Conscience in Land Law” [2000] *Conv.* 398; McFarlane, *supra*, n. 12, pp. 477-482. Similarly, it is clear that not all proprietary rights provide the same degree of priority in insolvency (some may indeed accord no priority: see Companies Act 1985, s 395(1)), and that some priority, or a ranking in insolvency equivalent to according priority, is an attribute of certain personal rights: see, *e.g.*, Insolvency Act 1986, ss 40(2) and 175(2)(b); Companies Act 1985, s 196; see too Insolvency Act 1986, s 176A, inserted by Enterprise Act 2002, s 252. The disconnection of proprietary rights and the possibility of specific recovery has been noted already: see, *supra*, n. 12. For a general discussion of the difficulty of identifying distinguishing features of proprietary rights, see S. Worthington, “The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation”, ch. 5 of S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Law Book Company, 2005).

¹⁵ Chapter 7, text to n. 10.

¹⁶ See, *e.g.*, *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, at p. 690, *per* Lord Goff, and at pp. 703, 706-707, *per* Lord Browne-Wilkinson; A. Burrows, “Swaps and the Friction between Common Law and Equity” [1995] *R.L.R.* 15, at p. 27.

countered that they never intended to suggest that innocent recipients would be subjected to such obligations.¹⁷

There are two possible interpretations of this disagreement, each of which highlights a danger posed by the use of such concepts in legal argument and analysis. The first and more straightforward view is simply that the two sides were at cross purposes, and hence the disagreement was apparent rather than real. Those arguing for trusts to be recognised in such cases understood and intended the word “trust” to signify merely the division of legal and equitable title. Their critics understood the term to refer to the combination of such duality of title *and* fiduciary duties owed by the trustee to the beneficiary. As such, they misunderstood the substance of the argument that its proponents had in mind. Such confusion is solely the product of employing the terminology of trusts. If, instead of using this language, the argument had been expressed in terms of priority in insolvency, the possibility of claiming against indirect recipients, the application of the *bona fide* purchase rule and the like, and so setting out exactly the claims held by and duties owed to the parties, any confusion would have been avoided.

A second interpretation of the disagreement is that it concerned whether a separation of legal and equitable title was possible without fiduciary duties also arising. On this view, the critics did not misunderstand the argument that had been put forward, but instead maintained that the intended division of title necessarily entailed or depended upon the recipient owing fiduciary obligations to the claimant. In other words, that the division of legal and equitable title always comes, at least in the first instance,¹⁸ as a package with fiduciary duties. Then the question becomes whether this is indeed true, to which the answer must be that, at the very least, it is hard to see what reason there could be for holding that such duality of title cannot arise in the absence of fiduciary duties. Indeed, if it were not for the fact that these two elements frequently do coincide, and that we are in the habit of grouping them together under the heading “trusts”, it is unlikely that such a suggestion would ever have been made. In any case, if it is to be suggested that we cannot have the division of legal and equitable title without accompanying fiduciary obligations, this requires more support than the bare fact that these usually do come as a package and that we usually do intend this package when using the word “trust”.

The upshot of all this is that, on the first view, employing the language of trusts has led to unnecessary confusion and, on the second, that it has encouraged some to connect two questions – on the one hand, whether the claimant should have the advantage of priority in insolvency and other incidents of equitable title and, on the other, whether the defendant should be subjected to fiduciary duties to the claimant – which have no obvious connection in principle, and without any explanation

¹⁷ See, e.g., P. Birks, “Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case” [1996] *R.L.R.* 3, at pp.11-12, 25-26; Chambers, *supra*, n. 2, pp. 196-203.

¹⁸ See *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, at pp. 706-707, *per* Lord Browne-Wilkinson.

of the basis of this connection. As before, the suggestion is not that the language of trusts should be abandoned. Rather, it is that until our understanding of it becomes settled, it is imperative to say exactly what we mean when using it. Without any agreement as to what the term imports, its use creates the possibility that the substance of the argument will be lost or misinterpreted. Moreover, even if we opt for a conception of trusts which comprises both duality of title and fiduciary obligations, it does not follow that these elements cannot exist or arise in isolation. This would require a further argument of principle, which must clearly go beyond appeal to linguistic convention, as to the basis of any such necessary connection.

These dangers are mirrored in the use of the language of personal and proprietary rights, for here too we have uncertainty as to what consequences follow from a right is described as proprietary and a tendency to assume a connection between various, seemingly discrete, incidents without any attempt to explain this in terms of principle. To avoid these dangers and to give us the best chance of developing a body of law which is consistent and just, the terminology of proprietary and personal rights, and its application in a given case, rather than driving the analysis of such claims, must follow from and depend on a prior examination and application of the principles relevant to such cases.

8.3 The location of title to misapplied assets

For these reasons the preceding chapters have examined the claims that should follow a misapplication of assets without reliance on the language of and distinction between personal and proprietary rights. As a consequence, there has been no inquiry into to the location of title to misapplied assets.¹⁹ Once more, a finding that title resides in a particular party must follow from and depend on a prior examination of the principles applicable in such cases and the claims they support. Once this is done, to hold that a particular title is held by the claimant may stand as a convenient shorthand for the detailed conclusions which follow from the application of these principles. Here too, however, such expressions are only useful, and indeed can only be used safely, if they do accurately convey the substance of these conclusions as to the parties' respective claims and liabilities. Of course, such conclusions can be stated, as they have been here, without using these expressions. In any case, it is clear that the examination of principle must come first.

It has been noted already²⁰ that the approach taken here, in a number of respects, mirrors the position of those who have argued that, in some cases, recipients of misapplied assets should hold

¹⁹ At least, if we use the word "title" to signify a particular type of proprietary right, rather than as a synonym for a more generalised interest in an asset such as justifies claims of the kind analysed here. For the difference between rights and interests that support them, see *infra*, text to nn. 65-72.

²⁰ *Supra*, text to n. 2.

them on resulting trust for the claimant, such that he can establish equitable title to them. However, there are also important differences between the resulting trust argument, as it has been put forward, and the line taken here. For instance, the preceding chapters argue for the defence of change of position replacing, rather than merely supplementing, the *bona fide* purchase rule, and its extension to cases of insolvency so as to protect the interests of other creditors.²¹ As such, there is no exact correlation between the approach advanced here and any one of the various responses presently found in English law. Because of this, while it would be possible still to reframe the conclusions of the previous chapters in terms of the recipient holding misapplied assets, and their fruits and substitutes, on trust for the claimant, thus signifying the possibility of recovering such assets from direct and indirect recipients alike and in priority to the claims of other creditors of the defendant, we would also have to gloss this by saying that the claimant's equitable title, and the claims of its holder, are subject to the change of position defence but are not defeated simply by the assets acquisition by a *bona fide* purchaser for value without notice.²² The gains of such a reframing are doubtful.

Though some may find the absence of references to proprietary rights and the location of title jarring, it should be plain that the omission is purely terminological rather than substantive. Such notions, as with all conceptual language, are simply a means of conveying particular ideas. Often such concepts provide a useful shorthand, neatly encapsulating an idea or some combination of ideas whose expression would otherwise be unwieldy or awkward. But they are useful only in so far as we do not lose sight of the ideas they identify. And even where such concepts are used consistently and the ideas they embody are well understood, it will always be possible to express those ideas without employing that conceptual language.²³

8.4 The viability of distinguishing personal and proprietary rights

The foregoing sections have questioned the utility of reliance on a distinction between personal and proprietary rights in the presentation and justification of legal rules and entitlements. As we have seen, one ground for this is the uncertainty that exists as to the incidents of proprietary

²¹ See chapter 6, text to nn. 31-36 and chapter 7, text to nn. 51-53.

²² This is not the only possibility. An alternative expression of the same substantive position would be to say that the claimant retains his title to the misapplied asset, though the defendant, by virtue of his receipt and possession of it, obtains a separate (legal) title to it, the claimant's title and the claims available to him again being subject to change of position. Since each denotes the same set of claims and liabilities, which, if either, we adopt is a solely a matter of linguistic convenience.

²³ Much the same argument is made in C. Rotherham, "Property and Unjust Enrichment: A Misunderstood Relationship", ch. 9 of A. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2004), at pp. 197-198.

rights and hence as to the significance of classing a right as proprietary rather than personal. However, though accounts differ on the consequences of such categorisation, there appears little or no doubt that personal and proprietary rights can meaningfully be opposed. Nonetheless, the lack of certainty as to the consequences which flow from so categorising rights at the very least suggests some uncertainty as to the basis of the distinction.

A useful starting point for an examination of the nature of the personal-proprietary rights divide, both because it has many supporters and because it provides a neat illustration of some of the problems of drawing and basing such a distinction, is the account put forward by Birks.

For Birks, the distinction between the two categories of right rested on their exigibility. The classification of a particular right as personal or proprietary turns on the answer to the question against whom the right can be demanded or asserted.²⁴ On this basis, personal rights, or, synonymously, rights *in personam*, are straightforwardly defined as those rights exigible only against a particular person.²⁵

[A] right *in personam* is a right against a person in the sense that it is a right that that person make some performance. The claimant holds the string and the other end is around the other's neck ... [T]he right is not called "personal" because it belongs to a person but because it is exigible against, and only against, the person who must make the performance.²⁶

Given this, we might therefore expect proprietary rights to be defined as those rights whose exigibility is not so limited and are instead exigible against a wider and/or open-ended class of people, since this is the alternative to the right being exigible only against a given individual. However, this is not quite what Birks said. Instead, he defined proprietary rights or, again synonymously, rights *in rem* as follows: "a right *in rem* is one whose exigibility is defined by reference to the existence and location of a thing, the *res* to which it relates."²⁷ And again: "[r]ights *in rem* are in principle demandable wherever the *res* (the thing) is found and hence against anyone who has it or is interfering with it."²⁸

This creates problems. Firstly, this seems to leave over a third possible class of rights, namely those which are not exigible only against a given individual, and so cannot be classed as personal rights, but whose exigibility is not determined by reference to the location of a particular thing. Indeed, Birks later accepted this possibility, identifying the right to bodily integrity and the

²⁴ See P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989), p. 49; Birks, *supra*, n. 10, p. 28.

²⁵ Or someone representing that person: Birks, *supra*, n. 10, p. 28.

²⁶ *Ibid.*, p. 164.

²⁷ Birks, *supra*, n. 24, p. 49.

²⁸ Birks, *supra*, n. 10, p. 28. See too *ibid.*, p. 165: "A right *in rem* is a proprietary right or simply a property right. The string in the claimant's hand is attached, at the other end, to a *res*, a thing."

right to reputation as instances.²⁹ This would mean that, contrary to the conventional understanding, the personal-proprietary categorisation of rights is not exhaustive. Birks, no doubt anxious to avoid such a conclusion, was able to assert the exhaustiveness of this classification only by reducing the focus of his inquiry to those legal rights which are “realizable in court”. On this basis, he felt able to exclude any rights which would fall into this third class since these were “superstructural” and “never directly realized in court”.³⁰ This move is itself problematic given Birks’ position that, even where proprietary rights are capable of direct “vindication”, the subsequent recovery of that asset or its value necessarily depends on the existence of a separate personal right to that effect.³¹ As such, if we are to limit our analysis to rights realisable in court, and the reasons for this are nowhere to be found, it is unclear to what extent we can accommodate proprietary rights.³²

Secondly, and more importantly, if we define proprietary rights as Birks did, the basis of the classification of rights as personal or proprietary begins to look uneven. Though defined in both cases in terms of exigibility, the two categories can be seen to respond to different questions concerning exigibility, rather than embody different answers to the same question. The category of personal rights is formed in response to an inquiry into the number or, perhaps, the open-endedness of the people the right is exigible against. By contrast, the category of proprietary rights is identified as a response to the question of whom the right is exigible against or how we determine the exigibility of the right, the answer being those who have or are interfering with the relevant thing.³³ On this basis, we are in fact wrong to align personal and proprietary rights since they are categories formed in response to different questions. Indeed, applying Birks’ definitions of personal and proprietary rights, we end up with just the sort of “bent” classification Birks was, rightly, so quick to reject elsewhere.³⁴ It is because of this that the supposed twofold exhaustive classification ends up leaving room for a third, residual class. And, though Birks’ definitions do not result in overlapping or intersecting categories, their misalignment leaves us with no clear

²⁹ *Ibid.*, p. 30. Earlier, Birks, noting that such rights did not meet his definition of proprietary rights, was compelled to insist that such rights were personal, notwithstanding that they could be asserted against an indefinite number of people: see P. Birks, “Definition and Division: A Meditation on *Institutes* 3.13”, ch. 1 of P. Birks (ed.), *The Classification of Obligations* (Oxford University Press, 1997), at p. 10.

³⁰ Birks, *supra*, n. 10, p. 30.

³¹ See P. Birks, “Property and Unjust Enrichment: Categorical Truths” [1997] *N.Z. Law Review* 623, at pp. 656-658.

³² By contrast, if we hold that proprietary rights are to be treated as realisable in court despite their protection being dependent on such subsidiary personal rights, it is difficult to see why we cannot also treat Birks’ “superstructural” rights as realisable in court on a similar basis. The relationship between my proprietary right and my right that you not interfere with the thing or that you give it up to me seems to be no different from the relationship between my right to reputation and my right that you not publish material which is defamatory of me, a right capable of protection through the grant of an injunction.

³³ This shift in inquiry is also identified, though differently expressed, in W. Swadling, *supra*, n. 9, p. 222.

³⁴ See, e.g., Birks, *supra*, n. 29; P. Birks, “Misnomer”, ch. 1 of W. Cornish, R. Nolan, J. O’Sullivan and G. Virgo (eds.) *Restitution: Past, Present and Future* (Hart Publishing, 1998), at pp. 4-9. See too W. Swadling, “What is the Law of Restitution About? Four Categorical Errors”, ch. 21 of W. Cornish, R. Nolan, J. O’Sullivan and G. Virgo (eds.) *Restitution: Past, Present and Future* (Hart Publishing, 1998), at pp. 331-335.

understanding of the basis, and hence the significance and consequences, of distinguishing personal and proprietary rights.

It seems likely that Birks was led into this misalignment by failing to distinguish two common, though distinct, conceptions of proprietary rights. The first of these sees proprietary rights as rights “good against the world”, or at least as against an open-ended class of people. The second views proprietary rights as rights “in” things. The former leads to a distinction between rights that can be asserted only against a particular individual, or perhaps some closed set of individuals, and rights that can be asserted against a wider, indeterminate class. It is this understanding which informs Birks’ use of exigibility as the basis for the personal-proprietary divide and gives him his definition of personal rights. It can also be seen in his reference to personal rights being “bipolar”,³⁵ the implication being that proprietary rights, being exigible against a wider class, are not. Of course, as we have seen, Birks did not define proprietary rights as rights good against a wider or indeterminate class, identifying them instead as rights exigible against those holding or interfering with the relevant thing. Here we see the second understanding of proprietary rights, as rights to or in things, creeping in. This view is also evident in the metaphor Birks employed, whereby right holders were to be understood as holding a string tied to the object of that right. With personal rights this string is tied to another individual, the person under the correlative duty to render the performance. By contrast, when a right is proprietary the string is attached, not to a person or group of people, but to a thing.³⁶ It is this confusion of two separate ideas which leads to Birks’ misaligned and confused division between personal and proprietary rights. If we are to use this distinction in legal analysis it must have a single, clear basis. To this end, we shall examine each of these two conceptions of proprietary rights to see if they lead to a useful and workable distinction.

8.5 Proprietary rights as rights against people generally

Personal rights are usually understood to take the form of what are often called Hohfeldian claim-rights,³⁷ that is, an entitlement that a specified individual render a particular performance. Such rights can be asserted only against that individual obligated to render that performance. However, we are also used to referring to rights which do not appear to be so limited. Because of this, it appears that we may be able to draw a distinction between those rights which can be asserted against only a specified individual and those rights which are assertable against a broader and/or

³⁵ P. Birks, *English Private Law: Volume I* (P. Birks (ed.), Oxford University Press, 2000), p. xxxix.

³⁶ Birks, *supra*, n. 10, p. 165.

³⁷ Following W. N. Hohfeld, *Fundamental Legal Conceptions* (W. W. Cook (ed.), Yale University Press, 1923), pp. 36-38.

indeterminate and/or open-ended class of people.³⁸ Some have argued that it is this distinction which the language of personal and proprietary rights identifies.

One immediate consequence of this is that, though it gives us a definition of personal with which we are familiar, it brings within the category of proprietary rights an array of rights which have little or nothing to do with “property”, at least as conventionally understood.³⁹ This, of course, is not a reason for doubting the distinction. At most it means that the proprietary label may not be the most appropriate for what is being described, and, given the inconsistency there has been in the application of these terms, even this objection is rather minor. However, before we approach the question whether this terminology is appropriate, we must ask whether the purported distinction holds good and whether it provides useful insights in the analysis and presentation of the law. If the distinction turns out to be either false or unrevealing, then we have reason to disregard it, whatever the terms in which it is expressed.

To answer the question whether a given right is assertable against one person or against a wider class of people, we must first offer a description of the right. Only then will we know if the right which can be asserted against a particular defendant is the same right which is capable of being asserted against other people. If, for instance, I am standing in front of you, I will have a right that you not punch me. I also have a right that you not poke me in the eye or stamp on my feet. Are these separate rights or all instances of the same right? Moreover, is my right that you not punch me when I am standing in front of you the same right as I have against others when driving that they do not crash their cars into me?

I would imagine that most people would say that we can view all these as instances of the same general right, the right that you not cause me physical injury. This is in essence just another

³⁸ As Honoré has noted, these various formulations differ and so lead to differently located distinctions: see A. Honoré, “Rights of Exclusion and Immunities against Divestment” (1960) 34 *Tulane L.R.* 453, at pp. 453-456. However, for present purposes, given the argument which follows, it is unnecessary to distinguish between them.

³⁹ This is evident in the analyses of those who define proprietary rights or rights *in rem* in these terms: see, e.g., J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (John Murray, 4th edn 1873), Lecture XIV, at pp. 381-382; H. Stone, “The Nature of the Rights of the *Cestui Que Trust*” (1917) 17 *Columbia L.R.* 467; L. Smith, “Transfers”, ch. 5 of P. Birks and A. Pretto (eds), *Breach of Trust* (Hart Publishing, 2002); c.f. L. Smith, *The Law of Tracing* (Clarendon Press, 1997), pp. 48-57; P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000), pp. 279-280. Others, while distinguishing rights *in rem* and rights *in personam* on this basis have rejected the equation of proprietary rights and rights *in rem*, thus avoiding the counter-intuitive conclusion that proprietary rights may have no connection to property as conventionally understood: see, e.g., Penner (J. Penner, *The Idea of Property in Law* (Oxford University Press, 1997), pp. 23-31) who treats proprietary rights, along with, for instance, the right to bodily security and the right not to be killed as examples or sub-classes of rights *in rem*. See too Honoré, *supra*, n. 38; Swadling, *supra*, n. 9, p. 222. In response to such approaches, Pretto-Sakmann (A. Pretto-Sakmann, *The Boundaries of Personal Property: Shares and Sub-shares* (Hart Publishing, 2005), p. 91) confidently states, “..property rights and rights *in rem* can never stand in a relationship of approximation or exemplification. They can only stand in a relationship of identity.” Quite why we should consider it impossible to decouple such terms, given that the question is simply one of linguistic convenience, and especially in light of the way these terms have been used historically, is left unexplained.

application of the principle that like cases should be treated alike. Despite the factual differences between these cases, between the specific act situations to which each right pertains, we can see that they are +all applications of the same principle, in this case that of protecting my interest in my bodily integrity. The grouping together of specific rights so as to form one general right is then possible wherever the specific rights share a common basis in principle. The more broadly we describe these principles, the more specific rights we can bring together as examples of a single general right.⁴⁰

However, though we can on this basis speak of a single general right that others not cause me physical injury, covering all these situations, we are not thereby precluded from also saying that I have a right that you do not punch me, that you do not poke me in the eye, and so on. There is nothing in the language of rights and duties which commits us to using them always at the same level of abstraction. Indeed, such uses of the term “right” are perfectly compatible. The specific right is simply an example or an application of the general right. The right that you not cause me physical injury *means* that I have, at this moment in time, a right that you not punch me. I have a right that you not punch me *because* I have a right that you not cause me physical injury.

The fact that rights and duties can be stated at different levels of abstraction creates problems, however, for a classification of rights by reference to the number or open-endedness of those they can be asserted against. This is because the same right is capable of expression in alternatives forms, depending on the level of abstraction at which we describe it. At higher levels of abstraction, the right we describe will take a general form, which is likely to be capable of assertion against people generally; at the lower end the right will pertain to specific act situations and requirements directed at and, at least at a given point in time, comprehensible to only one person or a limited class of people. So, for instance, the right that you not cause me physical injury is a right that I will also have against people generally. However, what particular conduct this requires of you, and indeed of others, will depend on the circumstances in which we find ourselves. If I am standing in front of you, I shall have a right, *inter alia*, that you not punch me; if I am crossing the road you are driving along, I have a right that you slow down and let me pass; if you are carrying me on your shoulders, I have a right that you not drop me. These specific rights and the directions they give to the duty holder only make sense in particular circumstances, to particular individuals at particular points in time. Accordingly, the more we focus on specific rights and specific act-situations, the more rights fall into the category of personal rights. The more we frame rights in general terms, the greater, on this version of the distinction, the category of proprietary

⁴⁰ For instance, we might view my interests in bodily integrity, in mental wellbeing, and in my reputation as separate, such that we can treat my right that you not physically injure me, my right that you don't cause me psychological harm, and my right that you do not defame me as separate rights. Alternatively, we might view the first two, or all three, as examples of a more general interest in my being free from harm or in autonomy etc., in which case these rights could be viewed as instances of a more general right.

rights becomes. And yet these are simply alternative expressions of the same rights. We must question what is gained by a classificatory system which allows the same material to be categorised differently simply as a result of resorting to different modes of expression.

To avoid this conclusion, and to enable personal and proprietary rights to be meaningfully opposed on this basis, we would have to show either that, contrary to the assumption made thus far, there is in fact only one true form or correct expression of a particular right or, alternatively, that, though this process of abstraction is possible and legitimate, it is nonetheless true that all rights, regardless of the level of abstraction at which they are expressed, remain either, in all forms, assertable against people generally or, in all forms, assertable against a fixed person or limited class of people.

The first approach is implausible. It is plain that we do habitually refer to rights at varying levels of abstraction and that such references are intelligible. The most that one could argue is that, in relation to any given right and its correlative duty, there is a form of expression which best expresses its content, which contains the optimal combination of general and specific information. Applying the notion of “basic-level concepts”, Penner has argued that we can identify a set of “basic obligations”, which formulate the duties we owe, and, presumably, the rights we hold, at a level of abstraction which most closely reflects the terms in which we perceive the interests the law seeks to protect and the events in the world to which such rights and duties pertain.⁴¹ However, even if this is true, it does not follow, and Penner does not suggest, that we refrain from speaking of rights and duties at anything other than this basic level. The most that we can say is that describing rights at a basic level is likely to provide a useful balance between providing specific information as to the act-situations to which it relates and general information about the basis of the right and its relationship to other rights. Of course, whether such a balance of the general and specific is the best way to describe the right will depend on the purpose of our inquiry. If we focus simply on the role of the law in guiding conduct, what type of description is most informative will depend on the sort of decision one is making. When we are making long-term or general plans, generalised rights and duties descriptions will be useful; when deciding between a variety of immediate actions, we are likely to benefit more from descriptions of rights and duties which are more specific.

Accordingly, classification of rights by reference to the number or open-endedness of those against whom the right can be asserted will only be viable if, despite the possibility of describing rights as different levels of abstraction, it remains true that, for any given right, however framed, it is assertable either against a fixed person or class or, alternatively, against a wider, open-ended class. However, this attempt must also fail. It may be that there are some rights which, however expressed, can only be asserted against a given individual or a fixed class. An example may be

⁴¹ J. Penner, “Basic Obligations”, ch. 5 of P. Birks (ed.), *The Classification of Obligations* (Oxford University Press, 1997).

certain rights one holds against one's parents by virtue of the parent-child relationship, since necessarily the number of people who fall within the class of parents is fixed. Even here, though, the question remains whether we can view such rights and duties as simply particular instances of more general rights that can also be asserted against others, for instance that they, in certain circumstances, provide for our welfare. Other rights which may be considered paradigm examples of personal rights can more straightforwardly be reframed in such terms that they can be asserted against people generally. Rights to contractual performance provide a useful example.

If I enter into a contract with you under which you undertake to pay me £100, my right that you pay me this sum is a right which can be asserted against you and nobody else. My right is that you give effect to your undertaking, and the undertaking was yours and yours alone. But this is just one instance of my right that others perform the contractual undertakings they make to me. In other words, I have a right to the performance of any contracts that I have entered or may enter into. This right avails against an open-ended class of people, since, though the number of people I presently have a contract with will be determinable, there is no limit to the number I may contract with. Accordingly, we can alternatively say that I have a specific right that you pay me £100 or that this is just one instance of a general right that others perform the contracts they make with me.

Some might object to framing a general right in these terms. When so described, the right and its correlative duty are, in a sense, contingent; before it imposes any direction or limitation on others' conduct, something else needs to happen, a contract needs to be in place. Until that time, there is nothing I can require of you. And then, once there is such a contract, the content of the duty and its correlative right is specific to the parties to it. If we compare this with the right that others not cause me physical injury, there appears to be an important difference, since, in this case, the duty on others has immediate practical application. No other element needs to be in place for me before I can require you to act or refrain from acting in a particular way. So, while my personal right to your contractual performance may be capable of being abstracted to a right which avails against people generally, this appears only to be possible by framing it in such terms as deprive it of present practical relevance to all but a determinable set of those to whom the norm is addressed. Indeed, it may be argued that it strips the notion of rights and duties of their import if they are expressed in a form which necessarily has no bearing on and offers no guidance in relation to the parties' present conduct.

The view one takes of how and when the language of rights and duties may legitimately be used of course turns on what one means by such terms, and it is quite clear that there are variances in how they are used. Sometimes, saying that a right is held and a duty owed is simply a way of expressing how legal rules apply to a particular fact situation. If we have a rule that contracts entail rights to performance and duties to perform, and that these follow as a matter of course from contract formation, then we can say that, prior to entry into a contract, there is a legal rule that entry

into such a contract will lead to the parties being required to perform and to their being able to require the other's performance. On this basis, it is simply a restatement of this legal reality to say that each party has a right that the other perform, should such a contract be entered into, and, more generally, that we have a general right to the performance of whatever contractual undertakings may be made to us. At other times, the language of rights and duties is used in a slightly different manner, stressing the normative role of law. This sees rights and duties as guides to conduct, as providing reasons for action. On this approach, the language of rights and duties should be used only where the purported right and duty do indeed have something to say to the parties about their present conduct, offering them an immediate, non-contingent reason for action.⁴² It is on this basis that one might argue that, though it is true that, wherever I enter into a contract, I acquire a right to its performance, it is wrong to say that I have a present right against people generally that they perform whatever contracts they may enter into with me.

Neither approach is misplaced. Each reflects an important function of law. The law provides responses to real world events and problems, stating what consequences follow from particular fact combinations in order to advance a variety of moral, social and economic ends. It also seeks to give directions and to offer guidance and assistance to people in their deliberations as to how to act. What I think we can say is that even if we wish to stress the normative understanding of rights, it does not follow that contingent rights, such as the right that others should perform the contractual undertakings they make to us, are not true rights. For a start, that the right and duty are contingent in the manner described above, does not mean that they have no impact on our conduct until that contingency arises. The fact that the making of a contractual undertaking generates a duty to perform is clearly important information for all those considering making such undertakings. More fundamentally, my right that you pay me £100 in performance of a particular contract exists because of a principle of general application that contracts should be performed.⁴³ The principle has an existence beyond its various, specific applications to individual contracts. Accordingly, the general statement of the right is in keeping, with, and indeed may be said to follow from, the

⁴² An example of this difference in the way the language of rights and duties is used can be seen in the challenge Smith makes to the orthodox view that recipients of mistaken payments come under an immediate duty to give up an equivalent sum, even where they are not to blame for and do not even know of the mistake: see S. Smith, "Justifying the Law of Unjust Enrichment" (2001) 79 *Texas L.R.* 2177. Smith argues that it cannot be right to expect a defendant unaware of the payment or of the mistake which motivated it to make restitution. This must be true, but it is likely that, when the orthodox accounts speak of such a defendant owing a duty to make restitution, they mean only that the law entitles the claimant to recovery of such a sum from the defendant, and so makes the defendant liable to make such a payment, upon receipt and without more. This leaves over, however, the question *why* the claimant should have such a claim, which is Smith's principal focus.

⁴³ Or more precisely, because there is a principle which justifies a requirement that contracts be performed. As we have seen already (chapter 6, n. 54), the precise identity of this principle, that is the reason why we say that contracts give a right to performance, is a matter of widespread disagreement.

generality of the principle that supports it.⁴⁴ As such, there is nothing inherent in our understanding of rights and duties which requires that they are not so contingent. Therefore, rights to contractual performance, despite conventionally being viewed as paradigm personal rights, can alternatively be described in a form which identifies a right which avails against people generally.⁴⁵

All of this reflects a basic truth about the way the law works and is structured. As we saw earlier,⁴⁶ the law is shaped by a body of principles reflecting the goals we wish to pursue through law. It is these principles which determine the content of the legal rights we hold and the duties we owe. Unless we believe that the law exists to further the interests of only some sub-section of society, these principles will not identify any particular individuals as deserving of special treatment. Instead they will be of general application. What the application of these principles entails for each of us will, of course, then depend on the circumstances in which we find ourselves, and, given that our circumstances differ from one person to another and change over time, what particular claims these principles justify and what particular limits they impose on our conduct will vary from day to day and from person to person. It is for this reason that the rights we have can be framed both in general terms, such that they are common to all of us, and in specific terms, which may be unique to a given individual at a given point in time.

Because of this, it becomes impossible to draw any meaningful opposition between rights which can be asserted against people generally and those that can be asserted only against a given individual or limited class of individuals. Personal and proprietary rights are usually viewed as being different and mutually exclusive types of right. However, dividing them on the basis of the number, determinacy or open-endedness of those against whom they can be asserted leaves us with a distinction reflecting not a difference in kind but rather the difference, and the relationship, between the general and the specific. Moreover, given that the same material can be located on either side of the divide simply by formulating it in broader or narrower terms, it is far from clear what advantages categorisation along such lines brings to legal analysis and presentation. That the law applies generally is clear. So too that what it requires of us depends on our personal circumstances. None of this offers any insight into, or assists us in the task of determining, the

⁴⁴ See too chapter 3, text to n. 3. Penner, *supra*, n. 39, pp. 20-22, also concludes, and for similar reasons, that contingent norms, rights and duties should be understood as applications of general norms, rights and duties. Further support for this view comes from drawing an analogy with the moral duty to keep one's promises, which mirrors the legal duty correlating to the general right described in the text, namely to perform whatever contracts one enters into. It is quite clear that references to the moral duty are intelligible and useful, despite the contingent nature of that duty. Accordingly, we have no reason for thinking that a parallel contingency is incompatible with a legal right. *C.f.* P. Eleftheriadis, "The Analysis of Property Rights" (1996) 16 *O.J.L.S.* 31, at pp. 51-53.

⁴⁵ Though see J. Waldron, *The Right to Private Property* (Clarendon Press, 1988), pp. 117-124 for a more hesitant approach to the possibility of such contingent rights.

⁴⁶ Chapter 3, text to nn. 1-4.

content of the general rights and duties found in the law nor the specific rights and duties which manifest them.

8.6 Proprietary rights as rights in things

The rights we have examined thus far, even those which can be asserted against people generally, have been rights against people, rights that another or others conduct themselves in a particular manner. However, it is clear that our expressions of rights frequently take a different form. Most statements of human rights, for instance, are not framed as rights that others not interfere with our expressing our opinions or that others not kill us, but rather as rights *to* freedom of expression and *to* life. Moreover, it is often assumed that these rights are more than a combination of rights that others so conduct themselves.⁴⁷ A second common understanding of the distinction between personal and proprietary rights proceeds on such a basis: while personal rights are rights against people, proprietary rights are to be understood as rights *to* or *in* things.

This conception of the personal-proprietary distinction fits a lot more closely with the notion of property as conventionally applied by lawyers and laymen alike. However, the validity of this distinction depends upon the validity of its premiss, that what we refer to as rights *to* or *in* things are indeed a genuine and distinct kind of right. This was famously doubted by Hohfeld. Hohfeld observed that lawyers' use of the term "right" in fact embraced a variety of distinct ideas and it was his contention that the failure to differentiate these senses of "right" had skewed legal analysis by encouraging the drawing of false equations and inferences. Hohfeld's thesis was that the various uses of "right" were all reducible to one, or a combination of, four discrete conceptions - claim-rights, liberties, powers and immunities - and that these, when combined with their jural opposites, exhaust the variety of legal relations.

Clearly this analysis could not accommodate the notion of a right to a thing, and accordingly Hohfeld argued that all references to proprietary rights or rights to things were reducible to combinations of distinct claim-rights, liberties, powers and immunities, and hence to a series of relationships with *people*.⁴⁸ Unsurprisingly, those who support the view that rights to things are distinct from rights against people have been at pains to find fault with Hohfeld's

⁴⁷ See, e.g., article 8 of the European Convention on Human Rights which states: "1. Everyone has a right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others." The statement that exercise of *the right* is not to be interfered with clearly presumes that the right is not simply a right that others not interfere with our (ability to lead a) private life.

⁴⁸ Hohfeld, *supra*, n. 37, pp. 28-31, 74-91.

analysis. One common objection is that Hohfeld's analysis is unable to account for or to accommodate many of the ways we typically employ the language of rights. For instance, Raz writes, "Hohfeld's insistence that every right is a relation between no more than two persons is completely unfounded and makes the explanation of rights *in rem* impossible, as has often been noted."⁴⁹ One immediate response is that Hohfeld did indeed offer an account of right *in rem* which fitted into his scheme, albeit one which differed from others' understanding of the term.⁵⁰ But, even if Hohfeld had concluded that the notion of a right *in rem* could not be accommodated within the analysis he had set down, what would this show? That Hohfeld's approach entails a rejection of some conventional uses of "rights" is plain. However, as we have seen, Hohfeld's principal objective in proposing his analysis of rights was to remedy the threat posed to sound legal analysis by the indiscriminate use of the language of "rights" to describe distinct notions. As Hohfeld wrote:⁵¹

Anyone who has seriously observed and reflected on the interrelation of ideas and language must realize how words tend to react upon ideas and to hinder or control them. More specifically, it is overwhelmingly clear that the danger of confusion is especially great when the same term or phrase is constantly used to express two or more distinct ideas.

It is hardly surprising then that Hohfeld's preferred approach involved both the adoption of less familiar terminology and the division of concepts previously understood to be indivisible. Accordingly, objecting that his analysis is inconsistent with standard uses of the term "right" or involves a more complex understanding of legal relations falls a long way short of identifying a flaw in his argument. Without more, such criticisms at most amount to appeals to linguistic convention and simplicity. However, when, as here, they are opposed to clarity and precision of thought and analysis, it is clear that such considerations carry little weight.

If Hohfeld's analysis is to be rejected it can only be on the basis that it fails accurately to describe the nature of legal relations and entitlements or that, though it does not misdescribe these concepts, they are nonetheless better understood and expressed in other terms. Some challenges have sought to demonstrate that Hohfeld's scheme of jural opposites and correlatives is false; for instance, that it is inaccurate to view rights and duties as necessarily correlative. However, such

⁴⁹ J. Raz, *The Concept of a Legal System* (Clarendon Press, 2nd edn, 1980), p. 180. See too Honoré, *supra*, n. 38, p. 456: "What Hohfeld does not notice or does not mind is that these axioms render impossible many of the uses of 'a right' to which lawyers and laymen are accustomed." Such an observation displays a remarkable unwillingness to engage with, even to acknowledge, Hohfeld's arguments.

⁵⁰ It is often said that Hohfeld viewed rights *in rem* as combinations of claims, liberties, powers and immunities. In fact, Hohfeld conceived of a right *in rem*, or multital right, as *one* such claim, liberty, power or immunity which exists alongside a variety of other claims, liberties, powers and immunities against other individuals of similar content; see, *ibid.*, pp. 72-74.

⁵¹ Hohfeld, *supra*, n. 37, pp. 69-70.

accounts commonly depend on a departure from Hohfeld's own use of such terms.⁵² As such, they succeed only in showing that the word "right" can be used in different ways, and that, when used in some alternative sense, it does not carry the meaning or share the same relationship of entailment as Hohfeld describes. This clearly gets us nowhere.

A better focussed challenge to Hohfeld is comes from Penner. He offers the following criticism:⁵³

If Hohfeld's description of rights *in rem* is correct, then whenever Blackacre is transferred from one person to another, everyone else in the world exchanges one duty for another. Since rights correlate with duties, when A sells Blackacre to B, all persons who previously had a duty to A now have a duty to B, since B now has the bundle of Blackacre rights. The alternative, and I think better, view is that no one's but A's and B's rights and duties have changed. Every one else maintains exactly the same duty, which is not to interfere with the use and control of Blackacre. It matters not the least to C, one of the multitude, who owns Blackacre. It matters not one whit to the content of his duty in respect of Blackacre that B now owns it instead of A. The duty not to interfere with the property of others is not owner-specific. We do not need to identify the owner in order to understand the content of the duty.

Of course, Penner is right that for most people most of the time it is irrelevant who owns a particular asset, and that they remain under a duty not to interfere with it irrespective of the identity of the present owner. Moreover, he is right to say that this duty is, at least for most purposes, fully intelligible without reference to the owner's identity. However, it is also surely true to say that this duty that each of us owes not to interfere with a given asset *is* owed to someone, and that that someone is the owner of the asset at the present time. Furthermore, it surely cannot be in doubt that this duty that each of us owes correlates to a right held by the present owner that others refrain from such interference. Accordingly, where ownership of an asset is transferred, though we may say that there is a persistent duty we all owe not to interfere with that asset, it must be true that no duty is now owed to A, the previous owner, and instead a duty is owed to the new owner, B. Equally, though A, prior to the transfer, has a right that others not interfere with the asset, it seems clear that, following the transfer, he loses that right and it, or such a right, is held instead by B. So, it is surely undeniable that the parties to the right-duty relationship *have* changed. At no point does Penner provide any basis for doubting the correctness, rather than the suitability or convenience, of this understanding of the legal effect of transferring assets. To argue this, he would have had to show that it is inaccurate to say that, prior to the transfer, C owed a duty to A not to interfere with the

⁵² For a fuller account of such arguments, and a defence of Hohfeld, see M. Kramer, "Rights Without Trimmings" in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford University Press, 1998), pp. 22-49.

⁵³ Penner, *supra*, n. 39, p. 23.

asset, and that, after its transfer, C owed such a duty to B. Unsurprisingly Penner makes no such attempt. At most, his argument suggests that Hohfeld's is an unnecessarily complicated or long-winded way of explaining the legal consequences of such a transfer, and that we can and should formulate the position in simpler but no less intelligible terms.

This simply takes us back to a point we examined earlier.⁵⁴ We can express rights and duties in different ways without changing their content. Which particular form of expression we use will depend on our purposes. Penner is no doubt right that for most purposes it is enough to express the duty we are under not to interfere with others' assets without reference to the identity of that owner. But that does not mean that an expression of the duty which does so identify the owner is incorrect or does not identify a genuine duty. So while Penner's argument shows that we can often understand and convey the legal rights and duties that exist in relation to assets in non-Hohfeldian terms, it fails to show that Hohfeld's analysis is defective and, in particular, it gives us no basis for rejecting the notion that rights in or to things are reducible to combinations of rights against people.⁵⁵

Other critics have sought to expose limitations of Hohfeld's analysis. Harris, for instance, argues that, though the law at any given time may be capable of reformulation in Hohfeldian terms, Hohfeld's approach fails to offer any assistance in determining the content of the law where it is unsettled or to accommodate any understanding of the law as a dynamic practice, whereby legal rights and relations change over time.⁵⁶ Moreover, it is in resolving such questions, Harris maintains, that some notion of ownership or property as a right to or relation with a thing is indispensable. Similarly, it has been pointed out that Hohfeld's analysis of rights *in rem* cannot account for *why* such rights come in bundles, and what the nature of the connection between them is.⁵⁷ If rights *in rem* are understood as rights to or in things we have no such difficulties.

In response to such criticisms we must note that Hohfeld's analysis does not, and does not seek to, help us determine what legal entitlements we have, save for the entailments expressed through the relationships of correlativity and opposition found in his scheme. So, if we know that A has a right that B do X, it means that B has a duty to A to do X and that B has no liberty in relation to A not to do X. Beyond this, Hohfeld was concerned only to correct common misunderstandings as to the meaning and necessary consequences of A having "a right". Now, one may say that we need a theory of rights which says something about what rights we have or at least how we are to

⁵⁴ See *supra*, text to n. 40

⁵⁵ As such Penner's argument ultimately reduces to a more sophisticated version of the objection that Hohfeld's analysis involves embracing certain unfamiliar applications, and rejecting certain familiar applications, of the term "right". A more explicit rejection of Hohfeld on such grounds is found in J. Penner, "Hohfeldian Use-Rights in Property", ch. 13 of J. Harris (ed.), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997), at pp. 168-174.

⁵⁶ J. Harris, *Property and Justice* (Oxford University Press, 1996), pp. 120-125.

⁵⁷ See, e.g., J. Penner, "The 'Bundle of Rights' Picture of Property" (1996) *U.C.L.A. Law Rev.* 711, at p. 727.

determine what rights we have. But this would be a different sort of theory to the one Hohfeld put forward, and, crucially, there is no incompatibility, and so no reason to choose, between an inquiry into what rights we have and an inquiry into what a right is. Indeed, it is hard to see how we can begin to answer the former question without having first addressed the latter.⁵⁸ Accordingly, we should not reject Hohfeld's conclusions on the nature of rights simply because he did not go on to provide a theory of what rights we have.

When we turn to the question of the content of the rights we have, this is determined by a set of principles reflecting the interests we want the law to protect and the causes we want the law to advance. It is through an understanding of these principles, rather than a clearer formulation of the basic nature of a right, that we are able to resolve uncertainties in the law, to see the connections that may exist between the various rights we and others hold, and to conceive of law as something more than a snapshot of the rights and relations which obtain at a given point in time. It is here that conceptions of ownership and property have a role to play, in identifying the sort of interest in the disposition of assets recognised and protected by law. To this extent I agree with Harris and Penner. What I doubt is whether these terms, and references to rights to or in things, are anything more than expressions of what rights (and liberties, powers and immunities) we have or may have against others in relation to particular things.

Though critics of Hohfeld's approach are quick to pour scorn on the idea that there can only be legal relations between people,⁵⁹ what exactly a legal relation between a person and thing *is* remains obscure. Moreover, the claim that there can be rights to things that do not reduce to, and so are not simply shorthand for, combinations of rights against people begins to look decidedly weaker when it is then admitted that there would be no room or no need for any notion of rights to things where all assets are held by the same person⁶⁰ or where there is no potential for competing claims to the use of assets.⁶¹ This looks very much like an admission that property is not about the rights to and relationships with things but rather about the rights we have as against one another concerning access to things. If our focus really was on relations between people and things, separate from the rights people have against each other, then why should their existence be dependent on the positions and claims of others?

Similarly, the idea of proprietary rights as rights to things tends to fade away when critics of Hohfeld come to address the boundary of personal and proprietary rights. Since, on this view,

⁵⁸ See too N. Simmonds, "Rights at the Cutting Edge" in M. Kramer, N. Simmonds and H. Steiner, *A Debate over Rights* (Oxford University Press, 1998), at pp. 162-165.

⁵⁹ See, e.g., Honoré, *supra*, n. 38, p. 463; aptly answered by Eleftheriadis, *supra*, n. 44, pp. 37-39. The idea that legal relations can exist between people and things is also rejected in J. Finnis, "Natural Law: The Classical Tradition", ch. 1 of J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), at p. 51.

⁶⁰ See Penner, *supra*, n. 39, p. 27.

⁶¹ See Harris, *supra*, n. 56, pp. 23-24.

proprietary rights are not to be understood as distinct from and hence not reducible to the personal rights which may arise to protect or given effect to them, we would expect the classification of a right as proprietary to turn not on the class of people against whom the right can be asserted but rather on its content and the extent to which it pertains or gives access *to* a thing. Yet this is not what we find. Harris, for instance, offers the following account of “non-ownership proprietary interests”:⁶²

If a particular category of contract or grant conferring some specific use-privilege over the thing, or some determinate monetary claim out of the wealth-potential of its exploitation, is protected by trespassory rules, not merely against the contractor or grantor, but against the world in general including succeeding owners, the contract or grant creates a non-ownership proprietary interest.

So, when it comes to identifying a right as personal or proprietary, the notion of proprietary rights as rights to things drops out of sight, to be replaced by the alternative notion of proprietary rights as rights which can be asserted against people generally. In other words, we know that a right can be regarded as *to* or *in* a thing only once we know or decide that it can be asserted against people generally. Far from being incidental to or consequential upon the right’s proprietary status, the existence and scope of the claims that may be brought to protect or vindicate the “right” become the defining feature.

Perhaps the reason for this retreat is that a commitment to the idea of proprietary rights as rights to things would lead us to locate the divide between personal and proprietary rights in some unfamiliar places. Consider licenses over land. Licenses may confer liberties to use the land, far more extensive than the liberties held by the holder of an easement, let alone a party entitled to the benefit of a restrictive covenant who has only a claim-right that the servient owner not use the land in a particular way. It is well established that while easements and restrictive covenants are capable of binding purchasers of the relevant land, licenses are not. Yet, if this is to be decisive of the status of such rights as personal or proprietary, the notion of rights to things collapses into one of rights (relating to a thing) which can be asserted against people generally. If we were serious about the idea of rights to things, we would conceive of and so define proprietary rights in a similar manner to Gray, who argues that there can be degrees of property, reflecting the extent to which the right-bearer has access to and control over the asset and its use.⁶³ And, of course, if we do follow this path we have no good reason for denying that at least some licenses *are* proprietary rights, albeit

⁶² See Harris, *ibid.*, pp. 55-56.

⁶³ See K. Gray, “Property in Thin Air” [1991] *C.L.J.* 252, at pp. 295-296. See too K. Gray and S. F. Gray, *Elements of Land Law* (Oxford University Press, 4th edn 2005), pp. 105-106: “...there can be *gradations* of property in a resource, and these gradations may vary over time. The quantum of property which a specified individual may claim in any piece of land is capable of calibration – along some sort of sliding scale – between a maximum value and a minimum value.”

ones which happen to be particularly fragile.⁶⁴ The suggestion is not that we cannot or should not consider the extent to which rights are thing centred, but rather to question the commitment of those who argue that there are rights to things which are not simply reducible to combinations of rights against others. For, if the accounts of those who take such a view can be seen ultimately to define proprietary rights by reference to the people against whom such rights can be asserted, we may reasonably doubt whether it is possible meaningfully to oppose rights to things and rights against people.

For these reasons I remain doubtful of the possibility of conceiving of a class of rights to things which cannot alternatively be framed as combinations of claim-rights, liberties, powers and immunities which avail against other people. However, it is unnecessary to pursue this argument further for, even if we were to accept that there is a valid notion of rights to things which does not reduce to combination of rights against people, we would nonetheless have good reason to reject a classification which opposes rights to things and rights against people.

8.7 The meanings of “rights”

“Personal rights” and “proprietary rights” are intended to identify subsets of the set “legal rights”. In other words, if we start off with the full array of legal rights before us, we will be able to allocate some to the category of personal rights and other to the category of proprietary rights.⁶⁵ The possibility of such categorisation depends on our identifying what it is that we are seeking to categorise, what constitutes the class “legal rights”. This, of course, requires some inquiry into the rights recognised by a given legal system. More fundamentally, however, and before we can begin any inquiry into what legal rights exist, we need to know what “legal rights” *means*. This involves not only distinguishing *legal* rights from other kinds of rights, but also that we identify what we mean by the word “right”. The need for a clear answer to this last question is particularly important seeing that the language of rights has been and, notwithstanding Hohfeld’s efforts, is still used at different times to mean different things. If our categories of personal and proprietary rights are to align we need to ensure that each identifies a class of rights, with “rights” bearing the same meaning in each case. Unless our classification employs and adheres to single sense of “rights”, our categories will not identify different varieties of a common set of “rights” but will instead identify different concepts, or sub-classes of different concepts, which happen to share the common

⁶⁴ Moreover, if we did take this approach to the identification of proprietary rights, unless we were content to detach a right’s proprietary status from the question of its assertability against third parties, we would have reason then to reconsider whether licenses should be so fragile.

⁶⁵ For present purposes we do not need to consider whether the categories of personal and proprietary rights exhaust the set of legal rights.

language of “rights”.⁶⁶ It would be equivalent to adopting a categorisation of games which gave counted among its categories “the Olympic games” and “ball games”. A classification of rights which includes categories of “rights against people” and “rights to/in things” is skewed in just this way.

Despite occasional suggestions that rights against people and rights to things differ only in their “polarisation”, the right in the former case being attached to another person and in the latter case to a thing,⁶⁷ it is clear that the relationship with another individual entailed by a personal right is different in kind, and not just in focus, to any relationship that can exist between person and thing. This can be seen from the fact that a personal right against another necessarily correlates to a duty owed by that other. The right and duty identify the same relationship from different ends. No such dual aspect or perspective exists in relation to rights to things. Those who correlate rights *in rem* with duties *in rem* can only do so by reducing such rights to rights against people or by misuse of the language of correlation, such that rights to things do not *equate to* the duties of non-interference owed by others but rather generate and, perhaps, necessitate such duties for their protection.⁶⁸ That we are here employing different senses of “right” is also suggested by the form in which the two types of right are expressed. For instance, we are compelled to apply different prepositions, such that rights are *to* or *in* things but *against* people. Moreover, while rights to things identify a “two-term” relationship between person and thing, which without more informs us, albeit incompletely, as to the right’s content, rights against people require a “three-term” expression, identifying not just the two parties but also the conduct of the duty bearer to which the right relates, to be intelligible.⁶⁹

When we talk of rights to things, we use the word “right” to identify some interest or domain of the right holder, some aspect of himself and/or his interactions with the world, which merits protection. This domain or interest marks out an area in which the right holder’s autonomy is to be respected and others must not intrude or interfere. So, when we say the claimant has a right to a particular thing, we mean that he is exclusively entitled, at least in relation to certain

⁶⁶ This is not to suggest that the use of a common term is likely to be purely co-incident. Often, as with the language of “rights”, there will be connections of content or context which explain why we use the same term in each case: see H. Hart, *The Concept of Law* (Clarendon Press, 2nd edn 1994), pp. 15-16. The key point is to appreciate that the same term may identify essentially different concepts, rather than simply examples or varieties of a common concept.

⁶⁷ See, e.g., F. Lawson, *Many Laws: Selected Essays, Volume 1* (North-Holland Publishing Company, 1977), at p. 12; Birks, *supra*, n. 10, pp. 164-165; Pretto-Sakmann, *supra*, n. 39, p. 92.

⁶⁸ See, e.g., Penner, *supra*, n. 39, pp. 23-31, whose understanding of rights and duties *in rem* seems to reduce to combinations of right-duty relations between people, albeit that the identity of the other party to the relationship is, for the most part at least, unnecessary for an understanding of the content of the right and duty, and hence such rights and duties are capable of expression without reference to the other party.

⁶⁹ The language of “two-term” and “three-term” relations is taken from J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), pp. 201-202, 218-219. Of course, these differences in expression only reflect and do not explain, let alone ground, the difference between these two concepts of “rights”.

dispositions of or advantages derived from the thing, to decide how that thing is to be used, and that he will be protected in the exercise of these freedoms and his choices respected. The “right” as domain or interest, though protected by and given effect through the imposition of rights against people is not reducible to a combination of such claims. Rather, it is to be understood as the basis of them. On this account, it is *because* the claimant has a right to the thing that he can, for instance, require that others not interfere with it without his consent or must return it if it comes into their possession, again in the absence of the claimant’s consent.

The difference between the two senses of “right” then becomes plain. We can and do use the word “right”, on the one hand, to describe the concrete claims that we can make of others in their dealings with us and, on the other, to identify the interests, objectives or freedoms which underlie and justify these concrete claims.⁷⁰ When we talk of “rights against people” we use “rights” in the first sense; when we talk of “rights to things”, at least in so far as we intend these to be more than aggregates of rights (and liberties, powers and immunities) against people, it is the second sense of “right” we use. Because of this, if we define personal rights as rights against people and proprietary rights as rights to or in things, distinct from and not reducible to combinations of rights against people, our resulting classes cannot be understood as subsets of a single notion of “rights”. Rather each identifies a discrete concept, or a subset of a discrete concept, to which the terminology of rights can be applied. Accordingly, so understood, the categories of personal and proprietary rights do not align and no meaningful opposition exists between them. Instead, proprietary rights, since they identify a subset of “interest” or “domain” rights, align with other instances of such rights, such as the right to bodily integrity, to reputation or to privacy.⁷¹ Personal rights identify a discrete notion of “rights” and they can be aligned only with liberties, powers and immunities, as subsets (when combined with their correlatives) of the set “legal relations between individuals”.⁷²

⁷⁰ The “domain” and “claim” senses of “rights” are identified and contrasted in J. Harris, “Property – Rights in Rem or Wealth”, ch. 4 of P. Birks and A. Pretto, *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University Press, 2002), at p. 52.

⁷¹ Proprietary rights as rights to things can then be sub-categorised on the basis of, *inter alia*, the type of thing one may have rights in or kind of rights or interest one may have in a thing (*e.g.*, the right to use, to sell, to income).

⁷² The category of personal rights can then be subdivided, most informatively on the basis of the principles or interests which justify such claims. One resulting sub-class would be claims which exist to protect or give effect to the claimant’s interest in exclusively determining the disposition of his assets.

8.8 Proprietary interests

If we return to the understanding of the law's shape and structure which have guided the preceding chapters, we can, I think, identify a useful role for "property", one which is consistent with familiar applications of the language of "property" and retains much of their significance.

The law is not an arbitrary set of rules and stipulations. Law has a purpose or collection of purposes, and the body of the law is shaped by those purposes, by the goals that law exists to pursue. The protection and effectuation of certain interests of individuals is, alternatively, one such purpose or necessary for the law to achieve its purposes, and much, at least, of the law is explicable and justifiable on the basis that it protects or effectuates such interests. These interests can be reformulated in dynamic terms as principles. To recognise some aspect of an individual or his engagement with the world as an interest which merits legal recognition is to say that it should be recognised and protected. So, our interest in our bodily integrity becomes a principle that we should not cause others, and that others should not cause us, bodily harm. These principles, when applied to concrete fact situations, justify specific determinations as to the permissibility and legal consequences of certain conduct; determinations which, I suspect, can be expressed without remainder through the language of Hohfeldian claim-rights, liberties, powers and immunities.

One such interest is an interest in exclusively determining the disposition of certain things. This interest can be expressed at different levels of generality. At its broadest, it is an interest in the institution and maintenance of a regime whereby individuals can become entitled exclusively to determine the disposition of certain items of wealth. More narrowly, it is an interest in exclusively determining the disposition of those items to which one has acquired such an entitlement. At this level, we can say that a claimant has an interest in relation to, or simply *in*, an asset where he is, at least in some form and to some extent,⁷³ exclusively entitled to determine its disposition. It is in describing these interests that we can usefully turn to the language of property. Hence, the regime through which individuals are accorded exclusive entitlements to certain assets is one of private property. The interests in assets which entitle their holder exclusively to determine their disposition can be usefully labelled *proprietary* interests.

This also allows us to account for the standard incidents of proprietary interests.⁷⁴ To say that one has an interest in *exclusively* determining an asset's disposition means, at least presumptively, that, so far as the interest extends, it is for the claimant, and nobody else, to choose

⁷³ This provides for the possibility that the property regime of a given legal system accommodates, as English law does, distinct types of interests in things. So, for instance we can distinguish interests which give open-ended use privileges (which we have termed "ownership interests") from those which are more limited, entitling the claimant, for instance, to use the asset only in some limited way or merely to determine whether others may use it in a particular way.

⁷⁴ See *supra*, text to nn. 9-10. Of course, it does not follow that all interests in assets should share the same incidents or that the claims of parties with no such interest should not carry at least some of these incidents.

how that asset is to be used, that it is his choices, and not those of others, which are to be respected, and that, in exercising his capacity for making such choices, he is to be protected from others' interference. This then tells us how we can link property with transmissibility, enforceability against third parties and priority in insolvency. It also allows us to distinguish, on the one hand, the entitlements of claimants with use-privileges to assets which derive from such an interest in the asset, and so which can be asserted against people generally, and, on the other, those of claimants whose use-privileges are based on other principles, such as the principle that contractual undertakings be performed, and so which impose duties only on a particular individual or group.⁷⁵ We can also see now why there is no illogic or inconsistency in references to proprietary interests *in* personal rights or claims, or combinations of such claims. As we saw earlier,⁷⁶ the concrete determinations as to the rights, duties, liberties etc which we bear are distinguishable from the interests and principles which support them. Thus, proprietary interests justify and are, I would suggest always, protected and effectuated through (personal) rights, liberties, powers and immunities. Moreover, since our personal rights are "ours", in that it is for each of us, as holder of a given right, to determine how the right is to be exercised, whether it is to be enforced or waived, whether, where possible, it is to be transferred and on what terms, and how its fruits are to be applied, there is obvious sense and in and meaning to the statement that we have a proprietary interest, indeed an ownership interest, in our personal rights.⁷⁷ So understood, we are not forced into the awkward positions taken by those who, wrongly, treat proprietary interests and personal rights or, more simply, property and obligation as mutually exclusive.⁷⁸

It is on this understanding of "property" and "proprietary interests" that we can say that the collection of claims commonly grouped under the heading "unjust enrichment", as well as fragments of the law of torts and trusts, have as their basis the claimant's proprietary interest, even

⁷⁵ Of course, this tells us only why not all claimants with some entitlement to the use of assets can bring claims against third parties who receive the asset or interfere with the claimant's use of it. The important question is when the claimant has an interest in (exclusively determining the disposition) the asset and when his claim rests on some other interest or principle. Here I think an important distinction is to be drawn between grants and promises. If we start with an asset in which A has an ownership interest, he, very generally, and subject to competing principles, is free (a) to transfer his interest or grant some lesser interest to B or, alternatively, (b) to promise B that he may use that asset in a given way (or that A will not use his asset in a given way). In the former case, B, so far as his interest extends, will carry rights against third parties, whereas, in the latter, his claim will be against A alone. The circumstances in which proprietary interests may be acquired in the absence of a grant (first acquisition, long use etc) involve different considerations. This in turn reflects the fact that the exact form of our private property regime and our interests under such a scheme, are dependant on our reasons for, that is, the principles and interests which support, the institution of such a regime.

⁷⁶ *Supra*, text to nn. 70-72.

⁷⁷ Or, in other words, "an obligation is as truly the subject-matter of property as any physical *res*": J. Ames, "Purchase for Value without Notice" (1887) 1 *Harvard L.R.* 1, at p. 9.

⁷⁸ Notable examples include Pretto-Sakmann, *supra*, n. 39, who forces upon herself the conclusion that shares cannot be the subject of proprietary interests, and those who insist that "charge backs", though clearly commercially effective, are nonetheless "conceptually" impossible: see, e.g., R. Goode, *Commercial Law in the Next Millennium* (Sweet and Maxwell, 1998), pp. 69-71.

where the law, as part of its response, holds title to the relevant asset to have passed. Where the claimant has a proprietary interest, that is, an interest in exclusively determining the disposition of a particular asset, then, to the extent of that interest, it is for him and him alone to determine who may receive and use that asset. It is only by reference to this interest that we can explain why the claimant's lack of consent to the defendant's receipt and use of the asset justifies the latter's liability. Liability is justified precisely because it was *and is* the claimant, by virtue of his interest in the asset, to decide whether the defendant may make such use of it and he did not so choose. Without such an interest, even where the defendant's receipt comes, in some factual sense, "at the claimant's expense", we simply have no reason for supporting his preference that the defendant not be entitled to retain the asset or the benefits it brings. Similarly, where, prior to its transfer, the claimant did have such an interest but, notwithstanding some flaw in his consent, he is regarded as having effectively exercised his power to dispose of that interest in the defendant's favour, what reason can there be for nonetheless entitling him to have that transfer, or some aspect of it, reversed?

Chapter 9

Implications and Concluding Remarks

The preceding chapters have mapped out a new approach to cases involving a defective transfer or misapplication of assets, shaped by the interests and principles which support and qualify such claims. Though these principles are all to be found in the law as it stands, their recognition and application is inconsistent and sporadic. The development of a response consistent with principle and which treats like alike therefore entails a number of important changes to the legal rules we presently apply. So, specific recovery of misapplied assets would, subject to defences, be available as of right. There would be no difference in the treatment of direct and indirect recipients. All such claims would, again subject to defences, be accorded priority in the event of the defendant's insolvency. Change of position would be extended to all such claims. The arguments in support of each of these changes have been made already and will not be repeated here. One comment is, however, worth making, particularly since many will consider these proposed changes radical and far-reaching.

It is surely uncontroversial to say that the law here is far from a model of clarity or consistency.¹ Moreover, though theories abound which, if adopted, would go some way to remedying much of this uncertainty, we are some distance from anything approaching a consensus as to which of these should be adopted. This is worth stressing, for there is a tendency to dismiss some reconceptions of the law purely on the basis that they involve, or are perceived as involving, too great a departure from the law as traditionally framed and understood. Now, as we have seen,² when dealing with the question of what the law *should* be, it is beside the point simply to argue that a given approach differs, even differs greatly, from what the law *is*. The most that can be said is that we should be wary of upsetting settled law, and thereby, at least in the short term, creating uncertainty and defeating the expectations of those who have planned their affairs on the basis of the law as it stands.

But, while I do not seek to challenge the relevance or value of such considerations, they carry much less weight where, as here, the law is far from settled. Moreover, it is questionable how much impact such considerations should have where they conflict with the requirement that like case be treated alike, and so with the pursuit of justice. In any case, seeing as there are few, if any, commentators in this area who do not argue or have not previously argued for changes in the law of

¹ For a summary of the law, see chapter 4, text to nn. 11-19.

² See chapter 3, text to n. 4.

comparable significance,³ those inclined to reject the approach proposed here simply on the basis of its novelty may be thought to display a somewhat fleeting and selective commitment to the value of leaving settled law undisturbed.

Aside from these substantive changes, the analysis presented here also differs markedly from standard accounts of the law in the manner of its expression, in the conceptual apparatus used to present and to justify the law's response. Claims following defective transfers and misapplications of assets have been approached through a variety of conceptual and doctrinal devices. Some such claims fall within the law of torts, others within the law of trusts, and a large group was traditionally collected under the heading quasi-contract. In recent years, many, though not all, of these have been reconceptualised as examples of unjust enrichment and/or restitutionary liability, though with well known differences of opinion as to the reach of and relationship between these terms.

Much good has been done by unjust enrichment theorists in locating unities obscured by some of the traditional terminology. But it is also clear that, at times, they too have been guilty of an uncritical adherence to the formal divisions found in the law. So, while they have been prepared to look behind the language of money hand and received, quantum valebat, quasi-contract, and resulting trusts to ask whether these terminological and presentational differences reflect material differences in the cases they covered, they notably failed to do the same elsewhere. The distinction between those cases where title to the misapplied asset remained in the claimant and those where title passed went largely unquestioned. So too did the allocation of some of these case to the law of torts. As Jaffey has astutely noted,⁴ while the unjust enrichment school has been zealous in its rejection of the fiction of implied contract, it has been strangely tolerant of what we may call the fiction of implied tort.⁵

³ In particular, and despite the conservative terms in which it was often framed, the development of a law of restitution for unjust enrichment as put forward by Birks, not to mention the (re)classification of private law of which it is part, involved and involves far-reaching changes both to the substance of the law and the terms in which it is to be understood. See P. Matthews, "The Legal and Moral Limits of Common Law Tracing", ch. 2 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995), pp. 36-37.

⁴ P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000), p. 327. See too A. Tettenborn "Conversion, Tort and Restitution", ch. 32 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn 1998), at p. 825: "[N]o-one has ever sat down seriously to consider what conversion is for. True, it is classified as a tort: but that is only for historical reasons and for lack of anywhere else to file it."

⁵ Of course, in each case, whether there is truly a fiction involved depends on how one understands the terms "contract" and "tort". Implied contracts are only a fiction if contracts are treated as necessarily dependant on consent; implied tort a fiction only if torts are treated as dependant on genuine culpability or moral wrongdoing. How these terms are used is largely a matter of convention, and no particular objection can be made to those who employ these terms to mean different things. The key point is just as the principles underlying implied contracts are different from those underlying "genuine" contracts, so too the principles underlying the "implied" tort of innocent conversion differ from those underlying other tort claims.

9.1 Classification and the law

In rejecting both the traditional categorisation of such claims and the reclassification introduced by unjust enrichment theorists, it should not, I hope, be thought that the approach taken here is motivated by scepticism as to the importance of classification in analysing and explaining the law. I agree with those who have stressed the potential of classification to aid analysis and affect the outcome of cases.⁶ The divisions and associations we draw in the law matter since they both reflect and shape our understanding of the nature, basis and incidence of legal rights and claims. Classification requires us to think about the validity of the divisions and associations found in the law and ensures that we remain focussed on the need to treat like cases alike. The contribution unjust enrichment lawyers have made in promoting the cause of good classification is to be applauded. Where I differ from such accounts is simply, but fundamentally, on the question of how and where we draw such divisions, on what it is that makes cases materially alike and unlike. The answer we give to the classificatory question is vital for, just as good classification assists in our understanding of the law and our ability to develop a body of law which is principled and just, defective classificatory schemes create obstacles to such goals. At the very least they fail adequately to explain why we draw the distinctions we draw; at worst, they encourage and entrench distinctions which are unprincipled and unjust.

It is a major failing of the approach of many unjust enrichment theorists to classificatory questions that they have consistently downplayed or disregarded the prescriptive aspects of the classifications they propose.⁷ The tendency has been to present them as (uniquely) latent in the case law, such that no justification is needed, and hence none offered, beyond an account of how the cases can be seen to fit into the proposed scheme. Aside from the inadequacy of such accounts to tell us why we *should* maintain such an approach to classification, it also opens up its advocates to accusations of inconsistency and hypocrisy, since the case law plainly reveals no such uniform classificatory scheme. Instead, the fit with the cases is achieved only by marginalising, distorting or dismissing as wrongly decided those decisions which do not square with the approach of the writer. We are told that we should support the theory because it fits the cases, but we should support the cases only where and to the extent that (and, we must therefore presume, only because) they fit the theory. The cases are relied on where they fit the theory and dismissed where they do not.⁸ The circularity and deficiency of this position are plain.

⁶ See, e.g., L. Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 *L.Q.R.* 412, at p. 422.

⁷ See, e.g., P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989, p. 27; P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *Western Australia L.R.* 1, at p. 3.

⁸ See S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003), pp. 21-22, 222-225.

As we have seen, the likeness of cases cannot be determined by examination of our treatment of such cases. The failing of the accounts offered by the unjust enrichment school is not that they seek to change our understanding of the law and to marginalise or treat as incorrect some of the cases. Rather it is to think that such conclusions can be justified simply by reference to the law as it stands. Classification cannot be value neutral. Any classificatory scheme must address the question of what differences and similarities matter, what makes cases alike or unlike. This is true even where our purpose in proposing a classificatory scheme is simply to present the current state of the law in an accessible and coherent manner, since we need some criteria to determine how the material may *best* be ordered, an inquiry which necessarily takes us beyond what the law is and what the cases say.⁹ Where our concern is to offer some framework against which the law can be judged and which offers guidance in the future development of the law, this becomes even more apparent. To answer these questions requires the application of standards which are in a sense external to or independent of the law, in that they are sourced not in the legal rules we may currently have but in some theory of what law exists to do, what its goals and functions are, and, just as importantly, how best to achieve them. This, of course, means that the positions we take on these issues have no means of authoritative resolution, and for that reason will always be contestable. But the fact that the premises on which classificatory schemes are founded will necessarily be open to challenge, and that such challenges can only be addressed (and even then with no guarantee of resolution) through moral, political or economic argument, must not lead us to conclude that such questions are unanswerable or, worse, that it is not the place of lawyers to speculate on them.

9.2 Unanswered questions

The foregoing chapters have covered much ground. The specific focus has been the law's response to the misapplication of assets. However, examination of the failings of orthodox analyses of the law in this area and the development of an alternative, principled approach, has also led us to address certain broader themes and controversies. These have included the role of classification in law and the basis upon which we can usefully categorise claims, the place of concepts in legal reasoning, the nature of legal "rights" and the soundness of dividing personal rights from proprietary. Many questions, however, remain outstanding.

The position advanced here is that claims should lie in respect of misapplied assets where and to the extent that the claimant has an interest in exclusively determining their disposition.

⁹ See too Waddams, *ibid.*, p. 222.

However, no justification has been offered of private property, and hence of the law's recognition of such interests. Similarly, little has been said as to the limits of such interests. As can be seen from cases such as *Victoria Park Racing*,¹⁰ the exclusivity of proprietary interests will usually not be absolute, and the availability of claims against those who have received, used or benefited from use of one's asset will turn on whether such uses or benefits derived from an asset are among those exclusively reserved for the claimant. The answers to these questions, however, fall beyond the scope of this thesis and must be sought elsewhere.

I have also offered no account of the historical development of the law in this area and hence any explanation as to the why we may have ended up with the current divergence of response to a single issue. I am well aware that some have decried those who criticise the law without examination of what led the courts to adopt such rules in the first place.¹¹ I disagree. While history may tell us why these rules were developed, and so may give an insight into what the courts considered the principles underlying them to be, the key question is to ask whether the law *is* justifiable, and that involves asking what principles, here and now, apply to such cases and whether they can be squared with the rules we have in place. History is no substitute for substantive moral, political, economic argument.

Accordingly, I shall say nothing on the question of why the law has ended up with such a varied and haphazard set of rules in this area, save to note briefly one possible and interesting answer which is hinted at in a recent essay by Lionel Smith.¹² Smith observes that "unjust enrichment" appears to serve a "corrective role", putting right failings of or filling in gaps left by other areas of the law.¹³ On this approach, many of the claims commonly grouped together under the heading "unjust enrichment" are corrective of and provide a gloss on the rules on property transfers, notable the rules on the passing of title.¹⁴ So, we may view the rules on the location of title to misapplied assets, including the bona fide purchase rule and the various exceptions to *nemo dat*, as providing a basic regime aimed at protecting and ordering the interests of owners whose assets have been misapplied and those who have subsequently received such assets. These rules have then been supplemented, and (some of) their imperfections ironed out, by the introduction of

¹⁰ *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor* (1937) 58 C.L.R. 479; examined in chapter 3, text to nn. 33-38.

¹¹ See, e.g., W. Gummow, "Conclusion" in S. Degeling and J. Edelman, *Equity in Commercial Law* (Law Book Company, 2005), at p. 515. My only point of agreement with Gummow is in his criticism of those too readily move from a conclusion that the law *should be* X to statements that the law *is* X. It should be plain that I have not argued that my analysis of the claims following a misapplication of assets set down in chapters 5 to 7 is an account of what the law *is*.

¹² L. Smith, "Property, Subsidiarity and Unjust Enrichment", ch. 21 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002).

¹³ *Ibid.*, pp. 610-622.

¹⁴ Smith goes further and sees unjust enrichment as also serving a corrective function in relation to contract and wrongs. This may be true of other aspects of unjust enrichment as conventionally understood, but not, I think, of the claims we have been examining here.

personal claims to recover the asset's value, the creation of new equitable titles, and the defence of change of position.

The analogy Smith draws is with the way equity was developed to correct the common law where the latter was considered to be defective. And just as the dualism between common law and equity meant that, though many of the inadequacies of the common law were remedied, inconsistencies sometimes remained,¹⁵ so this view may allow us both to say (contrary to most unjust enrichment lawyers) that, whether or not title is held to pass, the law is concerned with the same basic problem, and, at the same time, to explain why the law has ended up with a variety of diverse and seemingly mutually incompatible responses to this problem.

As a final remark, the position taken here on the classification of private law and on how the material likeness or dissimilarity of cases is to be determined has significance beyond the analysis of claims following defective transfers. I believe the rejection of Birks' event-based taxonomy and its replacement by a inquiry into the principles underlying claims would aid us greatly in our understanding of the law and our resolution of a number of well-known problem areas.¹⁶ These are, however, questions for another time.

¹⁵ See generally S. Worthington, *Equity* (Clarendon Press, 2nd edn 2006).

¹⁶ Examples would include the proper measure of damages, and more generally the forms of response, where there has been a breach of contract; the focus of awards in estoppel claims; the basis and incidence of negligence claims for pure economic loss; the interaction of and relationship between law and equity.

Bibliography

- T. Akkouch and C. Webb, "Mistake, Misprediction and Change of Position" [2002] *R.L.R.* 107.
- T. Akkouch and S. Worthington, "Re Diplock (1948)", ch. 11 of C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006).
- J. Ames, "Purchase for Value without Notice" (1887) 1 *Harvard L.R.* 1.
- Aristotle, *Nicomachean Ethics* (J. Thompson (trans.), H. Tredennick (rev.), Penguin, 1976).
- J. Austin, *Lectures on Jurisprudence or the Philosophy of Law*, (R. Campbell (ed.), John Murray, 4th edn 1873).
- J. Baker, *An Introduction to English Legal History* (Butterworths, 4th edn 2002).
- K. Barker, "After Change of Position: Good Faith Exchange in the Law of Restitution", ch. 7 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995).
- K. Barker, "Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement" [1999] *R.L.R.* 75.
- K. Barker, "Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons", ch. 5 of J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004).
- J. Beatson, "Benefit, Reliance, and the Structure of Unjust Enrichment", ch. 2 of *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991).
- J. Beatson, "Discharge for Breach: Instalments, Deposits, and Other Payments due Before Completion", ch. 3 of *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991).
- J. Beatson and W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 *University of Toronto L.J.* 149.
- G. Bell, *Principles of the Law of Scotland*, (W. Guthrie (ed.), T. & T. Clark, 10th edn, 1899).
- P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev. edn 1989).
- P. Birks, *Restitution – The Future* (The Federation Press, 1992).
- P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University, 1992), reprinted as Appendix 1 of P. Birks and F. Rose (eds), *Restitution and Equity: Volume 1 – Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000).
- P. Birks, "The Concept of a Civil Wrong", ch. 1 of D. Owen (ed.), *The Philosophical Foundations of Tort Law* (Clarendon Press, 1996).

- P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1.
- P. Birks, "Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case" [1996] *R.L.R.* 3.
- P. Birks, "Definition and Division: A Meditation on *Institutes* 3.13", ch. 1 of P. Birks (ed), *The Classification of Obligations* (Oxford University Press, 1997).
- P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] *N.Z. Law Review* 623.
- P. Birks, "Change of Position and Surviving Enrichment", ch. 2 of W. Swadling (ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* (British Institute of International and Comparative Law, 1997).
- P. Birks, "The Necessity of a Unitary Law of Tracing", ch. 9 of R. Cranston (ed.), *Making Commercial Law* (Clarendon Press, 1997).
- P. Birks, "Misnomer", ch. 1 of W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds.) *Restitution: Past, Present and Future* (Hart Publishing, 1998).
- P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 *University of Western Australia Law Review* 1.
- P. Birks, "The Law of Unjust Enrichment: A Millennial Resolution" [1999] *Singapore Journal of Legal Studies* 318.
- P. Birks, *English Private Law: Volume I* (P. Birks (ed.), Oxford University Press, 2000).
- P. Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79 *Texas L.R.* 1767.
- P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law", ch. 18 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002).
- P. Birks, *Unjust Enrichment* (Clarendon Press, 2nd edn 2005).
- P. Birks and R. Chambers, *The Restitution Research Resource* (Mansfield Press, 2nd edn. 1997).
- P. Birks and C. Mitchell, "Unjust Enrichment", ch. 15 of P. Birks (ed.), *English Private Law: Volume II* (Oxford University Press, 2000).
- W. Blackstone, *Commentaries on the Law of England: Volume 2* (1766).
- S. Bright, "The Third Party's Conscience in Land Law" [2000] *Conv.* 398.
- A. Burrows, *The Law of Restitution* (Butterworths, 1st edn 1993).
- A. Burrows, "Swaps and the Friction between Common Law and Equity" [1995] *R.L.R.* 15.
- A. Burrows, "Quadrating Restitution and Unjust Enrichment: A Matter of Principle?" [2000] *R.L.R.* 257.

- A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *L.Q.R.* 41.
- A. Burrows, *The Law of Restitution* (Butterworths, 2nd edn. 2002).
- A. Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 2nd edn 2004).
- A. Burrows, "The English Law of Restitution: A Ten-Year Review", ch. 2 of J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004).
- A. Burrows, "Unravelling Proprietary Restitution: A Response to Professor Lionel Smith" (2005) 41 *Can. Bus. L.J.* 424.
- R. Chambers, *Resulting Trusts* (Clarendon Press, 1997).
- R. Chambers, "Conditional Gifts", ch. 14 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn, 1998).
- R. Chambers, "Constructive Trusts in Canada" (1999) 37 *Alberta L.R.* 173.
- J. Davies, "Tort", ch. 14 of P. Birks (ed.), *English Private Law: Volume II* (Oxford University Press, 2000).
- J. Dawson, "Restitution without Enrichment" (1981) 61 *Boston University L.R.* 563.
- J. Dietrich, *Restitution: A New Perspective* (The Federation Press, 1998).
- R. Dworkin, *Taking Rights Seriously* (Duckworth, 1977).
- J. Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002).
- P. Eleftheriadis, "The Analysis of Property Rights" (1996) 16 *O.J.L.S.* 31.
- S. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469.
- V. Finch and S. Worthington, "The *Pari Passu* Principle and Ranking Restitutionary Rights", ch. 1 of F. Rose (ed.), *Restitution and Insolvency* (Mansfield Press, 2000).
- J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).
- J. Finnis, "Intention and Side-effects", ch. 2 of R. Frey and C. Morris (eds), *Liability and Responsibility* (Cambridge University Press, 1991).
- J. Finnis, "Natural Law: The Classical Tradition", ch. 1 of J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002).
- B. Fitzgerald, "Ownership as the Proximity or Privity Principle in Unjust Enrichment Law" (1995) 18 *U. Queensland L.J.* 166.
- J. Fleming, *The Law of Torts* (Law Book Company, 9th edn 1998).

- D. Fox, "Legal Title as a Ground of Restitutionary Liability" [2000] *R.L.R.* 465.
- D. Fox, "Overreaching", ch. 4 of P. Birks and A. Pretto (eds), *Breach of Trust* (Hart Publishing, 2002).
- C. Fried, *Contract as Promise* (Harvard University Press, 1981).
- D. Friedmann, "Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong" (1980) 80 *Columbia L.R.* 504.
- D. Friedmann, "Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution", ch. 10 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995).
- D. Friedmann, "The Protection of Entitlements via the Law of Restitution – Expectancies and Privacy" (2005) 121 *L.Q.R.* 400.
- S. Gardner, *An Introduction to the Law of Trusts* (Clarendon Press, 2nd edn 2003).
- M. Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 *O.J.L.S.* 42.
- R. Goode, *Commercial Law in the Next Millennium* (Sweet and Maxwell, 1998).
- W. Goodhart and G. Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 *M.L.R.* 489.
- J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006).
- R. Grantham and C. Rickett, "Restitution, Property and Ignorance – A Reply to Mr Swadling" [1996] *L.M.C.L.Q.* 463.
- R. Grantham and C. Rickett, "Trust Money as an Unjust Enrichment: A Misconception" [1998] *L.M.C.L.Q.* 514.
- R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000).
- R. Grantham and C. Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 *L.Q.R.* 273.
- R. Grantham and C. Rickett, "Property Rights as a Legally Significant Event" [2003] *C.L.J.* 717.
- K. Gray, "Property in Thin Air" [1991] *C.L.J.* 252.
- K. Gray and S. F. Gray, *Elements of Land Law* (Oxford University Press, 4th edn 2005).
- W. Gummow, "Conclusion" in S. Degeling and J. Edelman, *Equity in Commercial Law* (Law Book Company, 2005).

- D. Harris, A. Ogus and J. Philips, “Contract Remedies and the Consumer Surplus” (1979) 95 *L.Q.R.* 581.
- J. Harris, *Property and Justice* (Oxford University Press, 1996).
- J. Harris, “Property – Rights *in Rem* or Wealth”, ch. 4 of P. Birks and A. Pretto, *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University Press, 2002).
- H. Hart, *The Concept of Law* (Clarendon Press, 2nd edn 1994).
- S. Hedley, *A Critical Introduction to Restitution* (Butterworths, 2001).
- S. Hedley, “Unjust Enrichment: A Middle Course?” (2002) 2 *O.U.C.L.J.* 181.
- S. Hedley, “Implied Contract” [2004] *C.L.J.* 435.
- W. N. Hohfeld, *Fundamental Legal Conceptions* (W. W. Cook (ed.), Yale University Press, 1923).
- A. Honoré, “Rights of Exclusion and Immunities against Divestment” (1960) 34 *Tulane L.R.* 453.
- A. Honoré, “Ownership”, ch. 5 of A. Guest (ed.), *Oxford Essays in Jurisprudence: 1st series* (Oxford University Press, 1961).
- P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000).
- M. Jewell, “Change of Position”, ch. 10 of P. Birks and F. Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 1999).
- G. Jones, Note [1980] *C.L.J.* 275.
- G. Jones, *Goff and Jones: The Law of Restitution* (Sweet and Maxwell, 6th edn. 2002).
- M. Kramer, “Rights Without Trimmings” in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford University Press, 1998).
- F. Lawson, *Many Laws: Selected Essays, Volume 1* (North-Holland Publishing Company, 1977).
- F. Lawson and B. Rudden, *The Law of Property* (Clarendon Press, 3rd edn 2002).
- P. Matthews, “The Legal and Moral Limits of Common Law Tracing”, ch. 2 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995).
- P. Matthews, “The Comparative Importance of the Rule in *Saunders v. Vautier*” (2006) 122 *L.Q.R.* 266.
- B. McFarlane, “Identifying Property Rights: A Reply to Mr Watt” [2003] *Conv.* 473.
- M. McInnes, “‘At the Claimant’s Expense’: Quantifying Restitutionary Relief” [1998] *C.L.J.* 472.

- M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" [2001] *R.L.R.* 29.
- E. McKendrick, "Frustration, Restitution, and Loss Apportionment", ch. 6 of A. Burrows, *Essays on the Law of Restitution* (Oxford University Press, 1991).
- E. McKendrick, "Taxonomy: Does it Matter?", ch. 22 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002).
- P. Millett, "Review of A. Burrows, *The Law of Restitution*" (1995) 111 *L.Q.R.* 517.
- C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford University Press, 2003).
- C. Mitchell in "The New Birksian Approach to Unjust Enrichment" [2004] *R.L.R.* 260.
- G. Muir, "Unjust Sacrifice and the Officious Intervener", ch. 9 of P. Finn (ed.), *Essays on Restitution* (Law Book Company, 1990).
- B. Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1962).
- R. Nolan, "Change of Position", ch. 6 of P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995).
- R. Nolan, "Equitable Property" (2006) 122 *L.Q.R.* 232.
- D. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 *Can. Bar. Rev.* 315.
- J. Penner, "The 'Bundle of Rights' Picture of Property" (1996) *U.C.L.A. Law Rev.* 711.
- J. Penner, *The Idea of Property in Law* (Oxford University Press, 1997).
- J. Penner, "Basic obligations", ch. 5 of Birks (ed.), *The Classification of Obligations* (Clarendon Press, 1997).
- J. Penner, "Hohfeldian Use-Rights in Property", ch. 13 of J. Harris (ed.), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997).
- J. Penner, "Duty and Liability in Respect of Funds", ch. 12 of J. Lowry and L. Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths, 2006).
- A. Pretto-Sakmann, *The Boundaries of Personal Property: Shares and Sub-shares* (Hart Publishing, 2005).
- J. Raz, *The Concept of a Legal System* (Clarendon Press, 2nd edn, 1980).
- C. Rotherham, "Tracing and Justice in Bankruptcy", ch. 6 of F. Rose (ed.), *Restitution and Insolvency* (Mansfield Press, 2000).

- C. Rotherham, "Property and Unjust Enrichment: A Misunderstood Relationship", ch. 9 of A. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2004).
- B. Rudden, "Things as Things and Things as Wealth" (1994) 14 *O.J.L.S.* 81.
- W. Seavey and A. Scott, "Restitution" (1938) 54 *L.Q.R.* 29.
- A. Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 27 *Columbia L.R.* 269.
- R. Sharpe and S. Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 *O.J.L.S.* 290.
- E. Sherwin, "Constructive Trusts in Bankruptcy", [1989] *U. Illinois L.R.* 297.
- N. Simmonds, "Rights at the Cutting Edge" in M. Kramer, N. Simmonds and H. Steiner, *A Debate over Rights* (Oxford University Press, 1998).
- L. Smith, "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 *O.J.L.S.* 481.
- L. Smith, "The province of the law of restitution" (1992) 71 *Can. Bar. Rev.* 672.
- L. Smith, *The Law of Tracing* (Clarendon Press, 1997).
- L. Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 *L.Q.R.* 412.
- L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 71 *Texas L.R.* 2115.
- L. Smith, "Property, Subsidiarity and Unjust Enrichment", ch. 21 of D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002).
- L. Smith, "Transfers", ch. 5 of P. Birks and A. Pretto (eds), *Breach of Trust* (Hart Publishing, 2002).
- L. Smith, "Unravelling Proprietary Restitution" (2004) 40 *Can. Bus. L.J.* 317.
- S. Smith, "Taking Law Seriously" (2000) 50 *University of Toronto L.J.* 241.
- S. Smith, "Justifying the Law of Unjust Enrichment" (2001) 79 *Texas L.R.* 2177.
- D. Stevens, "Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things" (1989) 39 *U. Toronto L.J.* 258 and 325.
- J. Stevens, "Vindicating the Proprietary Nature of Tracing" [2001] *Conv.* 94.
- S. Stoljar, *The Law of Quasi-Contract* (Law Book Company, 2nd edn. 1989).
- H. Stone, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 27 *Columbia L.R.* 467.

- W. Swadling, "A New Role for Resulting Trusts?" (1996) 16 *L.S.* 110; reprinted as Appendix 2 of P. Birks and F. Rose (eds), *Restitution and Equity: Volume 1 – Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000).
- W. Swadling, "A Claim in Restitution" [1996] *L.M.C.L.Q.* 63.
- W. Swadling, "Property and Unjust Enrichment", ch. 11 of J. Harris (ed.), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997).
- W. Swadling, "The Proprietary Effect of a Hire of Goods", ch. 20 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn 1998).
- W. Swadling, "What is the Law of Restitution About? Four Categorical Errors", ch. 21 of W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds.) *Restitution: Past, Present and Future* (Hart Publishing, 1998).
- W. Swadling, "Property: General Principles", ch. 4 of P. Birks (ed.), *English Private Law: Volume I* (Oxford University Press, 2000).
- W. Swadling, "The Vendor-Purchaser Constructive Trust", ch. 18 of S. Degeling and J. Edelman, *Equity in Commercial Law* (Law Book Company, 2005).
- W. Swadling, "Unjust Delivery", ch. 15 of A. Burrows and Lord Rodger, *Mapping the Law: Essays in Honour of Peter Birks* (Oxford University Press, 2006).
- A. Tettenborn, "Lawful Receipt – A Justifying Factor?" [1997] *R.L.R.* 1.
- A. Tettenborn, "Misnomer – A Response to Professor Birks", ch. 2 of W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998).
- A. Tettenborn "Conversion, Tort and Restitution", ch. 32 of N. Palmer and E. McKendrick (eds), *Interests in Goods* (L.L.P., 2nd edn 1998).
- A. Tettenborn, "Restitution of Property you do not Own Anyway", ch. 11 of A. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2003).
- Thomas Aquinas, *Summae Theologicae* (Burns Oates and Washbourne, 1929).
- G. Treitel, *The Law of Contract* (Sweet and Maxwell, 11th edn 2003).
- G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 1st edn 1999).
- G. Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn 2006).
- E. von Caemmerer, "Grundprobleme des Bereicherungsrechts" in H. Leser (ed.), *Gesammelte Schriften I* (Mohr, 1968).
- S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003).

- J. Waldron, *The Right to Private Property* (Clarendon Press, 1988).
- G. Watt, "The Proprietary Effect of a Chattel Lease" [2003] *Conv.* 61.
- P. Watts, "Restitution - A Property Principle and a Services Principle" [1995] *R.L.R.* 49.
- P. Watts, "Property and 'Unjust Enrichment': Cognate Conservators" [1998] *N.Z. Law Review* 151.
- C. Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 *O.J.L.S.* 41.
- E. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).
- T. Weir, *Tort Law* (Clarendon Press, 2002).
- S. Worthington, "The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation", ch. 5 of S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Law Book Company, 2005).
- S. Worthington, *Equity* (Clarendon Press, 2nd edn 2006).
- R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co., 1990).